Opinion issued August 25, 2016

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00529-CV

NACE INTERNATIONAL, Appellant

V.

MAURICE JOHNSON AND E & M ENTERPRISES, INC., Appellees

On Appeal from the 215th District Court
Harris County, Texas
Trial Court Case No. 2015-04190

MEMORANDUM OPINION ON REHEARING[1]

Appellant National Association of Corrosion Engineers International ("NACE") contracted with Appellees E&M Enterprises, Inc. and Maurice Johnson

---

[1] We deny rehearing, withdraw our opinion and judgment dated March 31, 2016, and issue this opinion and judgment in their place.

for renovations to its training center. After completion of the renovation, a dispute arose between the parties regarding final payment, and Appellees sued NACE for breach of contract. NACE moved to compel arbitration under the parties' contract and Appellees argued that the arbitration provisions of the contract were illusory and unenforceable. The trial court denied the motion to compel, and NACE filed this interlocutory appeal. We reverse the order of the trial court and remand the case to the trial court for entry of an order compelling arbitration and staying the litigation pending the outcome of arbitration.

Background

NACE, a Texas non-profit organization, entered into a contract with E&M, a general contractor, for interior and exterior renovations to its Training Center in Houston, Texas. Maurice Johnson executed the contract on E&M's behalf and acted as E&M's project manager for the Training Center renovations.

Section 6.2 of the parties' contract addresses "Binding Dispute Resolution" and provides that any claim subject to mediation and not resolved thereby shall be subject to binding dispute resolution via:

> Arbitration pursuant to Section 15.4 of AIA Document A201–2007. If a satisfactory settlement is not reached in the arbitration process, the Owner [NACE] retains the right to pursue litigation in a court to resolve any such issue.

In relevant part, Section 15.4 of AIA Document A201–2007 provides:

> The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

Section 13.1 provides that the contract be governed by the Federal Arbitration Act. "Claim" is defined in the contract as "a demand or assertion by one of the parties seeking, as a matter of right, payment of money, or other relief with respect to the terms of the Contract. The term 'Claim' also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract." The contract does not define "satisfactory settlement."

A dispute arose between Appellees and NACE after completion of the renovation project when NACE allegedly failed to pay the final outstanding balance for work E&M performed under the contract. On January 26, 2015, Appellees sued NACE for breach of contract. On February 24, 2015, and March 31, 2015, NACE sent written letters notifying Appellees that the breach of contract claim was subject to the alternative dispute resolution process outlined in the contract and requesting that Appellees dismiss their claim against NACE.

By April 15, 2015, Appellees had not dismissed their claim, and NACE moved to compel arbitration and requested that the trial court stay its proceedings pending arbitration. In response to NACE's motion, Appellees asserted that the arbitration agreement is illusory and therefore unenforceable. As argued by Appellees, the arbitration agreement is illusory because, by affording NACE the

unilateral option to pursue litigation if a "satisfactory settlement" is not reached through arbitration, it effectively allows NACE "to opt out of binding arbitration."

After holding an oral hearing on the motion, the trial court denied NACE's motion to compel. NACE then filed this interlocutory appeal. On July 6, 2015, the trial court granted the parties' joint motion to stay proceedings in the trial court pending resolution of this appeal.

Discussion

By two issues, NACE contends that the trial court erred in denying its motion to compel arbitration and declining to stay its proceedings pending the outcome of the arbitration.

A. Standard of Review

We review a trial court's interlocutory order denying a motion to compel arbitration for an abuse of discretion, deferring to the trial court's factual determinations if supported by the evidence and reviewing legal determinations de novo. *Valerus Compression Servs., LP v. Austin*, 417 S.W.3d 202, 207 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (citing *Cleveland Constr., Inc. v. Levco Constr., Inc.*, 359 S.W.3d 843, 851–52 (Tex. App.—Houston [1st Dist.] 2012, pet. dism'd)).

B. Applicable Law

The parties agree that the Federal Arbitration Act ("FAA") governs the dispute. *See Forged Components, Inc. v. Guzman*, 409 S.W.3d 91, 97 n.1 (Tex.

App.—Houston [1st Dist.] 2013, no pet.) (providing that FAA governs an arbitration agreement when expressly invoked by that agreement); *Wachovia Sec., LLC v. Emery*, 186 S.W.3d 107, 111 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (providing that analysis under Texas Arbitration Act is unnecessary if arbitration clause is enforceable under FAA). "In general, a party seeking to compel arbitration under the FAA must establish that: (1) there is a valid arbitration agreement, and (2) the claims raised fall within that agreement's scope." *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 737 (Tex. 2005) (first citing *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 753 (Tex. 2001); then citing *In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571, 573 (Tex. 1999)).

