Opinion issued April 28, 2022.

In The

Court of Appeals

For The

First District of Texas

NO. 01-21-00148-CV

CALTON & ASSOCIATES INC., WESTPARK WEALTH ADVISORS INC., AND CHRISTOPHER D. GAMMON, Appellants

V.

RALPH AUGUILLARD, ON BEHALF OF HIS IRA, REGINALD BARDIN, ON BEHALF OF HIS IRA, STEPHEN DRISCOLL, ON BEHALF OF HIS IRA, KATHRINE DRISCOLL, ON BEHALF OF HER IRA, VAN RUSSELL, ON BEHALF OF HIS IRA, JEFFREY ROMBS, ON BEHALF OF HIS IRA, MICHAEL ROMBS, ON BEHALF OF HIS IRA, AND RONNIE ROMBS, ON BEHALF OF HIS IRA, Appellees

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On Appeal from the 125th District Court
Harris County, Texas
Trial Court Case No. 2019-79102

MEMORANDUM OPINION

Ralph Auguillard, Reginald Bardin, Stephen Driscoll, Kathrine Driscoll, Van Russell, Jeffrey Rombs, Michael Rombs, and Ronnie Rombs (collectively, "Appellees") were individual investors and clients of IMS Securities Inc. ("IMS"). After losing a substantial sum of money, Appellees sued IMS and several other defendants in arbitration and obtained an arbitration award in their favor. Before confirmation of the arbitration award, IMS entered into an Asset Purchase Agreement with Calton & Associates, Inc. ("Calton"), under which IMS transferred its retail customer accounts to Calton. Appellees filed suit against Appellants Calton, Westpark Wealth Advisors Inc. ("Westpark"), and Christopher D. Gammon ("Gammon") ("collectively, "Appellants") asserting violations of the Texas Uniform Fraudulent Transfer Act and a claim for unjust enrichment. Appellants moved to compel arbitration, and the trial court denied their motion.

In one issue, Appellants contend the trial court abused its discretion in denying their motion to compel because (1) they established the existence of valid arbitration agreements, (2) the arbitrator, not the trial court, determines the arbitrability of Appellees' claims, (3) Appellees are estopped from denying that valid arbitration agrements exist, and (4) the trial court failed to conduct a hearing to resolve material issues of fact. We affirm.

Background

Appellees were individual investors and clients of IMS, a registered brokerage firm. After losing a substantial sum of money, they commenced arbitration proceedings against IMS and several other respondents[1] before the Financial Industry Regulatory Authority ("FINRA"). They asserted claims for negligence, gross negligence, misrepresentation, omission of a material fact, failure to supervise, breach of fiduciary duty, breach of contract, and control person liability. Appellees alleged IMS and the other respondents "over-concentrated Appellees' retirement portfolios in illiquid alternate investments in annuities and private placements . . ." Appellees sought compensatory damages, statutory damages, punitive damages, costs, and filing and hearing fees.

Following an evidentiary hearing, a three-member arbitration panel awarded Appellees more than $1.3 million, collectively, in compensatory damages against IMS.[2] Eight days later, on November 8, 2017, Calton and IMS executed a one-page Asset Purchase Agreement ("APA"), pursuant to which Calton agreed to "purchase from [IMS] all retail customer accounts of [IMS] except for any accounts that choose

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[1] The respondents in the arbitration were IMS, Jackie D. Wadsworth, Christopher D. Gammon, Michael J. Spears, Joshua Patterson, and Stacey Rognon. Respondents Jackie D. Wadsworth, Michael J. Spears, Joshua Patterson, and Stacey Rognon are not parties to this appeal.

[2] The arbitration award was entered against IMS, Joshua Patterson, and Stacey Rognon. The claims against the remaining respondents were denied.

to transfer to another broker-dealer." Calton agreed to pay IMS the total sum of $1,000.00 for all such retail accounts.

On November 9, 2017, Appellees filed suit to confirm the arbitration award. The next day, they filed a "Motion to Confirm Arbitration Award and Enter Final Judgment." Because IMS did not file an answer or opposition to the motion, Appellees filed a motion for default judgment against IMS. On January 5, 2012, the trial court entered an interlocutory order granting Appellees' Motion to Confirm Arbitration Award and Enter Final Judgment as to IMS. The court then granted Appellees' motion to sever their claims against IMS and entered an order confirming the arbitration award and rendering judgment in Appellees' favor against IMS on August 8, 2018.

