Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-17-00028-CV

John Shelby **BRITTINGHAM**,
Appellant

v.

Rodrigo **MIRABENT**,
Appellee

From the 166th Judicial District Court, Bexar County, Texas
Trial Court No. 2016-CI-13172
Honorable Michael E. Mery, Judge Presiding

Opinion by: Irene Rios, Justice

Sitting: Karen Angelini, Justice
Marialyn Barnard, Justice
Irene Rios, Justice

Delivered and Filed: July 5, 2017

AFFIRMED

John Shelby Brittingham appeals the trial court's order denying his motion to compel arbitration of the direct claims asserted against him by Rodrigo Mirabent.[1] The sole issue presented on appeal is whether Mirabent's direct claims are within the scope of an arbitration clause contained in a Company Agreement governing the ownership and management of Beyond Contact Centers, LLC ("Beyond Contact"), a Texas limited liability company. Because we agree

[1] The order also granted Brittingham's motion to compel arbitration of the derivative claims Mirabent asserted on behalf of Beyond Contact Centers LLC. Brittingham does not challenge that portion of the trial court's order.

with the trial court that Mirabent's direct claims are not within the scope of the arbitration clause, we affirm the trial court's order.

FACTUAL AND PROCEDURAL BACKGROUND

In determining whether claims fall within the scope of an arbitration clause, we focus on the factual allegations in the plaintiff's pleading. *In re Rubiola*, 334 S.W.3d 220, 225 (Tex. 2011); *Amateur Athletic Union of the U.S., Inc. v. Bray*, 499 S.W.3d 96, 102 (Tex. App.—San Antonio 2016, no pet.). Therefore, the following facts are based on a summary of the factual allegations contained in Mirabent's original petition.[2]

In October of 2011, Mirabent and his brother purchased a Mexican entity known as Calling Solutions Mexico. Mirabent and his brother organized Beyond Contact to hold and operate Calling Solutions Mexico.

In April of 2012, Mirabent and his brother sold Brittingham 33% of the membership interests in Beyond Contact, and Mirabent, his brother, and Brittingham executed the Company Agreement governing the entity's ownership and management.[3] Around the same time, an entity named Fusion Contact Center, S de R.L. de C.V. was formed in Mexico, and the assets of Calling Solutions Mexico were transferred from Beyond Contact to Fusion. Beyond Contact owned 99% of Fusion, and Mirabent owned the other 1%. Also at that time, Mirabent was the chief operating officer and a managing member of Beyond Contact, Mirabent's brother was the chief executive officer and a managing member of Beyond Contact, and Brittingham was the president of Beyond Contact.

[2] Although Mirabent amended his original petition after the trial court signed the order Brittingham is appealing, we must consider the factual allegations that were before the trial court when it ruled on Brittingham's motion to compel. Accordingly, the facts recited in this background are based on the factual allegations in Mirabent's original petition.
[3] Brittingham's membership interest was initially owned by Blue River Investments, LLC which was wholly owned by Brittingham. Because this indirect ownership does not affect our analysis, we refer to Brittingham as the owner for ease of reference.

In June of 2013, a dispute arose. Based on representations made by Brittingham and Juan Carlos de Luna, an employee of Beyond Contact, Mirabent and his brother agreed to be removed as managers of Beyond Contact and Fusion and to a restructuring involving Beyond Contact, Fusion, and two other entities. First, Brittingham represented that Mirabent would be retained as a consultant by Beyond Contact for six months following the restructuring and receive United States dollars equivalent to 80,000 Mexican pesos per month. In addition, Brittingham represented any liability of Mirabent to American Express would be released or, if American Express would not agree to a release, then Beyond Contact and/or Fusion would satisfy the outstanding amount owed to American Express.[4]

Subsequent to the restructuring, Beyond Contact was owned in the following percentages: (1) Brittingham – 67.22%; (2) de Luna – 12.34%; (3) Mirabent – 8.5%; (4) Mirabent's brother – 8.5%; and (5) other lenders – 2.94%. Mirabent's liability to American Express, however, was not released or satisfied, and Mirabent was not paid under the terms of the consulting agreement. In addition, Brittingham and de Luna caused substantially all of the assets of Beyond Contact to be conveyed to another entity wholly owned by them.

