Opinion issued August 23, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-21-00460-CV

FAUST DISTRIBUTING CO. INC., LLC, Appellant

V.

VICTOR VERANO, Appellee

On Appeal from the 113th District Court
Harris County, Texas
Trial Court Case No. 2020-08330

MEMORANDUM OPINION

In this interlocutory appeal,[1] appellant, Faust Distributing Co. Inc., LLC ("Faust"), challenges the trial court's order denying its amended motion to compel

[1] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.016.

arbitration in the suit of appellee, Victor Verano, against Faust for negligence and gross negligence. In its sole issue, Faust contends that the trial court erred in denying its amended motion to compel arbitration.

We reverse, render, and remand.

Background

In his petition, filed in February 2020, Verano alleged that on April 30, 2019, he was an employee of Faust. His job required him to "operate[] a large Peterbilt commercial truck and deliver[] alcoholic beverages" to Faust's customers. On that day and while in the course and scope of his employment, Verano's "footing was displaced" as he stood on the side of the truck and tended to its maintenance before beginning his delivery route. He "fell from the side" of the truck and "suffered severe physical injuries."

Verano brought claims against Faust for negligence and gross negligence, alleging that Faust's negligence and gross negligence proximately caused Verano's injuries. According to Verano, Faust was negligent in failing to provide "a safe premises and working environment"; failing "to properly hire, train, retain, and supervise" Verano and its other employees; failing to provide Verano and its other employees with "proper notice or warning"; and failing to provide Verano and its other employees with "proper equipment to perform [their] required duties." Verano also alleged that Faust's "actions/omissions, including those of its employees

and . . . agents, when viewed objectively from the standpoint of [Faust] at the time of their occurrence, involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others" and Faust "had actual, subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others, including [Verano]." Further, Faust was vicariously liable for the negligent or grossly negligent acts or omissions of its employees and agents. Verano sought damages for his past and future physical and mental pain and anguish, his past and future disfigurement and impairment, his past and future medical expenses, lost wages, and lost earning capacity as well as exemplary damages.[2]

In late February 2020, Faust answered, generally denying the allegations in Verano's petition and asserting certain affirmative defenses, including that Verano's own negligence was the sole proximate cause of his injuries, Faust was "entitled to an offset for the medical and wage indemnity [it had] paid" to Verano and for payments it had paid on his behalf "to the medical providers for the injuries which [Verano] claim[ed] arose from the April 30, 2019 incident," and "an arbitration agreement [was] applicable" to Verano's claims and "th[e] matter should be referred to arbitration."

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[2] *See id.* § 41.003(a).

In March 2021, Verano and Faust filed an agreed motion for continuance, seeking to extend the discovery deadline, which had expired the previous month, and to postpone the trial date until the winter of 2021. In their motion, the parties noted the impact that the COVID-19 pandemic[3] had on "the orderly flow of civil litigation." They also informed the trial court that they had "exchanged written discovery in th[e] matter and [were] continuing to work through issues with th[e] [discovery] responses" but they had not been able to schedule the in-person depositions sought by Faust because of the COVID-19 pandemic.[4]

Faust deposed Verano in person on June 12, 2021. It then filed its motion to compel arbitration two days after the deposition and amended its motion to compel a few weeks later. In its amended motion to compel arbitration, Faust stated that

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[3] *See Kim v. Ramos*, 623 S.W.3d 258, 261 n.5, 266 & n.13 (Tex. App.—Houston [1st Dist.] 2021, no pet.) (explaining "COVID-19 is a disease caused by a novel coronavirus" and noting "the country is in the middle of a pandemic due to the virus known as COVID-19" (internal quotations omitted)); *see also United States v. Mitchell*, Crim. Action No. 08-807, 2020 WL 7181118, at *1 (E.D. Pa. Dec. 7, 2020) (mem. op.) ("Since the first cases of an unknown respiratory illness were reported in December 2019, a localized outbreak of coronavirus disease 2019 ('COVID-19') has quickly evolved into a global pandemic, causing a public health emergency of international concern.").

