# NUMBER 13-17-00184-CV

# COURT OF APPEALS

# THIRTEENTH DISTRICT OF TEXAS

# CORPUS CHRISTI - EDINBURG

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**SUPER STARR INTERNATIONAL, LLC, LANCE PETERSON, AND RED STARR, SPR DE RL DE CV,** **Appellants,**

**v.**

**FRESH TEX PRODUCE, LLC, INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF TEX STARR DISTRIBUTING, LLC, AND KEMAL MERT GUMUS,** **Appellees.**

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**On appeal from the 92nd District Court of Hidalgo County, Texas.**

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## MEMORANDUM OPINION

**Before Justices Rodriguez, Benavides, and Hinojosa**
**Memorandum Opinion by Justice Rodriguez**

This appeal concerns an arbitration agreement. Appellants Lance Peterson and his two companies Super Starr International, LLC (the Importer) and Red Starr, SPR de

RL de CV (the Grower) grow papayas. Appellants collaborated with appellee Fresh Tex Produce, LLC (Fresh Tex) to distribute the papayas in the United States. Together, appellants and Fresh Tex formed a separate company for distribution: Tex Starr Distributing, LLC (the LLC). However, the relationship between the parties soured, and Fresh Tex filed suit, individually and derivatively on behalf of the LLC.

Appellants moved to compel arbitration. Fresh Tex responded with a motion to enjoin arbitration, which the trial court granted. Further, the court denied appellants' motion to stay litigation, and it set the case for trial.

By two issues, appellants contend that the agreement required the trial court to defer the question of arbitrability to the arbitrator. We reverse and remand.

## I. BACKGROUND

This is our second occasion to consider an interlocutory appeal from the suit between Fresh Tex and appellants. In our prior opinion, we detailed the development of the papaya distribution business that was founded by Fresh Tex and appellants, the breakdown of their relationship, and the subsequent suit and temporary injunction. *Super Starr Int'l, LLC v. Fresh Tex Produce, LLC*, __S.W.3d__, __, No. 13-16-00663-CV, 2017 WL 3084294, at *1 (Tex. App.—Corpus Christi July 20, 2017, no pet. h.) [hereinafter "*Super Starr I*"].

Kenneth Alford owns and manages Fresh Tex, a produce distribution business based in Texas. On October 18, 2016, Fresh Tex filed suit individually and derivatively on behalf of the LLC. Named as defendants were: (1) the Importer, a Texas entity that imports produce into the United States; (2) the Grower, a Mexican entity that grows produce in Mexico and exports it into the United States through the Importer; (3) Lance

Peterson, the current president and owner of the Importer and the Grower; and (4) Kemal Mert Gumus, an employee of the Importer.

The crux of Fresh Tex's suit is that the appellants committed various torts[1] when they started a competing produce-distribution operation and took customers away from Fresh Tex and the LLC. Fresh Tex requested a temporary injunction to compel appellants to continue distributing papayas exclusively through the LLC, among other things. After hearing the evidence, the trial court granted Fresh Tex's request and entered a temporary injunction which was the subject of our opinion in *Super Starr I*. *See id.* This appeal concerns a second temporary injunction which enjoins appellants from pursuing arbitration.

**A. Origins of the Underlying Suit**

The record reveals that in 2010, Alford was approached by David Peterson, the father of appellant Lance Peterson. David was also the founder and co-owner of the Importer and the Grower. David proposed that Fresh Tex and the Importer work together to market a new hybrid papaya and, to that end, form a new limited liability company. Alford agreed. On January 1, 2011, the LLC was formed with two members, Fresh Tex and the Importer, and two managers, Alford and David Peterson.

Alford, David, and Lance executed an operating agreement (the First Agreement) to govern the LLC. Section 14.7 of the First Agreement provided that the parties would submit any disputes to binding arbitration.

[1] Fresh Tex alleged that when the Importer began its own distribution operation, the Importer misappropriated trade secrets belonging to Fresh Tex and the LLC (in particular, customer lists), committed breach of fiduciary duty, tortiously interfered with existing and prospective contractual relations, breached various agreements, and violated of the Texas Theft Liability Act.

