In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-09-00331-CV

SABINE SYNGAS, LTD. AND SABINE POWER, L.L.C., Appellants

V.

PORT OF PORT ARTHUR NAVIGATION DISTRICT OF JEFFERSON COUNTY, TEXAS, THE GOLDMAN SACHS GROUP, INC., PROCESS ENERGY SOLUTIONS, L.L.C. d/b/a PROCESS (TX) ENERGY SOLUTIONS, LC, AND JAMES S. FALSETTI, Appellees

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On Appeal from the 60th District Court
Jefferson County, Texas
Trial Cause No. B-178,017

MEMORANDUM OPINION

Sabine Syngas, Ltd. and Sabine Power, L.L.C. appeal the trial court's final judgment rendered in favor of appellees. Appellants contend the trial court erred in compelling arbitration and confirming an arbitration award rendered in favor of appellees. We affirm the trial court's judgment.

FACTUAL BACKGROUND

The Port of Port Arthur Navigation District of Jefferson County, Texas (the "Port") entered into a Development Agreement with Sabine Power, L.L.C. in its capacity as general partner of Sabine Syngas, Ltd. The contract concerned the design, development, financing, construction and operation of a gasification and electric generation facility. It is undisputed that section 9.24 of the Development Agreement contained a valid arbitration clause, which provided that "[a]ny claim, dispute or other matter in question arising out of or related to the Agreement or otherwise arising from the design and construction of the Project shall be subject to arbitration."

As early as January 12, 2006, the Port claimed the Development Agreement was terminated. Sabine claimed it was not. The Port sued Sabine Syngas, Ltd. and Sabine Power, L.L.C. (collectively "Sabine") alleging that Sabine breached the Development Agreement by failing to reimburse the Port for reasonable fees and expenses of lawyers and financial and technical advisors. Sabine filed a counter-claim against the Port for breach of contract and a third party claim[1] against The Goldman Sachs Group, Inc. (GSG), Process Energy Solutions, L.L.C. d/b/a Process (TX) Energy Solutions, LC (PES) and James S. Falsetti ("Falsetti"). Sabine alleged that the Port breached the Development

[1] Throughout Sabine's trial court pleadings and appellate brief, it incorrectly references its third party claims against GSG, PES and Falsetti as cross-claims. We identify and refer to Sabine's claims against GSG, PES and Falsetti as third party claims.

Agreement by entering into an agreement with PES in 2006 for the development of the gasification facility. Sabine alleged that Falsetti was employed with Texaco when Sabine disclosed trade secrets to Texaco in an effort to obtain a license for the gasification process in Port Arthur. Sabine further alleged Falsetti left Texaco to go to work for GSG and took with him Sabine's confidential information regarding the Port Arthur Gasification Facility. Sabine alleged that Falsetti improperly disclosed Sabine's trade secrets to PES and GSG, and that PES and GSG improperly used that information to tortiously interfere with Sabine's Development Agreement with the Port.

The Port, GSG, PES and Falsetti moved to arbitrate under section 9.24 of the Development Agreement. Sabine resisted arbitration by contending that the scope of the arbitration provision in the Development Agreement did not include its claims against GSG, PES and Falsetti. After an oral hearing, the trial court ordered that "all claims and causes of action in this lawsuit are subject to and must be submitted to arbitration as required by Section 9.24 of the Development Agreement entered into between the Port and Sabine." The court further ordered "[a]ll parties" to arbitration. Thereafter Sabine filed a Motion to Sever its third party claims against PES, Falsetti and GSG from the Port's claim against Sabine. The trial court denied Sabine's motion.

Almost a year after the trial court ordered the parties to arbitration and one day before the arbitration was to begin, Sabine sought mandamus relief from this Court. We refused to issue the writ, concluding that Sabine failed to establish that appeal would not

be an adequate remedy. *In re Sabine Syngas, Ltd.*, No. 09-08-473 CV, 2008 WL 4821472, at *1 (Tex. App.—Beaumont Nov. 5, 2008, orig. proceeding) (mem. op.).