[4] *See In re Landstar Ranger, Inc.*, No. 06-20-00047-CV, 2020 WL 5521136, at *4 (Tex. App.—Texarkana Sept. 15, 2020, orig. proceeding) (mem. op.) ("As a result of the onset of the COVID-19 pandemic, on March 13, 2020, Texas Governor Greg Abbott issued a disaster proclamation certifying that COVID-19 posed an imminent threat of disaster for all counties in the state of Texas. . . . Governor Abbott instituted health protocols, such as minimizing in-person contact, maintaining six feet between individuals, and suggesting that people wear masks when in the presence of other individuals.").

Verano began working at Faust on June 3, 2013. On his first day of employment with Faust, Verano signed a "Receipt and Arbitration Acknowledgement" (the "arbitration acknowledgment")[5] in which he acknowledged that he had "received and read (or had the opportunity to read) the Benefits Schedule, Summary Plan Description (the 'SPD') for the Employee Injury Benefit Plan" and that the "SPD include[d] a mandatory company policy requiring that certain **claims or disputes (that c[ould not] otherwise be resolved between [Faust] and [Verano]) must be submitted to an arbitrator,** rather than a judge and jury in court" (the "arbitration agreement"). Verano also acknowledged that he understood "that by receiving th[e] SPD and becoming employed (or continuing [his] employment) with [Faust] at any time on or after the Effective Date," he was "accepting and agreeing to comply with the[] arbitration requirements," and Faust was "also accepting and agreeing to comply with the[] arbitration requirements."

Faust then asserted that Verano's claims for negligence or gross negligence as alleged in his petition fell within the scope of the arbitration agreement. It attached to its amended motion to compel arbitration a copy of Appendix A to its Employee Injury Benefit Plan, entitled "Arbitration of Certain Injury-Related Disputes," which

[5] Faust attached to its amended motion to compel arbitration a copy of the arbitration acknowledgement and an excerpt from Verano's deposition in which Verano confirmed that the arbitration acknowledgment contained his signature.

required the "following claims or disputes" to be "submitted to final and binding arbitration":

> (A) any legal or equitable claim or dispute relating to enforcement or interpretation of the arbitration provisions in a Receipt and Arbitration Acknowledgement form or th[e] Appendix; and (B) any legal or equitable claim by or with respect to an employee for any form of physical or psychological damage, harm or death which relates to an accident, occupational disease, or cumulative trauma (including, but not limited to, claims of negligence or gross negligence or discrimination; claims for intentional acts, assault, battery, negligent hiring/training/supervision/retention, emotional distress, retaliatory discharge, or violation of any other noncriminal federal, state or other governmental common law, statute, regulation or ordinance in connection with a job-related injury, regardless of whether the common law doctrine was recognized or whether the statute, regulation or ordinance was enacted before or after the effective date of this Appendix). This includes all claims listed above that an employee has now or in the future against an Employer, its officers, directors, owners, employees, representatives, agents, subsidiaries, affiliates, successors, or assigns.

And Faust asserted that Verano had ratified the arbitration agreement by accepting "$3,403.65 in medical benefits and wage indemnity" from Faust's Employee Injury Benefit Plan following the April 30, 2019 incident.

In his amended response to Faust's amended motion to compel arbitration, Verano described himself as "a predominantly Spanish-speaking and Spanish-reading individual," who "enjoy[ed] challenging himself in attempting to be bilingual." He argued that because he was not provided a Spanish-language version of the arbitration agreement and "an explanation of its contents, he could not have had a meeting of the minds" with Faust about arbitrating his claims. Verano

also argued that the arbitration agreement was "substantively and procedurally unconscionable" because it "was not translated or explained to him, he had no access to translators" while reviewing it, and he "was instructed to sign the document by a Faust employee who knew [that Verano] did not know what it said." Finally, Verano argued that Faust had waived its right to invoke the arbitration clause because Faust had "substantially participated in the litigation process since February 24, 2020," when it filed its answer.

