TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00780-CV

Dianna G. Darlington, Appellant

v.

William David Darlington, Appellee

FROM THE DISTRICT COURT OF HAYS COUNTY, 207TH JUDICIAL DISTRICT
NO. 16-0619, HONORABLE BRENDA K. SMITH, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

Dianna G. Darlington filed a notice of appeal seeking to challenge the trial court's order of referral to arbitration, and William David Darlington has filed a motion to dismiss her appeal for lack of jurisdiction.[1] William argues that this Court lacks jurisdiction because the order is a non-appealable, interlocutory order. Because we agree that this Court lacks jurisdiction, we grant the motion and dismiss this appeal for want of jurisdiction.

Background

On October 17, 2016, the trial court signed an agreed final decree of divorce between the parties. In the decree, the trial court recited that, on August 2, 2016, it reviewed, approved and rendered judgment on the parties' Mediated Settlement Agreement that the parties had signed in

[1] Because the parties have the same last name, we refer to them by their first names.

May 2016. Among the parties' agreements in the MSA, the parties agreed to sell the marital residence and, if disputes arose over the marital residence, to resolve the disputes by arbitration as follows:

> If Dianna Darlington and William Darlington cannot resolve any dispute regarding the Property through direct negotiation, or as provided herein, then Dianna Darlington and William Darlington shall submit the issue to binding arbitration with Judge Gary Harger. The costs of arbitration shall be divided equally between the parties with each party paying 50% of any costs associated with the arbitration. Dianna Darlington and William Darlington agree that the arbitrator's decision shall be final and binding as to the issue submitted to arbitration.

The final decree of divorce incorporates the same provision verbatim, reciting the parties' agreement to arbitrate disputes regarding the marital residence with Judge Harger acting as the arbitrator.

On the same day that the trial court signed the agreed final decree of divorce, the trial court also signed the order of referral to arbitration that is the subject of this appeal. In its order, the trial court recited that, on October 7, 2016, it had heard the motion to compel arbitration filed by William and made certain orders that referred the parties' dispute regarding the sale of the marital residence to arbitration before Judge Harger. In his motion to compel arbitration, William had alleged that Dianna had refused to vacate the marital residence or to comply with the appointment of a realtor to sell the residence and that he had sought arbitration based on the parties' agreement in the MSA to arbitrate disputes concerning the residence.

Analysis

On appeal, Dianna raises three issues. She argues that: (i) the trial court erred in entering the order of referral to arbitration because it includes requirements and procedures that were

not contained in the MSA and differs from or changes provisions of chapter 171 of the Texas Civil Practice and Remedies Code; (ii) there was no evidence to support entry of the order; and (iii) in any event, the final decree of divorce had "superseded" or mooted the arbitration order. As support for her third issue, Dianna emphasizes that the signed final divorce decree in the clerk's record bears a file stamp that is one minute later than the file stamp affixed to the record copy of the arbitration order, apparently deducing that the decree was likewise *signed* (i.e., when it became effective for appellate purpose) subsequent to the arbitration order.[2] From this sequence, Dianna reasons that the arbitration order ceased to have any independent effect once the final decree was signed or filed, by virtue of finality language included in the decree.

Dianna also filed a response to William's motion to dismiss, explaining that her appeal "centers on the question of whether simply styling an order as a referral to arbitration gives the trial court the ability to impose procedural requirements that are not contained in the MSA, Agreed Final Decree of Divorce, or Chapter 171 of the Texas Civil Practice & Remedies Code." Dianna also posited in her response that "the parties might be in agreement" that this Court lacks jurisdiction over her appeal if the arbitration order (which, again, she presumed had been signed before the final decree) "was not intended to be part of the Agreed Final Decree of Divorce." In that event, Dianna "agree[d] that [the arbitration order] is no longer effective and is not the proper basis of an appeal." But "[i]f, however, the Order of Referral to Arbitration was intended to be part of

[2] Although the trial court signed the agreed final divorce decree and order of referral to mediation on October 17, 2016, the instruments were filed on the following day, one minute apart.

and/or survive the entry of the Agreed Final Decree of Divorce," Dianna reasoned, the arbitration order "is effectively part of the final order and a proper basis for this appeal."

