Affirmed; Opinion Filed May 17, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00319-CV

JOE H. STALEY, JR. AND STALEY BUSINESS PARTNERSHIP LIMITED, Appellants
V.
DELIA CROSSLEY, Appellee

On Appeal from Probate Court No. 1
Collin County, Texas
Trial Court Cause No. PB1-1828-2016

MEMORANDUM OPINION

Before Justices Lang, Brown, and Whitehill
Opinion by Justice Lang

In this interlocutory appeal, appellants Joe H. Staley, Jr. ("Staley") and Staley Business Partnership Limited ("SBP" or "the partnership") contend in a single issue that the trial court erred by denying their motion to compel arbitration. We decide appellants' issue against them. The trial court's order is affirmed.

I. FACTUAL AND PROCEDURAL CONTEXT

In 1993, Staley and his father, Joe H. Staley, Sr. ("Staley Sr."), formed SBP and assigned to it certain assets. Shortly thereafter, Staley Sr. passed away. Staley and one of his sisters, appellee Delia Crossley, were appointed co-executors of Staley Sr.'s estate ("the Estate"). In 1997, Crossley and another sister, Nancy Rettig, filed a lawsuit against Staley (the "1997 lawsuit") respecting, among other things, (1) the administration, distribution, and settlement of the Estate and (2) the distribution of the assets of SBP.

In 2005, Staley, Crossley, and Rettig entered into a settlement agreement respecting the 1997 lawsuit (the "2005 Agreement") that was read into the record before the trial court in that lawsuit. The 2005 Agreement stated in part that Crossley and Rettig each held a 29.6666% interest in SBP. Additionally, that agreement provided in part as follows:

> The parties hereto agree that they have reached a global, complete, and final settlement of all claims that all the parties may have against the estate of their father and the partnership . . . . The defendant will draft settlement documents that will include confidentiality provisions and full mutual releases of all claims, known or unknown, alleged or not, that each party may have against any other party, any of the parties' spouses, the estate of their father and mother, and the partnership. . . . Defendant will disburse the partnership assets in kind and all property held by the estate on or before December 31st, 2005.
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> . . . .
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> The parties will agree to an independent Auditor to audit the partnership for the last fiscal year, if not calendar, and up to the date of distribution, or if a calendar fiscal year, the audit will cover January lst, 2005, to the date of the distribution. If there is no agreement as to the auditor than [sic] Kirkpatrick, Mathis & Brown of Dallas, Texas, will conduct the audit. The audit is to be determined this audit is to determine [sic] the assets of the partnership and the value as to of date of distribution, and to identify any asset that is unaccounted for or been transferred out of the asset pool without a corresponding balancing action during the audit period. Sarah Williamson can review copies of all audit materials necessary for the audit called for at this agreement at plaintiff's expense.
>
> If any party chooses to challenge the distribution of the partnership assets or any expenses booked after 12/5/05 after receiving the audit report and claiming that there is a discrepancy in assets totals that reflect on the share received by that party, such party shall complain in writing to defendant and allow 30 days for him to comply with the request of the complaining party. If the party making the compliant [sic] is not satisfied with the results of the defendant's compliance, then the complaining party that chooses to proceed shall give defendant notice to that effect, and the complaining party and the defendant will participate in binding arbitration. The subject of the arbitration will be limited to any purported discrepancy the complaining party believes, according to the audit, requires a different distribution of the partnership assets to the complaining party. . . .
>
> Other than appropriate arbitration proceedings as described herein, each party covenants not to sue any party named in this lawsuit, or any spouse of any party in further consideration of the agreements made herein for a claim that predates the date of the signing of mutual releases described above. . . .
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> . . . .
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> As it relates to the audit part of the terms and conditions. [sic] It is the agreement of all parties that after Sarah Williamson has had an opportunity to look at the data that an auditor will look at, the plaintiffs may, at their election, decide to dispense with the audit in total or in part.

In June 2016, Crossley filed the live petition in the matter now before us,[1] in which she asserted in part that after entering into the 2005 Agreement, Staley "distributed all of the securities, bonds, and cash from the Partnership to Plaintiff and her sister," but "never did distribute the Partnership's mineral-related and surface interests." Further, the petition asserted (1) in approximately 2015, Crossley "discovered that . . . significant mineral and surface interests were never conveyed by [Staley Sr.] to the Partnership" and therefore remain in her parents' estates, and (2) Staley "falsely claims that these mineral and surface interests belong either to him or to the Partnership rather than to the Estates." Crossley sought (1) declarations respecting the assets transferred to SBP in 1993 and her "current ownership interest in [SBP] and in the assets held by [SBP] for her benefit" and (2) "a constructive trust over her 29.6666% of all mineral and connected surface interests controlled and/or held by Defendants, and all profits received by Defendants from those interests."