Verano attached to his amended response an excerpt from his June 12, 2021 deposition in which he testified as follows:

> Q. . . . Can you read, write, and speak English?
>
> A. I can understand. I'm not writing perfectly, and I don't understand everything, like, to read.
>
> Q. Okay. So you -- you are not able to read English?
>
> A. Some -- some, and some not.[6]

Verano also attached his affidavit to his amended response, in which he described his interactions with the then-district manager of Faust, Ron Anderson. In his affidavit, Verano testified:

> Anderson brought me the job application for Faust . . . and instructed me how to fill it out, including what boxes to check regarding my ability to speak and read English. . . . Anderson was aware I did not speak or

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6 Verano testified at his deposition in English without the aid of an interpreter.

> read English well, but instructed me to fill out the application indicating otherwise. [7]

Faust filed a motion for leave to file its reply to Verano's amended response in excess of the five-page limit permitted under the trial court's prescribed procedures.[8] Faust attached to the motion for leave a "condensed" version of its reply, in which it argued that Verano could not avoid the arbitration agreement simply by claiming that he could not read English well enough to understand it because he had not shown that he was prevented from having read and understood the agreement by trick or artifice. Faust pointed out that according to Verano's deposition testimony, Anderson had Verano fill out the employment application at a Subway restaurant on May 8, 2013, but Verano did not sign the arbitration acknowledgment until June 3, 2013 his first day of employment with Faust, and no evidence showed that Anderson had anything to do "with the presentation of the arbitration agreement or the acknowledgment" on that date. Nor did any evidence show that Verano had ever told anyone at Faust that he was unable to read English. Faust noted that Verano, as part of his duties as a delivery driver, completed

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[7] Verano's affidavit, which is written in English, states that it was "translated" by "[Verano's] wife, Azalia Verano."

[8] *See* 113th (Tex.) Dist. Ct. Proc. 3(h) (Harris Cty.), https://www.justex.net/JustexDocuments/5/113th%20District%20Court%20Procedures.updated%202.pdf.

"reconciliation recap" forms in English. Faust also argued that Verano had not established that the arbitration agreement was unconscionable because no evidence showed that any agent of Faust had "misrepresented the terms of the arbitration agreement or forced [Verano] into signing the arbitration agreement." And Faust asserted that Verano had ratified the arbitration agreement "by accepting wage indemnity payments" under it.[9]

In addition, Faust rejected Verano's assertion that it had waived its contractual right to arbitrate by substantially invoking the litigation process. Faust explained that it had propounded discovery on Verano consisting of thirteen requests for admissions, twenty-three interrogatories, and twenty-six requests for production, which was not sufficient to waive arbitration. And Faust had taken only one deposition—the deposition of Verano. Faust's trial counsel first sought to schedule Verano's deposition in June 2020, but Verano did not agree to an in-person deposition until June 2021. The delay in deposing Verano resulted from the parties' disagreement over whether the deposition should be virtual or in person and Verano's unwillingness to participate in an in-person deposition during the

[9] Faust attached to its condensed reply the declaration of Craig Hutson, the litigation analyst for the third-party administrator of Faust's Employee Injury Benefit Plan, to establish Verano's claim for benefits and the benefits that Verano received from Faust's Employee Injury Benefit Plan following the April 30, 2019 incident.

COVID-19 pandemic.[10] Faust also noted that "[t]he discovery [that had been] conducted would be available and useful in arbitration," it had not sought a ruling on the merits as to Verano's claims, and it had not brought any claim for affirmative relief in the trial court. According to Faust, the "totality of the circumstances" showed that it had "not substantially invoked the judicial process" to waive its right to arbitration and Verano was not prejudiced by Faust's conduct in the case.

At the hearing on the amended motion to compel arbitration, Faust stated that the reason the case had been "pending [in the trial court] this long [was] that [Faust] had to have [Verano's] deposition in person." Faust's trial counsel explained that his experience with "videoconferenc[ing] and taking people's depositions was that [the videoconferencing platforms] don't always have technology that allows you to see documents. And there were multiple documents presented during [Verano's] deposition"—the arbitration acknowledgement and paperwork from Verano's employment file that he had signed—that were "important in proving up [Verano's] signature." The deposition and other discovery that had been conducted were also important to the issue of arbitrability because Verano had taken the position that the "arbitration agreement was void" and claimed that he "did not communicate in

[10] Faust also attached to its condensed reply the affidavit of its trial counsel, Warren T. McCollum, along with copies of the emails and correspondence between McCollum and Verano's trial counsel about the scheduling issues related to Verano's deposition.

