Opinion issued April 17, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-17-00630-CV

CHERYL CURRID, Appellant

V.

COIT CLEANING AND RESTORATION SERVICES, Appellee

On Appeal from the County Civil Court at Law No. 3
Harris County, Texas
Trial Court Case No. 1087009

MEMORANDUM OPINION

Appellant, Cheryl Currid, appeals from the trial court's summary judgment in favor of appellee, Coit Cleaning and Restoration Services ("Coit"), on Coit's suit on a sworn account[1] and alternative claims for breach of contract, quantum meruit, and

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1 *See* TEX. R. CIV. P. 185.

unjust enrichment. In two issues, Currid contends that the trial court erred in not compelling the parties to arbitrate their dispute.

We affirm.

Background

In its original petition, Coit alleged that, after Currid's house suffered flood damage, Coit provided remediation, restoration, and cleaning goods and services to Currid, pursuant to a written agreement (the "agreement"). Coit alleged that after it provided Currid with such goods and services, she failed or refused to pay as agreed. Coit brought a suit on a sworn account and various alternative claims, including breach of contract, quantum meruit, and unjust enrichment, against Currid. Currid answered, generally denying the allegations and asserting a limitations defense.

Coit filed a motion for summary judgment, arguing that it was entitled to judgment as a matter of law on its suit on a sworn account because, on May 29, 2015, it provided goods and services to Currid, for which Currid promised to pay the reasonable, usual, and customary price. After it provided such goods and services, however, Currid failed or refused, despite demand by Coit, to pay as agreed. Coit asserted that it kept systematic records of the account and that, after all just and lawful offsets, credits, and payments, Currid owed the principal sum of $37,807.25.

Coit also asserted that it was entitled to judgment as a matter of law on its suit on a sworn account because Currid had failed to timely file a verified denial.[2] Further, the agreement, account, and damages were deemed admitted against Currid because she had failed to timely "provide any legitimate substantive responses to discovery."

Coit asserted that it was entitled to judgment as a matter of law on its alternative breach-of-contract claim because, pursuant to the parties' written agreement, Coit provided goods and services for which Currid agreed to pay; Coit fully performed its contractual obligations as promised; Currid breached the agreement by failing or refusing to pay as agreed; and such breach proximately caused Coit damages in the amount of $37,807.25.[3] Coit also asserted that it was

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2 *See id.*; *see also Panditi v. Apostle*, 180 S.W.3d 924, 927 (Tex. App.—Dallas 2006, no pet.) (holding that, absent timely filed verified denial, defendant "will not be permitted to dispute the receipt of the services or the correctness of the charges"); *Nguyen v. Short, How, Frels & Heitz, P.C.*, 108 S.W.3d 558, 562 (Tex. App.—Dallas 2003, pet. denied) ("[A] defendant's noncompliance with rule 185 conclusively establishes that there is no defense to the suit on the sworn account.").

3 Coit further moved for a no-evidence summary judgment, arguing that it was entitled to judgment on its claims because Currid had no evidence to support any defense against its claims, including limitations. "The law is well-established that a party may never properly move for [a] no-evidence summary judgment to prevail on its own claim or affirmative defense for which it bears the burden of proof." *Haven Chapel United Methodist Church v. Leebron*, 496 S.W.3d 893, 904 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (internal quotations omitted); *see also* TEX. R. CIV. P. 166a(i).

entitled to judgment as a matter of law on its alternative claims of quantum meruit and unjust enrichment.

Coit sought attorney's fees, pursuant to Chapter 38 of the Texas Civil Practice and Remedies Code,[4] in the amount of $7,250.00. Coit attached, as its summary-judgment evidence, the business records affidavit of its general manager, Gus Velasco; a copy of the agreement signed by Currid; an itemized description of the work performed; Coit's requests for admissions and Currid's responses; and an affidavit in support of Coit's claim for attorney's fees.