The FAA is intended to make arbitration agreements "as enforceable as other contracts, but not more so." *In re Merrill Lynch Trust Co. FSB*, 235 S.W.3d 185, 192 (Tex. 2007) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12, 87 S. Ct. 1801, 1806 (1967)). Thus, while a strong presumption favoring arbitration exists, "the presumption arises only after the party seeking to compel arbitration proves that a valid arbitration agreement exists." *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex. 2003).

Whether there is a valid agreement to arbitrate under the FAA depends on ordinary principles of state contract law. *In re Palm Harbor Homes, Inc.*, 195 S.W.3d 672, 676 (Tex. 2006) (orig. proceeding). Under Texas law, the elements of

a valid contract are (1) an offer, (2) an acceptance, (3) a meeting of the minds, (4) each party's consent to the terms, and (5) execution and delivery of the contract with the intent that it be mutual and binding. *Cleveland Constr.*, 359 S.W.3d at 852. In interpreting the parties' agreement, we apply ordinary contract principles. *See J.M. Davidson*, 128 S.W.3d at 227. We examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless. *Id.* at 229. "No single provision taken alone will be given controlling effect." *Id.*

If the party seeking to compel arbitration proves that a valid arbitration agreement exists, the burden shifts to the party opposing arbitration to raise an affirmative defense to enforcement of the arbitration agreement. *J.M. Davidson, Inc.*, 128 S.W.3d at 227–28. Generally applicable contract defenses include fraud, duress, unconscionability, revocation, and that the arbitration agreement is illusory. *See Venture Cotton Co-op v. Freeman*, 435 S.W.3d 222, 227 (Tex. 2014); *FirstMerit*, 52 S.W.3d at 756. "Once the trial court concludes that the arbitration agreement encompasses the claims, and that the party opposing arbitration has failed to prove its defenses, the trial court has no discretion but to compel arbitration and stay its own proceedings." *FirstMerit*, 52 S.W.3d at 753–54.

C. Analysis

In order to compel arbitration, NACE bore the burden to demonstrate (1) the existence of a valid and enforceable arbitration agreement and (2) that the claims asserted against them fall within the scope of that agreement. *See Rachal v. Reitz*, 403 S.W.3d 840, 843 (Tex. 2013). NACE maintains that the arbitration agreement is valid and enforceable because the parties are mutually bound to pursue arbitration of all claims and the underlying contract provides adequate consideration. Appellees do not dispute that their claim is covered by the arbitration agreement. However, Appellees maintain that the parties' arbitration agreement is illusory because NACE effectively never agreed to submit itself to binding arbitration when it reserved the right to pursue litigation if a "satisfactory settlement" is not reached by the arbitration process.

"Promises are illusory and unenforceable if they lack bargained-for consideration because they fail to bind the promisor." *Royston, Rayzor, Vickery, & Williams, LLP v. Lopez*, 467 S.W.3d 494, 505 (Tex. 2015) (citing *In re 24R, Inc.*, 324 S.W.3d 564, 566–67 (Tex. 2010)). As applied in the context of arbitration agreements, "[a]n arbitration agreement is illusory if it binds one party to arbitrate, while allowing the other to choose whether to arbitrate." *Id.* (citing *In re AdvancePCS Health, L.P.*, 172 S.W.3d 603, 607 (Tex. 2005)). When considering stand-alone arbitration agreements, mutually binding promises are required as the

only consideration rendered to create the contract. *AdvancePCS*, 172 S.W.3d at 607. However, "[w]hen an arbitration clause is part of an underlying contract, the rest of the parties' agreement provides the consideration." *Id.*

Arbitration agreements that bind parties to only arbitrate certain claims to the exclusion of others are not necessarily illusory. *Royston, Rayzor*, 467 S.W.3d at 505. In *Royston, Rayzor*, the parties' arbitration agreement allowed Royston, Rayzor to avoid arbitration related to its fee disputes, but required Lopez to arbitrate all his disputes. *Id.* at 499. The Texas Supreme Court held that Lopez's illusory defense failed because the provision bound both parties to arbitrate claims other than those specifically excluded and it did not allow either party to unilaterally escape or modify the agreement to arbitrate covered claims. *Id.* at 505. With respect to covered and excluded claims, the court noted that the agreement is not illusory because "Royston, Rayzor cannot choose whether to arbitrate or litigate." *Id.* at 506.

