Reverse and Remand and Opinion Filed August 30, 2022

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-21-00407-CV

ACADEMIC PARTNERSHIPS, LLC, Appellant
V.
ZOE BRISENO, Appellee

On Appeal from the 101st Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-20-10483

MEMORANDUM OPINION

Before Justices Osborne, Pedersen, III, and Reichek
Opinion by Justice Osborne

In this interlocutory appeal, Academic Partnerships, LLC appeals the trial court's order denying its motion to compel arbitration of a suit brought against it by its employee Zoe Briseno. In two issues, appellant contends the ruling was error because the parties (1) agreed to arbitrate and (2) agreed that issues relating to the agreement's scope would be decided by the arbitrator. We reverse the trial court's order and remand the case to the trial court for further proceedings consistent with this opinion.

BACKGROUND

Appellant Academic Partnerships, LLC ("AP") hired appellee Zoe Briseno as an administrative assistant in 2018. According to Briseno's allegations in her operative petition, Briseno attended a company-sponsored event in November 2019 where David Rodriguez, an AP shareholder and its Facilities Manager, was present. AP provided alcohol at the event. Briseno alleged that Rodriguez continued to buy drinks for her until she no longer felt safe to drive home. When Briseno told Rodriguez she was going to call for a ride share, Rodriguez told her he could use his position as Facilities Manager to allow her to park her car in covered parking overnight at no expense to her. Rodriguez insisted on escorting Briseno to her car for security reasons. Briseno alleged that once they were alone in the parking lot, Rodriguez sexually assaulted her.

In July 2020, Briseno sued Rodriguez and AP. She asserted claims against Rodriguez for sexual assault, gross negligence, and negligence per se. She asserted claims against AP for negligent hiring, supervision, and retention, and alleged that AP was vicariously liable for Rodriguez's actions.

AP answered and filed a motion to abate and compel arbitration. The motion was supported by the affidavit of Jennifer Shelton, AP's Senior Manager of Human Resources. Shelton's testimony authenticated AP's October 19, 2018 letter offering employment to Briseno and a "Confidentiality, Non-Disclosure, Non-Solicitation &

Non-Competition Agreement" ("Agreement") that Briseno was required to sign in order to accept the offer. AP's letter informed Briseno about the Agreement:

> **Confidentiality, Non-Disclosure, Non-Solicitation & Non-Competition**
> Due to the sensitive nature of AP's business, you will be subject to a Confidentiality, Non-Disclosure, Non-Solicitation and Non-Competition Agreement that contains confidentiality, nondisclosure, non-solicitation and non-competition requirements (the "Agreement"). Such Agreement is pursuant to AP's standard terms and conditions and is being presented to you for your review and signature with this letter.
>
> Your employment with AP is contingent upon your successful completion of a background check and the execution of the Agreement.
> . . .

Accordingly, Briseno signed the Agreement. The Agreement contained an arbitration provision:

> **5. Mediation: Arbitration; Waiver of Trial by Jury.**
>
> a. The parties agree that all disputes, controversies, or claims, or any proceeding seeking to investigate such disputes, controversies or claims including Rule 202 proceedings under the Texas Rules of Civil Procedure, between them arising out of or relating to this Agreement, any other agreement relating hereto or otherwise arising out of or relating to the employment relationship of Employee with the Company or the termination of same, including, but not limited to, claims of discrimination, harassment and retaliation, shall be submitted to, and determined by, binding arbitration. Such arbitration shall be conducted before a single arbitrator pursuant to the Employment Arbitration Rules and Mediation Procedures then in effect of the American Arbitration Association, except to the extent such rules are inconsistent with this Agreement. . . .
>
> b. By execution of this Agreement, each of the parties hereto acknowledges and agrees that such party has had an opportunity to consult with legal counsel and that such party knowingly and voluntarily waives any right to a trial by jury of any dispute pertaining to or relating in any way to the subject of this Agreement, the provisions

> of any federal, state, or local law, regulation, or ordinance notwithstanding.

Briseno filed a response to the motion, arguing that (1) AP did not establish the existence of a valid contract containing an arbitration agreement, (2) even if the court found a valid agreement to arbitrate, her claims were not covered by it, and (3) applying the arbitration provision to her claims would be unconscionable. AP filed a reply. The court heard AP's motion on November 30, 2020, and denied it by order of May 14, 2021. This interlocutory appeal followed.

ISSUES AND STANDARD OF REVIEW

In its first issue, AP contends the trial court erred by refusing to defer the issue of arbitrability to an arbitrator. AP contends the Agreement is a valid contract that incorporates the American Arbitration Association's rules, and under those rules, "the arbitrator rather than the trial court decides any issue relating to the scope of the [Agreement], including whether particular claims are covered by the [Agreement]."

In its second issue,[1] AP contends the trial court erred by denying its motion to compel arbitration because the Agreement applies broadly to all claims arising from Briseno's employment with AP, and Briseno alleges that AP breached duties arising "only by virtue of the employment relationship," including failure to provide a safe and secure workplace.

[1] AP's argument in support of its second issue includes the contention that Briseno's claims against Rodriguez must also be compelled to arbitration. We do not address this argument because neither Rodriguez nor a representative of his estate has ever been a party to this appeal.