David passed away in September 2013. Lance assumed ownership of the Importer and the Grower, and by extension, assumed control over half of the LLC. At some point, the parties executed a revised version of the agreement, effective January 1, 2014 (the Second Agreement). The Second Agreement contained the following arbitration clause which was identical to the one in the First Agreement:

> 14.7 Arbitration. Any claim, controversy, or dispute arising out of or relating to this Agreement shall, except as set forth herein, be settled by arbitration in the State of Texas in accordance with the rules of the American Arbitration Association. This agreement to arbitrate shall survive the termination of this Agreement. Any arbitration shall be undertaken pursuant to the Federal Arbitration Act, where applicable, and the decision of the arbitrators shall be final, binding, and enforceable in any court of competent jurisdiction. In any dispute in which a party seeks in excess of $50,000 in damages, three arbitrators shall be employed. Otherwise, a single arbitrator shall be employed. All costs relating to the arbitration shall be borne equally by the parties, other than their own attorneys' fees. The arbitrators shall not award punitive damages. Discovery depositions shall not be taken in the arbitration proceedings. Any Member may pursue remedies for emergency or preliminary injunctive relief in any court of competent jurisdiction. However, immediately following the issuance or denial of any such emergency or injunctive relief, the Members party to such a proceeding shall consent to the stay of such judicial proceedings on the merits of both this Agreement and the related transaction pending arbitration of all underlying claims between the Members.

Near the end of March 2016, Lance met with Alford and explained that the Importer would discontinue distributing papayas through the LLC. Instead, the Importer would begin its own distribution operation starting July 1, 2016. Fresh Tex filed this suit.

**B. Second Temporary Injunction Concerning Arbitration**

On February 2, 2017, appellants filed a demand for arbitration with the American Arbitration Association (AAA). Appellants soon moved to stay proceedings in the trial court and to compel arbitration. Fresh Tex responded with its own motion to enjoin appellants from pursuing arbitration.

The trial court granted Fresh Tex's motion, entered a temporary injunction to prevent appellants from pursuing arbitration, denied appellants' motion to stay litigation, and set the case for trial. In its orders, the trial court stated multiple reasons for enjoining arbitration: David Peterson's signature on the Second Agreement was an apparent forgery, appellants waived their right to arbitrate, and Fresh Tex's claims were beyond the scope of the arbitration clause, among other alternative grounds.

This second interlocutory appeal followed.

## II. WHO DECIDES THE QUESTION OF ARBITRABILITY?

We first take up the threshold issue of who should decide questions of arbitrability: the trial court or the arbitrator. As part of their first and second issues, appellants argue that questions of arbitrability—that is, the questions of whether there is a binding arbitration agreement, and whether that agreement encompasses the claims at issue—must be decided by the arbitrator.

Appellants point out that both the First and Second Agreements incorporate the arbitration rules of the AAA. Appellants direct our attention to multiple cases holding that where the AAA rules are incorporated in the agreement, the arbitrator is to decide questions of arbitrability. Accordingly, appellants argue that the trial court abused its discretion in reaching questions of arbitrability rather than referring those matters to the arbitrator.

### A. Standard of Review

We assess the trial court's ruling on an application for a temporary injunction under the abuse of discretion standard. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002) (op. on reh'g). We review an order denying a motion to compel arbitration under

an abuse of discretion standard. *In re Labatt Food Serv., LP*, 279 S.W.3d 640, 643 (Tex. 2009) (orig. proceeding). Under that standard, we defer to the trial court's factual determinations if they are supported by evidence, but we review the trial court's legal determinations de novo. *Id.* Whether an arbitration agreement is enforceable is subject to de novo review. *Id.* The test for abuse of discretion is whether the trial court ruled arbitrarily, unreasonably, without regard to guiding legal principles, or without supporting evidence. *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998).

**B. Applicable Law**

A party may bring an interlocutory appeal from an order granting a temporary injunction, TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(4) (West, Westlaw through 2017 R.S.), or from an order denying a motion to compel arbitration under the FAA. *See id.* § 51.016 (West, Westlaw through 2017 R.S.).

Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute to which he has not agreed to submit. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002). A party seeking to compel arbitration under the FAA must establish two threshold questions of arbitrability: (1) that there is a valid arbitration clause, and (2) that the claims in dispute fall within that agreement's scope. *In re Rubiola*, 334 S.W.3d 220, 223 (Tex. 2011) (orig. proceeding).

These questions must be decided by the courts, unless the parties clearly and unmistakably agreed otherwise. *Howsam*, 537 U.S. at 83; *In re Weekley Homes, LP*, 180 S.W.3d 127, 130 (Tex. 2005) (orig. proceeding). Thus, gateway disputes about whether the parties are bound by a valid arbitration clause or whether an arbitration clause applies to a particular type of controversy are, by default, questions for the court.

*Howsam*, 537 U.S. at 83. These questions will only be submitted to the arbitrator if there is unmistakable evidence that the parties so agreed. *Weekley Homes*, 180 S.W.3d at 130.

