In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-16-00357-CV

LEXINGTON INSURANCE COMPANY, Appellant

V.

EXXON MOBIL CORPORATION AND EXXONMOBIL OIL CORPORATION, Appellees

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On Appeal from the 136th District Court
Jefferson County, Texas
Trial Cause No. D-196093

MEMORANDUM OPINION

In this interlocutory appeal, Lexington Insurance Company challenges the trial court's denial of its motion to compel arbitration. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.016 (West 2015) (authorizing interlocutory appeals from orders denying arbitration for contracts subject to the Federal Arbitration Act); *Id*. § 171.098(a)(1) (West 2011) (authorizing interlocutory appeals from decrees denying applications to compel arbitration for contracts subject to the Texas Arbitration Act).

According to Lexington, the trial court should have required Exxon Mobil Corporation and ExxonMobil Oil Corporation (collectively, Exxon) to arbitrate their dispute over whether an umbrella policy issued by Lexington provided Exxon with coverage for a casualty that occurred on its premises in April 2013.

We conclude that a valid arbitration agreement exists, that the scope of the matters to be arbitrated include the disagreement the parties have over whether Lexington's umbrella covers Exxon for the claims Exxon made against Lexington under the policy, and that the trial court was required to grant Lexington's motion. We reverse the trial court's order denying Lexington's motion to compel arbitration, and we instruct the trial court to render an order requiring that all of Exxon's claims against Lexington and all of Lexington's defenses to Exxon's claims proceed in arbitration. We remand the cause to the trial court for further proceedings consistent with the Court's opinion.

Background

The casualty that forms the basis of Exxon's claims arose from a fire that occurred in April 2013 at Exxon's refinery in Beaumont, Texas. Exxon's Second Amended Petition, its live pleading for the purposes of the hearing on Lexington's motion to compel arbitration, indicates that at least ten individuals were injured in or as a result of the fire; of those injured, two of the individuals subsequently died.

Three of the individuals injured in the fire were employees of Brock Services, who was performing work at Exxon at the time of the casualty under a written procurement agreement. The written agreement indicates that Exxon hired Brock Services to provide Exxon with scaffolding, painting, and insulation services at Exxon's Beaumont refinery. Under the written agreement, Brock Services was required to name Exxon as an additional insured on all of the liability policies that the agreement required Brock Services to obtain while performing work for Exxon.

After the casualty, Exxon demanded that Lexington recognize that the umbrella policy that Lexington issued to Brock Services provided insurance coverage to Exxon for claims that arose from the casualty. When Lexington failed to respond to Exxon's demand, Exxon sued Lexington, and alleged that Lexington had wrongfully denied Exxon's claim. Lexington responded to Exxon's suit by filing a motion to compel arbitration. On July 26, 2016, the trial court conducted a hearing on Lexington's motion and admitted various exhibits into evidence for the purposes of the hearing on the motion to compel arbitration. However, no witnesses testified during the hearing. At the conclusion of the hearing, the trial court deferred its ruling and asked the parties to present the court with additional arguments, in writing, to support the positions they had taken during the hearing.

Exxon and Lexington complied with the court's request. The last documents the trial court considered before ruling on Lexington's motion to compel arbitration were filed on September 9, 2016. Approximately two weeks later, the trial court denied Lexington's motion. In a letter explaining its ruling, the trial court advised the parties that Lexington's umbrella policy was "clear and unambiguous," and that the court had construed it "by a simple factual analysis requiring no interpretation of the policy itself." The letter indicates that the trial court concluded that one of the policy provisions Lexington relied on to support its argument that the policy did not cover the casualty was not relevant to the dispute. While the trial court's letter does not specifically discuss whether the parties' disagreement over coverage were matters that fell outside those the arbitration agreement required the parties to arbitrate, the court's ruling clearly implies the trial court thought the dispute could be settled as a matter of law based on its construction of the policy.

