

Conditionally Granted; Opinion Filed March 27, 2018.



In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00882-CV

IN RE MCO MANAGEMENT, L.L.C., Relator

Original Proceeding from the 101st Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-15-08810

MEMORANDUM OPINION

Before Justices Lang, Evans, and Stoddart
Opinion by Justice Stoddart

In this original proceeding, relator MCO Management, L.L.C. (MCO) complains of the trial court's refusal to enforce a contractual jury waiver. We conditionally grant the writ.

BACKGROUND

The underlying case is a landlord-tenant dispute involving a commercial lease. Pursuant to the lease, relator is the Landlord and real party in interest Fortress Iron, L.P. (Fortress) is the Tenant. After Fortress vacated the premises, MCO sued Fortress for breach of contract and conversion alleging Fortress failed to pay sums due under the lease, damaged the premises, and improperly removed fixtures from the premises. In its original answer, Fortress asserted several affirmative defenses, including first material breach, estoppel, and waiver. Fortress also filed counterclaims for breach of contract, breach of the implied warranty of suitability, and unjust enrichment.

Fortress subsequently filed a demand for a jury trial. MCO moved to quash the demand based on a jury waiver in the lease. Specifically, article 19, paragraph 19.4 of the lease provides:

If, on account of any breach or default by Tenant in Tenant's obligations under the terms and conditions of this Lease, it shall become necessary or appropriate for Landlord to employ or consult with an attorney or collection agency concerning or to enforce or defend any of Landlord's rights or remedies arising under this Lease or to collect any sums due from Tenant, Tenant agrees to pay all costs and fees so incurred by Landlord, including, without limitation, reasonable attorneys' fees and costs. TENANT EXPRESSLY WAIVES ANY RIGHT TO TRIAL BY JURY.

In its response to MCO's motion, Fortress did not dispute that the jury waiver was enforceable or that it applied to the dispute. However, it argued the waiver only applied to MCO's claims against Fortress because it was located in the portion of the lease that addressed MCO's remedies for Fortress's breaches. It asserted its remedies for MCO's breaches were contained in article 42 of the lease, which did not contain any jury waiver language. Article 42 provides:

LANDLORD'S DEFAULT. If Landlord fails to perform any of its obligations hereunder within thirty (30) days after written notice from Tenant specifying such failure (or if the nature of Landlord's obligation is such that more than thirty (30) days are required for its performance, if Landlord fails to commence such performance within such thirty (30) day period or thereafter to diligently prosecute the same to completion), Tenant shall at its option be entitled to (i) institute an action for damages or (ii) seek specific performance of Landlord's obligations under this Lease. The liability of Landlord under this Article 42 shall be limited as set forth in Article 43 below.

Thus, according to Fortress, its jury waiver applied only to MCO's claims. The trial court agreed. As a consequence, the trial court granted MCO's motion to quash as to its claims against Fortress, determining it would act as the factfinder on those claims. The trial court otherwise denied MCO's motion to quash. This original proceeding followed.

LAW & ANALYSIS

1. Mandamus Standard

To be entitled to mandamus relief, a relator must show both that the trial court has clearly abused its discretion and that relator has no adequate appellate remedy. *In re Prudential Ins. Co.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding). A trial court has no discretion in determining what the law is or in applying the law to the facts, and a clear failure by the court to correctly analyze or apply the law will constitute an abuse of discretion. *In re Cerberus Capital Mgmt., L.P.*, 164 S.W.3d 379, 382 (Tex. 2005) (orig. proceeding); *In re Tex. Am. Express, Inc.*, 190 S.W.3d 720, 723 (Tex. App.—Dallas 2005, orig. proceeding). A trial court’s refusal to enforce a contractual jury waiver cannot in any “real sense . . . ever be rectified on appeal.” *In re Prudential Ins. Co. of Am.*, 148 S.W.3d at 138. Thus, mandamus relief is appropriate when a trial court fails to enforce a jury waiver. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d at 138; *In re Frost Nat. Bank, N.A.*, 324 S.W.3d 320, 320–321 (Tex. App.—Dallas 2010, orig. proceeding).

2. Jury Waivers

The Texas Constitution guarantees the right to a jury trial. Tex. Const. art. V. § 10. Parties to a contract may waive that right. *See In re Prudential Ins. Co. of Am.*, 148 S.W.3d at 138. The Texas Supreme Court has explained that a contractual jury waiver is a dispute resolution agreement similar to an arbitration agreement. *See In re Prudential Ins. Co. of Am.*, 148 S.W.3d at 138. The Supreme Court has also instructed that our jurisprudence should be the same for all similar dispute resolution agreements *See in re Frank Kent Motor Co*, 361 S.W.3d 628, 632 (Tex. 2012); *In re Bank of Am., N.A.* 278 S.W.3d 342, 344–44 (Tex. 2011). As with arbitration agreements, jury waivers are to be construed under traditional contract principles. *See In re Guggenheim Corp.*

Funding, L.L.C., 380 S.W.3d 879, 887 (Tex. App.—Houston [14th Dist.] 2012, orig. proceeding); cf. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227–28 (Tex. 2003) (construing arbitration agreement).

