AFFIRMED; Opinion Filed August 25, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00615-CV

DASPIT LAW FIRM, PLLC, Appellant
V.
ERIC HERMAN AND LAW OFFICES OF ANJEL K. AVANT, PLLC D/B/A AVANT LAW FIRM, Appellees

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On Appeal from the County Court at Law No. 3
Dallas County, Texas
Trial Court Cause No. CC-19-01463-C

MEMORANDUM OPINION

Before Justices Myers, Molberg, and Reichek
Opinion by Justice Myers

The Daspit Law Firm, PLLC brings an interlocutory appeal of the trial court's denial of its motion to compel arbitration under the Texas General Arbitration Act of the lawsuit brought by Eric Herman and the law firm representing him, Law Offices of Anjel K. Avant, PLLC d/b/a Avant Law Firm. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 171.098(a)(1). Appellant brings four issues on appeal contending the trial court abused its discretion by (1) ruling on appellees' objections to the formation of the arbitration agreement, (2) ruling on appellees' objections to arbitrability when the arbitration provision delegated

arbitrability to the arbitrator, (3) ruling on appellees' unconscionability objections that applied to the contract as a whole and not specifically to the arbitration provision, and (4) determining that the arbitration provision was unconscionable. We conclude the arbitration agreement in this case is procedurally unconscionable, and we affirm the trial court's order.

BACKGROUND

On February 2, 2018, Herman was driving on Highway 75 in Anna, Texas, when he was struck from behind by a commercial freight vehicle. Herman was injured, and he called appellant.

On February 6, a non-attorney employee of appellant met with Herman at a McDonald's restaurant. During the meeting, Herman described the accident. Appellant's employee then asked Herman to sign a document. Herman asked if it was a contract, and the employee told him, "No, we are just gathering information. A lawyer will call you." Herman asked for a copy of the document, and the employee refused to provide one but said one would be sent to him. Appellant's employee was impatient, and he told Herman he did not have time to explain things. Herman signed the document. The meeting lasted less than ten minutes.

Despite the employee's representation that the document was not a contract, the document was a lawyer–client agreement in which appellant agreed to represent Herman for a contingent fee of thirty-five to forty-eight percent of any recovery on Herman's claims. The contract also contained an arbitration

agreement requiring any disputes about the contract or appellant's representation of Herman to be arbitrated in Harris County. Herman left the meeting not knowing whether he had hired an attorney.

The next day, February 7, an attorney at appellant sent Herman an e-mail stating, "Dear Mr. Herman, It was a pleasure speaking with you over the telephone today. If you have any further questions regarding medical treatment or any general questions regarding your case, please do not hesitate to contact our law office . . . ."

The day after that, February 8, Herman met with a friend who was also an attorney. This person told Herman the meeting with appellant's employee was unprofessional and advised Herman to find a new lawyer.

The next day, February 9, Herman sent appellant an e-mail stating, "I will not be needing your services regarding the accident we discussed. I already had been working with my personal attorney. He has been my attorney for the last 15 years and in my confused state had forgotten that he was already working with the situation." The same day, an attorney at appellant called Herman and told him the firm would take the case. Herman responded that he did not want appellant to represent him because there had been no communication with him despite the fact he was in pain and needed to see a doctor. Herman also told the attorney he did not know what he had signed, that nothing had been explained to him, and that he was hiring new counsel.

After the February 9 conversation and e-mail, Herman hired Anjel Avant with the Avant Law Firm to represent him. Avant filed a claim with Herman's insurer on the policy's coverage for personal injury. Herman's insurer paid the claim, but the check was made out to Herman, Avant, and appellant. Until that time, Avant had never heard of appellant. The insurer told Avant that appellant claimed a thirty-five percent interest in Herman's case. Appellant also sent a notice-of-lien letter to the insurer of the driver who hit Herman.

Meanwhile, the driver who hit Herman initially refused to settle, and Avant filed suit on Herman's behalf. After discovery and mediation, Herman and the other driver reached a settlement.