On appeal, Lexington argues that the trial court erred by denying Lexington's motion to compel because its dispute with Exxon about whether the umbrella policy covered Exxon for the casualty fell inside the scope of the arbitration clause in the arbitration agreement that is in the umbrella policy that it issued to Brock Services. According to Lexington, Exxon failed to raise any valid defenses to its motion to compel arbitration, and its motion should have been granted. In response, Exxon

argues that the trial court properly construed the policy in concluding that the policy provided Exxon with coverage for the casualty. According to Exxon, Lexington's policy covers the casualty based on the language found in the policy so no valid disagreement can exist over whether the policy provided Exxon with coverage from the claims that it was required to defend arising from the casualty.

Is Exxon Subject to the Arbitration Agreement?

In its brief, Exxon argues that it is not bound by the arbitration clause in the umbrella policy because Brock Services acquired the policy, it did not negotiate to have a policy that contained an arbitration clause, and it is an additional insured under the agreement. Exxon suggests that a decision to enforce the arbitration clause under circumstances where it did not directly acquire the policy from the carrier would be unconscionable.

However, Exxon cannot seek to recover under the terms of Lexington's policy and at the same time avoid the provisions in the policy that it disfavors. Under the doctrine of direct benefits estoppel, non-signatories to arbitration agreements may be bound to the arbitration clause of a contract when the plaintiff is suing seeking to enforce all of the other terms of a written agreement. *See In re Kellogg Brown & Root, Inc*., 166 S.W.3d 732, 739-40 (Tex. 2005) (orig. proceeding) (explaining that under the doctrine of direct benefits estoppel, a non-signatory plaintiff seeking to

benefit under a contract cannot avoid the contract's arbitration clause). Given that Exxon is suing Lexington on Lexington's policy, we conclude that Exxon cannot avoid the umbrella policy's arbitration clause. *Id*.; *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 755-56 (Tex. 2001) (holding that a non-signatory subjected itself to the contract's terms by suing on the contract, including the contract's arbitration agreement).

Exxon also contends that enforcing the umbrella policy's arbitration provision against additional insureds who were not involved in the negotiations that led to the purchase of the policy would be unconscionable. *See* Tex. Civ. Prac. & Rem. Code Ann. § 171.022 (West 2011) ("A court may not enforce an agreement to arbitrate if the court finds the agreement was unconscionable at the time the agreement was made."). In this case, the trial court did not make a written finding on Exxon's claim of unconscionability. Additionally, Exxon provided no evidence to the trial court in support of its claim that enforcing the arbitration clause would be unconscionable. Finally, in its brief, Exxon did not provide this Court with any citations to any cases in which an appeals court has affirmed a finding of unconscionability where the facts of the case involved the claims of an alleged additional insured.

When the facts that form the basis of the unconscionability claim are undisputed, as here, an appellate court applies a *de novo* standard to review a trial

court's decision to deny a motion to compel arbitration. *See Royston, Rayzor, Vickery, & Williams, LLP v. Lopez*, 467 S.W.3d 494, 499 (Tex. 2015). As the Texas Supreme Court explained in *Lopez*, an arbitration agreement may be either substantively unconscionable, procedurally unconscionable, or both. *Id*. Nevertheless, arbitration agreements in surplus lines insurers' policies are not presumptively unconscionable. *See* Tex. Civ. Prac. & Rem. Code Ann. § 171.001 (West 2011). Additionally, the Supreme Court has explained that "[a]dhesion contracts are not automatically unconscionable, and there is nothing per se unconscionable about arbitration agreements. *In re AdvancePCS Health L.P.*, 172 S.W.3d 603, 608 (Tex. 2015) (orig. proceeding). We further note that Chapter 981 of the Texas Insurance Code, the chapter of the Insurance Code regulating surplus lines insurers, does not prohibit surplus lines carriers from including arbitration provisions in their form policies. *See* Tex. Ins. Code Ann. §§ 981.001-.222 (West 2009 & Supp. 2016). And, section 981.005 provides that insurance contracts obtained from eligible surplus lines insurers are "(1) valid and enforceable as to all parties; and (2) recognized in the same manner as a comparable contract issued by an authorized insurer." Tex. Ins. Code Ann. § 981.005.