Appellants filed a motion to compel arbitration in which they contended (1) "[i]t is undisputed that Staley distributed . . . what Defendants believe to be 29.6666% of SBP's assets to Plaintiff"; (2) "[i]n exchange," Staley received "a release," "a covenant not to sue," and "an agreement to arbitrate any dispute surrounding the distribution of assets from SBP"; (3) Crossley's petition "alleges that Defendants breached the 2005 Settlement Agreement by failing to distribute 29.6666% of SBP's assets to Plaintiff"; and (4) because Crossley's issues in her petition and the declarations sought by her "all go to whether or not Defendants distributed 29.6666% of SBP's assets to Plaintiff," her claims "are subject to the arbitration clause." Exhibits attached to the motion to compel arbitration included copies of the 2005 Agreement and a 1995 "Inventory, Appraisement and List of Claims" respecting the Estate.

[1] The claims in this case were originally asserted in a June 30, 2016 "Sixth Amended Petition" filed by Crossley in the 1997 lawsuit. Those claims were subsequently severed and assigned a new cause number, PB1-1828-2016, which is the case now before us.

Crossley filed a response to the motion to compel arbitration in which she asserted in part (1) "Defendants have waived arbitration by their actions" and (2) "[b]ecause Defendants have chosen not to conduct an audit and not to make a full or final distribution of partnership assets, [Crossley's] claims fall outside the scope of the Arbitration Provision," which provision "is directly, and specifically, tied to disputes about an anticipated audit of SBP."

At the hearing on appellants' motion to compel, counsel for appellants argued in part, "In ten years since the settlement agreement was entered into, no audit was requested; although defendants were ready, willing, and able to perform and comply with that. As a result, we feel that the plaintiff dispensed with any need for an audit." The trial court stated in part (1) "it would seem to me that [appellants] had the right to implement the audit"; (2) "[t]he provisions of the agreement relating to arbitration provide that the subject of the arbitration will be limited to purported discrepancies relating to the audit"; and (3) "[u]ntil we have an audit, it doesn't seem to me that we have anything that's subject to the arbitration agreement."

Following the trial court's order, which denied the motion to compel arbitration, this interlocutory appeal was timely filed. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 171.098 (West 2011).

II. DENIAL OF MOTION TO COMPEL ARBITRATION

A. Standard of Review

We review a trial court's order denying a motion to compel arbitration for abuse of discretion. *Henry v. Cash Biz, LP*, No. 16-0854, 2018 WL 1022838, at *3 (Tex. Feb. 23, 2018) (citing *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 642–43 (Tex. 2009)). We defer to the trial court's factual determinations if they are supported by evidence, but review its legal determinations de novo. *Id*. Whether the claims in dispute fall within the scope of a valid arbitration agreement is a question of law, which is reviewed de novo. *Id*.

B. Applicable Law

Arbitration "is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Seven Hills Commercial, LLC v. Mirabal Custom Homes, Inc*., 442 S.W.3d 706, 714 (Tex. App.—Dallas 2014, pet. denied) (quoting *Roe v. Ladymon*, 318 S.W.3d 502, 511 (Tex. App.—Dallas 2010, no pet.)). A party seeking to compel arbitration must establish that a valid arbitration agreement exists and that the claims asserted are within the scope of the agreement. *Id*. at 715 (citing *In re D. Wilson Constr. Co*., 196 S.W.3d 774, 781 (Tex. 2006) (orig. proceeding)). Both Texas policy and federal policy favor arbitration. *Cash Biz*, 2018 WL 1022838, at *3. Thus, courts "resolve any doubts about an arbitration agreement's scope in favor of arbitration." *Id*. Further, courts focus on the factual allegations and not on the legal causes of action asserted. *Id*. The presumption in favor of arbitration "is so compelling that a court should not deny arbitration unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue." *Id*. (quoting *Prudential Sec. Inc. v. Marshall*, 909 S.W.2d 896, 899 (Tex. 1995)). However, the strong policy favoring arbitration "cannot serve to stretch a contractual clause beyond the scope intended by the parties or allow modification of the plain and ambiguous provisions of an agreement." *IKON Office Sol., Inc. v. Eifert*, 2 S.W.3d 688, 697 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