Avant contacted appellant and asked appellant to send her a copy of appellant's retainer agreement with Herman, a list of its expenses, a copy of its file on Herman's case, and a description of any work performed. Although Avant called and wrote to appellant numerous times to obtain the information, appellant refused to talk to Avant or to provide the information.

Avant then filed this lawsuit on Herman's behalf. In the original petition, Herman sought a declaratory judgment to determine whether appellant's contract with Herman was "void or, in the alternative, determine what amount of money, if any, would be reasonable compensation" for appellant's work and expenses in representing Herman. Appellant did not respond immediately to the lawsuit. Avant set the case for a default judgment hearing and sent appellant notice of the

hearing. Appellant then contacted Avant, produced a copy of the attorney–client agreement, and filed an answer to the lawsuit with a motion to abate the lawsuit and to compel arbitration of the claims. The motion to compel arbitration included as an exhibit a copy of the attorney–client agreement. Appellant did not provide a description of any work performed for Herman, nor did appellant produce its file on Herman's case.

Avant then filed an amended petition, adding the Avant Law Firm as a plaintiff. The Avant Law Firm joined Herman's declaratory judgment claims and brought an individual claim alleging appellant tortiously interfered with the law firm's contracts with Herman, medical providers, and health insurance companies because appellant's actions delayed disbursement of the settlement funds.

The trial court held a hearing on appellant's motion to compel arbitration. At the hearing, appellant provided Avant with a copy of its file on Herman. Both sides introduced one exhibit each into evidence at the hearing. After hearing the attorneys' argument, the court denied the motion to compel arbitration. Appellant brings an interlocutory appeal of this order.

ARBITRATION

All of appellant's four issues contend the trial court abused its discretion by denying the motion to compel arbitration.

Standard of Review

We review a trial court's order denying a motion to compel arbitration for an abuse of discretion. *See Henry v. Cash Biz, LP*, 551 S.W.3d 111, 115 (Tex.), *cert. denied*, 139 S. Ct. 184 (2018). We defer to the trial court's factual determinations if they are supported by evidence, but we review its legal determinations de novo. *Id.*; *see also Sidley Austin Brown & Wood, L.L.P. v. J.A. Green Dev. Corp.*, 327 S.W.3d 859, 863 (Tex. App.—Dallas 2010, no pet.) (explaining that in reviewing denial of motion to compel arbitration, "we apply a no-evidence standard to the trial court's factual determinations and a de novo standard to legal determinations"). A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner or acts without reference to any guiding rules or principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985). The trial court does not abuse its discretion when its decision is based on conflicting evidence, some of which reasonably supports the decision. *RSR Corp. v. Siegmund*, 309 S.W.3d 686, 709 (Tex. App.—Dallas 2010, no pet.).

Arbitration Provision

The arbitration agreement in the attorney–client agreement stated:

> <u>ARBITRATION</u>
>
> Any and all disputes controversies, claims or demands arising out of or relating to this agreement or any provision hereof, the providing of legal services by attorneys to client or in any way relating to the relationship between attorneys and client, whether in contract, tort, or otherwise, at law or in equity, for damages or any other relief shall be resolved by binding arbitration pursuant to the Texas General

> Arbitration Statute in accordance with the Commercial Arbitration Rules then in effect with the American Arbitration Association. Any such arbitration proceeding shall be conducted in Harris County, Texas. The arbitration shall be enforceable in either federal or state court in Harris County, Texas pursuant to the substantive laws established by the Texas General Arbitration Statute. Any party to any award rendered in such arbitration proceeding may seek a judgment upon the award and that judgment may be entered by any federal or state court in Harris County, Texas having jurisdiction.

Herman testified in his affidavit that he signed the document.

Motions to Compel Arbitration

The arbitration agreement specified that arbitration would be pursuant to the Texas General Arbitration Act. *See* CIV. PRAC. §§ 171.001–.098. Chapter 171 of the Civil Practice and Remedies Code sets out the steps for determining whether claims must be arbitrated.