By enacting a statute that makes written agreements to arbitrate generally enforceable in Texas, the Legislature created a public policy that expressly favors

the arbitration of a broad range of disputes. *See* Tex. Civ. Prac. & Rem. Code Ann. § 171.001. We find nothing in the Insurance Code or case law indicating that the policy in Texas favoring the arbitration of disputes does not include such provisions when they are in surplus lines umbrella policies.

In arguing that enforcing arbitration would be unconscionable, Exxon does not expressly use the term "procedural unconscionability." Instead, Exxon identifies several factors that it argues support its claim that enforcing the arbitration agreement would be unfair. For example, Exxon notes that Exxon "did not negotiate" the coverage that Brock Services obtained naming Exxon as an additional insured. However, Exxon cannot both sue to enforce the policy and at the same time avoid the terms of the policy that it does not want enforced. *See Kellogg Brown & Root*, 166 S.W.3d at 739 ("A non-signatory plaintiff may be compelled to arbitrate if it seeks to enforce terms of a contract containing an arbitration provision.").

Exxon also argues the written procurement agreement between it and Brock Services does not contain an arbitration provision. However, Exxon's suit against Lexington is based on the terms that are found in the umbrella policy. Even were we to accept the premise of Exxon's argument that the policy as to Exxon is properly characterized as an adhesion contract, Texas law makes it clear that arbitration agreements, even when they are found in adhesion contracts, do not automatically

make the contracts unconscionable. *See AdvancePCS Health L.P.*, 172 S.W.3d at 608.

In this case, the evidence before the trial court showed that Exxon had the right to inspect the policies of insurance that Brock Services acquired for Exxon's benefit. The procurement agreement expressly provides that "[u]pon request by [Exxon], [Brock Services] shall have its insurance carrier(s) furnish to the requestor certified copies of the required insurance policies[.]" There was no evidence before the trial court demonstrating that Lexington or Brock Services refused any requests by Exxon to inspect the policies that Brock Services procured in carrying out its obligations under its agreement with Exxon. Generally, in the absence of fraud, misrepresentation, or deceit, parties are bound by the terms of a contract they have had an opportunity to read regardless of whether they read it or thought it had different terms. *See In re McKinney*, 167 S.W.3d 833, 835 (Tex. 2005). Where, as here, the non-signatory to a contract containing an umbrella policy failed to carry its burden of proving that it did not have an opportunity to read the written agreement containing the arbitration clause, the trial court is required to order the matter to arbitration. *AdvancePCS Health L.P.*, 172 S.W.3d at 608.

When considered in relation to the terms of Exxon's written agreement with Brock Services, the evidence before the trial court failed to demonstrate that the

arbitration clause in Lexington's umbrella policy is either substantively or procedurally unconscionable. We conclude that Lexington has the right to enforce the umbrella policy's arbitration agreement given that Exxon's claims against Lexington are based on the policy.

Duty to Arbitrate

Whether an arbitration clause imposes a duty on the parties to arbitrate a dispute is a matter of contract interpretation. *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986); *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 642-43 (Tex. 2009); *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 237 (Tex. 2003). As a matter of contract interpretation, the scope of the duty to arbitrate is a matter that is resolved by a court, not a jury. *Id*. The proper scope of a given arbitration clause is a matter that is reviewed using a *de novo* standard. *Tex. Petrochemicals LP v. ISP Water Mgmt. Servs. LLC*, 301 S.W.3d 879, 884 (Tex. App.—Beaumont 2009, no pet.); *McReynolds v. Elston*, 222 S.W.3d 731, 740 (Tex. App.—Houston [14th Dist.] 2007, no pet.).