English." Further, Faust's trial counsel had sent "multiple e-mails to [Verano's trial counsel] asking for dates to take [Verano's] deposition in person," but "[i]t wasn't until February of [2021] that [counsel] began to indicate that he would present [Verano] for an in-person deposition." And "[t]hen it took . . . until June [2021] to [actually] schedule" the in-person deposition, which was taken "on a Saturday," to accommodate Verano's work schedule. Finally, Faust argued that Verano had not been prejudiced by any delay because the parties had only exchanged written discovery, and Verano's deposition had been the only deposition that had been taken. Verano "still [had] an opportunity to conduct discovery of all the witnesses, to take his doctor's deposition, and whatever else" he "needed to present his case in arbitration."

In response, Verano's trial counsel denied having said that Verano "couldn't communicate [in English] in any way." As to the scheduling of Verano's deposition, counsel stated that he had made Verano available for a virtual deposition earlier in the case, but Faust had refused that offer. Faust had also refused to present any of its employees for deposition before Verano was deposed. He remarked that the "case would have been further down the line had [Faust's trial counsel] agreed to" a virtual deposition. Verano's trial counsel noted that the trial date was only two months away and that the parties were discussing dates for a new docket control order that would extend the discovery period.

Following counsels' arguments, the trial court stated that under the existing docket control order, the discovery period had already expired, and the trial court "would not be inclined to [re-]open anything." The trial court also informed Faust that it would "look at the reply" to Verano's amended response that was attached to Faust's motion for leave, and it took the amended motion to compel arbitration under advisement.

After the hearing, the trial court signed an order denying Faust's amended 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." *Henry v. Cash Biz, LP*, 551 S.W.3d 111, 115 (Tex. 2018). A trial court abuses its discretion when it acts arbitrarily or unreasonably, or without any reference to guiding rules and principles. *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990). "We defer to the trial court's factual determinations if they are supported by evidence." *Henry*, 551 S.W.3d at 115. We review the trial court's legal determinations as to the formation, validity, and enforcement of an arbitration agreement de novo. *See id.*; *Oak Crest Manor Nursing Home, LLC v. Barba*, No. 03-16-00514-CV, 2016 WL 7046844, at *2 (Tex. App.—Austin Dec. 1, 2016, no pet.) (mem op.).

Amended Motion to Compel Arbitration

In its sole issue, Faust argues that the trial court erred in denying its amended motion to compel arbitration because the arbitration agreement is enforceable, Verano's claims fall within the scope of the arbitration agreement, and Verano did not satisfy his burden to establish a valid defense to the enforcement of the arbitration agreement.

A party seeking to compel arbitration must establish that (1) a valid arbitration agreement exists and (2) the claims asserted fall within that agreement's scope. *Venture Cotton Coop. v. Freeman*, 435 S.W.3d 222, 227 (Tex. 2014); *In re Rubiola*, 334 S.W.3d 220, 223 (Tex. 2011); *Calton & Assocs. Inc. v. Aguillard*, No. 01-21-00148-CV, 2022 WL 1250565, at *4 (Tex. App.—Houston [1st Dist.] Apr. 28, 2022, no pet.) (mem. op.). "Upon such proof, the burden shifts to the party opposing arbitration to raise an affirmative defense to the agreement's enforcement." *Venture Cotton Coop.*, 435 S.W.3d at 227.

In interpreting an agreement to arbitrate, we apply ordinary contract principles. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex. 2003); *In re Houston Progressive Radiology Assocs., PLLC*, 474 S.W.3d 435, 443 (Tex. App.—Houston [1st Dist.] 2015, no pet.). 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). The existence of a valid arbitration agreement is a legal question. *In re Houston Progressive*, 474 S.W.3d at 443.