We review a trial court's order denying a motion to compel arbitration for abuse of discretion. *Henry v. Cash Biz, LP*, 551 S.W.3d 111, 115 (Tex. 2018). 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 and whether a party waived its right to arbitrate are questions of law, which are reviewed de novo. *Id.*

DISCUSSION

We address AP's second issue first because it is dispositive. A party seeking to compel arbitration must (1) establish the existence of a valid, enforceable arbitration agreement and (2) show that the disputed claim falls within the scope of that agreement.[2] *See Wagner v. Apache Corp.*, 627 S.W.3d 277, 282 (Tex. 2021). If one party resists arbitration, the trial court must determine whether a valid agreement to arbitrate exists. *Baby Dolls Topless Saloons, Inc. v. Sotero*, 642 S.W.3d 583, 586 (Tex. 2022) (per curiam).

When deciding whether the parties have agreed to arbitrate, we do not resolve doubts or indulge a presumption in favor of arbitration. *Emery v. Hilltop Secs., Inc.*, No. 05-18-00697-CV, 2019 WL 4010775, at *5 (Tex. App.—Dallas Aug. 26, 2019, no pet.) (mem. op.). Although there is a strong presumption favoring arbitration, that

[2] Although the arbitration provision in the Agreement does not state whether the Texas Arbitration Act or the Federal Arbitration Act applies, both acts impose the same burden on the party seeking to compel arbitration. *See Whitley Penn LLP v. GACP Fin. Co., LLC*, 2020 WL 4187910, at *3 n.1 (Tex. App.—Dallas July 21, 2020, no pet.) (mem. op.), and the authorities cited therein.

presumption arises only after the party seeking to compel arbitration proves that a valid arbitration agreement exists. *VSR Fin. Servs., Inc. v. McLendon*, 409 S.W.3d 817, 827 (Tex. App.—Dallas 2013, no pet.). We apply ordinary state contract law principles in deciding whether the parties agreed to arbitrate. *Id*.

After the party seeking to compel arbitration satisfies its initial evidentiary burden, the burden then shifts to the party seeking to avoid arbitration to raise an affirmative defense to the enforcement of the otherwise valid arbitration provision. *Seven Hills Commercial, LLC v. Mirabal Custom Homes, Inc.*, 442 S.W.3d 706, 715 (Tex. App.—Dallas 2014, pet. denied). In the absence of evidence of a valid defense, the trial court has no discretion—it must compel arbitration and stay its own proceedings. *Id.*

To meet its initial burden, AP offered evidence that Briseno signed the Agreement as she was required to do in order to accept the offer of employment. AP also offered evidence that the Agreement required arbitration of "all disputes, controversies, or claims . . . between [the parties] arising out of or relating to this Agreement, any other agreement relating hereto or otherwise arising out of or relating to the employment relationship of Employee with the Company or the termination of same . . . ." Citing specific paragraphs of Briseno's petition, AP contended that all of Briseno's claims "not only touch matters covered by the Arbitration Agreement, but fall squarely within the Arbitration Agreement per her

own description of the alleged facts and legal theories." AP makes similar arguments on appeal.

We conclude that AP met its initial burden. *See Seven Hills Commercial, LLC*, 442 S.W.3d at 715. Briseno does not dispute that she signed the Agreement or that the Agreement contains an arbitration provision. Briseno's claims as she has pleaded them arise out of or relate to her employment relationship with AP. Briseno's claims against AP are for "negligent hiring, supervision, and retention" of Rodriguez as well as breach of its "non-delegable duty" "to provide security and a safe workplace." Specifically, she pleaded that AP breached these duties by entrusting Rodriguez "with access to security clearances, including discretion to utilize private parking, access to facilities after regular business hours, and the authority to make and enforce security protocols." She pleaded that "[t]he possibility of serious bodily and emotional injury resulting from Rodriguez's behavior was known by [AP] and was thus foreseeable." She explained that AP further breached its duty to provide security and a safe workplace by "allow[ing] its Facilities Manager access to company premises and security clearances for personal use," "cloak[ing] Rodriguez with actual . . . [or] apparent authority to make and enforce rules for use of facilities operated by [AP]," "fail[ing] to train Rodriguez on how to properly treat employees and subordinates," and by "fail[ing] to create an employment environment where the safety and security of all its employees was a priority." We conclude that these

claims "aris[e] out of or relat[e] to the employment relationship of Employee with the Company" under the Agreement's terms.

Briseno responds that the trial court properly denied the motion to compel because she did not agree to arbitrate intentional tort claims. She argues that the arbitration clause is limited to "Confidentiality, Non-Disclosure, Non-Solicitation & Non-Competition"—the Agreement's title and substance—and is not broad enough to include claims arising from intentional criminal acts. She further argues that applying the arbitration clause to cover her claims arising from Rodriguez's criminal conduct would be unconscionable.