Similarly, even one-sided arbitration agreements are not necessarily illusory. *See Leyendecker Constr., Inc. v. Berlanga*, No. 04-13-00095-CV, 2013 WL 4009752, at *2 (Tex. App.—San Antonio Aug. 7, 2013, no pet.). In *Leyendecker*, the parties' contract provided that all disputes be resolved by litigation, "except that Leyendecker may, at its sole option, require that any dispute be submitted to arbitration." *Id.* at *2. Rejecting contrary arguments from the appellant, the San

Antonio Court of Appeals concluded that the arbitration agreement was not illusory because it was part of an underlying contract and thus the presence of mutual obligation was provided by the underlying contract. *Id.*; *see also Cleveland Constr.*, 359 S.W.3d at 853–54 (holding agreement to arbitrate at option of one party not illusory because presence of mutual obligation was provided by an underlying contract).

The arbitration provision at issue here does not stand alone; it is part of an underlying contract. As a result, consideration—the presence of mutual obligation—is provided by the underlying contract. *See AdvancePCS*, 172 S.W.3d at 607; *Palm Harbor*, 195 S.W.3d at 676 ("[W]hen an arbitration clause is part of a larger, underlying contract, the remainder of the contract may suffice as consideration for the arbitration clause.").

The arbitration agreement clearly indicates an intent to arbitrate. *See Wachovia Sec., LLC v. Emery*, 186 S.W.3d 107, 113 (Tex. App.—Houston [1st Dist.] 2005, no pet.). The arbitration clause states:

> For any claim subject to, but not resolved by, mediation . . . the method of binding dispute resolution shall be as follows:
>
> > Arbitration pursuant to Section 15.4 of AIA Document A201-2007. If a satisfactory settlement is not reached in the arbitration process, the Owner [NACE] retains the right to pursue litigation in a court to resolve any such issue.

The arbitration agreement does not empower either party to avoid arbitration. *See Royston, Rayzor*, 467 S.W.3d at 505. Nor does it afford either party unilateral authority to amend, change or terminate the arbitration clause. *See In re 24R, Inc.*, 324 S.W.3d 564, 567 (Tex. 2010) ("An arbitration clause is not illusory unless one party can avoid its promise to arbitrate by amending the provision or terminating it altogether.")). Because both NACE and Appellees must first arbitrate all claims and neither can avoid that promise by amending or terminating the arbitration clause, the arbitration agreement is not illusory.

The gravamen of Appellees' contrary argument is that, because NACE may not be bound by the result of arbitration, the parties effectively have no agreement to arbitrate. However, under the FAA, parties may agree to binding or nonbinding arbitration. *See McKee v. Home Buyers Warranty Corp. II*, 45 F.3d 981, 985 (5th Cir. 1995) (noting that "[d]isputes about whether arbitration is binding can arise under the FAA because the FAA provides that a court may enter judgment on the arbitration award only if the parties agreed that a court may enter judgment"). Here, because the parties agreed that the FAA governs, they were free to negotiate for binding or nonbinding arbitration. *See id.* Their mutual promises to first pursue a potentially nonbinding procedure do not equate to a failure to agree to arbitration. *Id.* The parties mutually committed to arbitration. NACE "cannot choose whether to arbitrate or litigate," *Royston, Rayzor*, 467 S.W.3d at 505, and NACE cannot

"avoid its promise to arbitrate by amending the provision or terminating it altogether." *In re 24R*, 324 S.W.3d at 567. The parties' dispute over the meaning and effect of the post-arbitration litigation provision touches not on the issue of whether an enforceable agreement to arbitrate exists, but instead concerns the parties' respective rights under their agreement. *See G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 521–22 (Tex. 2015) (distinguishing between substantive arbitrability questions concerning existence, enforceability, and scope of agreement to arbitrate—which courts decide—and procedural arbitrability questions concerning construction and application of agreement to arbitrate—which arbitrators decide).

We conclude that the parties' agreement to arbitrate is a valid and enforceable agreement to arbitrate all claims arising under the contract, with the underlying contract providing consideration. Because there is a valid arbitration agreement which encompasses Appellees' claims, the trial court proceedings should have been abated and arbitration compelled.

We sustain NACE's two issues.

Conclusion

We hold that the trial court abused its discretion in denying NACE's motion to compel arbitration and refusing to stay the litigation pending the result of the arbitration. Accordingly, we reverse the trial court's order denying NACE's motion

to compel arbitration and remand the case to the trial court for entry of an order compelling arbitration and staying the litigation pending the outcome of the arbitration.

Rebeca Huddle
Justice

Panel consists of Justices Jennings, Massengale, and Huddle.