When the parties agree to a broad arbitration clause, and that clause incorporates arbitration rules that specifically empower an arbitrator to decide issues of arbitrability, the incorporation of those rules may serve as clear and unmistakable evidence of the parties' agreement to delegate such issues to an arbitrator. *Saxa Inc. v. DFD Architecture Inc.*, 312 S.W.3d 224, 230 (Tex. App.—Dallas 2010, pet. denied); *see also In re Rio Grande Xarin II, Ltd.*, No. 13-10-00115-CV, 2010 WL 2697145, at *8 (Tex. App.—Corpus Christi July 6, 2010, pet. dism'd) (mem. op.) (combined appeal & orig. proceeding).

According to AAA commercial arbitration rule R-7, "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." AAA, COMMERCIAL ARBITRATION RULES & ADMIN. PROCS., R. R-7(a) (2013); *see also id.* R. R-8. In light of rule R-7, many courts—including this Court—have recognized that incorporation of the AAA rules may constitute clear and unmistakable evidence that the parties agreed to commit the question of arbitrability to the arbitrator. *See Trafigura Pte. Ltd. v. CNA Metals Ltd.*, __S.W.3d__, __, No. 14-16-00530-CV, 2017 WL 2784950, at *4 (Tex. App.—Houston [14th Dist.] June 27, 2017, no pet. h.); *Jody James Farms, JV v. Altman Grp., Inc.*, 506 S.W.3d 595, 599 (Tex. App.—Amarillo 2016, pet. filed) (cataloging federal cases); *Schlumberger Tech. Corp. v. Baker Hughes Inc.*,

355 S.W.3d 791, 802 (Tex. App.—Houston [1st Dist.] 2011, no pet.); *Saxa*, 312 S.W.3d at 230; *see also Rio Grande Xarin*, 2010 WL 2697145, at *8 (cataloging cases).

**C. Application**

Here, both the First and Second Agreements provide that "[a]ny claim, controversy, or dispute arising out of or relating to this Agreement shall, except as set forth herein, be settled by arbitration in the State of Texas in accordance with the rules of the American Arbitration Association." This broad arbitration clause and the incorporation of the AAA rules, taken together, serve as clear and unmistakable evidence of the parties' intent to delegate the question of arbitrability to the arbitrator. *See Saxa*, 312 S.W.3d at 230; *see also Rio Grande Xarin*, 2010 WL 2697145, at *8.

Fresh Tex argues that this matter is distinguishable from *Saxa* and other opinions that are similar to our holding in *Rio Grande Xarin*. According to Fresh Tex, there is uncertainty as to which version of the AAA rules applies here: the 2009 version, which was in effect when the First Agreement was executed; or the 2013 version, which was in effect when the Second Agreement was executed. Fresh Tex contends that this uncertainty prevents appellants from demonstrating a clear and unmistakable agreement to arbitrate the question of arbitrability.

However, even assuming some uncertainty as to which version applies here, the 2013 version of the AAA rules includes a provision identical to rule R-7(a) in the 2009 version. *See Schlumberger*, 355 S.W.3d at 803 (quoting an identical version of rule R-7(a) that was in effect from 2009 through 2013). In either instance, the AAA rules provide the arbitrator with the power to determine his or her own jurisdiction.

Because there is unmistakable evidence that the parties agreed to arbitrate questions of arbitrability, it is for the arbitrator to decide whether Fresh Tex must arbitrate its claims. *See Saxa*, 312 S.W.3d at 230; *see also Rio Grande Xarin*, 2010 WL 2697145, at *8. The trial court therefore abused its discretion when it reached these questions and denied the arbitrator the opportunity to decide them. *See Labatt Food Serv.*, 279 S.W.3d at 643; *Butnaru*, 84 S.W.3d at 204. The trial court's injunction against arbitration must be dissolved, and litigation in the trial court must be stayed pursuant to appellants' request.[2]

We sustain appellants' first and second issues.

## III. CONCLUSION

We reverse the ruling of the trial court and remand the matter to the trial court. In *Super Starr I*, we directed the trial court to modify its first temporary injunction concerning the use of trade secrets, the distribution of papayas, and other matters. *See* __S.W.3d at __, 2017 WL 3084294 at *17–18. Once the modifications described in *Super Starr I* have been completed, the trial court shall dissolve the temporary injunction against arbitration and stay proceedings in the trial court pending resolution through arbitration. We lift our stay of proceedings in the trial court.

NELDA V. RODRIGUEZ
Justice

Delivered and filed the 14th
day of September, 2017.

[2] Because we find this argument dispositive, we need not address appellants' remaining arguments. *See* TEX. R. APP. P. 47.1.