A. Contract Formation

In a portion of its sole issue, Faust argues that it established a valid arbitration agreement because Verano "did not object to" "Faust's verified evidence of the arbitration agreement and Verano's acceptance and acknowledgement of the agreement." Faust also asserts that the parties do not dispute that Verano's claims fall within the scope of the arbitration agreement.

For an agreement to be enforceable, the parties must mutually consent to its subject matter and essential terms. *See Superbag Operating Co. v. Sanchez*, No. 01-12-00342-CV, 2013 WL 396247, at *4 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (mem. op.); *John Wood Grp. USA, Inc. v. ICO, Inc.*, 26 S.W.3d 12, 20 (Tex. App.—Houston [1st Dist.] 2000, pet. denied). And the party seeking to compel arbitration must satisfy these basic requirements and show that a valid arbitration agreement exists before it is entitled to invoke the presumption favoring arbitration. *Superbag Operating Co.*, 2013 WL 396247, at *4.

Here, the evidence shows that Faust and Verano agreed that they would resolve their dispute concerning any workplace injuries in arbitration, and the parties do not dispute that Verano's claims fall within the scope of the arbitration agreement.

See id. But Verano argued that the arbitration agreement was invalid because despite being "a predominantly Spanish-speaking and Spanish-reading individual," who "does not read English well," Verano was not provided with a Spanish translation of the arbitration agreement, and as a result, there was no meeting of the minds as to its terms.

The determination of a meeting of the minds, and thus offer and acceptance, is based on the objective standard of what the parties said and did, not on their subjective states of mind. *Jim Maddox Props. v. WEM Equity Cap. Invs., Ltd.*, 446 S.W.3d 126, 133 (Tex. App.—Houston [1st Dist.] 2014, no pet.); *Superbag Operating Co.*, 2013 WL 396247, at *4. A party who signs a document is presumed to know its contents, as well as the contents of any documents specifically incorporated by reference. *In re Int'l Profit Assocs., Inc.*, 286 S.W.3d 921, 923 (Tex. 2009). Specifically, the signing party is presumed to have known the meaning of the words used in the contract and the contract's legal effect. *In re Raymond James & Assocs., Inc.*, 196 S.W.3d 311, 318–199 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *see Royston, Rayzor, Vickery, & Williams, LLP v. Lopez*, 467 S.W.3d 494, 501 (Tex. 2015) (party to written agreement is presumed to have knowledge of and understand its contents). Consistent with these presumptions, a contract signatory's failure to understand the terms of an agreement, without more, is not a defense to contract formation. *Doskocil Mfg. Co. v. Sang Nguyen*, No. 02-16-00382-CV, 2017

WL 2806322, at *5 (Tex. App.—Fort Worth June 29, 2017, no pet.) (mem. op.); *Tamez v. Sw. Motor Transp., Inc.*, 155 S.W.3d 564, 570 (Tex. App.—San Antonio 2004, no pet.).

Further, illiteracy is not a defense and will not relieve a party of the consequences of the contract. *Tamez*, 155 S.W.3d at 570. "Absent fraud, misrepresentation, or deceit, a party is bound by the terms of [an] arbitration agreement [that] he signed, regardless of whether he read it or thought it had different terms." *In re McKinney*, 167 S.W.3d 833, 835 (Tex. 2005); *see also Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962) (reaffirming principle that contracting parties "have an obligation to protect themselves by reading what they sign"). Thus, Verano's testimony that he was able to read "some" English "and some not" and that he did not understand the arbitration acknowledgment is no obstacle to the formation of the arbitration agreement.

We conclude that Faust met its burden of establishing that a valid arbitration agreement existed and that Verano's claims fall within the scope of the arbitration agreement. *See Venture Cotton Coop.*, 435 S.W.3d at 227; *In re Rubiola*, 334 S.W.3d at 223; *Calton & Assocs. Inc.*, 2022 WL 1250565, at *4.

B. Enforceability of Arbitration Agreement

In another portion of his sole issue, Faust argues that to the extent that the trial court denied its amended motion to compel arbitration on the ground that the

arbitration agreement was unconscionable, it erred in doing so because Verano's "English-language abilities d[id] not make the arbitration agreement unconscionable" and Verano's other unconscionability arguments do not pass muster.