On August 8, 2016, Mirabent sued Beyond Contact, Brittingham, and de Luna asserting claims for statutory fraud, common law fraud, breach of contract, and breach of fiduciary duty. Brittingham filed a motion to compel arbitration of the claims asserting the claims were within the scope of the arbitration clause of the Company Agreement which provided:

> 11.01 *Submission of Disputes to Arbitration*.
>
> (a) This Article 11 shall apply to any of the following types of disputes (each a *"Dispute"*):
>
> (i) any dispute as to fair market value under Sec. 3.03(c)(ii)(B) or 11.04;

[4] It appears the American Express debt was incurred to benefit Beyond Contact or its operations.

> (ii) any dispute as to any accounting or tax issue under this Agreement; or
>
> (iii) except for disputes described in the foregoing paragraphs (i) and (ii), (A) any dispute regarding the construction, interpretation, performance, validity, or enforceability of any provision of the Certificate[5] or this Agreement, or whether any Person is in compliance with, or [in] breach of, any provisions of the Certificate or this Agreement; or (B) any other dispute of a legal nature arising under the Certificate or this Agreement, it being intended that this Sec. 11.01(a)(i) shall not include any disputes of a purely business nature, such as disputes as to business strategy.

Brittingham asserted Mirabent's claims were disputes covered by section 11.01(a)(iii).

Mirabent filed a response to Brittingham's motion, agreeing that the claims he asserted derivatively on behalf of Beyond Contact were within the scope of the arbitration clause because those claims arose under the Company Agreement. Mirabent disagreed, however, that his direct claims were subject to arbitration because those claims did not arise under the Certificate or the Company Agreement. Mirabent attached copies of the Restructuring Agreement and the Consulting and Nonsolicitation Agreement to his response.[6] After a hearing, the trial court granted Brittingham's motion with regard to the derivative claims but denied the motion with regard to the direct claims.

Based on the trial court's order, Mirabent amended his pleading to clarify his direct statutory and common law fraud claims were based on the material misrepresentations Brittingham made to induce Mirabent to agree to restructure Beyond Contact and the other entities, and his direct breach of contract claim was based on the failure of Brittingham, de Luna, and Beyond Contact to comply with the terms of the restructuring and consulting agreements. The amended

[5] The term "Certificate" is defined to mean the certificate of formation filed with the Texas Secretary of State.

[6] The Restructuring Agreement refers to the ownership of the entities, debt the entities owed to Brittingham, de Luna, Mirabent, and Mirabent's brother, and contracts between the entities and third parties, and recites the purpose of the agreement is to "restructure the business of the companies, centralizing the business and contracts in JPR [JPR Calling Solutions, LLC, a Texas limited liability company] and in Fusion."

pleading also clarified his derivative breach of contract claim was based on the failures by Brittingham and de Luna to comply with the Company Agreement in transferring Beyond Contact's assets. Similarly, Mirabent's derivative breach of fiduciary duty claims related to Brittingham and de Luna breaching their fiduciary obligations to Beyond Contact by transferring Beyond Contact's assets.

After Mirabent amended his pleading, Brittingham filed a motion to reconsider his motion to compel. Mirabent filed a response to Brittingham's motion to reconsider and also filed another amended pleading in which he dropped his derivative claims. After a hearing, the trial court denied Brittingham's motion to reconsider.[7] Brittingham appeals.