On October 30, 2019, Appellees filed suit against Calton, Westpark, and Gammon seeking to recover the assets IMS transferred to Calton under the APA, which transaction they allege "was entered into expressly for the purpose of preventing [Appellees] from being able to collect the amount they were awarded in the arbitration." Appellees also sought exemplary damages, attorney's fees, and costs. Westpark is a registered investment advisory company owned and operated by Gammon, which Appellees allege, continues to operate "out of the same offices a[t] which IMS operated." According to Appellees, as part of the APA between IMS and Calton, Calton hired Gammon as a representative of Calton. They allege that

"at all relevant times," Gammon "was also the Chief Financial Officer of IMS." They assert that "the book of business which Calton purportedly purchased for $1,000, was actually retained by Gammon and he continues to receive the benefits from such business by or through Calton and/or Westpark." Appellees asserted claims against Appellants for actual and constructive fraudulent transfer under the Texas Uniform Fraudulent Transfer Act[3] and unjust enrichment. Appellants filed general and special denials. Their responsive pleadings did not mention or invoke any arbitration agreement. Rather, they "pray[ed] that the court enter an order dismissing Plaintiff's TUFTA and unjust enrichment claims against them, that the court enter a take nothing judgment against Plaintiffs, and that Defendants recover their costs and be awarded such other and further relief that they may show themselves entitled."

In March 2020, Appellees served Appellants with requests for production of documents seeking, among other things, to identify and evaluate the assets purchased and transferred from IMS to Calton. After receiving no response, and

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[3] The Texas Uniform Fraudulent Transfer Act, TEX. BUS. & COM. CODE § 24.001–.013 ("TUFTA"), is "designed to protect creditors from being defrauded or left without recourse due to the actions of unscrupulous debtors," and its purpose is to "prevent debtors from defrauding creditors by placing assets beyond their reach." *Spencer & Assocs., P.C. v. Harper*, 612 S.W.3d 338, 355 (Tex. App.—Houston [1st Dist.] 2019, no pet.) (quoting *KCM Fin. LLC v. Bradshaw*, 457 S.W.3d 70, 89 (Tex. 2015)).

following two unsuccessful attempts to meet and confer with Appellants' counsel to discuss the outstanding discovery requests, Appellees moved to compel discovery on April 20, 2020. Appellants filed a response objecting to the breath of the discovery and further moving for a protective order. Appellants' response did not mention or invoke any arbitration agreement.

Following a hearing, the trial court reserved its ruling, instructing the parties to work in good faith to resolve the outstanding discovery issues. The trial court advised the parties that if they could not reach an agreement, it would order Appellants to produce all requested documents. On June 3, 2020, after Appellants produced some documents but less than what Appellees had requested, Appellees' counsel reached out to counsel for Appellants to inquire whether they intended to produce any further documents or whether Appellees needed to reset their motion to compel for hearing. Appellants did not respond.

On June 4, 2020, Appellants filed an amended answer asserting additional special denials and affirmative defenses based on limitations and res judicata. Their pleadings did not mention or invoke any arbitration agreement. Instead, they prayed "that the court enter an order (a) dismissing Plaintiff's TUFTA and unjust enrichment claims against them, (b) finding that the claims and causes of action asserted by Plaintiffs are groundless and brought in bad faith and for the purpose of harassment and/or for an improper purpose, (c) awarding Defendants attorney's fees

as sanctions, and (d) awarding Defendants their costs and such other such other and further relief that Defendants may show themselves entitled." On the same day, they filed a traditional and no-evidence motion for summary judgment seeking dismissal of Appellees' TUFTA and unjust enrichment claims and an award of costs and attorney's fees. They set their motion for submission on June 29, 2020.

Appellees reset their motion to compel discovery for hearing. Appellants filed a supplemental response in opposition to the motion to compel on June 22, 2020 arguing that the requested discovery was "a pattern of harassment" that had begun two years earlier when Appellees failed to obtain an arbitration award against Gammon.[4] Consequently, they argued, "in addition to [Appellants'] Motion for Protective Order, [Appellants] have filed a Motion for Summary Judgment demonstrating that [Appellees'] claims are without merit." Appellants yet again made no mention of any arbitration agreement.

On June 23, 2020, eight months after Appellees filed suit, Appellants moved to compel arbitration, arguing for the first time that Appellees' claims were subject to three arbitration agreements[5] and Appellees were estopped from challenging

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[4] The arbitration award was entered against IMS, Joshua Patterson, and Stacey Rognon. The claims against the remaining respondents, including Gammon, were denied.

