Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-20-00522-CV

FROST BANK,
Appellant

v.

Steven A. **DAVIS**, M.D., P.A.,
Appellee

From the 438th Judicial District Court, Bexar County, Texas
Trial Court No. 2020CI16478
Honorable Norma Gonzales, Judge Presiding

Opinion by: Rebeca C. Martinez, Chief Justice

Sitting: Rebeca C. Martinez, Chief Justice
Irene Rios, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: June 16, 2021

REVERSED AND REMANDED

Frost Bank seeks relief from the trial court's order denying its motion to compel arbitration. Because the trial court erred by denying Frost Bank's motion to compel arbitration, we reverse the trial court's order and remand the cause to the trial court for entry of an order compelling the parties to arbitration.

BACKGROUND

In 2012, Steven A. Davis, M.D. organized an event called the "San Antonio Regenerative Medicine Symposium" (the "Symposium"). On March 7, 2012, Davis, the co-chairman of the

Symposium, opened an account under the name "San Antonio Regenerative Medicine Symposium" (the "Account") with Frost Bank. Davis signed a signature card agreeing "to the terms set forth in the Deposit Agreement and Disclosure" along with other agreements and disclosures "as amended by the Financial Institution from time to time." The card also stated that the authorized individual signing "acknowledges that the Financial Institution provided at least one copy of these deposit account documents."

The referenced "Deposit Account Agreement & Other Disclosures," dated March 1, 2012, stated as follows:

> IN THE EVENT OF ANY DISPUTE ARISING OUT OF OR RELATED TO THIS AGREEMENT, YOU AND BANK SHALL FIRST ATTEMPT IN GOOD FAITH TO PROMPTLY RESOLVE SUCH DISPUTE THROUGH NEGOTIATION. IN THE EVENT OF ANY DISPUTE, YOU (OR YOUR AUTHORIZED REPRESENTATIVE) AND BANK SHALL MEET AT LEAST ONCE TO NEGOTIATE IN GOOD FAITH TO RESOLVE THE DISPUTE . . . . IF THE MEDIATION DOES NOT SUCCESSFULLY RESOLVE THE DISPUTE OR CLAIM, THE MEDIATOR SHALL PROVIDE WRITTEN NOTICE TO YOU AND BANK REFLECTING THE SAME, AND EITHER YOU OR BANK MAY THEN PROCEED TO SEEK BINDING ARBITRATION, WITH THE EXCEPTION OF ANY DISPUTE IN WHICH THE AMOUNT IN CONTROVERSY IS WITHIN THE JURISDICTIONAL LIMITS OF, AND IS FILED IN, A SMALL CLAIMS COURT. BY EXECUTION OF THIS AGREEMENT YOU ACKNOWLEDGE AND AGREE THAT YOU HAVE HAD AN OPPORTUNITY TO CONSULT WITH COUNSEL AND KNOWINGLY AND VOLUNTARILY WAIVE YOUR RIGHT TO A TRIAL BY JURY. EITHER YOU OR BANK MAY REQUEST ARBITRATION BY WRITTEN REQUEST TO THE OTHER, AND THE ARBITRATION MUST TAKE PLACE WITHIN THIRTY (30) CALENDAR DAYS AFTER THE DATE SUCH NOTICE IS GIVEN.

The Symposium was held in March 2012 and neither Davis nor Frost Bank closed the Account after the Symposium. In March 2020, Davis discovered that an employee of his practice (the "Practice") had been using the Account to divert cash and checks, totaling $300,386.72, from the Practice.

Davis sued Frost Bank in August 2020. In his first amended petition, which was Davis's live pleading at the time of the hearing, Davis asserted causes of action for negligence, conversion, fraudulent inducement, and breach of contract. Frost Bank moved to compel arbitration based on the Deposit Agreement signed by Davis when opening the Account. Davis filed a response to the motion. The trial court held a hearing on Frost Bank's motion to compel arbitration and denied the motion without specifying the reason. Frost Bank appealed.

STANDARD OF REVIEW

Appellate courts review a trial court's denial of a motion to compel arbitration for an abuse of discretion. *Ewing Constr. Co. v. Benavides Indep. Sch. Dist.*, No. 04-19-00797-CV, 2020 WL 1277756, at *1 (Tex. App.—San Antonio Mar. 18, 2020, pet. denied) (mem. op.). The trial court's interpretation of the arbitration clause, however, is a legal question subject to *de novo* review. *See J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex. 2003); *see also Henry v. Gonzalez*, 18 S.W.3d 684, 689–90 (Tex. App.—San Antonio 2000, pet. dism'd by agr.).