Once the party seeking to compel arbitration establishes that an arbitration agreement exists and the claims at issue fall within the agreement's scope, a presumption arises in favor of arbitrating those claims and the party opposing arbitration has the burden of proving a defense to arbitration, such as unconscionability. *Lopez*, 467 S.W.3d at 499–500; *see also Taylor Morrison of Tex., Inc. v. Goff*, No. 01-21-00404-CV, 2022 WL 1085714, at *11 (Tex. App.—Houston [1st Dist.] Apr. 14, 2022, no pet.) (mem. op.).

Unconscionability is not subject to precise definition and is determined in light of a variety of factors. *Venture Cotton Coop.*, 435 S.W.3d at 228; *In re Poly-Am., L.P.*, 262 S.W.3d 337, 348 (Tex. 2009). There are two types of unconscionability: substantive and procedural. *In re Halliburton Co.*, 80 S.W.3d 566, 571 (Tex. 2002); *Goff*, 2022 WL 1085714, at *11. "Substantive unconscionability refers to the fairness of the arbitration provision itself, whereas procedural unconscionability refers to the circumstances surrounding adoption of the arbitration provision." *In re Palm Harbor Homes, Inc.*, 195 S.W.3d 672, 677 (Tex. 2006); *see also Goff*, 2022 WL 1085714, at *11. Whether a contract is

unconscionable at the time it is formed is a question of law. *In re Poly-Am.*, 262 S.W.3d at 349.

In his amended response to Faust's amended motion to compel arbitration, Verano argued that the arbitration agreement was unconscionable because he was not proficient enough in reading English to understand it. According to Verano, Faust District Manager Anderson, who had recruited him to work for Faust, was aware that Verano did not read or speak English "well, but [Anderson] instructed [him] to fill out the [employment] application indicating otherwise." Notably, however, there is no evidence showing that Anderson had any involvement in having Verano sign the arbitration acknowledgment on his first day of work, which was nearly a month after Verano met with Anderson and filled out his employment application. Verano presented no evidence showing that, at the time he signed the arbitration acknowledgment, he either informed the Faust employee who gave it to him that he did not read English well enough to understand it or asked for a Spanish version of the arbitration acknowledgment or the arbitration agreement. Nor did Verano present any evidence that Faust misrepresented the arbitration agreement's contents or withheld information about the arbitration agreement from Verano.[11]

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[11] Verano ostensibly understood from Anderson's instruction that he should not disclose any difficulties he had in speaking or reading English to other managers or supervisors at Faust. But given the sparse evidentiary record on this issue, we cannot conclude that Verano's understanding of Anderson's subjective intent is anything more than speculation. Thus, it is no evidence that Faust pressured him to

An agreement is not procedurally unconscionable just because one party did not understand it. *In re McKinney*, 167 S.W.3d at 835; *see also In re Halliburton Co.*, 80 S.W.3d at 568–69, 573; *Truly Nolen of Am., Inc. v. Martinez*, 597 S.W.3d 15, 22 (Tex. App.—El Paso 2020, pet. denied) (absent fraud, misrepresentation or deceit, employee who signed receipt and acceptance form for arbitration agreement was bound by it even if he did not understand it). Because Verano only showed that he may not have understood the arbitration agreement when he agreed to it, he did not satisfy his burden of proving that the arbitration agreement was unenforceable due to unconscionability. *See Lopez*, 467 S.W.3d at 499–500; *see also Goff*, 2022 WL 1085714, at *11. Thus, we conclude that the trial court's denial of Faust's amended motion to compel arbitration cannot rest on this ground.

C. Waiver of Right to Arbitration

In the remaining portion of its sole issue, Faust argues that to the extent that the trial court denied its amended motion to compel arbitration based on a conclusion that Faust had waived the right to enforcement of the arbitration agreement, the trial court erred in doing so because "[t]he burden to show waiver of arbitration is a 'high

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sign the arbitration acknowledgment without giving him an opportunity to ask for an explanation, either in Spanish or English, of its meaning and effect. *See Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Rsch. Corp.*, 299 S.W.3d 106, 114 (Tex. 2009) ("Findings based on speculation are not based on legally sufficient evidence.").

one,'" Faust did not substantially participate in the judicial process, and there was no evidence that Verano had been prejudiced.