STANDARD OF REVIEW AND GENERAL LAW GOVERNING ARBITRATION

Whether the scope of an arbitration agreement encompasses the claims in dispute is a question of law reviewed de novo. *Amateur Athletic Union of the U.S., Inc.*, 499 S.W.3d at 102. Because the parties do not dispute the existence of a valid arbitration agreement, "a 'strong presumption favoring arbitration arises' and we resolve doubts as to the agreement's scope in favor of arbitration." *Rachal v. Reitz*, 403 S.W.3d 840, 850 (Tex. 2013) (quoting *Ellis v. Schlimmer*, 337 S.W.3d 860, 862 (Tex. 2011)). As previously noted, in determining whether claims fall within the scope of an arbitration clause, we focus on the factual allegations in the plaintiff's pleading, not the legal claims. *In re Rubiola*, 334 S.W.3d at 225; *Rachal*, 403 S.W.3d at 850; *Amateur Athletic Union of the U.S., Inc.*, 499 S.W.3d at 102.

Once a valid arbitration agreement is established, "a court should not deny arbitration *unless it can be said with positive assurance* that an arbitration clause is *not* susceptible of an interpretation which would cover the dispute at issue." *In re D. Wilson Const. Co.*, 196 S.W.3d

[7] The Honorable Michael E. Mery denied Brittingham's motion to compel. The Honorable Renee A. Yanta denied Brittingham's motion to reconsider.

774, 783 (Tex. 2006) (internal quotations omitted) (emphasis in original). "Generally, if the facts alleged 'touch matters,' have a 'significant relationship' to, are 'inextricably enmeshed' with, or are 'factually intertwined' with the contract that is subject to the arbitration agreement, the claim will be arbitrable. *Pennzoil Co. v. Arnold Oil Co., Inc.*, 30 S.W.3d 494, 498 (Tex. App.—San Antonio 2000, orig. proceeding). "However, if the facts alleged in support of the claim stand alone, are completely independent of the contract, and the claim could be maintained without reference to the contract, the claim is not subject to arbitration." *Id*.

ANALYSIS

Focusing on the factual allegations in Mirabent's pleading, Mirabent alleges Brittingham misrepresented he would be retained as a paid consultant and his liability to American Express would be released or satisfied in order to induce him into signing the Restructuring Agreement and the Consulting and Nonsolicitation Agreement. After the restructuring, however, Mirabent's liability to American Express was not released or satisfied, and Mirabent was not paid under the terms of the consulting agreement.

Although the restructuring involved Beyond Contact, the factual allegations regarding the execution of and terms of the Restructuring Agreement and the Consulting and Nonsolicitation Agreement are completely independent of the Company Agreement. None of Mirabent's claims require any reference to the Company Agreement. The restructuring was not limited to Beyond Contact but involved three other entities, and the terms of the Company Agreement do not need to be reviewed to finalize the restructuring. In fact, the Restructuring Agreement acknowledges that its terms differ from the terms of the Company Agreement and contemplates amending the Company Agreement to implement or incorporate those differences.[8] Finally, the

[8] The only reference to the Company Agreement in the Restructuring Agreement is the following sentence, "The members of Beyond and JPR [one of the other entities] hereby agree to execute such documents as may be reasonably

misrepresentations regarding the consulting agreement and the American Express debt stand totally apart from and are completely independent of the Company Agreement. Therefore, Mirabent's claims stand alone and are not within the scope of the arbitration provision in the Company Agreement. *Id*.

In his brief, Brittingham primarily relies on two cases: *Gerwell v. Moran*, 10 S.W.3d 28 (Tex. App.—San Antonio 1999, no pet.) and *In re Bath Junkie Franchise, Inc.*, 246 S.W.3d 356 (Tex. App.—Beaumont 2008, orig. proceeding). The facts in each of those cases, however, are distinguishable from the facts of the instant case.

A. *Gerwell v. Moran*

In *Gerwell*, Kristine Gerwell, Michelle Moran, and Suzette Dooley entered into a written partnership agreement in 1993 which covered all aspects of the partnership, including its establishment, capitalization, management, profits/losses and distributions, and respective liabilities for partnership debt. 10 S.W.3d at 29. The partnership agreement expressly prohibited a partner from assigning her interest in the partnership without the express written permission of all the remaining partners. *Id*. The partnership agreement contained an arbitration clause requiring arbitration of "any controversy or claim arising out of" the partnership agreement. *Id*. Each partner owned a one-third interest in the partnership and was liable for her pro rata share of the partnership debt. *Id*.

