Fourth Court of Appeals
San Antonio, Texas

OPINION

No. 04-20-00315-CV

Diamandina **GUERRA**,
Appellant

v.

Monica **GARZA**, Individually and El Tigre Food Stores,
Appellees

From the 381st Judicial District Court, Starr County, Texas
Trial Court No. DC-17-35
Honorable José Luis Garza, Judge Presiding

Opinion by: Patricia O. Alvarez, Justice

Sitting: Rebeca C. Martinez, Chief Justice
Patricia O. Alvarez, Justice
Beth Watkins, Justice

Delivered and Filed: November 3, 2021

AFFIRMED

In this appeal, Appellant Diamandina Guerra asserts that in cases involving alleged sexual assault in the workplace, mandatory arbitration is against public policy. Accordingly, she argues, the trial court erred in compelling arbitration and confirming the arbitrator's award.

We disagree, and we affirm the trial court's judgment confirming the arbitrator's award.

BACKGROUND

Guerra was employed by Appellee El Tigre Food Stores. On March 25, 2015, Guerra was working with a company auditor. The auditor was sitting on a chair in front of a computer and

Guerra was standing behind the auditor. Guerra's supervisor, Appellee Monica Garza, allegedly approached Guerra from behind, placed her hand inside Guerra's pants, and touched Guerra's buttocks. When Guerra asked why Garza did that, Garza responded that she was tucking-in Guerra's shirt. Guerra reported the incident to the area manager; Guerra complained of a hostile work environment in which she was sexually assaulted by Garza. A police report was also filed. On May 14, 2015, Garza terminated Guerra's employment.

Subsequently, Guerra sued both El Tigre and Garza, Appellees, alleging that Garza committed misconduct of a sexual nature within the course and scope of Garza's employment with El Tigre. El Tigre timely filed a motion to compel arbitration and stay litigation. It was undisputed that Guerra's employment agreement contained an arbitration provision, which reads as follows: "All disputes that may arise between you [Guerra] and CSI and/or your assigned client company [El Tigre Food Stores] will be resolved exclusively through binding arbitration pursuant to the Federal Arbitration Act."

The trial court agreed that Guerra's claim was governed by the Federal Arbitration Act, and it granted El Tigre's motion to stay the litigation and compel arbitration. On October 21, 2019, Guerra moved for a rehearing on the trial court's order to compel arbitration. In her motion, Guerra indicated the sole issue to be decided by the trial court was whether "the employment agreement which requires plaintiff to litigate a sexual assault claim in confidential and binding arbitration violate[s] public policy?"

The trial court denied Guerra's motion, and the parties' dispute was arbitrated on October 31, 2019. At the conclusion of arbitration, the arbitrator issued an award in favor of El Tigre and Garza, who then filed a motion to confirm arbitration.

On February 19, 2020, the trial court denied Guerra's October 21, 2019 motion for rehearing. Guerra filed a motion for reconsideration of the trial court's ruling compelling arbitration and a brief in support of setting aside the arbitration award, but the motion was denied.

On June 15, 2020, and before the trial court entered its judgment confirming the arbitration award, Guerra filed her first notice of appeal on the "denial [of] the Motion to Reconsider signed on 06/02/2020." On June 24, 2020, Guerra filed an identical amended notice of appeal, the only difference being the certificate of service. On September 16, 2020, the trial court issued its final judgment confirming the arbitration award and rendering a take nothing judgment against Guerra.

ISSUES AND ARGUMENTS ON APPEAL

Guerra's only issue on appeal is whether mandatory arbitration concerning cases of sexual assault in the workplace violates public policy. Guerra claims that arbitrating a workplace sexual assault case is against public policy.

Appellees argue that this court does not have jurisdiction over the appeal because Guerra failed to file a notice of appeal after the trial court entered its judgment. Consequently, they argue, Guerra never invoked appellate jurisdiction over the final judgment. In the alternative, Appellees argue that because only an arbitrator decides whether an arbitration clause is against public policy, this court has nothing to resolve. In the further alternative, Appellees contend Guerra's argument regarding public policy is wrong on the merits.

We will first address Appellees' jurisdictional argument.[1]

DOES THIS COURT HAVE JURISDICTION?

Appellees contend that although Guerra filed notices of appeal, the notices invoked this court's appellate jurisdiction over only the trial court's interlocutory orders compelling arbitration.

[1] Appellees cited interlocutory appeal provisions of the Civil Practice and Remedies Code and the FAA, but they did not cite any case to show how those provisions preclude this court's jurisdiction. *Contra* TEX. R. APP. P. 38.1(i).

See TEX. CIV. PRAC. & REM. CODE ANN. § 51.01 (interlocutory appeals); *see also* 9 U.S.C. § 16 (2018) (arbitration appeals). Appellees also argue that because this court's jurisdiction over interlocutory appeals is distinct from our jurisdiction over final judgments—and Guerra failed to file a notice of appeal relating to the final judgment—this court lacks jurisdiction. We disagree.

The supreme court has "repeatedly held that the right of appeal should not be lost due to procedural technicalities," *Roccaforte v. Jefferson Cty.*, 341 S.W.3d 919, 924 (Tex. 2011) (citing *Guest v. Dixon*, 195 S.W.3d 687, 688 (Tex. 2006) (per curiam)), and the Texas Rules of Appellate Procedure anticipate some of the procedural technicality circumstances present here.

Specifically, Rule 27.1 recognizes that "[i]n a civil case, a prematurely filed notice of appeal is effective and deemed filed on the day of, but after, the event that begins the period for perfecting the appeal." TEX. R. APP. P. 27.1; *accord Jay & VMK, Corp. v. López*, 572 S.W.3d 698, 703 (Tex. App.—Houston [14th Dist.] 2019, no pet.).