Briseno's first argument concerns the type and scope of the Agreement. Briseno contends that her tort claims based on criminal acts are unrelated to her employment or to the subjects addressed in the Agreement. Instead, she argues the Agreement expressly states that its purpose is to protect "the sensitive nature of AP's business." She argues that we must determine whether her claim is subject to arbitration by considering whether her tort claim can "stand alone" "completely independent of the contract and could be maintained without reference to the contract," quoting *Fridl v. Cook*, 908 S.W.2d 507, 511 (Tex. App.—El Paso 1995, writ dism'd w.o.j.). Because her tort claims meet this standard, she argues, they do not fall within the arbitration clause's scope.

AP responds that the arbitration clause in *Fridl* was different, requiring arbitration only for claims "arising out of or relating to this agreement." *See id.* at

510. The court reasoned that this provision would not include claims "completely independent of the contract." *See id.* at 511. Here, although the Agreement's clause does contain similar language, it also extends to "all disputes, controversies, or claims . . . *otherwise arising out of or relating to the employment relationship of Employee with the Company*." (Emphasis added). We agree with AP that *Fridl* is distinguishable because the clause at issue in that case did not include this broader language. *Cf. id.*

Briseno next argues that if the arbitration provision is construed as AP contends, then it is unconscionable. Quoting *In re FirstMerit Bank*, 52 S.W.3d 749, 757 (Tex. 2001), she contends that "a contract is unconscionable if, 'given the parties' general commercial background and the commercial needs of the particular trade or case, the clause involved is so one-sided that it is unconscionable under the circumstances existing when the parties made the contract.'" She argues that "[i]n view of the outrageous conduct of the Defendants, applying the arbitration clause to Ms. Briseno's claims is unconscionable."

"Arbitration agreements may be either substantively or procedurally unconscionable, or both." *Royston, Rayzor, Vickery, & Williams, LLP v. Lopez*, 467 S.W.3d 494, 499 (Tex. 2015). "Substantive unconscionability refers to the fairness of the arbitration provision itself, whereas procedural unconscionability refers to the circumstances surrounding adoption of the arbitration provision." *Id.* (internal quotation omitted). "An arbitration agreement is unenforceable if it is procedurally

unconscionable, substantively unconscionable, or both." *Id.* at 502. The "crucial inquiry" in determining unconscionability of an arbitration provision is "whether the arbitral forum in a particular case is an adequate and accessible substitute to litigation, a forum where the litigant can effectively vindicate his or her rights." *Venture Cotton Co-op. v. Freeman*, 435 S.W.3d 222, 231–32 (Tex. 2014) (internal quotation omitted). The burden of proving the defense of unconscionability is on the party opposing arbitration. *In re First Merit Bank, N.A.*, 52 S.W.3d at 756.

Briseno has not identified any substantive right or remedy she would be unable to assert in arbitration. *Cf. In re Poly-America, L.P.*, 262 S.W.3d 337, 344 (Tex. 2008) (orig. proceeding) (arbitration agreement's provisions prohibiting award of punitive damages or reinstatement of employment were "substantively unconscionable and void"). Nor has she complained of unfairness in the circumstances surrounding her signing of the Agreement. *Cf. In re Turner Bros. Trucking Co., Inc.*, 8 S.W.3d 370, 377 (Tex. App.—Texarkana 1999, orig. proceeding) (arbitration agreement was procedurally unconscionable where employee was functionally illiterate, did not understand the document and had no one to explain it, and employees presenting the document did not themselves understand it). But even in *Turner Bros.*, the court noted, "[t]he fact that an employee relinquishes certain rights in a 'take it or leave it' situation does not make such an arrangement unconscionable per se." *Id.* As the court explained in *Lopez*, "[f]inal and binding resolution of a dispute by arbitration is an accepted and adequate

alternative to its resolution by a judge or jury." *Lopez*, 467 S.W.3d at 502. Without identifying how or why the arbitration provision would preclude effective vindication of her rights, Briseno has not shown her agreement to arbitration was procured through procedural or substantive unconscionability. *See Venture Cotton Co-op.*, 435 S.W.3d at 231–32.

We conclude that AP established the existence of a valid, enforceable arbitration agreement and that Briseno's claims fall within the agreement's scope. *See Wagner*, 627 S.W.3d at 282. Consequently, the trial court erred by denying AP's motion to compel arbitration. We sustain AP's second issue. Given this disposition, we need not address AP's first issue. TEX. R. APP. P. 47.4.

CONCLUSION

We reverse the trial court's order denying AP's motion to compel arbitration. We remand the case to the trial court for further proceedings consistent with this opinion.

/Leslie Osborne//
LESLIE OSBORNE
JUSTICE

210407f.p05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

ACADEMIC PARTNERSHIPS, LLC, Appellant	On Appeal from the 101st Judicial District Court, Dallas County, Texas Trial Court Cause No. DC-20-10483.
No. 05-21-00407-CV V.	Opinion delivered by Justice Osborne. Justices Pedersen, III and
ZOE BRISENO, Appellee	Reichek participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** and this cause is **REMANDED** to the trial court for further proceedings consistent with the opinion.

It is **ORDERED** that appellant Academic Partnerships, LLC recover its costs of this appeal from appellee Zoe Briseno.

Judgment entered this 30th day of August, 2022.