[5] They argued Appellants had entered into an arbitration agreement with (1) IMS, the judgment debtor; (2) Hilltop Securities, Inc., "the custodian of [Appellants'] investment accounts; and (3) Calton, "the current broker dealer."

enforcement of the agreements. No evidence was attached to their motion. Appellees opposed Appellants' motion to compel arbitration, arguing Appellants' motion was unsupported by evidence, no valid arbitration agreement existed, and even if it did, Appellees' claims were not within the scope of any purported agreement.

On July 24, 2020, the trial court heard Appellees' motion to compel discovery and Appellants' motion to compel arbitration together. Subsequently, on October 19, 2020, the trial court granted Appellees' motion to compel discovery. Appellees later filed a motion for sanctions based on Appellants' alleged refusal to comply with the court's discovery order. Appellants then filed a petition for writ of mandamus with this Court contending the trial court abused its discretion by not ruling on their motion to compel arbitration and instead ordering merits-based discovery. We denied Appellants' petition on February 4, 2021. *See In re Calton & Assocs., Inc.*, No. 01-20-00765-CV, 2021 WL 380434, at *1 (Tex. App.—Houston [1st Dist.] Feb. 4, 2021, orig. proceeding).

On February 26, 2021, the trial court entered an order denying Appellants' motion to compel arbitration. Weeks later, on March 22, 2021, Appellees reset their motion for sanctions based on Appellants' alleged failure to comply with the Court's discovery order. Three days later, Appellees filed the present interlocutory appeal.

Discussion

Appellants contend the trial court abused its discretion in denying their motion to compel arbitration because (1) they established the existence of valid arbitration agreements, (2) the arbitrator, not the trial court, determines the arbitrability of Appellees' claims, (3) Appellees are estopped from denying that valid arbitration agreements exist, and (4) the trial court failed to conduct an evidentiary hearing to resolve any material issues of fact. In response, Appellees assert Appellants "waived the arbitration issue" or, alternatively, failed to provide any evidence showing that an arbitration agreement between the parties exist. Appellees further contend Appellants waived their arguments and, even if properly raised, the arguments fail.

A. Standard of Review and Applicable Law

We review an order denying a motion to compel arbitration for abuse of discretion. *Henry v. Cash Biz, LP*, 551 S.W.3d 111, 115 (Tex. 2018). 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). "We defer to the trial court's factual determinations if they are supported by evidence but review its legal determinations de novo." *Henry*, 551 S.W.3d at 115.

A party seeking to compel arbitration must establish that (1) a valid arbitration agreement exists and (2) the claims in dispute fall within the scope of the agreement. *In re Rubiola*, 334 S.W.3d 220, 223 (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." *Williams Indus., Inc. v. Earth Dev. Sys. Corp*., 110 S.W.3d 131, 134 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (quoting *Mohamed v. Auto Nation USA Corp.*, 89 S.W.3d 830, 835 (Tex. App.—Houston [1st Dist.] 2002, no writ) (citing *In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571, 573 (Tex.1999)). While there are strong policies and presumptions favoring arbitration, arbitration cannot be ordered when there is no agreement to arbitrate. *See Prudential Sec. Inc. v. Marshall*, 909 S.W.2d 896, 899 (Tex. 1995); *Freis v. Canales*, 877 S.W.2d 283, 284 (Tex. 1994).

B. Analysis

In their motion to compel arbitration and on appeal, Appellants argue that Appellees conducted business and are parties to customer agreements with three entities: IMS, the judgment debtor, Hilltop Securities Inc., the custodian of Appellees' investment accounts, and Calton, who purchased the rights to service Appellants' investment accounts from IMS. Appellants claim that each of the customer agreements includes an arbitration agreement that binds Appellees and requires arbitration of their claims. Appellants provided no evidentiary support for

their motion. Instead, and without attaching the alleged customer agreements at issue, Appellants quoted the purported arbitration agreements in their motion.