Rule 27.2 allows this court to "treat actions taken before an appealable order is signed as relating to an appeal of that order and give them effect as if they had been taken after the order was signed." TEX. R. APP. P. 27.2; *see Brighton v. Koss*, 415 S.W.3d 864, 866 (Tex. 2013).

Further, "[w]hen a trial court renders a final judgment, the court's interlocutory orders merge into the judgment and may be challenged by appealing that judgment." *Bonsmara Nat. Beef Co., LLC v. Hart of Tex. Cattle Feeders, LLC*, 603 S.W.3d 385, 390 (Tex. 2020) (citing *Roccaforte*, 341 S.W.3d at 924); *see Anderson v. Hous. Cmty. Coll. Sys.*, 458 S.W.3d 633, 642 n.1 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

Thus, when the trial court signed the final judgment, its earlier interlocutory orders compelling arbitration were merged into the final judgment, *see Bonsmara*, 603 S.W.3d at 390; *Roccaforte*, 341 S.W.3d at 924 n.10, and Guerra's prematurely filed notices of appeal were

effective on the same day, but immediately after, the final judgment was signed, *see* TEX. R. APP. P. 27.1; *Brighton*, 415 S.W.3d at 866. We have jurisdiction in this appeal.

Having concluded we have jurisdiction over Guerra's appeal, we now address Guerra's sole appellate issue.

IS THE ARBITRATION AGREEMENT UNENFORCEABLE ON PUBLIC POLICY GROUNDS?

A. Arguments of the Parties

On appeal, Guerra argues that her employment agreement, which mandates arbitration of her alleged sexual assault that occurred in the workplace, is against public policy. Specifically, Guerra contends that arbitration under these circumstances is unenforceable and void. For this reason alone, Guerra contends, the trial court erred in compelling arbitration and, later, confirming the arbitrator's award.

Appellees argue that matters involving the enforceability of an arbitration agreement must be decided by the arbitrator and not the court. They contend that because Guerra failed to raise the issue of enforceability with the arbitrator, she waived any complaint on appeal. In the alternative, Appellees argue the employment agreement does not violate public policy and is valid.

Based on the arguments presented by the parties, we recognize two separate questions. First, whether the arbitrator, and not the court, should have decided the public policy defense raised by Guerra. If the court, and not the arbitrator, should have decided Guerra's public policy defense, the second question is whether the employment agreement was unenforceable on public policy grounds.

B. Employment Agreement

To begin, we note that Guerra does not dispute that she signed the employment agreement, and she does not challenge its arbitration clause separately. Instead, she argues the entire employment agreement is void as against public policy.

C. Who Decides the Public Policy Defense?

1. Standard of Review

Whether an arbitration agreement is enforceable is subject to de novo review. *See J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex. 2003); *Garcia v. Huerta*, 340 S.W.3d 864, 869 (Tex. App.—San Antonio 2011, pet. denied). Further, "[w]hether a trial court or an arbitrator decides a challenge to the validity of an entire contract is [also] a question of law which we review de novo." *Schmidt Land Servs., Inc. v. UniFirst Corp.*, 432 S.W.3d 470, 472 (Tex. App.—San Antonio 2014, pet. denied) (citing *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 643 (Tex. 2009)).

2. Applicable Law

"[A]rbitration clauses are separable from the contracts in which they are embedded." *RSL Funding, LLC v. Newsome*, 569 S.W.3d 116, 124 (Tex. 2018) (citing *Prima Paint Corp. v. Flood & Conkling Mfg. Co.*, 388 U.S. 395, 402–04 (1967)).

The validity of an arbitration clause may be challenged by "(1) challenging the validity of the contract as a whole; (2) challenging the validity of the arbitration provision specifically; and (3) challenging whether an agreement exists at all." *Id.* (citing *In re Morgan Stanley & Co.*, 293 S.W.3d 182, 187 (Tex. 2009)).

"Because an arbitration clause is separable from the rest of the contract, the arbitrator decides the first type of challenge." *Id.* (citing *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010)). "Any contract defense that attacks the contract as a whole but does not go to the issue of contract formation must be decided by the arbitrator." *Id.* at 125 (citing *Rent-A-Ctr.*, 561 U.S. at 66). When a party resisting arbitration argues that the whole contract is void on public policy grounds, the issue falls into the category of cases delegated to the arbitrator. *Id.* Under such circumstances, "the arbitrator, not a court, decides the issue." *Id.*

3. Analysis

On appeal, Guerra's brief consistently attacks the entire employment agreement; she argues it violates public policy because it requires her to resolve her sexual assault allegation in a confidential arbitration proceeding. *See RSL Funding*, 569 S.W.3d at 125. Thus, Guerra's public policy defense was a question for the arbitrator, not for the trial court. *See id.* ("Any contract defense that attacks the contract as a whole but does not go to the issue of contract formation must be decided by the arbitrator.").

We conclude that, under the doctrine of separability, this court cannot decide Guerra's public policy defense because that decision was reserved for the arbitrator. *See id.*

C. Is The Arbitration Agreement Unenforceable on Public Policy Grounds?

Having decided that, on the facts of this case, the issue of enforceability is one for the arbitrator, we do not reach this issue.

CONCLUSION

Contrary to Appellees' assertion, this court has jurisdiction over Guerra's appeal. We conclude, however, that the trial court did not err in denying Guerra's motions challenging the enforceability of the employment agreement on the grounds that confidential arbitration of a sexual assault claim was against public policy.

Patricia O. Alvarez, Justice