Under Texas law, a written agreement to arbitrate is valid and enforceable if an arbitration agreement exists and the claims asserted are within the scope of the agreement. Tex. Civ. Prac. & Rem. Code Ann. §§ 171.001, 171.021 (West 2011). "To determine whether a party's claims fall within an arbitration agreement's scope,

we focus on the complaint's factual allegations rather than the legal causes of action asserted." *In re FirstMerit Bank, N.A.*, 52 S.W.3d at 754. Courts should not deny a motion to compel arbitration unless the arbitration clause in the parties' agreement is not susceptible of an interpretation that is sufficiently broad so that it includes the matters at issue in a dispute. *Prudential Sec. Inc. v. Marshall*, 909 S.W.2d 896, 899 (Tex. 1995) (orig. proceeding).

Once the party asking that a court compel the parties to arbitrate a dispute demonstrates that the parties' dispute is subject to a valid arbitration agreement, the burden shifts to the party opposing arbitration to demonstrate that the claims in dispute fall outside the scope of the matters the parties agreed to arbitrate. *Marshall*, 909 S.W.2d at 900 (applying this rule to an agreement that was subject to the Federal Arbitration Act); *McReynolds*, 222 S.W.3d at 740 (applying this rule to an agreement that was subject to the Texas Arbitration Act). In determining whether a dispute falls within the terms of a given arbitration agreement, courts focus on the factual allegations in the suit as opposed to the legal causes of action that are in a parties' pleadings. *McReynolds*, 222 S.W.3d at 740. Generally, a strong presumption exists favoring arbitration under Texas law, and trial courts are required to resolve doubts that may arise on such matters in favor of requiring the parties to arbitrate their disputes. *Ellis v. Schlimmer*, 337 S.W.3d 860, 862 (Tex. 2011) (per curiam).

In Exxon's brief, Exxon argues that its dispute over coverage with Lexington is a matter that lies outside the scope of the matters the arbitration clause in the umbrella policy covers. The arbitration agreement in the umbrella policy provides, in pertinent part:

> . . . in the event of a disagreement as to the interpretation of this policy (except with regard to whether this policy is void or voidable), it is mutually agreed that such dispute shall be submitted to binding arbitration before a panel of three (3) Arbitrators consisting of two (2) party-nominated (non-impartial) Arbitrators and a third (impartial) Arbitrator (hereinafter "umpire") as the sole and exclusive remedy.

According to Exxon, no reasonable disagreement can exist about whether the umbrella policy covers the casualty because the policy is not ambiguous. However, in its brief, Lexington advanced several arguments to support its decision denying Exxon's assertion that the umbrella policy covered Exxon at the time of the casualty.

To determine whether a coverage dispute must be arbitrated, we examine the language in the arbitration agreement in context, and we give the arbitration clause its plain grammatical meaning. *See In re Wachovia Sec., LLC*, 312 S.W.3d 243, 247 (Tex. App.—Dallas 2010, orig. proceeding). We also determine the meaning of an arbitration clause in a contract in light of the entire contract. *See BBVA Compass Inv. Sols., Inc. v. Brooks*, 456 S.W.3d 711, 719 (Tex. App.—Fort Worth 2015, no pet.).

In this case, in part, the parties' dispute over coverage revolves around whether Exxon is, or is not, an "additional insured" under Lexington's umbrella policy. In pertinent part, the umbrella policy defines the term "insured" to include:

> Any person or organization, other than the 'Named Insured', included as an additional 'Insured' under 'scheduled underlying insurance', but not for broader coverage than would be afforded by such 'scheduled underlying insurance'.

The parties dispute how the "but not for broader coverage" clause affects Exxon's coverage. The parties also dispute whether the procurement agreement required Exxon to be named on Lexington's umbrella policy as an additional insured. According to Lexington, the procurement agreement required Brock Services to maintain "normal and customary general liability insurance coverage and policy limits." Lexington concludes that the "normal and customary" clause requires that Lexington recognize Exxon as an additional insured for the purposes of the coverage available to Exxon under the general liability policy that Lexington issued to Brock Services, but it claims that the "normal and customary" clause did not require Brock Services to obtain an umbrella policy that named Exxon as an additional insured.

