AFFIRMED and Opinion Filed August 11, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-18-00326-CV

MICHAEL A. RUFF, ET AL., Appellants
V.
SUZANN RUFF INDIVIDUALLY AND IN HER CAPACITY AS TRUSTEE OF THE RUFF MANAGEMENT TRUST, AND MATTHEW D. RUFF, Appellees

On Appeal from the Probate Court No. 1
Dallas County, Texas
Trial Court Cause No. PR-11-02825-1

MEMORANDUM OPINION

Before Justices Myers, Whitehill, and Pedersen, III
Opinion by Justice Whitehill

A pivotal question we address is whether a party can initiate an arbitration proceeding pursuant to a specific arbitration agreement, demand that a signatory to that agreement be compelled to participate in that arbitration, and then disavow the resulting award by alleging that he (the initiating party) did not agree to arbitrate according to that arbitration agreement. Another important question is whether the integrated documents construction principle can bind a non-signatory to an arbitration agreement.

Appellant Mike Ruff argues that the trial court erred by denying his motion to vacate the arbitration award in favor of Suzann Ruff, Matthew Ruff, and Frost Bank as Trustee of the Ruff Management Trust (Frost) because: (i) he did not agree to arbitrate Suzann's tort claims against him, and (ii) he was denied discovery to determine the extent of one of the arbitrator's relationship with Frost.[1]

We reject both issues and affirm the trial court's judgment.

I. BACKGROUND

A. The Ruff Management Trust and its Trustees

Suzann and Arthur Ruff had five children: Mike, Matthew, Tracy, Kelly, and Mark. Arthur died in 1998. In 2007, Suzann created the Ruff Management Trust (the Trust) and appointed Mike trustee.

In 2009, Suzann asked Mike to distribute certain assets to the Trust and resign as trustee. In exchange, she agreed to release any claims she had against him. To this end, they signed a Family Settlement Agreement and Release (FSA).

Thereafter, Kelly, Tracy, and Mark served as co-trustees of the Trust until they later resigned and Frost was appointed successor trustee.

To implement the transition to Frost, the parties executed a series of documents, including a February 26, 2010, Acknowledgement of Successor Trustee and a Release and Indemnity signed between Suzann and Frost (Frost Release). The

[1] Because most of the parties to this dispute are named "Ruff," we refer to individuals by first name.

Frost Release ratified the FSA and released all the Ruff children except Mike, who was not a signatory to that document.[2]

The Frost Release included an arbitration clause providing for arbitration of:

> [a]ny controversy or claim arising out of or relating to this Agreement, or the breach of any contractual or non-contractual duties hereunder . . . administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules . . . .

Also in connection with the Frost appointment, Mike, Kelly, Tracy, and Mark each signed separate March 1, 2010 releases. These releases each contained an arbitration clause identical to the clause in the Frost Release.

[2] In 2013, Suzann and Frost executed a document entitled Settlement Agreement and Amended Release and Indemnity Agreement. That document has an arbitration clause identical to the one in the initial Frost Release.

The components of these transactions can be summarized as follows:

Date	Releasor	Releasees	Scope	Reason
10/2/09 (the FSA)	Suzann	Mike	General	Mike to resign and transfer assets
2/26/10 (Frost Release)	Suzann	Frost and kids, except Mike	Everything related to the Trust and the release, including ratifying the FSA	Sub in Frost
3/1/10	Mike	Frost, siblings	Everything related to the Trust and the release, including ratifying the FSA	Sub in Frost
3/1/10	Tracy	Frost, Mike, siblings	Everything related to the Trust and the release, including ratifying the FSA	Sub in Frost
3/1/10	Kelly	Frost, Mike, siblings	Everything related to the Trust and the release, including ratifying the FSA	Sub in Frost
3/1/10	Mark	Frost, Mike, siblings	Everything related to the Trust and the release, including ratifying the FSA	Sub in Frost

B. The Lawsuits and Arbitration

Pleadings in the clerk's record show that this case began in August 2011 with Suzann filing a simple petition seeking a declaratory judgment and related request to modify certain Trust terms. Her children filed general denials, and the matter appeared to be a non-controversial trust modification suit.

But Suzann's August 31, 2012 second amended petition included her trust modification claims, added detailed allegations against Mike dating back to 1998, and asserted numerous tort claims against him regarding his conduct while acting as her fiduciary and the Trust's trustee. She sought to recover millions of dollars from him.

Less than a week later, Mike responded by filing a first amended answer that asserted various affirmative defenses to Suzann's claims, including that the FSA's release barred all her tort claims against him. He also filed a counterclaim seeking, among other things, a declaratory judgment that the FSA was valid and that the FSA's release barred all of her tort claims against him.

On October 8th, Mike filed a second amended answer, again including the FSA's release among his affirmative defenses. Shortly thereafter, he filed a third-party petition that rejoined Frost (Suzann dropped it with her second amended petition) and requested a declaratory judgment that the FSA's release was valid and barred Suzann's claims against him.

At the end of the month, Mike filed his first amended counterclaim and again sought a declaratory judgment that the FSA's release was valid and barred Suzann's claims against him.

The next day, Suzann filed her lengthy and detailed third amended petition continuing to assert numerous tort claims against Mike.

Two weeks later, asserting that he was a third-party beneficiary of the Frost Release, Mike filed with the American Arbitration Association an arbitration demand against Suzann, Frost, and his siblings. Among his requested relief, Mike sought a declaration that the FSA and Frost Release agreements were valid and that the FSA's release was enforceable. Specifically, Mike's demand asserted that:

> The named claimant [Mike], a party to an arbitration agreement dated March 1, 2010 . . . which provides for arbitration under the Commercial Arbitration Rules of the American Arbitration [sic] hereby demands arbitration . . .
>
> and a third party beneficiary of a Release and Indemnity Agreement dated February 26, 2010.