The party seeking arbitration files an application for arbitration. *Id.* § 171.021(a). The application must show an agreement to arbitrate, the opposing party's refusal to arbitrate, and that the claims at issue fall within the scope of the agreement to arbitrate. *Id.*; *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex. 2003). To avoid arbitration, the party opposing arbitration must show no arbitration agreement exists, that the claims do not fall within the arbitration provision, or that the arbitration agreement is unconscionable or otherwise unenforceable. *Id.* §§ 171.001, .021(b), .022; *RSL Funding, LLC v. Newsome*, 569 S.W.3d 116, 124 (Tex. 2018). Assertions that the contract containing an arbitration provision (as opposed to only the arbitration provision) is invalid due to

contract defenses such as unconscionability, illegality, or fraudulent inducement are decided by the arbitrator and not the trial court. *RSL Funding*, 569 S.W.3d at 124, 125 ("Any contract defense that attacks the contract as a whole but does not go to the issue of contract formation must be decided by the arbitrator."). If the party opposing arbitration denies the existence of the agreement, then the trial court determines that issue "summarily." CIV. PRAC. § 171.021(b).

Motions to compel arbitration are ordinarily decided in summary proceedings "on the basis of affidavits, pleadings, discovery, and stipulations." *Kmart Stores of Tex., L.L.C. v. Ramirez*, 510 S.W.3d 559, 565 (Tex. App.—El Paso 2016, pet. denied) (quoting *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 269 (Tex. 1992)). Where a party seeking to compel arbitration provides competent, prima facie evidence showing an arbitration agreement, and the party resisting arbitration contests the agreement's existence and raises genuine issues of material fact by presenting affidavits or other such evidence as would generally be admissible in a summary proceeding, the trial court must forgo summary disposition and hold an evidentiary hearing. *Id.* When the trial court conducts such a "*Tipps* hearing" and thereafter makes a ruling, we review the trial court's findings for legal sufficiency. *Id.*

In a nonjury proceeding where no findings of fact or conclusions of law are filed or requested, we infer that the trial court made all the necessary findings to support its judgment. *Id.*; *see also Holt Atherton Indus. Inc. v. Heine*, 835 S.W.2d

80, 83 (Tex. 1992). If the implied findings are supported by the evidence, we must uphold the trial court's judgment on any theory of law applicable to the case. *Kmart*, 510 S.W.3d at 565; *see also Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990).

When reviewing the evidence for legal sufficiency, we consider the evidence in the light most favorable to the challenged finding, crediting favorable evidence if a reasonable factfinder could and disregarding contrary evidence unless a reasonable factfinder could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 807 (Tex. 2005). Evidence is legally insufficient if the record reveals: (a) the complete absence of a vital fact; (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; or (d) the evidence establishes conclusively the opposite of the vital fact. *Id.* at 810. Evidence is legally sufficient if it would enable fair-minded people to reach the verdict under review. *Id.* at 827. When conducting a review of the legal sufficiency of the evidence, we are mindful that the factfinder was the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Id.* at 819.

Delegation of Authority to the Arbitrator to Determine Arbitrability

In the second issue, appellant contends the trial court erred by making determinations of whether the claims were arbitrable because the arbitration provision "clearly and unmistakably delegated issues of arbitrability to the

arbitrator." Normally, questions of whether claims are subject to arbitration are determined by the trial court. *See Saxa Inc. v. DFD Architecture Inc.*, 312 S.W.3d 224, 229 (Tex. App.—Dallas 2010, pet. denied). However, parties may delegate that determination to the arbitrator. *Id.* "Silence or ambiguity about who should decide the arbitrability issue should not lead a court to presume the parties intended for the issue to be decided by the arbitrator." *Id.* Instead, "a court must examine the arbitration agreement to decide if, when construed under the relevant state law, the agreement evidences a clear and unmistakable intention that the arbitrators will have the authority to determine the scope of arbitration." *Id.*

In this case, the text of the arbitration provision does not indicate the parties clearly and unmistakably intended to have the arbitrator determine questions of arbitrability. Instead, appellant points to the provision stating the arbitration would be conducted "in accordance with the Commercial Arbitration Rules then in effect with the American Arbitration Association." *See id.* at 229–30. Appellant asserts that one of those rules, and it does not identify which rule, provides that the arbitrator had authority to determine whether the claims were arbitrable.