In the trial court, Lexington argued that the question of whether Brock Services was obligated to obtain an umbrella policy naming Exxon as an additional insured should be made by examining Lexington's umbrella policy, the general

liability policy, and the written agreement between Brock Services and Exxon in a six-step analysis. Under Lexington's six-step approach to the documents that it contends are relevant to construing the umbrella policy, Lexington concludes that Brock Services' agreement with Exxon did not require that Brock Services obtain an umbrella policy naming Exxon as an additional insured. On the other hand, Exxon disputes Lexington's arguments regarding the documents that a court should consider in deciding whether Exxon is an additional insured under the umbrella policy, and Exxon contends that the dispute over coverage can be resolved as a matter of law by looking to the policy. In resolving the dispute, the trial court appears to have adopted Exxon's arguments about how to properly construe the umbrella policy. However, the umbrella policy's arbitration provision required the trial court to send the parties' disagreements about the policy to arbitration, "not merely those which the court will deem meritorious." *AT & T Techs.*, 475 U.S. at 649-50.

We express no opinion about whether the trial court properly construed Lexington's umbrella policy in resolving the parties' dispute. We also express no opinion regarding the merits of the parties' arguments about the appropriate method for resolving the coverage dispute. Once Lexington and Exxon disagreed about whether the policy covered the casualty, and Lexington established that the umbrella policy contained a valid arbitration agreement that required disputes over coverage

to be arbitrated, the trial court was required to submit the matter to arbitration regardless of the merits of the respective parties' arguments. *Id*. We hold that the trial court erred by considering the merits of the coverage dispute before sending the matter to arbitration.

Defenses to Arbitration

Once Lexington established that Exxon was a party to an agreement containing a valid arbitration clause and that the dispute fell within the scope of the agreement, the burden shifted to Exxon to raise an affirmative defense to Lexington's motion to compel arbitration. *See Venture Cotton Coop. v. Freeman*, 435 S.W.3d 222, 227 (Tex. 2014). In the trial court, Exxon advanced several defenses, arguing that: (1) Lexington breached the policy by denying coverage, excusing its obligation to comply with the arbitration clause in the agreement; (2) article 21.42 of the Insurance Code provides Texas courts with a right to exercise jurisdiction over surplus lines carriers that issue policies of insurance to Texas residents; (3) Lexington failed to show that it is an authorized surplus lines insurer with rights to enforce its policies in Texas; and (4) Lexington substantially invoked the judicial process by the actions it took to litigate the matter, thereby waiving its right to rely on the arbitration clause in its policy.

First, we address Exxon's argument that the arbitration clause did not survive Lexington's decision to deny coverage. Under both federal and state law, the arbitration clause in a written agreement survives the breach of other contract terms found in a written agreement. *See Local Union No. 721, United Packinghouse, Food & Allied Workers, AFL-CIO v. Needham Packing Co.*, 376 U.S. 247 (1964) (explaining that arbitration provisions in collective bargaining agreements are meant to survive their breach); *Brooks*, 456 S.W.3d at 718 ("An agreement to arbitrate contained within a contract survives the termination or repudiation of the contract as a whole."). We reject Exxon's argument that the arbitration clause was no longer enforceable once Lexington denied Exxon's claim seeking coverage under the policy.

Exxon also argues that enforcing the arbitration clause would frustrate the requirements in article 21.42 of the Texas Insurance Code, a provision that allows Texas courts to exercise jurisdiction over surplus lines carriers who sell insurance policies to Texas residents. Article 21.42 provides:

> Any contract of insurance payable to any citizen or inhabitant of this State by any insurance company or corporation doing business within this State shall be held to be a contract made and entered into under and by virtue of the laws of this State relating to insurance, and governed thereby, notwithstanding such policy or contract of insurance may provide that the contract was executed and the premiums and policy (in case it becomes a demand) should be payable without this State, or at the home office of the company or corporation issuing the same.

Tex. Ins. Code Ann. art. 21.42 (West 2009).