In her summary-judgment response, Currid asserted that Coit had brought its claims "in the wrong forum." She asserted that Coit had "sue[d] on a contract that contains an arbitration agreement that subjects any dispute related to the performance of services by COIT to mandatory arbitration," as follows:

> ***BINDING ARBITRATION AND ATTORNEYS' FEES.*** ANY DISPUTE RELATING TO THE PERFORMANCE OF SERVICES BY COIT, THE PRE-EXISTING OR RESTORED CONDITION OF THE BUILDING OR ITS CONTENTS, THE USE OF DISINFECTANTS, DEODORANTS, OR OTHER CHEMICALS, OR OTHERWISE ARISING OUT OF THIS AGREEMENT OR ANY ANCILLARY AGREEMENTS BETWEEN COIT AND ME SHALL BE SUBMITTED TO BINDING ARBITRATION BEFORE THE AMERICAN ARBITRATION ASSOCIATION ("AAA") UNDER APPLICABLE AAA RULES, OR TO SUCH OTHER ARBITRATOR OR MEDIATOR AND UNDER SUCH OTHER RULES AS COIT AND I MUTUALLY APPROVE IN WRITING FOR RESOLUTION OF OUR DISPUTE. Any award or determination made in such arbitration shall be in writing and shall be final and binding, and a legal judgment based thereon may be filed in any district or County court by the party in whose favor such award or determination is made. The prevailing party shall be entitled to recover its reasonable attorneys' fees and costs.

Currid asserted that, to the extent there existed any "ambiguity regarding the applicability and enforceability of the arbitration agreement for purposes of

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[4] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (West 2015) (providing attorney's fees for certain claims, including services rendered, labor performed, materials furnished, sworn account, or written contract).

defending against [Coit's] motion," the trial court should resolve it summarily because it constituted a question of law and one properly decided by the trial court, rather than a merits issue reserved for the arbitrator. In her prayer, Currid asked the trial court to "sustain her objection to [Coit's] choice of forum in denigration of the arbitration agreement, enter an order denying [Coit's] motion for summary judgment, and dismiss this suit for having been filed in the wrong forum." Currid did not attach any evidence.

Coit, in its reply, asserted that Currid had not presented any competent summary-judgment evidence to raise a genuine issue of material fact and had waived arbitration by raising it for the first time in her response, just two weeks before trial.

Subsequently, the trial court signed a final summary judgment in favor of Coit on its claims, awarded it damages in the amount of $37,807.25, and awarded it attorney's fees in the amount of $7,250.00 through trial, with conditional attorney's fees through appeal and petition for review.

Currid then filed a "Motion to Alter or Set Aside the Final Summary Judgment," asserting that the trial court had erred in granting summary judgment for Coit because the trial court "should have limited the inquiry to the threshold matter of arbitrability." Currid requested that the trial court vacate the judgment and "replace it with a judgment of dismissal with prejudice to [Coit] re-filing its claim in a court of law and without prejudice to the claim being refiled in the proper arbitral

forum, based . . . on the arbitration provisions in the terms of the document relied upon by [Coit], of which the Court is requested to take judicial notice." Currid asked, in the alternative, that she be granted a new trial, "in the interest of justice." After a hearing, at which Currid agreed that she had not, prior to the trial court's ruling on the summary judgment, filed a motion to enforce the arbitration provision, the trial court denied the motion to vacate its judgment.

Arbitration

In her first issue, Currid argues that the trial court "erred when it did not compel arbitration," and "[i]nstead, . . . ruled on the merits of the summary judgment motion,"[5] because she established that the parties had a valid arbitration agreement and that Coit's claims fell within the scope of the agreement. In her second issue, Currid asserts that, because the trial court "should have compelled arbitration, it did not have jurisdiction to award attorney's fees."

Standard of Review and Legal Principles

The Texas General Arbitration Act ("TAA")[6] provides, in pertinent part, that:

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5 Currid does not challenge the merits of Coit's claims.

6 The agreement at issue does not specifically invoke either the TAA or Federal Arbitration Act ("FAA"). *See* 9 U.S.C. §§ 1–16. Because both parties apply the TAA and neither asserts that the FAA preempts the TAA or is materially different on any issue in this case, we apply decisions addressing both the TAA and FAA. *See G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 519 n.14 (Tex. 2015); *S.C. Maxwell Family P'ship, Ltd. v. Kent*, 472 S.W.3d 341, 343 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

> (a) A court shall order the parties to arbitrate on [the] application of a party showing:
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> (1) an agreement to arbitrate; and
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> (2) the opposing party's refusal to arbitrate.
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> (b) If a party opposing an application made under Subsection (a) denies the existence of the agreement, the court shall summarily determine that issue. The court shall order the arbitration if it finds for the party that made the application. If the court does not find for that party, the court shall deny the application.
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> (c) An order compelling arbitration must include a stay of any proceeding, subject to section 171.025.

TEX. CIV. PRAC. & REM. CODE ANN. §§ 171.021, 171.025 (West 2011).