The evidentiary standards for a motion to compel arbitration are the same as for a motion for summary judgment. *Gracepoint Holding Co., LLC v. FJR Sand, Inc.*, No. 01-19-00574-CV, 2020 WL 61594, at *4 (Tex. App.—Houston [1st Dist.] Jan. 7, 2020, no pet.) (mem. op.) (citing *In re Estate of Guerrero*, 465 S.W.3d 693, 703 (Tex. App.—Houston [14th Dist.] 2015, pet. denied)). Under the summary judgment standard, copies of documents must be authenticated to constitute competent summary judgment evidence. *See Republic Nat'l Leasing Corp. v. Schindler*, 717 S.W.2d 606, 607 (Tex. 1986); *Gracepoint Holding*, 2020 WL 61594, at *4. A proper affidavit stating that documents attached to a motion are true and correct copies of the originals is sufficient to authenticate the copies which may then be considered as summary judgment evidence. *Republic Nat'l Leasing*, 717 S.W.2d at 607; *Guerrero*, 465 S.W.3d at 704.

As the party seeking to compel arbitration, Appellants bore the initial burden to establish the existence of a valid arbitration agreement binding Appellees. *See In re Rubiola*, 334 S.W.3d at 223; *Branch Law Firm, L.L.P. v. Osborn*, 447 S.W.3d 390, 394 (Tex. App.—Houston [14th Dist.] 2014, no pet.). Appellants did not provide copies of the customer agreements containing the alleged arbitration agreements, nor did they attach any affidavit authenticating any of these purported

agreements to their motion to compel. Instead, they merely quoted portions of the alleged arbitration agreements in their motion. Appellants also failed to provide any evidence that Appellees signed any of the purported agreements.

Appellants do not dispute these deficiencies. They argue instead that because Appellees failed to submit an affidavit or other admissible evidence in support of their opposition to Appellants' motion to compel, they failed to prove gateway issues pertaining to authentication of the customer agreements with the arbitration agreements or the arbitrability of their claims. Appellants misapprehend the burden they bear in seeking to compel arbitration. As the movant, Appellants bore the initial burden to prove the existence of a valid arbitration agreement. *See In re Rubiola*, 334 S.W.3d at 223. Only if the movant carries this initial burden, does the burden shift to the party resisting arbitration to present evidence on its defenses to the arbitration agreement. *Williams Indus., Inc.*, 110 S.W.3d at 134. Because Appellants failed to carry their initial burden to establish the existence of a valid arbitration agreement, the burden never shifted to Appellees.

Appellants also assert Appellees are estopped from denying the existence of the purported arbitration agreement with IMS because they judicially admitted its existence in the prior arbitration. This argument also misses the mark. Appellants cite no authority—nor are we aware of any—holding that the doctrine of judicial estoppel relieves a movant of its initial burden to prove the existence of a valid

arbitration agreement. And even if the judicial estoppel doctrine applied in this context, Appellants' reliance on the doctrine is unavailing. Judicial estoppel, which precludes a party from adopting a position inconsistent with one it maintained successfully in an earlier proceeding, requires that (1) a sworn, inconsistent statement be made in a prior judicial proceeding, (2) the statement not be made inadvertently or because of mistake, fraud, or duress, (3) the statement be deliberate, clear, and unequivocal, and (4) the party making the statement gain some advantage by it. *See Evans v. Allen*, 358 S.W.3d 358, 366–67 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (citing *Galley v. Apollo Associated Servs., Ltd.*, 177 S.W.3d 523, 528–29 (Tex. App.—Houston [1st Dist.] 2005, no pet.)). Appellants did not present evidence of any sworn statements made by Appellees concerning the existence or terms of an agreement to arbitrate.

Because Appellants did not satisfy their burden to prove that a valid arbitration agreement binding Appellees exists, we hold the trial court did not abuse its discretion in denying their motion to compel arbitration. *See Grace Interest, LLC v. Wallis State Bank*, 431 S.W.3d 110, 123 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (holding trial court did not err in refusing to compel arbitration where movant failed to provide evidence of valid arbitration agreement); *see also In re Universal Fin. Consulting Grp., Inc.*, No. 14-08-00226-CV, 2008 WL 2133186, at *2 (Tex. App.—Houston [14th Dist.] May 20, 2008, no pet.) (mem. op.)

(concluding trial court did not abuse discretion in denying amended motion to compel arbitration where movant submitted no competent evidence of agreement to arbitrate).[6]

We overrule Appellants' issue.

Conclusion

We affirm the trial court's order denying Appellants' motion to compel arbitration.

Veronica Rivas-Molloy
Justice

Panel consists of Justices Goodman, Rivas-Molloy, and Farris.

[6] Because we conclude Appellants failed to establish the existence of a valid arbitration agreement, we do not reach their remaining arguments.