Appellant did not make this argument in the trial court. Nor did appellant present the trial court with evidence of the American Arbitration Association (AAA) rules "then in effect." Rule of Appellate Procedure 33.1 provides, "As a prerequisite to presenting a complaint for appellate review, the record must show that" the party presented the complaint to the trial court and that the trial court

ruled on it. TEX. R. APP. P. 33.1(a). Because appellant did not assert in the trial court that the parties had delegated questions of arbitrability to the arbitrator by incorporating the AAA rules, appellant may not assert that as error on appeal. *See id.*; *see also Mansions in the Forest, L.P. v. Montgomery Cty.*, 365 S.W.3d 314, 317 (Tex. 2012) ("[A] party 'should not be permitted to waive, consent to, or neglect to complain about an error at trial and then surprise his opponent on appeal by stating his complaint for the first time.'" (quoting *In re B.L.D.*, 113 S.W.3d 340, 350 (Tex. 2003) (orig. proceeding))). *Cf. Jody James Farms, JV v. Altman Group, Inc.*, 547 S.W.3d 624, 632 (Tex. 2018) (in dispute between party to arbitration agreement and non-signatory, incorporation of AAA rules into arbitration agreement did not show clear intent to arbitrate arbitrability); *Saxa*, 312 S.W.3d at 328–30 (incorporation of AAA rules delegating arbitrability to arbitrator was part of summary judgment decision).

We overrule appellant's second issue.

Unconscionability

In the fourth issue, appellant contends the trial court erred by determining the arbitration provision was procedurally or substantively unconscionable. Appellees asserted in their response to the motion to compel arbitration that the trial court should have denied the motion to compel arbitration because the arbitration agreement was substantively and procedurally unconscionable. The Texas Arbitration Act provides, "A court may not enforce an agreement to arbitrate

if the court finds the agreement was unconscionable at the time the agreement was made." CIV. PRAC. § 171.022.

"Substantive unconscionability refers to the fairness of the arbitration provision itself, whereas procedural unconscionability refers to the circumstances surrounding adoption of the arbitration provision." *Royston, Rayzor, Vickery, & Williams, LLP v. Lopez*, 467 S.W.3d 494, 499 (Tex. 2015); *In re Palm Harbor Homes*, 195 S.W.3d 672, 677 (Tex. 2006) (orig. proceeding). Unconscionable contracts, whether relating to arbitration or not, are unenforceable under Texas law. *See In re Poly-America, L.P*, 262 S.W.3d 337, 348 (Tex. 2008) (orig. proceeding). A party seeking to avoid arbitration on unconscionability grounds bears the burden of proof. *Id.*

In the third issue, appellant contends the trial court erred by ruling on appellees' arguments that the entire contract, and not just the arbitration provision, was unconscionable. The trial court may determine whether an arbitration provision is unconscionable, but questions of whether the contract as a whole is unconscionable may be decided only by the arbitrator. *See In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 648–49 (Tex. 2009) orig. proceeding).

Courts consider the following factors when determining whether the arbitration provision is unconscionable:

1. the entire atmosphere in which the agreement was made;

2. the alternatives, if any, available to the parties at the time the contract was made;
3. whether the contract was illegal or against public policy; and
4. whether the contract is oppressive or unreasonable.