The Port filed its request for arbitration and the case proceeded to arbitration through the American Arbitration Association. No other party sought affirmative relief in the arbitration proceedings. At the conclusion of the arbitration, the arbitrator issued its Award in favor of the Port on its breach of contract claims and ordered Sabine Syngas to pay the Port contract damages and attorney fees and the costs of the arbitration. The arbitrator further held that the award was "in full settlement of all claims submitted to this Arbitration" and that "[a]ll claims not expressly granted herein are, hereby denied." Thereafter, the Port filed a Motion to Confirm the Arbitration Award. PES, Falsetti, and GSG filed a Joint Motion for Entry of Judgment, asking the trial court to sign a take nothing judgment on Sabine's third party claims. Sabine opposed entry of final judgment on its third party claims, alleging that those claims were not arbitrated. The trial court rejected Sabine's argument and entered judgment in favor of the Port confirming the arbitration award.[2]

ISSUES AND STANDARDS

On appeal, Sabine asserts two reasons why we should vacate the arbitrator's award and reverse the trial court's final judgment. In its first issue, Sabine argues that the trial

[2] Sabine has not presented any issues on appeal related to the arbitration award and subsequent judgment in favor of the Port.

court erred in compelling arbitration of its dispute with GSG, PES and Falsetti because these claims fall outside the scope of its arbitration agreement with the Port. In its second issue, Sabine argues that the trial court erred in confirming the arbitrator's award and issuing its final judgment because it disposed of Sabine's tort claims without any arbitration finding or conclusion and without evidence to support the take nothing final judgment. [3]

We review the trial court's order compelling arbitration under an abuse of discretion standard. *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 271 (Tex. 1992); *Teel v. Beldon Roofing & Remodeling Co.*, 281 S.W.3d 446, 448 (Tex. App.—San Antonio 2007, pet. denied). We review a trial court's confirmation of an arbitration award de novo. *Hisaw & Assocs. Gen. Contractors, Inc. v. Cornerstone Concrete Sys., Inc.*, 115 S.W.3d 16, 18 (Tex. App.—Fort Worth 2003, pet. denied). However, since Texas and Federal law favors arbitration, our review of an arbitration award is extremely narrow. *Id*. An arbitration award has the same effect as the judgment of a court of last resort; therefore, we must indulge every reasonable presumption to uphold the award. *Id.*; *Pheng Invs., Inc. v. Rodriguez*, 196 S.W.3d 322, 328 (Tex. App.—Fort Worth 2006, no pet.). The arbitration "award is conclusive on the parties as to all matters of fact and law." *Id*. "For an appellate court to have jurisdiction to review an arbitration award, [the] appellant must allege a statutory or common law ground to vacate the award." *Hisaw*,

[3] Sabine does not contest the applicability of the Federal Arbitration Act.

115 S.W.3d at 19.

APPLICABLE LAW AND APPLICATION

Order Compelling Arbitration

Since an arbitration agreement is a contract matter, it generally binds only signatories to that agreement. *In re James E. Bashaw & Co.*, 305 S.W.3d 44, 54 (Tex. App.—Houston [1st Dist.] 2009, orig. proceeding) (citing *Brown v. Pac. Life Ins. Co.*, 462 F.3d 384, 398 (5th Cir. 2006)). However, "[a] person who has agreed to arbitrate disputes with one party may in some cases be required to arbitrate related disputes with others." *Meyer v. WMCO-GP, LLC*, 211 S.W.3d 302, 304 (Tex. 2006). "Estoppel is one of five or six instances in which the federal circuit courts require arbitration with nonsignatories." *In re Merrill Lynch Trust Co. FSB*, 235 S.W.3d 185, 191 (Tex. 2007) (orig. proceeding). "[I]n certain limited instances, pursuant to an equitable estoppel doctrine, a non-signatory-to-an-arbitration-agreement-defendant can nevertheless compel arbitration against a signatory-plaintiff." *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 526 (5th Cir. 2000). In *Grigson*, the Fifth Circuit agreed with the intertwined-claims test formulated by the Eleventh Circuit, which provides:

> Existing case law demonstrates that equitable estoppel allows a nonsignatory to compel arbitration in two different circumstances. First, equitable estoppel applies when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory. When each of a signatory's claims against a nonsignatory makes reference to or presumes the existence of the written agreement, the signatory's claims arise out of

> and relate directly to the written agreement, and arbitration is appropriate. Second, application of equitable estoppel is warranted when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract. Otherwise the arbitration proceedings between the two signatories would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted.

Id. at 527 (*quoting MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999)) (citations and quotation marks omitted).