A party who opposes the enforcement of a valid arbitration agreement based on the defense of waiver bears the burden of proving the defense. *Lopez*, 467 S.W.3d at 499–500. There is a strong presumption against waiver of arbitration. *Perry Homes v. Cull*, 258 S.W.3d 580, 589–90 (Tex. 2008); *see also Branch Law Firm L.L.P. v. Osborn*, 532 S.W.3d 1, 22 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) ("Because the law favors and encourages arbitration, in close cases, the presumption against waiver governs."). As a result, the party asserting waiver bears a heavy burden of proof. *RSL Funding, LLC v. Pippins*, 499 S.W.3d 423, 430 (Tex. 2016).

A party may waive its right to arbitration either expressly or impliedly. *G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 511 (Tex. 2015). To establish the implied waiver on which Verano relied, Verano had the burden of proving that (1) Faust substantially invoked the judicial process in a manner inconsistent with its claimed right to compel arbitration and (2) Verano suffered actual prejudice as a result of the inconsistent conduct. *See Henry*, 551 S.W.3d at 116; *see also Perry Homes*, 258 S.W.3d at 595 (without showing both substantial invocation of judicial process and prejudice, high burden of establishing waiver is

not met). When the relevant facts are undisputed, whether a party waived its right to arbitrate is a question of law. *G.T. Leach Builders*, 458 S.W.3d at 511.

Whether a party has substantially invoked the judicial process before moving to compel arbitration depends on the totality of the circumstances. *Id.* at 512. Courts consider a "wide variety" of factors, including:

- how long the party moving to compel arbitration waited to do so;
- the reasons for the movant's delay;
- whether and when the movant knew of the arbitration agreement during the period of delay;
- how much discovery the movant conducted before moving to compel arbitration, and whether that discovery related to the merits;
- whether the movant requested the [trial] court to dispose of claims on the merits;
- whether the movant asserted affirmative claims for relief in [the trial] court;
- the extent of the movant's engagement in pretrial matters related to the merits (as opposed to matters related to arbitrability or jurisdiction);
- the amount of time and expense the parties ha[d] committed to the litigation;
- whether the discovery conducted would be unavailable or useful in arbitration;
- whether activity in [the trial] court would be duplicated in arbitration; [and]

- when the case was to be tried.

Id. (internal quotations omitted); *see also Perry Homes*, 258 S.W.3d at 590–91. No single factor is dispositive. *See RSL Funding*, 499 S.W.3d at 430; *see also In re Vesta Ins. Grp., Inc.*, 192 S.W.3d 759, 763 (Tex. 2006) (delay alone generally does not establish waiver); *In re Serv. Corp. Int'l*, 85 S.W.3d 171, 174 (Tex. 2002) (participation in litigation is not enough unless a party "has substantially invoked the judicial process to its opponent's detriment" (internal quotations omitted)).

Here, the record shows that before Faust filed its amended motion to compel arbitration, it had propounded written discovery on Verano consisting of thirteen requests for admissions, twenty-three interrogatories, and twenty-six requests for production, and it had taken Verano's deposition. Faust also jointly filed with Verano an agreed motion for continuance, and it participated in the drafting of proposed docket control orders. But Faust's standard discovery into the merits of Verano's claims and participation in motions for continuance do not constitute substantial invocation of the judicial process and did not cause Verano prejudice. *See G.T. Leach Builders*, 458 S.W.3d at 513–14 (party's litigation conduct aimed at defending itself, minimizing litigation expenses, and "protect[ing] existing litigation rights from forfeiture," including filing motion for trial continuance and sending form request for disclosure with answer, did not substantially invoke litigation process); *EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 90 (Tex. 1996) (party did not

waive arbitration by filing answer, discussing docket-control order, sending written discovery, noticing deposition, and agreeing to postpone trial setting); *Garg & Assocs., P.C. v. Pham*, 485 S.W.3d 91, 110 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (responding to discovery, propounding limited written discovery, and participating in motion for continuance did not waive right to arbitration); *see also In re Vesta Ins. Grp.*, 192 S.W.3d at 763 ("[m]erely taking part in litigation" is not enough to show waiver of arbitration rights).