"If there is a proceeding pending in a court involving an issue referable to arbitration under an alleged agreement to arbitrate, a party may make an application under this subchapter only in that court." *Id.* § 171.024. Generally, the trial court "shall stay a proceeding that involves an issue subject to arbitration if an order for arbitration or an application for that order is made under this subchapter." *Id.* § 171.025. The party seeking to compel arbitration has the initial burden to establish that there exists a valid agreement to arbitrate, that the claims asserted fall within the scope of the agreement, and that the opposing party has refused to arbitrate. *See id.* § 171.021; *S.C. Maxwell Family P'ship, Ltd. v. Kent*, 472 S.W.3d 341, 343 (Tex. App.—Houston [1st Dist.] 2015, no pet.); *Mohamed v. Auto Nation USA Corp*., 89 S.W.3d 830, 835 (Tex. App.—Houston [1st Dist.] 2002, no pet.); *see also Ellis v. Schlimmer*, 337 S.W.3d 860, 861–62 (Tex. 2011).

"If the party seeking arbitration carries its initial burden, the burden then shifts to the party resisting arbitration to present evidence on its defenses to the arbitration agreement." *Mohamed*, 89 S.W.3d at 835; *see Ellis*, 337 S.W.3d at 862. One such defense is that the party seeking arbitration has waived its right to arbitration. *Williams Indus., Inc. v. Earth Dev. Sys. Corp*., 110 S.W.3d 131, 135 (Tex. App.—Houston [1st Dist.] 2003, no pet.). A party does not waive arbitration merely by delay; rather, waiver may be found only if the proponent of the defense establishes that: (1) the party seeking arbitration has substantially invoked the judicial process and (2) the party opposing arbitration suffers actual prejudice as a result. *G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 511–12, 515 (Tex. 2015); *Williams Indus., Inc*., 110 S.W.3d at 135. Waiver may be implied or express, but it must be intentional. *See Williams Indus., Inc*., 110 S.W.3d at 135. Because public policy favors arbitration, there is a strong presumption against finding that a party has waived its right to arbitration. *Id*. Whether waiver has occurred depends on the individual facts and circumstances of each case. *Id.*

Motion to Compel Arbitration

Here, Currid first argues that the trial court erred in not compelling arbitration because she included in her summary-judgment response an "assertion that the case should be compelled to arbitration."

Coit asserts that the "proper mechanism for invoking arbitration" under section 171.021 is a motion to compel arbitration and that Currid did not file a motion to compel arbitration or to abate or to stay the proceedings, did not invoke arbitration in her summary-judgment response, and affirmatively represented to the trial court that she did not act to compel arbitration.

"A party to a lawsuit who seeks to enforce an arbitration provision must file a motion to compel arbitration." *S.C. Maxwell Family P'ship, Ltd.*, 472 S.W.3d at 343 ("[A]rbitration provisions are not self-executing . . . ."); *Ground Force Const., LLC v. Coastline Homes, LLC*, No. 14-13-00649-CV, 2014 WL 2158160, at *2 (Tex. App.—Houston [14th Dist.] May 22, 2014, no pet.) (mem. op.) (noting that section 171.021 "requires an 'application of a party' for the court to order arbitration"); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 171.021 ("A court shall order the parties to arbitrate *on [the] application* of a party . . . ." (emphasis added)); *see, e.g.*, *Schlumberger Tech. Corp. v. Baker Hughes Inc.*, 355 S.W.3d 791, 797 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (holding that interlocutory jurisdiction required filing of "an application to compel arbitration made under Section 171.021").

It is undisputed that Currid did not file a motion to compel arbitration in the instant proceeding in the trial court. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 171.021, 171.024 ("If there is a proceeding pending in a court involving an issue referable to arbitration under an alleged agreement to arbitrate, a party may make an

application under this subchapter *only in that court*." (emphasis added)); *S.C. Maxwell Family P'ship, Ltd.*, 472 S.W.3d at 343.

The record shows that Currid, in her summary-judgment response, asked the trial court to "sustain her objection to [Coit's] choice of forum in denigration of the arbitration agreement, enter an order denying [Coit's] motion for summary judgment, and dismiss this suit." She does not direct us to any place in her response, or to any other place in the record, in which she requested an order from the trial court compelling the parties to arbitrate Coit's claims or to abate or to stay the proceedings. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 171.021, 171.025.