Regardless of the sequence in which they were signed, the net effect of the final decree and the arbitration order, as relevant to this proceeding, is that: (1) the arbitration provision in the MSA is now incorporated verbatim into the final divorce decree; and (2) the trial court's arbitration order enforces that provision. The arbitration order is interlocutory not because of any temporal relationship to the final decree, but because it precedes any additional judgment through which an arbitration award would be given effect. *See* Tex. Civ. Prac. & Rem. Code §§ 171.081 (conferring jurisdiction on court to enforce agreement to arbitrate), .098 (authorizing appeal from judgment entered under chapter 171); *see, e.g.*, *Saks v. Rogers*, No. 04-16-00286-CV, 2017 Tex. App. LEXIS 6923, at *13–14 (Tex. App.—San Antonio July 26, 2017, no pet.) (mem. op.) (addressing appellant's challenge to order compelling arbitration in appeal from judgment confirming arbitration award); *Elm Creek Villas Homeowner Ass'n v. Beldon Roofing & Remodeling Co.*, 940 S.W.2d 150, 153–54 (Tex. App.—San Antonio 1996, no writ) (holding that order compelling arbitration was not subject to judicial review until arbitration was completed).

Under Texas procedure, appeals generally may only be brought from final orders or judgments that dispose of all pending legal issues and parties. *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001) (stating that "the general rule, with a few mostly statutory exceptions, is that an appeal may be taken only from a final judgment" and that "judgment is final for purposes of appeal if it disposes of all pending parties and claims in the record, except as necessary to carry out the decree"); *see also* Tex. Civ. Prac. & Rem. Code § 51.012 (authorizing

appeals of trial courts' final judgments). Here, the order of referral to arbitration does not dispose of the pending legal issues or parties and, thus, it is not a final order. *See Lehmann*, 39 S.W.3d at 195; *see also* Tex. Civ. Prac. & Rem. Code § 171.081 (conferring jurisdiction on court to enforce agreement to arbitrate and to render judgment on arbitration award under chapter); *In re Provine*, 312 S.W.3d 824, 829–30 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (explaining that trial court that rendered divorce decree "has continuing jurisdiction to render further orders to enforce the division of the property made in the decree of divorce[,] to assist in the implementation of[,] or to clarify the prior order").

Further, the general Texas statute permitting appeals of interlocutory orders does not authorize an appeal from an order granting arbitration. *See generally* Tex. Civ. Prac. & Rem. Code § 51.014. Chapter 171 of the Texas Civil Practice and Remedies Code, which specifically addresses arbitration, also does not authorize an appeal from an order granting arbitration. *See id.* § 171.098(a) (authorizing appeal of order "denying an application to compel arbitration," "granting an application to stay arbitration," "confirming or denying confirmation of an award," "modifying or correcting an award," or "vacating an award without directing a rehearing"); *see also Mohamed v. AutoNation USA Corp.*, 89 S.W.3d 830, 833–34 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (observing that "no interlocutory appeal lies from an order granting a motion to compel arbitration under TAA" and that "[o]nly mandamus lies over an order granting a motion to compel arbitration under the TAA").

Thus, we do not have jurisdiction over this appeal. *See Mustafa v. Rippy*, No. 03-15-00422-CV, 2015 Tex. App. LEXIS 9934, at *1 (Tex. App.—Austin Sept. 24, 2015, no

pet.) (mem. op.) (concluding that this Court lacked jurisdiction to review trial court's interlocutory order granting arbitration).

Conclusion

For these reasons, we dismiss this appeal for want of jurisdiction.

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Melissa Goodwin, Justice

Before Chief Justice Rose, Justices Pemberton and Goodwin

Dismissed for Want of Jurisdiction

Filed: October 6, 2017