Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-18-00874-CV

CONTINENTAL MOTORS, INC.,
Appellant

v.

ENGINE COMPONENTS INTERNATIONAL, INC.,
Appellee

From the 224th Judicial District Court, Bexar County, Texas
Trial Court No. 2015-CI-11291
Honorable Karen H. Pozza, Judge Presiding

Opinion by: Patricia O. Alvarez, Justice

Sitting: Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice
Irene Rios, Justice

Delivered and Filed: July 17, 2019

AFFIRMED

Appellant Continental Motors, Inc. appeals the trial court's order denying Continental's motion for attorneys' fees and granting summary judgment denying those fees. Appellee Engine Components International, Inc. (ECI), in a cross-point, contends the appeal is frivolous and it is entitled to sanctions.

We affirm the trial court's order denying Continental's motion for attorneys' fees and granting ECI's motion for summary judgment. We deny ECI's request for sanctions.

BACKGROUND

ECI, a subsidiary of Danbury Aerospace, Inc., distributes aftermarket aircraft engine parts. ECI and AC Corporation discussed ECI's distribution of a line of aircraft engine components, and ECI issued several purchase orders to AC Corporation. The relationship between the parties subsequently deteriorated when ECI became dissatisfied with the results of internal tests conducted on the AC Corporation components.

While ECI and AC Corporation were involved in the testing dispute, Danbury entered into an Asset Purchase Agreement with Continental. Under the Agreement, Continental agreed to purchase certain assets and assume certain liabilities from ECI. Prior to the final agreement, the parties engaged in a due diligence review of Danbury's assets, which included purchase orders from ECI to AC Corporation. As a result of this review, Danbury and Continental added an addendum to the Agreement. The addendum noted there were outstanding sales orders between ECI and AC Corporation. The orders were not yet fulfilled due to ongoing testing. Pursuant to the addendum, Continental agreed to assume the outstanding orders if testing was completed and the components met a particular standard by December 31, 2015. If testing and required performance were not completed by that date, ECI would cancel the orders.

Danbury and Continental consummated the Agreement in July 2015. At that time, the orders between ECI and AC Corporation were still pending due to incomplete testing of the components. In September 2015, ECI notified AC Corporation that the orders would be cancelled if testing and performance measures were not completed by the December 31, 2015 deadline. AC Corporation failed to complete testing by the deadline.

Around the time Danbury and Continental finalized the Agreement, ECI filed a declaratory judgment action against AC Corporation, seeking a declaration about the nature of the purchase order arrangement. In March 2016, AC Corporation counterclaimed against ECI, alleging

numerous causes of action. ECI amended its petition to allege a breach of warranty claim against AC Corporation. Then, in January 2017, ECI again amended its petition to add a third-party claim against Continental, seeking to recover any amounts AC Corporation might recover against ECI based on AC Corporation's counterclaims.[1] The third-party claim was based on terms set out in the Agreement between Danbury and Continental.

In response, Continental answered, and in subsequent amended answers, asserted a claim against ECI for attorneys' fees under section 15.2 of the Agreement. Section 15.2 is entitled "Governing Law; Arbitration," and provides as follows:

> This Agreement shall be governed in all respects in conformity with the intent of the parties as expressed in the provisions of this Agreement. To the extent any issue between the parties is not controlled by this Agreement, then any dispute between the parties shall be governed and construed in accordance with the law of the State of Delaware, without regard to its choice of law principles. UNLESS THIS AGREEMENT OR ANY OTHER AGREEMENT CONTEMPLATED HEREBY SPECIFICALLY PROVIDES FOR ANOTHER TYPE OF DISPUTE RESOLUTION WITH RESPECT TO A PARTICULAR KIND OF DISPUTE, ANY AND ALL CONTROVERSIES AND CLAIMS ARISING OUT OF OR RELATING TO THIS AGREEMENT, OR THE BREACH THEREOF, SHALL BE SETTLED BY FINAL AND BINDING ARBITRATION IN ACCORDANCE WITH THE COMMERCIAL ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION THEN IN EFFECT. Any such arbitration proceeding shall be and remain confidential. The panel of arbitrators for any such arbitration shall consist of three members of the American Arbitration Association, one of whom shall be selected by Buyer, one of whom shall be selected by Seller, and the third who will be selected by the other two. ***The prevailing party before such panel shall be entitled to an additional award of reimbursement of its reasonable attorneys' fees and costs.*** Judgment upon the decision rendered by the arbitrators may be entered in any court having jurisdiction thereof. The parties specifically acknowledge that this Agreement evidences a transaction involving, affecting, affected by, and a part of, interstate commerce and that this agreement to arbitrate is governed by and enforceable under 9 U.S.C. §§ 1 et seq. The place of arbitration shall be Bexar County, Texas. Nothing herein shall prohibit any party from seeking specific performance of Sections 6.1, 6.3, 6.4, 6.5, 6.6, 6.7, 6.8, 7.1, or 7.2 in a court of competent jurisdiction. (emphasis added).