Mike additionally moved to stay the trial court action and told the trial court that Suzann's tort claims and the declaratory judgment he requested in arbitration were intertwined. Specifically, regarding the FSA's release he told the trial court that:

> Should the arbitration panel determine that the Release and Indemnity, and Acknowledgment are valid and enforceable, then Mrs. Ruff's claims would be barred. In addition, the Release and Indemnity affirms the Trust, the Release, and all prior transactions. A finding that the Release is binding and enforceable would dispose of all claims and counterclaims asserted in this action. Furthermore, every issue in this lawsuit relates back to the validity, enforceability, or interpretation of the trust, the Release and the Release and Indemnity. Therefore, the Court must stay all proceedings pending a ruling in arbitration.

Suzann opposed the stay, arguing inter alia, that Mike had no standing to rely on the arbitration clause in the Frost Release because he was not a signatory to that document.

Mike responded that he was, in fact, a signatory. Specifically, he claimed that the Frost Release was not an independent, stand-alone agreement, but rather "part and parcel of a series of documents that, taken together, comprise a transaction and thus create a contract." He also argued that his and his siblings' March 1, 2010, releases contain identical arbitration clauses and were part of the single transaction

to change the Trust's management from Mark, Tracy, and Kelly to Frost. He further argued that he was a third-party beneficiary of the Frost Release.

The parties also argued about whether Suzann's tort claims against Mike could properly be heard in arbitration. Mike maintained that it was "up to the arbitrators to decide whether such claims would be included." Ultimately, the trial court granted Mike's motion to compel arbitration.

Suzann asserted her tort claims against Mike as counterclaims in the arbitration, but Mike challenged their arbitrability, that is, whether they were in the arbitration clause's scope.

The arbitrators' fifteen page first amended order on the AAA's jurisdiction concluded that Suzann's tort counterclaims were included and overruled Mike's and his siblings' objection to the AAA's jurisdiction to consider those claims.

The final arbitration hearing began on August 28 and 29, 2017, and was scheduled to resume on October 24, 25, and 26. But on September 22, 2017, Mike nonsuited his declaratory judgment claims. Suzann's counterclaims, however, remained pending.[3]

On October 18, Mike filed in the arbitration a "Refusal to Arbitrate," indicating he would no longer participate in the process. Thus, the October portion of the final hearing was conducted without him.

[3] Suzann had previously non-suited her cross-claims against Kelly, Tracy, and Mark and they were removed as parties to the arbitration.

The arbitrators found that Mike committed numerous torts against Suzann and determined that she was entitled to recover $49,000,000 from him plus attorney's fees and costs. The award also provided that Frost and Matthew recover their attorney's fees and costs from Mike as well.

Suzann moved to confirm the award, and Mike moved to vacate it. Mike asserted that the award should be vacated because:

- The arbitrators exceeded their powers;
- The arbitrators refused to postpone the hearing and refused to consider material evidence;
- His rights were prejudiced by an arbitrators' evident partiality;
- His rights were prejudiced by an arbitrators' misconduct or willful misbehavior; and
- The award was obtained by corruption, fraud, or other undue means.

As relevant here, in opposing the award's confirmation, Mike argued to the trial court that:

> Mike disputes that there is an agreement between himself and Mrs. Ruff to arbitrate her "counterclaims," and Mike refused to arbitrate them. Thus, in order to avail herself of arbitration, Mrs. Ruff must establish: (1) there is a "valid agreement to arbitrate between the parties"; and (2) the "dispute in question falls within the scope of that arbitration agreement." *JP Morgan Chase & Co. v. Conegie ex. rel. Lee*, 492 F.3d 596, 598 (5th Cir. 2007). Mrs. Ruff has neither offered proof, nor even argument, that either of the above two requirements exist.

Mike, however, did not specify whether he sought vacatur based on the TAA, the FAA, or both.[4]

After an extensive evidentiary hearing, the trial court confirmed the award and subsequently entered a final judgment accordingly. Mike appeals from that judgment.[5]

II. ANALYSIS

A. First Issue: Should the award be vacated because Mike did not agree to arbitrate Suzann's tort claims?

No. The trial court did not err by confirming the arbitration award over Mike's objection that he never agreed to arbitrate Suzann's tort claims against him. In short, regarding whether there was an agreement to arbitrate, Mike initiated and, over Suzann's objection, successfully moved the trial court to compel the arbitration about which he complains. Furthermore, the parties' documents reflect an

[4] The grounds asserted, however, are vacatur grounds under the TAA. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 171.088(a). And Mike's supplemental motion to vacate invoked the TAA. The trial brief he submitted in support of his motion was also based on the TAA.

[5] The parties have been to this court before. This protracted litigation spanning several years, includes: *Ruff v. Ruff*, No. 05-13-00317-CV, 2013 WL 2470750 (Tex. App.—Dallas June 10, 2013, no pet.) (interlocutory appeal of order to hold an evidentiary hearing on the issue of arbitration dismissed for want of jurisdiction); *In re Ruff Management Trust*, No. 05-17-00535-CV, 2018 WL 1281420 (Tex. App.—Dallas Mar. 13, 2018, no pet.) (appealing denial of Mike's request for temporary injunction seeking to enjoin Suzann from arbitrating certain claims; dismissed as moot because arbitration concluded); *In re Ruff*, No. 05-18-00671-CV, 2018 WL 2979859 (Tex. App.—Dallas June 14, 2018, orig. proceeding) (denying mandamus concerning enforcement of probate judgment enforcement proceedings); *In re Ruff*, No. 05-18-01456-CV, 2018 WL6427283 (Tex. App.—Dallas Dec. 6, 2018, orig. proceeding) (denying mandamus to overturn post-judgment discovery order); *In re Ruff*, No. 05-19-00526-CV, 2019 WL 2211 081 (Tex. App.—Dallas May 21, 2019, orig. proceeding) (seeking to block show cause hearing for violation of post-judgment discovery order).

agreement between Mike and Suzann to arbitrate, and Suzann's tort claims fall within the scope of that agreement.

