# NUMBER 13-18-00596-CV

# COURT OF APPEALS

# THIRTEENTH DISTRICT OF TEXAS

# CORPUS CHRISTI – EDINBURG

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**FRIES RESTAURANT MANAGEMENT, LLC D/B/A BURGER KING,** **Appellant,**

**v.**

**LUCERO SILVA,** **Appellee.**

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**On appeal from the 206th District Court of Hidalgo County, Texas.**

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# MEMORANDUM OPINION

## Before Justices Hinojosa, Perkes, and Tijerina
## Memorandum Opinion by Justice Tijerina

Appellant Fries Restaurant Management, LLC (Fries) d/b/a Burger King appeals the trial court's order granting appellee Lucero[1] Silva's motion to reconsider its previous

[1] Lucero Silva identified herself in the trial court as Lucero Silva. On appeal, the parties claim Lucero's name is Lucerito Silva. However, Lucero Silva is the name that appears in the pleadings throughout the trial court and in the trial court's judgment.

order compelling arbitration. By one issue, Fries argues that Silva failed to raise an issue of fact concerning whether a valid arbitration agreement exists. We reverse and remand.

## I. BACKGROUND

In May 2016, Silva began working for Burger King. Three months later, she did not return to her employment. In August 2017, Silva sued Fries based upon allegations arising from her employment with Burger King. On November 6, 2017, Fries filed a motion to compel arbitration. In its motion, Fries argued that Silva agreed to submit all disputes between her and Burger King to binding arbitration. The trial court set the motion for a hearing on April 23, 2018. Silva did not file a response to Fries's motion, and she failed to appear at the hearing.

At the hearing, Fries submitted the declaration of its General Counsel Carlisle Braun to support its motion to compel arbitration. Braun asserted that he was the custodian of records for Fries, and he attached an agreement to arbitrate allegedly containing Silva's electronic signature. Following the hearing, the trial court entered an order granting Fries's motion to compel arbitration.

On April 30, 2018, Silva filed a motion for reconsideration of the trial court's order compelling arbitration. In her motion, Silva asserted that Fries failed to produce competent evidence establishing that an arbitration agreement existed between the parties. She attached her affidavit averring that she did not agree to arbitrate disputes she may have had with Burger King.

At an evidentiary hearing on September 21, 2018, Burger King Manager Miguel Arteaga testified that although he did not recollect Silva specifically, he hired her. Arteaga stated, all Burger King applicants are required to submit online applications because the

hiring process is paperless. If a person walks into Burger King and requests an application, Arteaga directs them to the online website. Before an applicant is hired, the applicant must sign and agree to arbitrate any disputes with Burger King. According to Arteaga, he has never seen a personnel file that did not include a signed arbitration agreement.

By contrast, Silva denied that she submitted an online application and claimed instead that she completed a paper application. Contrary to Arteaga's testimony that the hiring process was paperless, Silva testified that she submitted hard copies of all her paperwork. Silva stated she did not agree to arbitrate any dispute with Burger King, and she denied receiving such an agreement. Following a hearing, the trial court granted Silva's motion to reconsider the trial court's previous order compelling arbitration and set the case for trial. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 171.098 (authorizing an interlocutory appeal from an order denying arbitration).

## II. EVIDENTIARY HEARING

By its sole issue, Fries asserts the trial court erred in granting Silva's motion for reconsideration of its order compelling the parties to arbitrate. Because Silva does not dispute that the terms of the arbitration agreement would require her to arbitrate her employment discrimination claims, we consider only whether Fries presented evidence that a reasonable factfinder could not disregard, which establishes that Silva signed the arbitration agreement despite her statement that she did not. *See Delfingen US–Tex., L.P. v. Valenzuela*, 407 S.W.3d 791, 798 (Tex. App.—El Paso 2013, no pet.) (providing that a party seeking to compel arbitration must establish both the existence of an agreement and that an arbitrable dispute exists within that agreement's scope).

## A. Standard of Review and Applicable Law

We review a trial court's order denying a motion to compel arbitration under an abuse of discretion standard. *Henry v. Cash Biz*, LP, 551 S.W.3d 111, 115 (Tex. 2018). We defer to the trial court's factual determinations if they are supported by evidence but review its legal determinations de novo. *Id*. We will reverse the trial court's ruling only if the trial court acted without reference to any guiding rules and principles, such that its ruling was arbitrary or unreasonable. *Wright v. Hernandez*, 469 S.W.3d 744, 750 (Tex. App.—El Paso 2015, no pet.).

If a party opposing the motion to compel arbitration denies the existence of the agreement, the court is required to summarily determine that issue. TEX. CIV. PRAC. & REM. CODE ANN. § 171.021(b). Motions to compel arbitration are ordinarily decided in summary proceedings "on the basis of affidavits, pleadings, discovery, and stipulations." *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 272–73 (Tex. 1992); *Kmart Stores of Tex., L.L.C. v. Ramirez*, 510 S.W.3d 559, 569–70 (Tex. App.—El Paso 2016, pet. denied). "A summary motion to compel arbitration is essentially a motion for partial summary judgment, subject to the same evidentiary standards." *In re Bunzl USA, Inc.*, 155 S.W.3d 202, 208 (Tex. App.—El Paso 2004, orig. proceeding). Where a party seeking to compel arbitration provides competent, prima facie evidence of an arbitration agreement, and the party seeking to resist arbitration contests the agreement's existence and raises genuine issues of material fact "by presenting affidavits or other such evidence as would generally be admissible in a summary proceeding[,]" the trial court must forego summary disposition and hold an evidentiary hearing commonly referred to as a "*Tipps* hearing." *Tipps*, 842 S.W.2d at 269; *Nabors Drilling USA, L.P. v. Carpenter*, 198 S.W.3d 240, 246 (Tex. App.—

San Antonio 2006, no pet.). Where the trial court conducts such a "*Tipps* hearing" and thereafter makes a ruling, we review the trial court's findings for legal sufficiency. *Kmart*, 510 S.W.3d at 565.