Relying on the Fifth Circuit's ruling in *Grigson*, the Texas Supreme Court has adopted a similar concept. In *Meyer v. WMCO-GP, LLC*, the Court stated "[w]e have held that a person who seeks by his claim 'to derive a direct benefit from the contract containing the arbitration provision' may be equitably estopped from refusing arbitration." 211 S.W.3d 302, 305 (Tex. 2006). In *Meyer*, an auto dealership agreement between Ford and Bullock gave Ford a right of first refusal to acquire Bullock's dealership should he decide to sell. *Id*. at 304. Bullock contracted to sell the dealership to WMCO. *Id*. Ford thereafter assigned its right of first refusal to Meyer. *Id*. Bullock terminated the contract with WMCO when Meyer exercised Ford's right of first refusal and determined to purchase the dealership. WMCO sued Bullock, Meyer and Ford seeking a declaration that Ford's right of first refusal was void because Ford's assignee, Meyer, disclosed WMCO's confidential information in violation of Ford and Bullock's agreement. WMCO sought damages from Meyer for tortious interference with the

WMCO-Bullock agreement and sought damages from Ford and Meyer for conspiring to violate the Texas Motor Vehicle Commission Code. *Id*. Meyer and Ford moved to compel arbitration based on an arbitration provision in the WMCO-Bullock agreement. *Id.* at 304-05. Even though they were not parties to the contract, Meyer and Ford argued that, "because WMCO had made this agreement with Bullock, WMCO was equitably estopped from refusing to arbitrate with them." *Id*. at 305. The Court found that WMCO's claims against Meyer and Ford depended on the existence of the WMCO-Bullock agreement in that if Bullock had properly terminated this agreement, then WMCO would have no claim for tortious interference. Further, WMCO's damages could not be calculated without reference to the Bullock agreement. The Court held that "[w]hen a party's right to recover and its damages depend on the agreement containing the arbitration provision, the party is relying on the agreement for its claims." *Id*. at 307. The Court further held that WMCO's claims against Meyer were intertwined with WMCO's claims against Bullock and in fact "have the same tap root: WMCO's assertion that Ford lost its right of first refusal." *Id*.

Here, Sabine's breach of contract claims against the Port are intertwined with its tortious interference claims[4] against PES, Falsetti, and GSG and in fact have the same tap

[4] Sabine does not adequately brief the appropriateness of the trial court's compelling arbitration of its misappropriation of trade secrets claim against Falsetti. Except for a reference to this claim in a subheading and in a conclusory sentence, Sabine

root—the Port's proper termination of its agreement with Sabine. If the Port properly terminated its contract with Sabine, the Port's subsequent execution of a development agreement with PES would not have been a breach of the Port's contract and there could be no tortious interference with a terminated contract. Sabine's tortious interference claims are dependent on the existence and terms of its Development Agreement with the Port.

Sabine argues that PES, Falsetti and GSG violated a general obligation imposed by law through their tortious interference with Sabine's contract and therefore Sabine is entitled to sue for that tort in court and should not be forced into arbitration. *Meyer* does not support this contention. The *Meyer* Court held that a signatory-plaintiff, claiming tortious interference with a contract, was equitably estopped from avoiding its own agreement to arbitrate, even though its claims were against non-parties to the contract. The Court did not question the nature of the cause of action, but rather whether the signatory's claim refers to or depends upon the contract containing the arbitration provision. *Meyer*, 211 S.W.3d at 307.

Sabine's reliance on *In re Kellogg Brown & Root, Inc.* and *In re Weekley Homes, L.P.* is misplaced as those cases are distinguishable in that the Court considered whether a signatory could compel a non-signatory to arbitrate. *See In re Weekley Homes, L.P.*, 180

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focuses on its tortious interference claims. We do not review this on appeal. *See* Tex. R. App. P. 38.1(h).

S.W.3d 127 (Tex. 2005) (orig. proceeding); *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732 (Tex. 2005) (orig. proceeding).

Sabine further relies on section 9.12 of the Development Agreement to contend that third parties, such as GSG, PES and Falsetti have no right to compel arbitration. Section 9.12 of the Development Agreement is entitled "Third-Party Beneficiary" and provides:

> The provisions of the Agreement are for the exclusive benefit of the Port and Sabine and not for the benefit of any third person, nor shall this Agreement be deemed to have conferred any rights, express or implied, upon any third person unless otherwise expressly provided for herein.