Although Mike's appellant's brief does not neatly delineate between the two components of whether there was an agreement to arbitrate Suzann's tort claims, we construe his brief to argue that both elements are missing in this case.

1. Standard of Review and Applicable Law

a. *Jody James* and the Standard of Review

Relying on *Jody James Farms, JV v. Altman Group, Inc.*, 547 S.W.3d 624 (Tex. 2018), Mike argues that we must apply the de novo standard of review because he was a non-signatory to the arbitration agreement. But the *Jody James* scenario presents different concerns regarding who decides "arbitrability" issues, of which there are two: (i) is there a valid agreement to arbitrate at all, and (ii) if there is, does its scope cover the claims at issue. In that case, the signatory was attempting to force the non-signatory to arbitrate pursuant to an agreement that the non-signatory had not actually agreed to. But here it is the non-signatory that forced a signatory to arbitrate according to an arbitration clause that the signatory had previously agreed to be bound by. Thus, the *Jody James* concerns about foisting an arbitration agreement on a party that had not previously agreed to arbitrate do not exist here.

And, unlike the *Jody James* non-signatory, although Mike did not sign the Frost Release document, he did sign a March 1, 2010 release that contained an

identical arbitration clause, and that was part of the collective documents, including the Frost Release, that effected Frost's succession service as the Trust's trustee.

b. Applicable Standards

We review a trial court's ruling confirming an arbitration award de novo based on the entire record before us. *Prell v. Bowman*, No. 05-17-00369-CV, 2018 WL 2473850, at *2 (Tex. App.—Dallas June 4, 2018, no pet.) (mem. op.).

A party seeking to vacate an arbitration award bears the burden of presenting a record that establishes its grounds for vacating the award. *Statewide Remodeling, Inc. v. Williams*, 244 S.W.3d 564, 568 (Tex. App.—Dallas 2008, no pet.). And a party seeking to avoid confirmation of an arbitration award under the TAA may do so "only by demonstrating a ground expressly listed in section 171.088." *Hoskins v. Hoskins*, 497 S.W.3d 490, 495 (Tex. 2016). Under this section, an arbitration award shall be vacated only when:

(i) the award was obtained by corruption, fraud, or undue means;

(ii) the rights of a party were prejudiced by evident partiality by an arbitrator appointed as a neutral arbitrator, corruption in an arbitrator, or misconduct or willful misbehavior by an arbitrator;

(iii) the arbitrators exceeded their powers, refused to postpone the hearing after a showing of sufficient cause for postponement, refused to hear material evidence, or conducted the hearing in a manner that was contrary to one of five sections of the TAA and that substantially prejudiced the rights of a party; or

(iv) there was no agreement to arbitrate, the issue was not adversely determined in a proceeding to compel or stay arbitration, and the party did not participate in the arbitration hearing without raising the objection. TEX. CIV. PRAC. & REM. CODE § 171.088(a); *Hoskins*, 497 S.W.3d at 494. The issue before us concerns only the second and fourth grounds.

Whether a party must arbitrate over its objection presents two elements: first, was there a valid agreement to arbitrate at all, regardless of the scope; and, second, if there is a contract to arbitrate, are the relevant claims within its scope. *See G.T. Leach Builders LLC v. Sapphire, V.P., L.P.*, 458 S.W.3d 502, 525 (Tex. 2015).

Here, Mike argues that he and Suzann never agreed to arbitrate their disputes because there is no written agreement between them containing an arbitration agreement. Instead, he argues that he compelled arbitration as a non-signatory and third-party beneficiary of the Frost Release—an agreement between Suzann and Frost—and this release was relevant to only his declaratory judgment action because Suzann denied the existence and validity of the release and the FSA. According to Mike, the existence and validity of those documents was the only issue to be arbitrated and Suzann's tort claims were not included.

At bottom, Mike urges that he could enforce the Frost release's arbitration agreement against Suzann to determine whether the FSA release was a good defense to her tort claims against him without Suzann also being able to assert those claims

against him as counterclaims in the same arbitration. That is, he wanted to divorce his release defense from the very claims he was asserting were released.

Although Mike melds the existing agreement and scope issues into one argument, his argument address both components of whether there was a valid agreement to arbitrate those claims. Thus, before we consider whether the tort claims are included in the scope, we must first determine whether there is a valid agreement to arbitrate at all. *See id*.

3. The Agreement to Arbitrate

Determining whether a party agreed to arbitrate is controlled by contract interpretation principles. *Jody James*, 547 S.W.3d at 631. Consistent with those principles, we "give effect to all the provisions of the contract so that none will be rendered meaningless." *Seagull Energy E&P, Inc. v. Eland Energy Inc.*, 207 S.W.3d 342, 345 (Tex. 2006).

a. Invited Error

To begin, Mike initiated the arbitration about which he now complains. Furthermore, he successfully asked the trial court to compel Suzann to participate in the arbitration and that produced the adverse award. Thus, he is in effect appealing from an order he asked the trial court to enter (but later opposed after he lost the arbitration).

Assuming, without suggesting, that the trial court's order and ultimate judgment were error, it would be an invited error about which Mike cannot complain.

See Tittizer v. Union Gas Corp., 171 S.W.3d 857, 862 (Tex. 2005) (citing *Northeast Tex. Motor Lines v. Hodges*, 138 Tex. 280, 158 S.W.2d 487, 488 (1942)); *In re Dept. of Family & Protective Servs.*, 273 S.W.3d 637, 646 (Tex. 2009).

Nonetheless, Mike changed his mind after the arbitrators released their award, and he opposed confirmation and argued that he was not a party to an arbitration agreement with Suzann. We disagree.

b. Mike's Direct Agreement to Arbitrate with Suzann and Estoppel

Additionally, having demanded arbitration according to the Frost Release's arbitration clause and persuaded the trial court to order Suzann's compliance with it, Mike necessarily agreed (in writing) to arbitrate with Suzann under that clause and cannot not now complain that the matter proceeded accordingly. He cannot rescind his assent now that he dislikes its consequences.