In support of her argument that she "sought to compel arbitration" in her summary-judgment response, Currid relies on *Grace Interest, L.L.C. v. Wallis State Bank*, 431 S.W.3d 110, 122–23 (Tex. App.—Houston [14th Dist.] 2013, pet. denied). In *Grace Interest*, the appellate court upheld the trial court's denial of the appellants' request for arbitration because the appellants did not meet their burden to establish the existence of a valid arbitration agreement covering the claims at issue. *Id.* at 123. There, however, the appellants included a request for arbitration in their summary-judgment response. *Id.*

As a prerequisite to presenting a complaint for appellate review, the record must show that the complaint was made to the trial court by a timely request,

objection, or motion. TEX. R. APP. P. 33.1. Because the record does not show that Currid moved to compel arbitration, nothing is presented for our review. *See id*.

Moreover, we note that "judicial economy generally requires that a trial court have the opportunity to correct an error before an appeal proceeds," *In re C.O.S.*, 988 S.W.2d 760, 765 (Tex. 1999), and a motion to reconsider provides the trial court with just such an opportunity. *In re Christus Santa Rosa Health Sys*., 492 S.W.3d 276, 281 (Tex. 2016). Here, however, at the hearing on Currid's motion to vacate the judgment, during which the trial court could have corrected the alleged error Currid now presents on appeal, Currid affirmatively represented to the trial court that she had not moved to enforce the arbitration agreement and, thus, no error had occurred.[7] "A party may not lead a trial court into error and then complain about it on appeal." *Solomon v. Parkside Med. Servs. Corp*., 882 S.W.2d 492, 493 (Tex.

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[7] The parties dispute whether these statements constitute judicial admissions. "A judicial admission is a formal waiver of proof that dispenses with the production of evidence on an issue and bars the admitting party from disputing it." *Lee v. Lee*, 43 S.W.3d 636, 641 (Tex. App.—Fort Worth 2001, no pet.). Judicial admissions may include arguments to the trial court or counsel's statements to the trial court on behalf of a client. *Id*.; *see also Am. Nat. Petroleum Co. v. Transcon. Gas Pipe Line Corp*., 798 S.W.2d 274, 278 (Tex. 1990); *Sanroc Co. Int'l v. Roadrunner Transp., Inc.*, 596 S.W.2d 320, 323 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ) ("Judicial admissions are not evidence but rather constitute a waiver of evidence.").

Here, the record shows that these statements took place during the hearing on Currid's motion to vacate, after the trial court had ruled on the motion for summary judgment. Thus, the trial court did not rely on the statements in rendering its judgment. *See Plotkin v. Joekel*, 304 S.W.3d 455, 486 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (noting that review generally extends to that which was before the trial court at the time of its ruling); *cf. Brown v. Lanier Worldwide, Inc*., 124 S.W.3d 883, 900 (Tex. App.—Houston [14th Dist.] 2004, no pet.);

App.—Houston [1st Dist.] 1994, writ denied); *see, e.g.*, *Steamboat Capital Mgmt., LLC v. Lowry*, No. 01-16-00956-CV, 2017 WL 5623414, at *11 (Tex. App.—Houston [1st Dist.] Nov. 21, 2017, no pet.) (mem. op.) (holding that appellant could not, on appeal, rely on fiduciary shield doctrine because record showed that he affirmatively asserted in trial court that he "didn't seek the application of fiduciary shield doctrine").

In sum, Currid does not challenge the merits of the summary judgment on Coit's claims. Rather, her complaint on appeal is that the trial court erred in not compelling arbitration. Because Currid does not direct us to any place in the record, however, in which she filed a motion to compel or requested that the trial court compel the parties to arbitration, in accordance with section 171.021, nothing is presented for review. *See* TEX. R. APP. P. 33.1. We do not reach whether there exists a valid agreement to arbitrate, Coit's claims fall within the scope of the agreement, or Coit refused to arbitrate. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 171.021; *S.C. Maxwell Family P'ship, Ltd.*, 472 S.W.3d at 343. Because Currid did not meet her initial burden, the burden never shifted to Coit to establish its waiver defense. *See Mohamed*, 89 S.W.3d at 835; *see Ellis*, 337 S.W.3d at 862.

We hold that Currid has waived her first issue.

Accordingly, we do not reach Currid's second issue, in which she argues that, because the trial court "should have compelled arbitration, it did not have jurisdiction to award attorney's fees."

Conclusion

We affirm the judgment of the trial court.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Massengale and Brown.