[1] AC Corporation filed cross claims against Continental—the same claims it previously asserted against ECI—claiming Continental assumed ECI's liability under the terms of the Agreement.

Continental moved for summary judgment on all claims asserted against it by AC Corporation and ECI, claiming that because testing of the components was not completed by December 31, 2015, it had not assumed liability relevant to the purchase orders. In response, ECI nonsuited its claims against Continental. Continental then filed a "Motion for Award of Attorneys' Fees," seeking to recover attorneys' fees from ECI. The motion, like the request in Continental's answer to ECI's third-party claim, was based on section 15.2 of the Agreement. ECI opposed the motion and moved for summary judgment against Continental's claim for attorneys' fees.

After a hearing, the trial court rendered an order denying Continental's motion for attorneys' fees and granting ECI's motion for summary judgment challenging Continental's entitlement to the fees. All claims and disputes were ultimately disposed of, creating a final judgment. Thereafter, Continental filed this appeal in which it challenges the trial court's order denying its motion and granting summary judgment for ECI with regard to attorneys' fees.

ATTORNEYS' FEES, SUMMARY JUDGMENT

Continental contends the trial court erred in denying its motion for attorneys' fees under the Agreement and granting ECI's motion for summary judgment against those fees. In its brief, ECI rebuts Continental's appellate contentions and raises a cross-point requesting sanctions based on the alleged frivolousness of Continental's appeal.

We begin by reciting the applicable standards of review.

A. Standards of Review

"The construction of an unambiguous contract is a question of law for the court, which we may consider under a de novo standard of review." *Tawes v. Barnes*, 340 S.W.3d 419, 425 (Tex. 2011); *accord Kachina Pipeline Co. v. Lillis*, 471 S.W.3d 445, 449 (Tex. 2015). Similarly, "[a]n issue concerning the availability of attorney's fees under a statute or contract presents a question of law that appellate courts review de novo." *Fitzgerald v. Schroeder Ventures II, LLC*, 345

S.W.3d 624, 627 (Tex. App.—San Antonio 2011, no pet.) (citing *Holland v. Wal-Mart Stores, Inc.*, 1 S.W.3d 91, 94 (Tex. 1999); *In re Lesikar*, 285 S.W.3d 577, 583 (Tex. App.—Houston [14th Dist.] 2009, orig. proceeding)).

Likewise, we review a trial court's order granting summary judgment de novo. *See Lujan v. Navistar, Inc.*, 555 S.W.3d 79, 84 (Tex. 2018); *Knopf v. Gray*, 545 S.W.3d 542, 545 (Tex. 2018); *Hardaway v. Nixon*, 544 S.W.3d 402, 407 (Tex. App.—San Antonio 2017, pet. denied). "A traditional motion for summary judgment is properly granted when the movant establishes there are no genuine issues of material fact and it is entitled to judgment as a matter of law." *Hardaway*, 544 S.W.3d at 407 (citing TEX. R. CIV. P. 166a(c)); *see Lujan*, 555 S.W.3d at 84.

B. American Rule

In Texas, we adhere to the American Rule for recovery of attorneys' fees. *Wheelabrator Air Pollution Control, Inc. v. City of San Antonio*, 489 S.W.3d 448, 453 n.4 (Tex. 2016); *Epps v. Fowler*, 351 S.W.3d 862, 865 (Tex. 2011). Under the American Rule, a party may not recover attorneys' fees unless such recovery is authorized by statute or contract. *Wheelabrator*, 489 S.W.3d at 453 n.4; *Epps*, 351 S.W.3d at 865. Here, Continental based its claim for attorneys' fees on a contract, specifically section 15.2 of the Agreement. Thus, we must construe section 15.2 of the Agreement to determine whether it authorizes Continental to recover attorneys' fees.