For the same reasons, he is now estopped to deny his agreement to arbitrate Suzann's tort claims against him. *See Jody James*, 547 S.W.3d at 636–37.[6]

c. Single Transaction Documents

Furthermore, Mike's argument is based on a faulty premise requiring analysis of the Frost Release in a vacuum. But it is well-established that one document

[6] Mike argues that direct benefits estoppel does not apply because Suzann's claims are independent of the Frost Release. As discussed herein, we reject that argument. The parties further argue about whether Mike is also judicially estopped from advancing the arguments he makes on appeal, but we need not address those arguments to resolve the case. *See* TEX. R. APP. P. 47.1.

containing an arbitration clause is sufficient to require arbitration of claims arising under other documents—if they are part of one transaction. *Kirby Highland Lakes Surgery Ctr., L.L.P. v. Kirby*, 183 S.W.3d 891, 902 (Tex. App.—Austin 2006, orig. proceeding); *see also Tantrum Street, LLC v. Carson*, No. 05-16-01096-CV, 2017 WL 3275901, at *5 (Tex. App.—Dallas July 25, 2017, orig. proceeding) (mem. op.) (claims involving redemption of promissory note were not completely independent of appellant's employment and were therefore within the scope of the employment agreement's arbitration clause); *Fort Worth Indep. Sch. Dist. v. City of Fort Worth*, 22 S.W.3d 831, 840 (Tex. 2000) ("In appropriate instances, courts may construe all the documents [in the same transaction] as if they were part of a single, unified instrument.").

Here, the Frost Release was part of a larger transaction whereby the prior trustees (Mark, Kelly, and Tracy) resigned and Frost was appointed to replace them. As Mike described to the trial court, this transaction involved an interrelated seven-step process:

- Mark, Kelly, and Tracy resign as trustees;
- The resigning trustees ask the Trust protectors to appoint a new trustee;
- The beneficiaries (including Mike) each waive the thirty-day notice of the trustees' resignations;
- The Trust protectors appoint Frost as trustee;
- Suzann accepts Frost as trustee and executes the Frost Release;

- Each beneficiary, including Mike, signs a release and indemnity agreement; and

- Frost accepts the trustee position.

Each document executed in each step was part of the same transaction and each one was necessary for the transaction to be completed. Consequently, they are construed as a single, unified agreement. *See Kirby*, 183 S.W.3d at 902; *see also Pratt-Shaw v. Pilgrim's Pride Corp.*, 122 S.W.3d 825, 831–32 (Tex. App.—Dallas 2003, pet. denied).

Additionally, the evidence supports these documents' interrelated nature. Kelly, Tracy, and Mark would not have resigned as co-trustees but for their release. Mike and the other trust protectors would not have appointed Frost without a release.

Furthermore, in connection with his request to compel arbitration, responding to Suzann's opposition argument that there was no agreement to arbitrate, Mike told the trial court that the no arbitration agreement argument was false:

> **TRUTH**: In the settlement with Frost, Mrs. Ruff admitted, in writing, on November 13, 2013, that "in connection with the appointment of Frost as Trustee … Mrs. Ruff executed the '2010 RIA'." The 2010 RIA was one of the many integral documents that resulted in Frost Bank becoming the Successor Trustee. There is now no dispute that an agreement to arbitrate exists between ALL of the parties to the agreement appointing Frost as Successor Trustee in 2010, including both Mrs. Ruff and Mike. Mrs. Ruff's blatant misrepresentation is a flagrant and sanctionable attempt to mislead this Court.

Significantly, each of the Frost transition documents (including the Frost Release and the releases signed by Mike, Tracy, Kelly, and Mark) ratify the FSA. And each of the releases contain an identical arbitration clause. Although Suzann,

Mike, Kelly, Tracy, Mark and Frost all signed separate documents, each was for the single purpose of effecting Kelly, Tracy, and Mark's resignations as co-trustees and Frost's appointment as successor trustee.

When parties include an arbitration clause in one document that is an essential part of the overall transaction, courts presume that they intended the arbitration clause to reach all aspects of the transactions governed by other contemporaneously executed agreements that are part of the same transaction. *See In re Houston Progressive Radiology Assocs. PLLC*, 474 S.W.3d 435, 444–445 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (documents essential to same transaction construed together and arbitrations provisions were intended to reach entire transaction even though the contracts were not between the same parties).

The single transaction here concerns the issues Mike sought to arbitrate, including the validity and enforceability of the Trust, the FSA's release, and the acknowledgement and appointment of Frost as successor trustee. And as later discussed, those issues necessarily relate to and are intertwined with Suzann's counterclaims.

Therefore, in this context, Mike's status as a non-signatory to the specific Frost Release is not dispositive. His March 1, 2010, release, and all the other documents comprising that single transaction, include an arbitration clause in which the parties agree to submit their disputes to arbitration. Mike is a party to that agreement. Accordingly, there is a valid agreement to arbitrate.

d. Third Party Beneficiary

Contract principles also bind Mike to arbitration because he is a third-party beneficiary of the Frost Release.

"Third-party-beneficiary status is established by demonstrating that the contracting parties intended to secure a benefit to that third party and entered into the contract directly for the third party's benefit." *First Bank v. Brumitt*, 519 S.W.3d 95, 102 (Tex. 2017). The question of third-party beneficiary status is determined by reference to the contract language alone. *Id*.

Courts begin with the presumption that the parties contracted only for themselves. *Id*. at 103; *see also Gore v. Smith*, No. 05-19-00156-CV, 2020 WL 4435312, at *3 (Tex. App.—Dallas Aug. 3, 2020, no pet. h.) (mem. op.). That presumption may be overcome only if the contract contains a clear and unequivocal expression of the parties' intent to directly benefit a third party. *Tawes v. Barnes*, 340 S.W.3d 419, 425 (Tex. 2011).