Generally, when deciding whether the parties agreed to arbitrate a matter, courts should apply ordinary state law principles governing the formation of contracts. *Am. Realty Trust, Inc. v. JDN Real Estate-McKinney, L.P.*, 74 S.W.3d 527, 531 (Tex. App.—Dallas 2002, pet. denied). Our primary concern in contract construction is to ascertain the true intentions of the parties as expressed in the agreement. *FC Background, LLC v. Fritze*, No. 05-17-00277-CV, 2017 WL 5559594, at *2 (Tex. App.—Dallas Nov. 16, 2017, pet. dism'd) (mem. op.) (citing *FPL Energy, LLC v. TXU Portfolio Mgmt. Co., L.P.*, 426 S.W.3d 59, 63 (Tex. 2014)). Words used in a contract

should be given their plain grammatical meaning unless it definitely appears such a meaning would defeat the intentions of the parties. *Am. Realty Trust,* 74 S.W.3d at 532.

"Questions about whether prerequisites to arbitration have been fulfilled generally are left to the arbitrator to resolve." *Seven Hills*, 442 S.W.3d at 722. "However, there is a narrow exception to this rule: if clearly established proof shows that a strictly procedural requirement has not been met and that procedural requirement precludes arbitration, a court can deny a motion to compel arbitration on this ground." *Id*. "The exception may apply and a court may determine procedural arbitrability questions when the issues are factually undisputed." *Id*. (citing *In re Pisces Foods, L.L.C.*, 228 S.W.3d 349, 352–53 (Tex. App.—Austin 2007, orig. proceeding)).

C. Application of Law to Facts

In their sole issue on appeal, appellants contend the trial court erred by denying their motion to compel arbitration of Crossley's claims. According to appellants, (1) Texas law provides that "[g]enerally, if the factual allegations 'touch matters,' are 'factually intertwined,' have a 'significant relationship to,' or are 'inextricably enmeshed' with the contract containing the arbitration provision, the claim is arbitrable" and (2) therefore, the "scope of the arbitration" in this case "covers any dispute or challenge related to the SBP Distribution." Further, appellants assert (1) they did not waive arbitration by their actions and (2) Crossley should not be allowed to "elect to dispense with the audit for ten years, avoid binding arbitration by arguing that the parties intended the audit to be a pre-condition to arbitration and then challenge the SBP Distribution through additional, costly litigation against Staley," because that interpretation of the 2005 Agreement "flies in the face of the clear intent manifested by the parties to enter a global, final settlement." Additionally, in their reply brief in this Court, appellants contend the question of "whether procedures have been followed or excused" is "an issue that should be determined by an arbitrator."

Crossley argues in part (1) while appellants "cite authorities and rules of law that relate to broad arbitration provisions," this appeal "involves a narrow arbitration clause relating solely to an audit of SBP," (emphasis original); (2) "[a]lthough appellants could have triggered the narrow arbitration provision by conducting an audit, they chose not to"; (3) Crossley "has never formally dispensed with an audit of SBP"; and (4) appellants "seek to twist the express words of the arbitration provision and ignore the dependency of the arbitration provision on an audit that never occurred."

As described above, the 2005 Agreement contains the following arbitration provision:

> If any party chooses to challenge the distribution of the partnership assets or any expenses booked after 12/5/05 after receiving the audit report and claiming that there is a discrepancy in assets totals that reflect on the share received by that party, such party shall complain in writing to defendant and allow 30 days for him to comply with the request of the complaining party. If the party making the compliant [sic] is not satisfied with the results of the defendant's compliance, then the complaining party that chooses to proceed shall give defendant notice to that effect, and the complaining party and the defendant will participate in binding arbitration. **The subject of the arbitration will be limited to any purported discrepancy the complaining party believes, according to the audit, requires a different distribution of the partnership assets to the complaining party.**

(emphasis added).

We begin with appellants' argument that the question of whether prerequisites to arbitration existed that were not satisfied is "an issue that should be determined by an arbitrator." The arbitration provision before us states "[t]he subject of the arbitration will be **limited to** any purported discrepancy the complaining party believes, **according to the audit**, requires a different distribution of the partnership assets to the complaining party." (emphasis added). The plain grammatical meaning of that language expressly limits arbitration to purported discrepancies based on the audit described in the agreement. *See Am. Realty Trust*, 74 S.W.3d at 532. Additionally, the 2005 Agreement provides "the plaintiffs may, at their election, decide to dispense with the audit in total or in part."

As indicated above, appellants argue that, regardless of the express limitation described above, the "scope of the arbitration" in this case "covers any dispute or challenge related to the SBP Distribution." We disagree.