In construing a contract, our primary objective is to ascertain and give effect to the parties’ intent as expressed in the writing itself. *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 333 (Tex. 2011). We give words their plain and ordinary meaning unless the instrument indicates the parties intended a different meaning. *Kachina Pipeline Co., Inc. v. Lillis*, 471 S.W.3d 445, 450 (Tex. 2015). We consider the entire writing and attempt to harmonize and give effect to all the provisions of the contract by analyzing the provisions with reference to the whole agreement. *Frost Nat. Bank v. L & F Distribs, Ltd.*, 165 S.W.3d 310, 312 (Tex. 2005).

3. Analysis

Under the plain terms of the parties’ agreement Fortress expressly waived “ANY RIGHT TO TRIAL BY JURY.” The waiver contains no limitations or exceptions. Nor is it expressly limited by any language in paragraph 19.4 or any other provision of the lease. Fortress nevertheless argues, if read in the context of its location, the jury waiver *could* be interpreted narrowly to mean it only waived its right to a jury trial with respect to MCO’s claims against Fortress. Furthermore, it asserts that, because jury waivers are to be “strictly construed,” the trial court properly adopted its narrow interpretation.¹

Here, the unambiguous language of the waiver provides that Fortress waived *any* right to a jury trial, which necessarily includes its right to a jury trial on its counterclaims. Cf. *Skidmore*

¹ The only authority Fortress cites to support its contention that jury waivers are to be strictly construed is the Houston Fourteenth Court of Appeals’s opinion in *In re Credit Suisse First Boston Mortg. Capital, L.L.C.*, 257 S.W.3d 486 (Tex. App.—Houston [14th Dist.] 2008, orig. proceeding). In that case, the Houston Fourteenth Court of Appeals stated in dicta that “unlike arbitration agreements, which are strongly favored under Texas law, the right to a jury trial is so strongly favored that contractual jury waivers are strictly construed and will not be lightly inferred or extended.” See *In re Credit Suisse First Boston Mortg. Capital, L.L.C.*, 257 S.W.3d at 490. However, as the Texas Supreme Court later explained, “[a]rbitration removes the case from the court system almost altogether, and is every bit as much of a surrender of the right to a jury trial as a contractual jury waiver.” *In re Frank Kent Motor Co.*, 361 S.W.3d at 632. Thus, more recently, the Fourteenth Court specifically held that jury waivers should be construed in the same manner as other dispute resolution agreements. See *In re Guggenheim Corp. Funding, LLC*, 380 S.W.3d at 887.

Energy, Inc. v. Maxus (U.S.) Expl. Co., 345 S.W.3d 672, 687–88 (Tex. App.—Dallas 2011, pet. denied) (broad language in an arbitration agreement evidences the parties’ intent to be inclusive rather than exclusive). The jury waiver contains no limitations or exceptions. Yet, Fortress’s proffered interpretation would require us to add language to the jury waiver limiting the waiver to MCO’s claims against Fortress. It is well settled we are not permitted to do so. *Tenneco Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 646 (Tex. 1996) (courts may not under the guise of interpretation, add language to a contract the parties could have, but did not include or imply restraints for which the parties did not bargain). It is the language that controls, not the location of the language within the lease. *See, e.g., In re Frost Nat. Bank, N.A.*, 324 S.W.3d at 321 (jury waiver located in arbitration agreement applied to both arbitration agreement and underlying contract). Here, the language clearly shows that Fortress waived any right to a jury trial regardless of what claims were asserted and that waiver is not limited by its location in the lease. Moreover, the result is the same even if we were to limit the waiver to paragraph 19.4 because Fortress agreed in that paragraph to pay attorney’s fees incurred by MCO in “enforcing or defending” MCO’s rights under the lease. Fortress asserted counterclaims against MCO, which required MCO to take steps in the litigation to enforce and defend its rights under the lease. As such, Fortress unambiguously waived its right to a jury trial as to MCO’s defenses against Fortress’s counterclaims as well as MCO’s claims against Fortress.

Based on the plain language of the parties’ agreement, we conclude Fortress waived any right to a jury trial in this case. Therefore, the trial court clearly abused its discretion in failing to quash Fortress’s jury demand. Accordingly, we conditionally grant mandamus relief and direct

the trial court (1) to vacate its July 7, 2017 order and (2) to grant MCO's motion to quash. A writ will issue only if the trial court fails to comply.

/Craig Stoddart/
CRAIG STODDART
JUSTICE

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