The Frost Release affirms the FSA's continued existence and validity. The FSA benefits Mike by releasing him. Thus, the parties clearly intended to benefit Mike by affirming the FSA in the Frost Release (as well as the other releases) and Mike is a third-party beneficiary of the Frost Release.

In addition, the Frost Release provides that it "shall be binding upon and inure to the benefit of . . . the Beneficiaries." "Beneficiaries" is a defined term that

includes Mike by name. Therefore, the contract's language reflects the parties' intent to benefit Mike.

As a third-party beneficiary, Mike was entitled to, and actually did compel arbitration. *See ConocoPhillips Co. v. Grahm, N*o. 01-11-00503-CV, 2012 WL 1059084, at *3–7 (Tex. App.—Houston [1st Dist.] Mar. 29, 2012, no pet.) (mem. op.) (finding third-party beneficiary could enforce arbitration clause). He cannot disclaim that status now.

4. Scope

Having concluded that the trial court did not err by concluding that that Mike agreed to arbitrate with Suzann under the Frost release's arbitration clause, we next consider whether her tort claims were within that agreement's scope. *See Leach*, 458 S.W.3d at 525.

We assume, without deciding, that the Frost release's arbitration clause didn't delegate to the arbitrators the power to decide the scope issue and review de novo the trial court's decision that Suzann's tort claims are within that clause's scope. Based on that review, we conclude for several reasons that the trial court did not so err.

a. Invited Error

Again, it was Mike who initiated the arbitration process and successfully moved the court to order Suzann to participate in the arbitration he began. *See Haler v. Boyington Cap. Grp., Inc*. 411 S.W.3d 631, 637 (Tex. App.—Dallas 2013, pet.

denied) (discussing invited error); *Dao v. Garcia*, 486 S.W.3d 618, 627–28 (Tex. App.—Dallas 2016, pet. denied) (same). That Suzann would assert her tort claims against him in that arbitration was a natural and foreseeable step in the arbitration that Mike demanded.

Specifically, Mike's arbitration demand addendum recited his role as the Trust's first trustee and Frost's ultimate succession to that role. He further discussed Suzann's underlying litigation against him in which she was asserting that the release was not valid. The only reason the record shows that she would take that position is that Mike was asserting that release as a defense to her tort claims against him and sought a declaration to that effect.

Furthermore, the arbitration clause on which Mike relied to support his motion to compel provides that the arbitration will be administered by the American Arbitration Association according to its Commercial Arbitration Rules. Those rules permit parties to assert counterclaims. AM. ARBITRATION ASS'N COMMERCIAL ARBITRATION RULES R17.

As a practical matter, unless she asserted her counterclaims in the arbitration, Suzann faced the possibility of losing them completely under res judicata. *See Premium Plastics Supply, Inc., v. Howell*, 537 S.W.3d 201, 205–206 (Tex. App.—

Houston [1st Dist.] 2017, no pet.) (compulsory counterclaims that should have been asserted in arbitration barred by res judicata).

Thus, by successfully invoking that clause Mike necessarily agreed that Suzann could assert her tort claims in the arbitration proceeding. On these facts, we cannot conclude that the trial court erred in rejecting Mike's scope- based arguments. Furthermore, had the trial court so erred, it would be invited error.

Nonetheless, alternatively, we consider whether the Frost Release's arbitration clause's scope covers Suzann's tort counterclaims against Mike.

b. The Text

(1). Principles

Both Texas and federal policy favor arbitration. *Henry*, 551 S.W.3d at 115. Therefore, courts "resolve any doubts about an arbitration agreement's scope in favor of arbitration." *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))

An arbitration clause's scope is determined based on the factual allegations rather than the legal causes of action asserted. *See In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 754 (Tex. 2001) (orig. proceeding). "When the contract contains a broadly written arbitration clause, so long as the allegations touch matters, have a

significant relationship with, or are inextricably enmeshed or factually intertwined with the contract, the claim will be arbitrable." *Athas Health, LLC v. Trevithick, No.* 05-16-00219-CV, 2017 WL 655926, at *4 (Tex. App.—Dallas Feb. 17, 2017, no pet.) (mem. op.); *see also Jack B. Anglin Co., Inc. v. Tipps,* 842 S.W.2d 266, 271 (Tex. 1992) (although misrepresentation claims were grounded in legal theory distinct from contract claim, they were factually intertwined with breach of contract claim and thus subject to arbitration provision of contract).

However, "[i]f the facts alleged in support of the claim stand alone, are completely independent of the contract [containing the arbitration provision], and the claim can be maintained without reference to the contract, the claim is not subject to arbitration." *VSR Fin. Servs., Inc. v. McLendon*, 409 S.W.3d 817, 832 (Tex. App.—Dallas 2013, no pet.).

"[T]he scope of an arbitration clause that includes all 'disputes,' and not just claims, is very broad and encompasses more than claims 'based solely on rights originating exclusively from the contract.'" *Pinto Tech. Ventures, L.P. v. Sheldon,* 526 S.W.3d 428, 439 (Tex. 2017).

Similarly, the term "relating to" is also broad. *See Tantrum St.,* 2017 WL 3275901 at *4; *Schwarz v. Pully*, No. 05-14-00615-CV, 2015 WL 4607423, at *3 (Tex. App.—Dallas Aug. 3, 2015, no pet.) (mem. op.) (claim 'relates to' a contract if it has a significant relationship with or touches matters covered by the contract).

Accordingly, "arbitration provisions that employ terms like 'any dispute' and 'relating to' are broad arbitration clauses capable of expansive reach and create a presumption of arbitrability." *In re Signor*, No. 05-16-00703-CV, 2017 WL 1046770, at *6 (Tex. App.—Dallas Mar. 20, 2017, orig. proceeding) (mem. op.).

When parties include such a broad clause in an agreement to arbitrate and do not expressly exclude claims from arbitration, "only the most forceful evidence of a purpose to exclude the claim[s] from arbitration can prevail." *Id*. (quoting *BDO Seidman, LLP v. J.A. Green Dev. Corp*., 327 S.W.3d 852, 857 (Tex. App.—Dallas 2010, no pet.)).