Verano also pointed out, in its amended response, that sixteen months had passed between the time that Faust filed its answer in the trial court and the time that Faust filed its amended motion to compel arbitration. But delay alone does not show waiver. *See Richmont Holdings, Inc. v. Superior Recharge Sys., L.L.C.*, 455 S.W.3d 573, 576 (Tex. 2014) ("[M]ere delay in moving to compel arbitration is not enough for waiver."); *In re Vesta Ins. Grp.*, 192 S.W.3d at 763 (party opposing arbitration did not show prejudice from two-year delay before moving to compel arbitration, during which time parties seeking arbitration propounded standard requests for disclosure, noticed a total of four depositions, and sent two requests for production); *EZ Pawn Corp.*, 934 S.W.2d at 89–90 (absent showing of prejudice, defendants did not waive right to arbitration by requesting discovery and waiting ten months to ask for arbitration); *see also Garg & Assocs.*, 485 S.W.3d at 111 ("[E]ven substantial delay will not show prejudice because waiver cannot be implied from a party's

inaction."). And even though sixteen months is a substantial amount of time, the record shows that most of the delay was caused by the parties' disagreement over whether Verano would be deposed virtually or in person and Verano's unwillingness to participate in an in-person deposition during the first year of the COVID-19 pandemic. Given the unusual circumstances during that time, including the threat of contagion presented by the COVID-19 virus and the various public health measures put in place as a result,[12] neither party can be faulted for the delay. We also note that Faust sought Verano's deposition, in part, to inquire into issues raised by Verano about the arbitration agreement's enforceability—issues that Faust had a right to explore before deciding whether to move to compel arbitration.

We conclude that Verano did not meet his burden to show that Faust substantially invoked the judicial process in a manner inconsistent with its claimed right to compel arbitration or any prejudice from the delay attributable to Faust's

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[12] *See Kim*, 632 S.W.3d at 266 (recounting Texas governor's disaster declaration on March 13, 2020 certifying that "COVID-19 pose[d] an imminent threat of disaster" in Texas and series of emergency orders issued by Supreme Court of Texas pursuant to declaration allowing state courts to modify or suspend deadlines and procedures in order to "avoid risk to court staff, parties, attorneys, jurors, and the public" while disaster declaration is in effect); *see also In re State*, 602 S.W.3d 549, 550–51 (Tex. 2020) (describing origins and effect of COVID-19 pandemic on Texas as of May 2020); *Abbott v. La Joya Indep. Sch. Dist.*, No. 03-21-00428-CV, 2022 WL 802751, at *3–4 (Tex. App.—Austin Mar. 17, 2022, pet. filed) (mem. op.) ("On March 13, 2020, Governor Abbott, in his official capacity, issued a statewide disaster declaration, certifying that the novel coronavirus (COVID-19) pose[d] an imminent threat of disaster for all Texas Counties, and he has renewed that proclamation every month since." (internal quotations omitted)).

conduct. *See Henry*, 551 S.W.3d at 116; *see also Perry Homes*, 258 S.W.3d at 595. Thus, Verano failed to overcome the presumption against the waiver of Faust's right to arbitration.

Based on the foregoing, we hold that the trial court erred in denying Faust's amended motion to compel arbitration.

We sustain Faust's sole issue.

Conclusion

We reverse the order of the trial court denying Faust's amended motion to compel arbitration. We render judgment granting Faust's amended motion to compel arbitration and ordering the referral to arbitration of Verano's claims against Faust. We remand this case to the trial court for further proceedings consistent with this opinion, including the granting of an appropriate stay. *See FW Servs. Inc. v. McDonald*, No. 14-19-00331-CV, 2020 WL 444400, at *5 (Tex. App.—San Antonio Jan. 29, 2020, no pet.) (mem. op.).

Julie Countiss
Justice

Panel consists of Justices Kelly, Countiss, and Rivas-Molloy.