In our opinion, a court's decision to enforce an arbitration clause does not divest the trial court of jurisdiction over the dispute. Under the Texas Arbitration Act, a Texas court has jurisdiction "to enforce the agreement and to render judgment on" the arbitration award. Tex. Civ. Prac. & Rem. Code Ann. § 171.081 (West 2011). While an arbitration clause affects the forum for the resolution of a dispute, the enforcement of an arbitration clause under the Texas Arbitration Act and the Texas Insurance Code does not divest trial courts of jurisdiction to require the parties to abide by the terms of their agreement to arbitrate and to then enforce the arbitrator's decision based on the agreement the parties made to arbitrate their dispute. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 171.001-.098 (West 2011) (Texas Arbitration Act); Tex. Ins. Code Ann. art. 21.42. For example, Texas law allows a Texas court to exercise jurisdiction over nonresident insurance carriers who sell policies to Texas residents by enforcing an arbitration clause in a written agreement and ordering disputes that fall within the provisions of the arbitration agreement to arbitration. *See* Tex. Civ. Prac. & Rem. Code Ann. § 171.021 (requiring Texas courts to order parties to arbitrate on the application of a party showing an agreement to arbitrate and the opposing party's refusal to arbitrate). Contrary to Exxon's claim that the enforcement of the arbitration clause divests the court of jurisdiction, the Texas

Arbitration Act vests a court with jurisdiction to enforce the agreement and to render judgments on arbitration awards. *See* Tex. Civ. Prac. & Rem. Code Ann. § 171.081.

We conclude that enforcing a valid arbitration clause does not divest the trial court of jurisdiction to enforce the arbitration award even though the trial court is no longer the entity assigned the responsibility of deciding the merits of the dispute the parties agreed to arbitrate. In this case, Lexington's umbrella policy required that its dispute with Exxon regarding coverage be resolved through arbitration, but the resolution that follows the arbitration is enforceable in a Texas court. We conclude that Exxon's suggestion that enforcing the arbitration clause defeats the purpose of article 21.42 of the Texas Insurance Code is without merit.

Next, Exxon contends that Lexington failed to meet its burden to show that it is an authorized insurer in Texas entitled to enforce the terms of the umbrella policy in a Texas court. Section 101.201(a) of the Texas Insurance Code provides that policies issued to Texas residents by unauthorized insurers are unenforceable by the insurer. *See* Tex. Ins. Code Ann. § 101.201(a) (West 2009) ("An insurance contract effective in this state and entered into by an unauthorized insurer is unenforceable by the insurer."). When Exxon suggested that Lexington was an unauthorized insurer, Lexington responded by filing the affidavit of the branch manager for the insurance agency that issued the umbrella policy. The branch manager's affidavit

states that when Lexington issued the umbrella policy at issue, "Lexington was an eligible surplus lines insurer, [the agency she worked for] was a licensed surplus lines agency, and [she] was a licensed surplus lines agent."

After Lexington filed the branch manager's affidavit, the burden shifted to Exxon to show that Lexington was not an authorized insurer. *Freeman*, 435 S.W.3d at 227. However, in response to the affidavit of the branch manager of the insurance agency that sold the policy, Exxon produced no evidence to show that the Department of Insurance had not authorized Lexington to sell surplus lines policies to Texas residents.

Exxon's argument relies on section 101.201(a) of the Insurance Code, which makes insurance contracts issues by unauthorized insurance carriers unenforceable in Texas. *See* Tex. Ins. Code Ann. § 101.201(a). However, Exxon ignores the language in section 101.201(b) of the Insurance Code, which provides that section 101.021(a) "does not apply to insurance procured by a licensed surplus lines agent from an eligible surplus lines insurer[.]" Tex. Ins. Code Ann. § 101.201(b) (West 2009). Lexington provided the trial court with evidence to show that it was a licensed surplus lines insurance carrier when it sold the policy at issue, shifting the burden to Exxon to prove otherwise. We hold that Exxon failed to meet its burden to show that

Lexington was not an eligible surplus lines carrier. *See RSL Funding, LLC v. Pippins*, 499 S.W.3d 423, 430 (Tex. 2016).