DISCUSSION

On appeal, the parties do not dispute whether a valid arbitration agreement exists. Davis presents two reasons for resisting arbitration: (1) Frost Bank's liability arose from its own fraudulent and tortious activity which predates the parties' agreement to arbitrate claims; and (2) Frost Bank's liability arose from its assistance and participation in the tortious activity of one of Davis's employees, which exceeds the scope of the arbitration agreement. We read Davis's arguments together to assert that his claims do not fall within the scope of the arbitration agreement.

A. Applicable Law

A party seeking to compel arbitration must establish: (1) a valid arbitration agreement exists; and (2) the claims at issue fall within that agreement's scope. *In re Dillard Dep't Stores,*

Inc., 186 S.W.3d 514, 515 (Tex. 2006) (orig. proceeding) (per curiam). Because state and federal policies favor arbitration, a presumption exists favoring agreements to arbitrate, and courts must resolve any doubts about an arbitration agreement's scope in favor of arbitration. *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 753 (Tex. 2001) (orig. proceeding).

Once an 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.'" *Prudential Sec. Inc. v. Marshall*, 909 S.W.2d 896, 899 (Tex. 1995) (orig. proceeding) (per curiam) (quoting *Neal v. Hardee's Food Sys., Inc.*, 918 F.2d 34, 37 (5th Cir. 1990)). To determine whether a claim falls within the scope of an agreement to arbitrate, courts must focus on the factual allegations of the pleadings rather than the legal causes of actions asserted. *Id.* at 900. Claims must be submitted to arbitration if "liability arises solely from the contract or must be determined by reference to it." *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 132 (Tex. 2005) (orig. proceeding). If the facts alleged touch matters, have a significant relationship to, are inextricably enmeshed with, or are factually intertwined with the contract containing the arbitration agreement, then the claim is arbitrable. *Amateur Athletic Union of the U.S., Inc. v. Bray*, 499 S.W.3d 96, 105 (Tex. App.—San Antonio 2016, no pet.). In contrast, a "claim is not subject to arbitration only if the facts alleged in support of the claim are completely independent of the contract and the claim could be maintained without reference to the contract." *Glassell Producing Co. v. Jared Res., Ltd.*, 422 S.W.3d 68, 77 (Tex. App.—Texarkana 2014, no pet.). Arbitrability depends on the substance of the claim, not artful pleading. *In re Kaplan Higher Educ. Corp.*, 235 S.W.3d 206, 208–09 (Tex. 2007) (orig. proceeding) (per curiam).

"A party may not avoid broad language in an arbitration clause by attempting to cast complaints in tort rather than contract." *Merrill Lynch, Pierce, Fenner & Smith v. Eddings*, 838 S.W.2d 874, 880 (Tex. App.—Waco 1992, writ denied). A party opposing arbitration because of

fraud must show that the fraud relates to the arbitration provision specifically, not to the broader contract in which it appears. *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51, 56 & n.13 (Tex. 2008).

B. Application

As stated above, the parties do not dispute that there is a valid arbitration agreement signed by Davis. *See In re Dillard Dep't Stores, Inc.*, 186 S.W.3d at 515. Instead, in the trial court, Davis asserted that Frost Bank's liability arises from tortious conduct and fraudulent activity which exceed the scope of the arbitration agreement.

The arbitration clause of the Deposit Agreement provides that "ALL DISPUTES ARISING OUT OF, OR RELATED IN ANY WAY TO [THE] ACCOUNT[,]" be arbitrated. Courts reviewing similar language have termed such clauses "extremely broad" and "expansive of reach." *See Kirby Highland Lakes Surgery Ctr., L.L.P. v. Kirby*, 183 S.W.3d 891, 898 (Tex. App.—Austin 2006, orig. proceeding) (noting an arbitration clause embracing "[a]ll disputes or controversies arising under or related to this Agreement" is "extremely broad" and "capable of expansive reach."); *AutoNation USA Corp. v. Leroy*, 105 S.W.3d 190, 195–96 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding) (recognizing language requiring arbitration of claims "arising out of or relating to" the particular contract is broad language favoring arbitration).