(2). Application

The Frost Release's arbitration clause provides that:

> 15. Any controversy or claim arising out of or relating to this Agreement . . . shall be settled by an arbitration . . . .

After Suzann asserted multiple tort claims against him in the trial court, Mike raised various affirmative defenses, including that those claims were released in the FSA. His arbitration demand—based on that clause—sought a declaration concerning his affirmative defenses to Suzann's claims and argued that the FSA's release was a complete bar to those claims.

Suzann's arbitration counterclaims alleged that Mike systematically misappropriated her assets for his own purposes. She also alleged that his fraud and

misappropriation were inherently undiscoverable because of the way in which he controlled her finances and restricted her access to financial records.

Suzann further pled that she first discovered Mike's misdeeds when she was provided with an estimate of her assets and net worth in 2009. She also alleged that Mike coerced her into signing the FSA, which he subsequently engaged counsel to prepare the FSA to release him from liability for his wrongdoing.

Suzann also pled that in December 2009, while also serving as trustee, Mike appointed himself, Tracy, and Kelly to serve as "trust protectors" for the Trust. She alleged that the trust protectors (including Mike) conspired to have her sign the various releases at issue here and included the ratification of the FSA in those releases.

Suzann's counterclaim also says that the trust protectors breached their fiduciary duties by failing to find a suitable replacement trustee for the interim after Mike resigned, leaving the Trust without a trustee for an extended time.

Based on these and a detailed list of other Trust-related misdeeds, Suzann asserted various fraud, negligence, and breach of fiduciary duty claims against Mike and the other children and requested damages and an accounting. She further requested that the trust protectors be removed and that the children's interests in the Trust be revoked.

During the hearing on the motion to compel, Mike argued that whether the tort claims were to be arbitrated pursuant to that clause was for the arbitrators to

decide. Likewise, his response to Suzann's motion to stay the arbitration argued that whether the agreement resulted from fraud or duress (as Suzann claimed) was for the arbitrators to decide. He further argued that the arbitrators' determination concerning the Release's validity would bar Suzann's claims.

Indeed, because the arbitration clause requires arbitration of "any controversy or claim arising out of or relating to [the] agreement, or the breach of any contractual or non-contractual duties [under the agreement]," its scope is not limited to just Mike's claims. It also includes controversies, which is also a broad, expansive term. *See Advocare GP, LLC v. Heath*, No. 05-16-00409-CV, 2017 WL 56402, at *2 (Tex. App.—Dallas Jan. 5, 2017, no pet.). Significantly, the arbitration clause does not say that the parties agree to arbitrate only controversies concerning the construction and validity of the agreements, i.e., Mike's declaratory judgment claims. Instead, it broadly encompasses all controversies related to such documents.

In light of the clause's expansive, inclusive language, we cannot conclude that Suzann's tort claims are not within its broad scope. Indeed, Mike's breach of fiduciary duties and related torts are inextricably enmeshed and factually intertwined with the very agreement he claims releases him from liability. Suzann's claims cannot be made without reference to that contract.

For example, Mike fails to explain how Suzann's claim that she was fraudulently induced to sign the FSA could possibly be resolved without referring to the FSA and Mike's arbitration request for a declaratory judgment that the FSA

release is valid. In fact, Mike's declaratory judgment concerning the document's validity goes to the very essence of Suzann's claim.

Likewise, Mike omits to mention how his duties as trustee and the validity of the Trust could be resolved without referring to Suzann's fraud and mismanagement allegations and her request that his Trust interest be revoked. *See Capital Income Props. LXXX v. Blackmon*, 843 S.W.2d 22, 23 (Tex. 1992) (orig. proceeding) (partners' claims of fraudulently inducing partners to invest in the partnerships were within scope of arbitration clause requiring arbitration of claims arising out of or related to partnership agreement); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967) (arbitration agreement to arbitrate any controversy or claim arising out of agreement encompassed claim that agreement procured by fraud).

Under these circumstances, we conclude that when Mike agreed to arbitrate, he agreed to arbitrate Suzann's tort claims because such claims are within the scope of that agreement.

c. Direct Benefits Estoppel

Alternatively, direct benefits estoppel forecloses Mike's argument that there was no agreement to arbitrate.

The direct benefits estoppel doctrine recognizes that a party may be estopped from asserting that his non-signatory status precludes enforcement of a contract's arbitration clause when he has consistently maintained that other contract provisions

benefit him. *See Rachal v. Reitz*, 403 S.W.3d 840, 846 (Tex. 2013). As applied to an agreement to arbitrate, a nonparty may be compelled to arbitrate if he deliberately seeks and obtains substantial benefits from the contract itself. *See id*. The doctrine may apply regardless of whether the non-signatory's lawsuit claims are based on the contract. *See In re Weekly Homes, L.P.*, 180 S.W.3d 127, 132 (Tex. 2005) (orig. proceeding).

We note again that Mike was not compelled to arbitrate. Instead, he demanded it. Although this is not the typical case, the direct benefits estoppel principle still applies.

Mike argues that direct benefits estoppel does not apply because Suzann's tort claims are independent of the Frost Release. We have previously rejected that premise.

Mike also claims that the estoppel doctrine is inapplicable because Suzann's claims sound in tort, not contract. In support, he relies on *Leach*, which states that when a claim's substance arises from general obligations imposed by state law, including statutes, torts and other common law duties rather than from contract, direct benefits estoppel does not apply. *See G.T. Leach Builders LLC v. Sapphire*, V.P., L.P., 458 S.W.3d 502, 527–28 (Tex. 2015). That aspect of the *Leach* holding, however, is inapplicable to these facts. The claims at issue for estoppel purposes are Mike's declaratory judgment claims, not Suzann's counterclaims. And as the *Jody James* court explained, "[w]hen a claim depends on the contract's existence and

cannot stand independently—that is, the alleged liability arises solely from the contract or must be determined by reference to it—equity prevents a person from avoiding the arbitration clause that was part of that agreement." *Jody James*, 547 S.W.3d at 637. The court noted that, "a person cannot both have his contract and defeat it too." *Id*.