Exxon also suggests that Lexington waived its right to seek arbitration by substantially invoking the judicial process. The record shows that less than four weeks after Exxon served Lexington with the suit, Lexington moved to compel arbitration and to stay the suit. Exxon claims that Lexington waived its right to rely on the arbitration clause by stipulating to certain matters in June 2015, which occurred after Lexington appeared in the suit. The written stipulation agreement between Exxon and Lexington addresses a number of matters pertaining to the various insurance policies that Lexington issued to Brock Services. While the stipulation concerns matters that Lexington chose not to dispute, the stipulation does not address Lexington's claim that it had a contractual right to enforce the arbitration provision in the umbrella policy. Moreover, in the stipulation, Lexington expressly reserved all of its rights except for those rights that Lexington expressly agreed not to contest. The matters Lexington agreed not to contest did not include its coverage dispute with Exxon over Exxon's rights, if any, under the umbrella policy that Lexington issued.

Exxon contends that the evidence it provided to the trial court shows that it has devoted substantial time and incurred substantial expense in litigating various

claims that were filed against it due to fire that occurred on its premises. However, the matters that Exxon devoted to litigating disputes with parties other than Lexington are not relevant to whether Lexington waived its rights under the terms of the umbrella policy to enforce the policy's arbitration agreement. *Kennedy Hodges, L.L.P. v. Gobellen*, 433 S.W.3d 542, 545 (Tex. 2014) (explaining that litigating a matter with parties who were not parties to a written agreement that contained an arbitration clause did not substantially invoke the litigation process with respect to an individual who was not a party to the written agreement). Exxon failed to prove how much time and expense it had devoted to litigating its claims with Lexington before Lexington filed its motion to compel arbitration. We are also not persuaded that Lexington substantially invoked the judicial process, as the record shows that Lexington did not appear in response to Exxon's claims as a party to the suit until late May 2016. In its initial response, Lexington filed a motion to compel arbitration and asked the trial court to stay the suit. Although the trial court scheduled a hearing on Lexington's motion to compel at Lexington's request in late June 2016, the hearing was re-scheduled to late July 2016 at the request of Exxon's counsel. After the trial court heard Lexington's motion to compel in July, it then asked for additional briefing and did not rule on the motion until September 20, 2016. The procedural history does not show that Lexington unreasonably delayed the case

before it sought to force the matter into arbitration. We hold the record does not support Exxon's claim that Lexington substantially invoked the judicial process before it asked the trial court to compel Exxon to arbitrate the parties' disagreement about whether the umbrella policy covers Exxon for the casualty that occurred on its premises in April 2013.

Finally, Exxon argues that requiring the coverage dispute to be arbitrated will unduly delay the trial. However, the record does not show that Lexington is the party who suggested to the trial court that the matter was ready for trial or the party that requested the current setting. We focus on Lexington's acts in evaluating Exxon's claim that Lexington invoked the judicial process, not acts attributable to other parties. *See Marshall*, 909 S.W.2d at 898. We conclude that the record does not support Exxon's claim that Lexington substantially invoked the judicial process before it asked the trial court to require Exxon to arbitrate its claims.

Conclusion

"[A] litigant who sues based on a contract subjects him or herself to the contract's terms." *In re FirstMerit Bank, N.A.*, 52 S.W.3d at 755. We conclude that Exxon is not entitled to enforce some of the umbrella policy's terms but to defeat others. *See In re Weekley Homes, L.P.*, 180 S.W.3d 127, 135 (Tex. 2005) (orig. proceeding). We reverse the trial court's order denying Lexington's motion to

compel arbitration, and we remand the cause to the trial court with instructions to render an order compelling Lexington and Exxon to arbitrate their disagreements over Exxon's contract rights, if any, under Lexington's umbrella policy number 052456339.

REVERSED AND REMANDED.

HOLLIS HORTON
Justice

Submitted on March 2, 2017
Opinion Delivered April 27, 2017

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