C. Contract Construction

Our review is guided by well-established principles of contract construction. The primary principle to which we must adhere is ascertaining the true intentions of the parties as expressed in the writing itself, relying on objective rather than subjective manifestations of intent. *See Tawes*, 340 S.W.3d at 425; *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co.*, 341 S.W.3d 323, 333 (Tex. 2011). Thus, the starting point for contract construction is the express language of the writing. *Italian Cowboy*, 341 S.W.3d at 333.

When the terms at issue are plain, definite, and unambiguous, we may not vary them even to protect a party from the consequences of its own oversight and failures. *See In re Davenport*, 522 S.W.3d 452, 457–58 (Tex. 2017); *Bell v. Chesapeake Energy Corp.*, No. 04-18-00129-CV, 2019 WL 1139584, at *3 (Tex. App.—San Antonio Mar. 13, 2019, no pet.) (mem. op.). Unless the parties used a term in a technical or unusual sense, contractual terms must be given their plain, ordinary, and generally accepted meaning. *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996). Moreover, we may not add, alter, or eliminate essential terms. *Samson Explor., LLC v. T.S. Reed Props., Inc.*, 521 S.W.3d 766, 776 n.26 (Tex. 2017). "We construe contracts 'from a utilitarian standpoint, bearing in mind the particular business activity sought to be served' and 'will avoid when possible and proper a construction that is unreasonable, inequitable, and oppressive." *Frost Nat'l Bank v. L&F Distribs., Ltd.*, 165 S.W.3d 310, 312 (Tex. 2005) (quoting *Reilly v. Rangers Mgmt., Inc.*, 727 S.W.2d 527, 530 (Tex. 1987)).

D. Construing Section 15.2

Continental bases its claim for attorneys' fees on the following sentence from an arbitration provision (section 15.2) of the Agreement: "The prevailing party before such [arbitration] panel shall be entitled to an additional award of its reasonable attorneys' fees and costs."

When read in the context of the entire provision, the plain language, which is unambiguous, compels us to conclude that an award of attorneys' fees is available to a party that prevails *before an arbitration panel following arbitration proceedings*. *See Heritage Res.*, 939 S.W.2d at 121. The express language shows the parties' true intent was to permit recovery of such fees only in the arbitration context. *See Italian Cowboy*, 341 S.W.3d at 333. If the parties had desired to permit recovery of attorneys' fees to a prevailing party following a decision in a court of law, they were certainly at liberty to contract for it; however, they did not. When, as here, the terms of the agreement are plain and unambiguous, we may not vary them. *See Davenport*, 522 S.W.3d at

457–58. As the supreme court has observed, "it is not the courts' role 'to protect parties from their own agreements.'" *Nat'l Prop. Holdings, L.P. v. Westergren*, 453 S.W.3d 419, 425 (Tex. 2015) (quoting *El Paso Field Servs., L.P. v. MasTech N. Am., Inc.*, 389 S.W.3d 802, 810–11 (Tex. 2012)).

Continental argues the parties' intent was to allow a prevailing party to recover attorneys' fees no matter the forum. It insists this interpretation is reasonable given that arbitration was not feasible here because the claims at issue involved AC Corporation, which was not a party to the Agreement and its arbitration provision. Continental further argues it would be unfair to deny its recovery of attorneys' fees given ECI's alleged bad faith in bringing claims against Continental in the first instance. Continental argues ECI lacked a legal basis to sue Continental, which is demonstrated by its decision to nonsuit its claims against Continental rather than responding to Continental's motion for summary judgment on those claims.

Even if arbitration was not feasible and ECI brought claims against Continental without a legal or factual basis, this does not change the plain meaning of the terms in section 15.2 with regard to recovery of attorneys' fees. The provision permits recovery of attorneys' fees only by a party who prevails *before an arbitration panel*. There is no provision in the Agreement for recovery of attorneys' fees by a party who prevails in a court action, regardless of any inability to arbitrate or bad faith by another party.[2] Other than section 15.2, which does not permit Continental to recover attorneys' fees outside the arbitration context, there is no other statutory or contractual basis cited by Continental to support an award of attorneys' fees in this matter. In the absence of statutory or contractual authorization of attorneys' fees, no award of attorneys' fees is warranted.

[2] If Continental believed ECI acted in bad faith or had no basis for its legal action, Continental was not without remedy. Rule 13 of the Texas Rules of Civil Procedure permits, upon a finding of good cause, recovery of sanctions in the form of attorneys' fees when a pleading is groundless and brought in bad faith or groundless and brought for the purpose of harassment. TEX. R. CIV. P. 13; *see* TEX. R. CIV. P. 215; *see also Low v. Henry*, 221 S.W.3d 609, 614 (Tex. 2007); *In re E.V.*, No. 04-16-00626-CV, 2018 WL 1402064, at *3 (Tex. App.—San Antonio Mar. 21, 2018, no pet.) (mem. op.). Similar relief is authorized under Chapter 10 of the Texas Civil Practice and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 10.001–10.005; *Low*, 221 S.W.3d at 614.