In 1994, Dooley assigned her interest in the partnership to Edwin Gerwell, and the partnership agreement was amended to reflect Dooley's withdrawal and Edwin's addition. *Id*. In

requested by the management of Beyond and JPR to implement these provisions [setting forth conditions relating to the offer and sale of membership interests in Beyond or JPR] as part of the Company Agreement of Beyond and/or JPR." Because the terms of the Restructuring Agreement are different from the terms of the Company Agreement, a dispute regarding those terms cannot arise under the Company Agreement because the Company Agreement does not contain those terms.

late 1998-early 1999, Moran decided to leave the partnership and to assign her one-third interest to the Gerwells. *Id*. at 30. Pursuant to the partnership agreement, the parties entered into a written assignment agreement that provided the Gerwells would pay Moran $85,000 less "credits, adjustments, prorations of taxes, insurance, interest, rents and other liabilities of the partnership." *Id*.

Ultimately, the Gerwells delivered a check to Moran for $22,811.93, representing the amount the Gerwells computed they owed Moran by deducting Moran's liabilities of the partnership from the $85,000 purchase price. *Id*. Moran sued the Gerwells alleging claims for breach of the assignment agreement, breach of fiduciary duty, fraud, fraudulent inducement, and unjust enrichment. *Id*. The Gerwells filed a motion to compel arbitration based on the arbitration clause in the partnership agreement. *Id*. The trial court denied the Gerwells' motion, and they appealed. *Id*.

This court held Moran's claims fell within the scope of the arbitration provision contained in the partnership agreement. *Id*. at 33. Important to this court's analysis was that "part of the dispute involve[d] what liabilities [the Gerwells] were entitled to deduct from the purchase price." *Id*. at 32. This court noted, "Determination of these liabilities necessarily involves review of the [partnership] agreement, which specifies each party's interest and pro rata share of liabilities. Part of the dispute, therefore, relates to or touches upon the [partnership] agreement." *Id*. This court also noted the partnership agreement required the express written approval of all of the partners; therefore, the assignment agreement was executed in accordance with the terms of the partnership agreement. *Id*. With regard to the second part of its reasoning, this court concluded but for the partnership agreement, "Moran would not have a partnership interest to assign to the Gerwells." *Id*.

Brittingham seizes on the second part of this court's reasoning to *Gerwell* to argue but for the Company Agreement, Mirabent would not have an ownership interest to be restructured. In doing so, Brittingham loses sight of this court's broader reasoning which acknowledges the partnership agreement would have to be reviewed to determine the validity of the deductions made from the purchase price. Because the partnership agreement had to be reviewed in order to calculate the purchase price Moran should have been paid for her partnership interest, Moran's claims in *Gerwell* were not completely independent of the partnership agreement. Unlike the dispute in *Gerwell*, however, the terms of the Company Agreement do not have to be reviewed in resolving Mirabent's direct claims in the instant case because Mirabent's claims are exclusively based on the terms of the Restructuring Agreement and the Consulting and Nonsolicitation Agreement and the misrepresentations made to induce Mirabent into signing those agreements.

B. *In re Bath Junkie Franchise, Inc.*

The decision in *In re Bath Junkie Franchise, Inc.* is similarly distinguishable. In that case, Bath Junkie, an Arkansas Corporation, and Hygiene, L.L.C., a Texas corporation, entered into a franchise agreement containing the terms under which Hygiene would open a Bath Junkie franchise in Texas. 246 S.W.3d at 361. The franchise agreement contained an arbitration clause requiring "any dispute or controversy arising out of or relating to this Agreement" to be arbitrated. *Id*. at 361-62. The franchise agreement also contained a survival clause stating the arbitration clause would survive the termination of the agreement. *Id*. at 362.