Yet that is what Mike seeks to do. He claimed that the FSA released him from all of Suzann's claims. He argued that if the Frost Release and the FSA were determined to be valid (as his declaratory judgment requested), Suzann's tort claims would be defeated.

But the FSA is a component part of the multi-document contract requiring arbitration. Because Mike sought to have his liability determined pursuant to that contract, he cannot now complain that the arbitration clause in that contract was applied. *See Jody James*, 546 S.W.3d at 637.

For the foregoing reasons, we resolve Mike's first issue against him.

B. Second Issue: Should the award be vacated because discovery was denied?

No, the trial court did not erroneously deny discovery. The subpoena was deficient, the Administrative Review Council (ARC) finally decided the issue in arbitration, and Mike failed to show that the requested discovery would have advanced his requested vacatur.

In February 2015, prior to any substantive arbitration proceedings, Bob Harrison, one of the arbitrators, disclosed that one of his clients had appointed Frost executor of the client's estate and trustee of her testamentary trust. The client died in 2015, and Harrison revealed that he would be representing the estate and thus technically representing Frost. The AAA invited further objections, but no one did.

Two years later, after several panel rulings, Mike objected to the entire panel, including Harrison. Mike asked the AAA to convene the ARC.[7]

The ARC set a schedule for objections and responses. During that time, Mike complained about various rulings against him and specifically objected to Harrison based on his Frost representation.

The ARC ruled against Mike, specifically concluding that:

> . . . the AAA's Administrative Review Council ("Council") considered Claimant's objection to the continued service of the panel, Arbitrators Goehrs, Harrison, and Knebel, and any response received, After careful consideration of the parties' contentions, the Council has determined that the three arbitrators shall be reaffirmed as the panel for this case, This decision will be made a part of our administrative file.
>
> The AAA's rule on disqualification provides that an arbitrator shall be subject to disqualification for partiality or lack of independence, inability or refusal to perform his or her duties with diligence and in good faith, and any grounds for disqualification provided by applicable law, The Council has carefully reviewed and considered the parties' submissions in this matter, Based upon the Council's Review Standards . . . to which the parties were previously referred, the Council is reaffirming Arbitrators Goehrs, Harrison, and Knebel in this case.

[7] The AAA rules provide that: "Upon objection of a party to the continued service of an arbitrator, or on its own initiative, the AAA shall determine whether the arbitrator should be disqualified under the grounds set out in the rules, and shall inform the parties of its decision, which decision shall be conclusive."

> Under the Rules, the AAA's decision regarding an objection to an arbitrator is conclusive. Any additional objection to the continued service of any of the panel members must be based on new grounds.

Despite that decision's finality, Mike's motion to vacate raised the Harrison issue with the trial court. Then, he served a subpoena to take a deposition on written questions and for document production on Harrison's firm. The firm moved to quash the subpoena and the court granted the motion.

Mike's second issue argues that the trial court erroneously granted the motion to quash and erred in confirming the award without allowing him discovery to determine the extent of Harrison's relationship with Frost.[8] We disagree.

We review a trial court's ruling on a motion to quash under an abuse-of-discretion standard. *See In re Christus Spohn Hosp. Kleberg*, 222 S.W.3d 434, 445 (Tex. 2007) (orig. proceeding). A trial court abuses its discretion when it acts "without reference to any guiding rules and principles"; in other words, if it acts arbitrarily or unreasonably. *Downer v. Aquamarine Operators, Inc*., 701 S.W.2d 238, 241–42 (Tex. 1985).

[8] Mike also filed a motion to continue the vacatur hearing, claiming that he needed more time to depose Harrison and to explore (i) Harrison working for Frost; (ii) an undisclosed financial interest; and (iii) undisclosed communications with Frost. But we do not read Mike's brief as complaining about the continuance denial. Moreover, even if we treated Mike's reference to a continuance as an issue, the analysis would not differ. A party requesting a discovery continuance must show he used due diligence to obtain the needed evidence. *Zaidi v. N. Tex. Tollway Auth*., No. 05-17-01056-CV, 2018 WL 6426798, at *1 (Tex. App.—Dallas Dec. 6, 2018, no pet.) (mem. op.). Waiting until after an adverse award has been entered does not demonstrate diligence, and for the same reasons discussed above, there is nothing to establish that the trial court abused its discretion by denying a continuance.

Mike agreed to arbitration under the AAA rules. Although he did not object when Harrison initially disclosed the Frost relationship, after several adverse rulings, Mike invoked the ARC process. The ARC determined that Harrison (and the other panel members) would not be disqualified, and the AAA rules provide that this determination was "conclusive."

Mike's agreement to the AAA rules clearly evinces an intent to let the AAA decide the issue. *See Saxa Inc. v. DFD Architecture, Inc*., 312 S.W.3d 224, 229 (Tex. App.—Dallas 2010, pet. denied). When a party voluntarily submits an issue to arbitration, he cannot subsequently complain that the arbitrators ruled on the issue. *Centex/Vestal v. Friendship W. Baptist Church*, 314 S.W.3d 677, 686 (Tex. App.—Dallas 2010, pet. denied).

And as this court has previously observed, a request to take discovery of arbitrators is "often a 'tactic' employed by disgruntled or suspicious parties, who, having lost the arbitration, are anxious for another go at it." *Rodas v. La Madeline of Tex., Inc*., No. 05-14-00054-CV, 2015 WL 1611780, at *4 (Tex. App.—Dallas Apr. 10, 2016, pet. denied) (mem. op.)