See Wheelabrator, 489 S.W.3d at 453 n.4; *Epps*, 351 S.W.3d at 865. Accordingly, we overrule Continental's issue that the trial court improperly denied its request for attorneys' fees.[3]

ECI'S REQUEST FOR SANCTIONS

In its cross-point, ECI contends Continental's appeal is frivolous and asks that we sanction Continental under Rule 45 of the Texas Rules of Appellate Procedure. *See* TEX. R. APP. P. 45.

A. Law for Sanctions

Rule 45 provides that if a court of appeals determines an appeal is frivolous, it *may* award a prevailing party just damages. *In re Willa Peters Hubberd Testamentary Trust*, 432 S.W.3d 358, 369 (Tex. App.—San Antonio 2014, no pet.). "Whether to grant sanctions for a frivolous appeal is a matter of discretion that this court exercises with prudence and caution and only after careful deliberation in truly egregious circumstances." *Id.* (quoting *Gard v. Bandera Cty. Appraisal Dist.*, 293 S.W.3d 613, 619 (Tex. App.—San Antonio 2009, no pet.)).

In determining whether an appeal is frivolous, we consider "the record, briefs, and other papers filed in this court." *Gard*, 293 S.W.3d at 619. "If [the] appellant's argument on appeal fails to convince us but has a reasonable basis in law and constitutes an informed, good-faith challenge to the trial court's judgment [or order], sanctions are not appropriate." *Id.*

B. Frivolousness

ECI contends the appeal is frivolous because the plain language of section 15.2 of the Agreement limited recovery of attorneys' fees to the arbitration context.

Continental argues arbitration was not feasible because the claims at issue involved AC Corporation, which was not a party to the Agreement, and therefore, could not be compelled to

[3] Because we have determined a proper interpretation of the contract does not entitle Continental to an award of attorneys' fees in any context other than arbitration, we need not review Continental's contention that it was a "prevailing party" based on ECI's nonsuit.

arbitrate. According to Continental, ECI should not be allowed to escape Continental's request for attorneys' fees—given the impropriety of ECI's decision to bring Continental into the suit in the first instance, as demonstrated by ECI's nonsuit in response to Continental's motion for summary judgment—merely because arbitration was not feasible. Rather, Continental contends this court should determine that pursuant to section 15.2, the intent of the parties was to allow recovery of attorneys' fees to a prevailing party in any dispute arising under the Agreement.

In support of its contention, Continental relies upon a supreme court case in which non-parties to an agreement were not permitted to participate in an arbitration proceeding that was based on an agreement to which they were not parties. *See G.T. Leach Builders, LLC v. Sapphire V.P., L.P.*, 458 S.W.3d 502, 527 (Tex. 2015).

G.T. Leach Builders is distinguishable based on the terms of the agreement therein, but we recognize there are cases—though not cited by Continental—in which non-signatories to an arbitration provision are not bound to arbitrate. *See generally In re Weekley Homes, L.P.*, 180 S.W.3d 127, 129 (Tex. 2005) (recognizing nonparties may be bound to arbitration clause only when rules of law or equity would bind them to the contract generally).

Although we agree with ECI that section 15.2 does not authorize recovery of attorneys' fees from a trial court's order, and there is no other statutory or contractual basis supporting Continental's claim for attorneys' fees, after careful deliberation we conclude that this appeal does not present truly egregious circumstances warranting sanctions pursuant to Rule 45. *See* TEX. R. APP. P. 45; *In re Willa Peters Hubberd Testamentary Trust*, 432 S.W.3d at 369. We overrule ECI's cross-point, but we award ECI costs of court for this appeal. *See* TEX. R. APP. P. 43.4.

CONCLUSION

We conclude the trial court properly denied Continental's motion to award attorneys' fees and properly granted ECI's motion for summary judgment with regard to such fees. Thus, we overrule Continental's appellate issues.

Although Continental is not entitled to recover attorneys' fees under the Agreement, its appeal of that denied recovery is not so egregious as to warrant an imposition of sanctions under Rule 45; we overrule ECI's cross-point.

Accordingly, we affirm the trial court's order.

Patricia O. Alvarez, Justice