See Delfingen US-Tex., L.P. v. Valenzuela, 407 S.W.3d 791, 798 (Tex. App.—El Paso 2013, no pet.); *see also Venture Cotton Co-op v. Freeman*, 435 S.W.3d 222, 228 (Tex. 2014); *Chubb Lloyds Ins. Co. of Tex. v. Andrew's Restoration, Inc.*, 323 S.W.3d 564, 578 (Tex. App.—Dallas 2010), *aff'd in part & rev'd in part sub nom. Cruz v. Andrews Restoration, Inc.*, 364 S.W.3d 817 (Tex. 2012). For there to be procedural unconscionability, "the circumstances surrounding the negotiations must be shocking." *Washburne v. Lynn Pinker Cox & Hurst, LLP*, 05-19-00716-CV, 2020 WL 4034978, at *6, (Tex. App.—Dallas July 17, 2020, no pet.) (mem. op.) (quoting *LeBlanc v. Lange*, 365 S.W.3d 70, 88 (Tex. App.—Houston [1st Dist.] 2011, no pet.)).

In this case, the first factor, the entire atmosphere in which the agreement was made, provides some evidence to support an implied finding that the arbitration provision was procedurally unconscionable.

Herman testified in his affidavits that the meeting with appellant's employee was less than ten minutes. Herman made a brief statement to the employee explaining the accident, and the employee told Herman to sign a document. Herman asked the employee if the document was a contract, and the employee answered, "No, we are just gathering information," that the Daspit firm would

review the facts, and that a lawyer would call him. The employee was "very impatient" and told Herman "he could not stay to explain things." Herman also testified that when he signed the document, he "did not understand . . . that it contained an arbitration clause." Herman argues appellant's employee did not permit Herman to read the arbitration provision before signing the document.

Lawyers must take reasonable care to insure that their non-attorney assistants comply with the lawyer's professional obligations. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 5.03(a), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (TEX. STATE BAR R. art. X, § 9). The basis of many of the Rules of Professional Conduct is that lawyers should not make misleading statements to prospective clients. *See id.* R. 1.01(a), 7.01 to 7.07. Appellant's employee made a materially misleading statement to Herman by telling him the document was not a contract. Because "[a]rbitration is a creature of contract between consenting parties," *Jody James Farms*, 547 S.W.3d at 629, this statement constituted a representation by appellant's employee that the document did not contain an arbitration agreement.

Based on Herman's testimony of the employee's statements, the trial court could have found that Herman had no reason to believe the document was a contract at all, much less that it was an arbitration agreement. However, as Herman later learned, the document provided that Herman had agreed to arbitration of disputes with appellant.

As this Court and the Texas Supreme Court have observed, "[a] party to a written agreement . . . is charged as a matter of law with knowledge of its provisions . . . unless he can demonstrate that he was tricked into its execution." *Town N. Nat'l Bank v. Broaddus*, 569 S.W.2d 489, 492 (Tex. 1978) (quoting *Tex. Export Dev. Corp. v. Schleder*, 519 S.W.2d 134, 139 (Tex. App.—Dallas 1974, no writ)); *see also Nexion Health at Omaha, Inc. v. Martin*, 06-10-00017-CV, 2010 WL 2690562, at *6 (Tex. App.—Texarkana July 7, 2010, no pet.) (mem. op.) (quoting *Town N. Nat'l Bank*). In this case, the trial court could have found Herman was "tricked into [the document's] execution" and that the employee did not provide appellant an opportunity to read the arbitration agreement.

Although Herman did not specifically state that he did not read the arbitration agreement, it is apparent from Herman's affidavits that he did not read it. Herman stated he left the meeting with the employee unaware that disputes about the contract were subject to arbitration. If Herman had examined any part of the document other than the signature line, he could not have helped but seen that the document contained an arbitration agreement. The top of the two-page document stated, in all capital letters, "THIS CONTRACT IS SUBJECT TO ARBITRATION UNDER THE TEXAS GENERAL ARBITRATION STATUTE." Herman signed at the bottom of the second page of the contract, which was the page setting out the arbitration agreement. The arbitration agreement was in all capital letters under the heading "<u>ARBITRATION</u>." Thus,

the trial court could infer from Herman's affidavits that he did not read the arbitration provision before signing it. The trial court could also determine that Herman's failure to notice that the document contained an arbitration agreement resulted from the employee's impatience, lack of time, and the false assurance that the document was not a contract. Based on the evidence before it, the trial court could conclude appellant's employee tricked Herman into agreeing to the arbitration provision.