Mike admits that Harrison disclosed that he would technically be representing Frost in a probate matter involving his client. He further admits that he knew that the client's name was Lois Waldron, and that Linda Baker, a Frost trust officer and potential arbitration witness, might have some involvement in the probate case. But

he claims he did not know about the Miles Bentson affidavit until after the final award was issued.[9]

The record reflects that Mike's investigation commenced during the ARC process. Although Harrison's disclosure did not identify Waldron by name, Mike's ARC submission referenced both a name and the cause number of the Waldron probate proceeding. The Bentson affidavit that Mike claims to have discovered post-award was filed on October 21, 2015 in the probate proceeding Mike referenced in his ARC complaint.

If there were "undisclosed financial interests," or "undisclosed communications" as Mike claims, Mike should have expanded his investigation when the issue was before the ARC. He offers no explanation about what prevented him from doing so.

Mike also argues that we should reverse this case "for the same reason" we reversed in the *Rodas* case. This reliance is misplaced.

Rodas involved the denial of a motion to compel discovery concerning evident partiality under the FAA. *Id.* at *1–3. There, an arbitrator failed to disclose one or two arbitrations involving one of the parties' law firms that he had accepted during the pendency of the arbitration at issue. *Id*. at *6. Unlike the present case, those relationships had not been previously disclosed and the issue had not been finally

[9] Bentson is a Frost attorney and vice-president. The affidavit Mike refers to is an affidavit in lieu of inventory filed in the Waldron probate proceeding.

determined by an ARC pursuant to AAA rules under which the parties agreed to be bound. Also, unlike this case, there was no indication that a defective subpoena was served.

Mike's subpoena, however, was technically deficient. The subpoena was served on January 5, 2018, setting the deposition and document production for January 17, 2018. Thus, the subpoena did not provide twenty days' notice for the deposition. *See* TEX. R. CIV. P. 200.1, 205.2. In addition, Mike did not serve a document production notice ten days before the subpoena was issued. *See* TEX. R. CIV. P. 200.1, 205.2.

Furthermore, a trial court correctly denies post-arbitration discovery into irrelevant matters. *Thomas James Assocs. v. Owens*, 1 S.W.3d 315, 322–23 (Tex. App.—Dallas 1999, no pet.). To obtain post-arbitration discovery, Mike was required to show that the requested discovery would have advanced his request to vacate the award. *See Petrobas Am., Inc. v. Astra Oil Trading NV*, No. 01-11-0073-CV, 2012 WL 1068311, at *15 (Tex. App.—Houston [1st Dist.] Mar. 29, 2012, no pet.) (mem. op.). At a minimum, that showing required that Mike raise a bona fide question of whether the arbitrator failed to disclose information that he had a duty to disclose. *Rodas*, 2015 WL 1611780, at *4. There was no such showing here.

Mike testified extensively about his litany of complaints about the arbitration process, implying that rulings against him somehow demonstrated impartiality. Cross-examination, however, showed that there was a basis for these rulings, the

substance of which we do not review on appeal. *See Tex. Health Mgmt., LLC v. Healthspring Life & Health Ins. Co.*, No. 05-18-01036-CV, 2020 WL 3071729, at *9 (Tex. App.—Dallas June 10, 2020, no pet. h.) (courts refuse to meddle in evidentiary rulings and credibility determinations of arbitrators); *see also Babcock & Wilcox Co. v. PMAC, Ltd.*, 863 S.W.2d 225, 234 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (when arbitrator's decision rests on an adequate basis, complaints that he failed to address all issues presented do not render the proceedings fundamentally unfair).[10]

Mike also argued that there was "newly discovered" evidence about Frost's relationship with Harrison because he had obtained documents showing that Harrison communicated with Frost about the Waldron estate. The court observed that such communication was inevitable during the course of Harrison's representation of the estate's representative—a representation that had been disclosed. And opposing counsel pointed out that Harrison's disclosure was made in February 2015, and Mike told the ARC about the "new" communication he claimed to have discovered in September 2017.

[10] In addition, while the record reflects that the panel threatened to exclude documents Mike refused to produce, it does not show, nor does Mike identify, any such exclusions or other specific issues that were not addressed.

Mike does not argue evident impartiality on appeal, but the alleged need for the discovery was partially premised on this ground for vacatur raised in the court below. Thus, the evident partiality cases further inform our analysis.

A prospective neutral arbitrator exhibits evident partiality only "if he or she does not disclose facts which might, to an objective observer, create a reasonable impression of the arbitrator's partiality." *Thomas James*, 1 S.W.3d at 320–21. Evident partiality can be established from a nondisclosure itself. *Rodas*, 2015 WL 1611780, at *3. But the disclosure of relevant information forecloses an evident partiality finding because the parties can evaluate the potential bias at the outset, rather than requesting that a court do so after the arbitration. *Burlington Northern R. Co. v. Tuco*, 960 S.W.2d 629, 635 (Tex. 1997).

Here, the disclosure of relevant information was made three years before the final hearing and was conclusively evaluated by the ARC. Mike's unsubstantiated post-award allegations several years later do not establish evident partiality as a basis for discovery concerning an issue previously raised and finally decided.

Under these circumstances, we conclude that the trial court did not err by granting the motion to quash. We resolve Mike's second issue against him.

III. CONCLUSION

Having resolved all of Mike's issues against him, we affirm the trial court's judgment.

/Bill Whitehill/
BILL WHITEHILL
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

MICHAEL A. RUFF, ET AL., Appellant

No. 05-18-00326-CV V.

SUZANN RUFF INDIVIDUALLY AND IN HER CAPACITY AS TRUSTEE OF THE RUFF MANAGEMENT TRUST, AND MATTHEW D. RUFF, Appellees

On Appeal from the Probate Court No. 1, Dallas County, Texas
Trial Court Cause No. PR-11-02825-1.
Opinion delivered by Justice Whitehill. Justices Myers and Pedersen, III participating.

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

It is **ORDERED** that appellee SUZANN RUFF INDIVIDUALLY AND IN HER CAPACITY AS TRUSTEE OF THE RUFF MANAGEMENT TRUST, AND MATTHEW D. RUFF recover their costs of this appeal from appellant MICHAEL A. RUFF.

Judgment entered August 11, 2020