Appellees sought to compel arbitration in the trial court based on the theory of equitable estoppel, not as third party beneficiaries of the Development Agreement. Third party beneficiary theories, as well as equitable estoppel, are each independent bases non-signatory appellees can rely on to enforce the arbitration provision. *See Arthur Andersen LLP v. Carlisle*, 129 S.Ct. 1896, 1902, 173 L.Ed.2d 832 (2009). We conclude this third party beneficiary disclaimer does not negate appellees right to compel arbitration based on equitable estoppel.

The trial court did not abuse its discretion in compelling Sabine to arbitrate its claims against GSG, PES and Falsetti.

Judgment Confirming Arbitration Award

Sabine argues that the trial court erred in signing the final judgment as to the third

party claims when the court heard no evidence and the arbitration award does not dispose of Sabine's claims against PES, Falsetti, and GSG.

In the absence of an agreement providing otherwise, the burden to initiate arbitration proceedings rests on the party seeking relief. *Mamlin v. Susan Thomas, Inc.*, 490 S.W.2d 634, 639 (Tex. Civ. App.—Dallas 1973, no writ). A trial court may dismiss a party's claims with prejudice when the trial court orders the party to arbitrate its claims and the party seeking relief fails to do so. *Id*.

Here, the arbitration provision provides that "[a]ny claim, dispute or other matter in question arising out of or related to the Agreement or otherwise arising from the design and construction of the Project shall be subject to arbitration." The arbitration provision does not place a burden on any particular party to initiate arbitration. The trial court ordered "all claims and causes of action in this lawsuit" to arbitration, including Sabine's third party claims against PES, Falsetti, and GSG. The Port initiated arbitration proceedings and the arbitration concluded in a final award. While the record before this court does not include a copy of the arbitration proceeding, Sabine's counsel admitted to the trial court that it did not present its third party claims to the arbitrator, despite being ordered to arbitration. When the trial court asked Sabine's counsel why it failed to assert these claims in arbitration, Sabine's counsel was unable to provide the court with an answer. Later in its Motion to Reinstate, Sabine argued to the trial court that it "did not initiate an arbitration proceeding on their tort claims against PES, Falsetti or GSG out of

concern that such an affirmative action would be used against them." We hold that Sabine had the burden to initiate arbitration as to its third party claims against PES, Falsetti and GSG. Since Sabine failed to initiate arbitration after the trial court ordered the arbitration to proceed, the trial court properly entered judgment disposing of all claims. *See Mamlin*, 490 S.W.2d at 639.

Sabine also argues that the trial court erred in signing the final judgment because the arbitrator did not have jurisdiction to decide its third party claims when a three-person arbitration panel was required in arbitrations involving monetary claims in excess of $250,000 and there was only one arbitrator in this case. The trial court determines the arbitrability of a matter, i.e, whether an arbitrator has "jurisdiction" over certain parties and claims. *Haddock v. Quinn*, 287 S.W.3d 158, 171-72 (Tex. App.—Fort Worth 2009, pet. denied). Sabine's issue concerning the number of arbitrators necessary to decide a claim is not a jurisdictional issue, but rather a procedural issue controlled by the arbitration provision in the Development Agreement, which called for three arbitrators to decide matters involving more than $250,000. As this is a contract issue, absent an express provision providing otherwise, the Port and Sabine were free to waive this provision.

Sabine did not bring forward to the trial court a record of the arbitration proceedings for the court to substantiate Sabine's argument or to determine whether Sabine waived this provision of the agreement. Sabine had the burden to provide the trial

court, as well as this court, with a complete record, but failed to do so. *See Statewide Remodeling, Inc. v. Williams*, 244 S.W.3d 564, 568-69 (Tex. App.—Dallas 2008, no pet.) (When a non-prevailing party seeks to modify or vacate an arbitration award, the non-prevailing party bears the burden to bring forth a complete record to the trial court to establish its basis for vacating or modifying the award.); *see also GJR Mgmt. Holdings, L.P. v. Jack Raus, Ltd.*, 126 S.W.3d 257, 263 (Tex. App.—San Antonio 2003, pet. denied). From the appellate record before us, we are unable to discern whether Sabine ever requested a panel of three arbitrators to decide its third party claims. On this record, we overrule Sabine's objections and affirm the trial court's judgment.

AFFIRMED.

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CHARLES KREGER
Justice

Submitted on October 25, 2010
Opinion Delivered January 13, 2011

Before McKeithen, C.J., Gaultney and Kreger. JJ.