In support of that position, appellants cite *In re Signor*, No. 05-16-00703-CV, 2017 WL 1046770, at *4–5 (Tex. App.—Dallas Mar. 20, 2017, no pet.) (mem. op.). *Signor* involved a contract that required certain dispute resolution procedures for "any dispute between Subcontractor and Contractor arising out of or relating to the Subcontract, or the breach thereof" that "involves claims by the Owner against the Contractor for defective and/or non-conforming work." *Id*. at *5. This Court stated in part (1) "[c]ourts employ a strong presumption in favor of arbitration when deciding whether claims fall within an arbitration agreement"; (2) "[t]his presumption particularly applies where the clause is broad"; (3) "[i]n such cases, in the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail"; (4) "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute"; and (5) "[g]enerally, if the factual allegations 'touch matters,' are 'factually intertwined,' have a 'significant relationship' to, or are 'inextricably enmeshed' with the contract containing the arbitration provision, the claim is arbitrable." *Id*. at *4. Then, this Court concluded, "With this broad clause, because there is no express provision excluding [Subcontractor's] claims from arbitration, only the most forceful evidence of a purpose to exclude the claim[s] from arbitration can prevail." *Id*. at *6.

However, unlike the contract in *Signor*, the arbitration provision in the case before us does not contain the terms "arising out of," "relating to," or "involves," nor does it use any similar "broad" language. *See id*. at *5. Further, the provision before us contains an express limitation

respecting the "subject of the arbitration." Because this Court's conclusion in *Signor* was based on a "broad" clause with no such limitation, we do not find *Signor* instructive. *See id*. at *4–5; *see also IKON*, 2 S.W.3d at 696 (concluding that because "narrow arbitration clause" covered only disputes related to termination of employment, plaintiff's claims "not based on the termination of his employment" were not subject to arbitration).

Further, in support of their position that Crossley's interpretation of the 2005 Agreement is contrary to the parties' expressed intent, appellants assert "[t]he clear intent of the parties" was for the 2005 Agreement "to end all future litigation between them." However, the 2005 Agreement does not specifically address ending "future" litigation. Moreover, the express limitation described above "strongly indicates" the parties intended to arbitrate only certain disputes. *See Boston Fin. Inst. Tax Credits XII v. Paseo Plaza Apts., L.P.*, No. 13-14-00395-CV, 2015 WL 392787, at *5 (Tex. App.—Corpus Christi Jan. 29, 2015, no pet.) (mem. op.) (rejecting defendant's argument that plaintiff's interpretation of arbitration clause rendered agreement meaningless where language "strongly indicates that the parties intended to arbitrate only those disputes specifically mentioned").

As described above, "if clearly established proof shows that a strictly procedural requirement has not been met and that procedural requirement precludes arbitration, a court can deny a motion to compel arbitration on this ground." *Seven Hills*, 442 S.W.3d at 722. "Th[is] exception may apply and a court may determine procedural arbitrability questions when the issues are factually undisputed." *Id*.; *Pisces Foods*, 228 S.W.3d at 352–53. In the case before us, the parties do not dispute that no audit occurred. Further, while appellants contend Crossley "dispensed" with the audit, they cite no evidence or authority to support that position.

On this record, without reaching the question of whether appellants waived arbitration by their actions, we conclude "the right to compel arbitration has not yet accrued under the terms of

the contract." *Pisces Foods*, 228 S.W.3d at 354; *see also Boston Fin.*, 2015 WL 392787, at *6 (where defendant produced no evidence of occurrence of either of two events required to fall within scope of narrow arbitration provision, trial court properly denied motion to compel arbitration). Therefore, the trial court did not abuse its discretion by denying appellants' motion to compel arbitration. *Pisces Foods*, 228 S.W.3d at 354; *see also Seven Hills*, 442 S.W.3d at 715. We decide against appellants on their issue.

III. CONCLUSION

We decide appellants' sole issue against them. The trial court's order is affirmed.

/Douglas S. Lang/
DOUGLAS S. LANG
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JOE H. STALEY, JR. AND STALEY BUSINESS PARTNERSHIP LIMITED, Appellants

No. 05-17-00319-CV V.

DELIA CROSSLEY, Appellee

On Appeal from Probate Court No. 1, Collin County, Texas
Trial Court Cause No. PB1-1828-2016.
Opinion delivered by Justice Lang, Justices Brown and Whitehill participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee DELIA CROSSLEY recover her costs of this appeal from appellants JOE H. STALEY, JR. AND STALEY BUSINESS PARTNERSHIP LIMITED.

Judgment entered this 17th day of May, 2018.