"Subsequently, the relationship between the parties deteriorated, and on October 19, 2005, the parties executed a Termination of Franchise Relationship." *Id*. That agreement required Bath Junkie to pay Hygiene $61,400 and required Hygiene to transfer its unencumbered lease to Bath Junkie. *Id*. In January of 2006, Bath Junkie issued a check to Hygiene for $61,400, but stopped

payment on the check after Hygiene refused to transfer the lease free and clear of all encumbrances because Hygiene insisted on the return of its security/rental deposit. *Id*.

Hygiene sued Bath Junkie claiming Bath Junkie breached the termination agreement, committed fraud, and engaged in a conspiracy. *Id*. Bath Junkie counterclaimed alleging Hygiene breached the termination agreement and tortiously interfered with an existing contract between Bath Junkie and its new franchisee. *Id*. A year after filing its counterclaim, Bath Junkie filed a motion to compel which the trial court denied. *Id*. Bath Junkie filed a petition for writ of mandamus with the Beaumont court of appeals challenging the trial court's order. *Id*.

The Beaumont court noted the arbitration clause encompassed "any dispute or controversy arising out of or relating to" the franchise agreement. *Id.* at 366. The court then held "[t]he facts of the dispute are related to the Franchise Agreement." *Id*. Citing this court's opinion in *Gerwell*, the court further stated, "Without the parties' relationship that arose from the Franchise Agreement, Hygiene and Bath Junkie would not have entered into the Termination Agreement." *Id*. (citing *Gerwell*, 10 S.W.3d at 32).

Brittingham relies on the broad language in the last quoted sentence to assert that the parties in the instant case would not have engaged in restructuring the ownership of Beyond Contact without the relationship that arose from the Company Agreement.[9] Although the Beaumont court's opinion does contain a broad statement, its holding is based on the language of the arbitration clause encompassing disputes "related to" the franchise agreement, and its analysis that "[t[he facts of the dispute are related to the Franchise Agreement." *Id*. The phrase "arising out of or relating to" an agreement which was examined in *Bath Junkie* is much broader than the phrase

[9] We note that taking Brittingham's argument to its logical extreme, any dispute involving a member and Beyond Contact would be subject to arbitration because Beyond Contact would not exist but for the Company Agreement. We refuse to read the arbitration clause so broadly as to eliminate the requirement that the dispute "arise under" the Company Agreement.

"arising under" an agreement which is the language contained in the arbitration provision in the instant case. *See Glassell Producing Co. v. Jared Resources, Ltd.*, 422 S.W.3d 68, 78 (Tex. App.—Texarkana 2014, no pet.) (noting arbitration clause applying to claims arising out of an agreement is narrow while "[a]rbitration clauses in which the scope is defined using 'relating to' and similar wide-reaching phrases are interpreted broadly"); *Osornia v. AmeriMex Motor & Controls, Inc.*, 367 S.W.3d 707, 713-14 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (distinguishing cases in which broad arbitration clause encompassed all claims arising out of or relating to a contract in case where arbitration clause was limited to claims arising out of this agreement). Accordingly, the facts in *Bath Junkie* are readily distinguishable from the instant case.

CONCLUSION

"[T]he strong policy in favor of arbitration cannot serve to stretch a contractual clause beyond the scope intended by the parties or to allow modification of the unambiguous meaning of [an] arbitration clause." *Osornia*, 367 S.W.3d at 712. Mirabent's claims are based on misrepresentations made to induce Mirabent to execute the Restructuring Agreement and the Consulting and Nonsolicitation Agreement and the breach of those agreements by Brittingham, de Leon, and Beyond Contact. These claims are completely independent of the Company Agreement, and none of Mirabent's claims require any reference to the Company Agreement. *See Pennzoil Co.*, 30 S.W.3d at 498. Therefore, we can say with positive assurance that the arbitration provision in the Company Agreement is not susceptible to any reasonable interpretation that would encompass Mirabent's claims in this case. *See In re D. Wilson Const. Co.*, 196 S.W.3d at 783. Accordingly, the trial court's order is affirmed.

Irene Rios, Justice