In Davis's live petition at the time of the hearing, he alleges that Frost Bank: (1) negligently kept the Account open after the conclusion of the Symposium and accepted checks payable to Davis as payee and deposited them in the Account; (2) converted Davis's funds by unlawfully and without authority assuming dominion and control over his checks, paying the checks, and depositing the funds into an Account that allowed an employee of the Practice to defraud David; (3) fraudulently induced Davis to sign the Deposit Agreement by purportedly asserting that the

Account would only be temporary; and (4) breached the Deposit Agreement by making unauthorized payments of account funds.[1]

In light of the arbitration agreement's broad language, all of Davis's claims fall within the agreement's scope. *See In re Conseco Fin. Servicing Corp.*, 19 S.W.3d 562, 570 (Tex. App.—Waco 2000, orig. proceeding) (holding that broad provision requiring arbitration of any claims "arising from or relating to" the contract encompassed claimant's statutory and tort claims although these claims were not based on the formation, negotiation, terms, or performance of the contract). All of Davis's factual allegations arise out of or relate to the Account Davis opened with Frost Bank. The essence of his claims is that he was tricked into agreeing to open the Account because he thought it would be temporary and solely for the purpose of the Symposium. *See Glassell Producing Co.*, 422 S.W.3d at 80 (holding that a plaintiff's claims were related to or connected with the subject matter of an agreement because the essence of the plaintiff's claims was that she was tricked into agreeing to the sale in dispute). The terms of the Deposit Agreement provide how the Account should be closed, if requested; they provide all details of how funds are handled in the Account; and they detail how statements are made available to Davis. Davis's claims cannot be maintained without reference to the terms of the Deposit Agreement, which provide for Frost Bank's duties and responsibilities under the Deposit Agreement. *See id.* at 77 (stating that a claim is not subject to arbitration "only if the facts alleged in support of the claim are completely independent of the contract and the claim could be maintained without reference

[1] After the trial court ruled on the motion to compel arbitration, Davis amended his original petition again. This second amended petition adds an "assistance and participation in fraud" claim and alleges Frost Bank assisted Davis's employee in converting the funds and concealed the wrongdoings, which allegedly breached Frost Bank's duty of ordinary care to Davis. Because this petition was not before the trial court when it ruled on the motion to compel arbitration, we do not consider it and the additional claim within it. *See Associated Glass, Ltd. v. Eye Ten Oaks Invs., Ltd.*, 147 S.W.3d 507, 511 & n.3 (Tex. App.—San Antonio 2004, orig. proceeding) (declining to consider new causes of action in amended petition filed after the trial court ruled on the motions to compel arbitration); *see also In re Profanchik*, 31 S.W.3d 381, 386 (Tex. App.—Corpus Christi 2000, orig. proceeding) (limiting its consideration to the record as it appeared before the trial court at the time of its ruling on the motion to compel arbitration).

to the contract."); *see also New Hampshire Ins. Co. v. Magellan Reinsurance Co., Ltd.*, 508 S.W.3d 320, 325–26 (Tex. App.—Fort Worth 2013, no pet.) (holding that a plaintiff's non-breach of contract claims such as fraud, breach of fiduciary duty, conversion, theft, and accounting claims were all within the scope of the arbitration agreement because they required, or touched upon in some way, the interpretation of the arbitration agreement in the reinsurance agreement).

Further, the tortious behavior Davis complained of is related to the Account that Davis alleges he opened for the sole purpose of the Symposium. *See FirstMerit Bank*, 52 S.W.3d at 754–56 (holding that arbitration should be compelled because the plaintiff's alleged tortious behavior related to a financing contract containing an arbitration clause); *cf. In re J.D. Edwards World Sols. Co.*, 87 S.W.3d 546, 50–51 (Tex. 2002) (orig. proceeding) (per curiam) (holding that the question of whether the contract was induced by fraud was a dispute that fell within the scope of the parties' arbitration agreement, which required that all disputes "involving" the agreement be arbitrated). We therefore cannot conclude that Davis's claims do not require—or at a minimum, touch upon in some way—the interpretation of the Deposit Agreement. *See Capital Income Props.-LXXX v. Blackmon*, 843 S.W.2d 22, 23 (Tex. 1992) (orig. proceeding) (per curiam) (holding partners' claims that partnership breached fiduciary duty in operating and managing the partnership, misrepresenting the financial health of the operation, and fraudulently inducing partners to invest in the partnership were within the scope of a clause requiring arbitration of claims "arising out of" or "relating to" the partnership agreement). Finally, none of Davis's claims specifically challenge the validity of the arbitration agreement; all claims broadly challenge the entire contract. *See Forest Oil Corp.*, 268 S.W.3d at 56 & n.13 (stating that a fraudulent inducement claim that attacks the broader contract must be considered by an arbitrator and not the court). Therefore, Davis's claims fall within the scope of the arbitration agreement.

CONCLUSION

Frost Bank established the existence of a valid arbitration agreement and that Davis's claims fall within the scope of the agreement. *See In re Dillard Dep't Stores, Inc.*, 186 S.W.3d at 515. The trial court erred in denying Frost Bank's motion to compel arbitration. Accordingly, the trial court's order denying Frost Bank's motion to compel arbitration is reversed and the case is remanded to the trial court for an entry of an order compelling the parties to arbitration.

Rebeca C. Martinez, Chief Justice