Just as it would have been immediately apparent to Herman that the document contained an arbitration agreement, it would also have been immediately apparent to appellant's employee. The court could conclude appellant's employee must have known what the document was and that he intended to mislead Herman by telling him the document was not a contract (and therefore not an arbitration agreement) and by telling Herman to sign it without allowing Herman the time to observe that it contained an arbitration agreement.

Moreover, Herman was not represented by counsel. Instead, he was seeking representation for an accident that left him in pain. He stated in an affidavit that his only income was from "Social Security disability." Appellant is a law firm, and it prepared the agreement its employee told Herman to sign. Thus, this agreement was not one between two sophisticated parties represented by attorneys. *Cf. JP Morgan Chase Bank, N.A. v. Orca Assets G.P., L.L.C.*, 546 S.W.3d 648, 656 (Tex. 2018) (in fraud and negligent misrepresentation cases, courts "view the

circumstances in their entirety while accounting for the parties' relative levels of sophistication").

Based on these facts, the trial court could have reasonably concluded this conduct by a law firm toward a prospective client was sufficiently shocking to constitute procedural unconscionability concerning the arbitration agreement. *Cf. Lynch v. Cruttenden & Co.*, 22 Cal. Rptr. 2d 636, 641 (Cal. Ct. App. 1993) (Federal Arbitration Act "does not require arbitration where, as alleged here, the plaintiffs were so deceived they did not understand they were contracting"). Therefore, the trial court did not abuse its discretion by denying appellant's motion to compel arbitration of Herman's claims. CIV. PRAC. § 171.022. We overrule appellant's third and fourth issues.[1]

Avant Law Firm

The Avant Law Firm argued in the trial court that the arbitration provision did not apply to it because it was not a signatory to the agreement. *See Roe v. Ladymon*, 318 S.W.3d 502, 511 (Tex. App.—Dallas 2010, no pet.) (non-signatories "are normally not bound by arbitration agreements between

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[1] Having concluded that the trial court did not abuse its discretion by denying the motion to compel arbitration of Herman's claims on the ground that the arbitration agreement was procedurally unconscionable, we need not address appellant's argument that the trial court would have erred by determining the contract was substantively unconscionable. We also need not address appellant's first issue contending the trial court would have erred by determining no arbitration agreement existed or that Herman's claims did not fall within the arbitration provision. We make no determination of those issues. We also make no determination of whether any other provision of the contract or the contract as a whole was unconscionable.

others”). On appeal, appellant does not make any argument explaining why the trial court’s denial of arbitration of the claims asserted by the Avant Law Firm was an abuse of discretion. Accordingly, we conclude appellant has failed to show the trial court abused its discretion by denying appellant’s motion to compel arbitration of the claims brought by the Avant Law Firm.

CONCLUSION

We affirm the trial court’s order denying appellant’s motion to compel arbitration.

/Lana Myers/
LANA MYERS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DASPIT LAW FIRM, PLLC, Appellant

No. 05-19-00615-CV V.

ERIC HERMAN AND LAW OFFICES OF ANJEL K. AVANT, PLLC D/B/A AVANT LAW FIRM, Appellees

On Appeal from the County Court at Law No. 3, Dallas County, Texas
Trial Court Cause No. CC-19-01463-C.
Opinion delivered by Justice Myers. Justices Molberg and Reichek participating.

In accordance with this Court's opinion of this date, the order of the trial court denying the motion to compel arbitration is **AFFIRMED**.

It is **ORDERED** that appellees ERIC HERMAN AND LAW OFFICES OF ANJEL K. AVANT, PLLC D/B/A AVANT LAW FIRM recover their costs of this appeal from appellant DASPIT LAW FIRM, PLLC.

Judgment entered this 25th day of August, 2020.