The party alleging an arbitration agreement must present complete summary proof of his "case in chief" that an agreement to arbitrate requires arbitration of the issues in dispute. *In re Jebbia*, 26 S.W.3d 753, 757 (Tex. App.—Houston [14th Dist.] 2000, orig. proceeding). "If that summary proof intrinsically raises issues about the procedural enforceability of the agreement, the movant's summary proof should include any evidence that resolves those issues without creating an issue of material fact." *Id*. The non-movant can resist summary arbitration by raising an issue of material fact regarding the existence of the agreement or whether the claims fall within the scope of the agreement. *In re DISH Network, L.L.C.*, 563 S.W.3d 433, 438 (Tex. App.—El Paso 2018, orig. proceeding).

"In a nonjury proceeding, when no findings of fact or conclusions of law are filed or requested, we infer that the trial court made all the necessary findings to support its judgment." *Paragon Indus. Applications, Inc. v. Stan Excavating, L.L.C.*, 432 S.W.3d 542, 548 (Tex. App.—Texarkana 2014, no pet.). "When the inferred findings of fact are supported by the evidence, the appellate court must uphold the judgment on any theory of law applicable to the case." *Id*. at 549. We review the legal sufficiency of the evidence by considering the evidence in the light most favorable to the challenged finding, crediting favorable evidence if a reasonable factfinder could and disregarding contrary evidence unless a reasonable factfinder could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 807 (Tex. 2005). Evidence is legally insufficient if the record reveals: (a) the complete absence of a vital fact; (b) the court is barred by rules of law or of evidence from giving weight to

the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; or (d) the evidence establishes conclusively the opposite of the vital fact. *Id*. at 810. Evidence is legally sufficient if it would enable fair-minded people to reach the verdict under review. *Id*. at 827. When conducting a review of the legal sufficiency of the evidence, we are mindful that the factfinder was the sole judge of the credibility of the witnesses and weight to be given their testimony. *Id*. at 819.

## B. Discussion

### 1. The Evidence

At the evidentiary hearing, Arteaga explained that Burger King's hiring process required for Silva to complete the following: (1) create a unique log-in account including a username and password through an online system known as talentReef; and (2) complete an employment application online, which includes inputting the applicant's personal information. After the applicant completes the electronic application, a Burger King manager reviews it. If the manager approves the application, he will call the applicant for an interview. After a successful interview, the applicant agrees to a background check. Once the applicant passes the background check, the applicant is tentatively offered employment. After receiving an offer, the employee must again login using the unique login information the employee created to fill out various personnel documents for employment, including a W-4 form, an I-9 form, and a mandatory arbitration agreement. The employee must digitally sign each document. Thereafter, the hiring manager must digitally sign the document by entering the manager's own unique login and password information and complete the tasks necessary for the employee to be submitted to payroll.

TalentReef's Vice President Paula Passalacqua explained that only someone with personal knowledge of Silva's address, phone number, or e-mail could have entered Silva's information into their secure database. Silva's entire personnel file was admitted into evidence. Passalacqua provided step-by-step screen shots of Silva's online application as it would appear to Silva throughout her application process. The application included Silva's home address, cell phone number, personal e-mail address employment history, personal references and phone numbers for reach reference, along with Silva's social security number. Silva's digital signature dated May 20, 2016, at 2:42 p.m., appeared on the application. Also included in Silva's personnel file was a "MUTUAL AGREEMENT TO ARBITRATE" reflecting Silva's digital signature dated May 20, 2016, at 3:01 p.m. Arteaga's digital signature also appeared on the documents dated May 20, 2016, at 3:23 p.m. He explained that unless all online forms—including the agreement to arbitrate—were completed, he could not have hired Silva, and Silva could not have been added to payroll. Employees are only able to login to the system, clock-in, or clock-out during their works shift once they complete the online forms and agreement to arbitrate.

**2. Burden Shift**

The record shows that Fries presented *prima facie* evidence that an arbitration agreement exists. *In re DISH Network, L.L.C.*, 563 S.W.3d at 438. Consequently, the burden shifted to Silva to raise a fact issue regarding the existence of an arbitration agreement. *See id*.

In this regard, Silva testified that she completed a paper application on May 20, 2016, even though no handwritten application appeared in her file. She denied completing an electronic application and could not explain all the digital paperwork in her file. She

also denied that the e-mail address on her talentReef file was hers. According to Silva, she submitted a paper application at Burger King and was called back to fill out additional paperwork, in writing, which consisted of an I-9, W4, and a consent to a background check. She stated she did not sign an agreement to arbitrate.

For Silva to have raised a fact issue, a person would have to conclude the following: (1) Silva completed a paper application although all other Burger King employees completed online applications and Burger King utilizes a paperless application system; (2) Silva's paper application disappeared from her personnel file; (3) Burger King somehow anticipated Silva would sue Fries such that someone other than Silva forged an online job application using her name, personal contact information, social security number, education, job history, e-mail address, and personal references; (4) someone other than Silva signed the online application on Silva's behalf and retroactively applied a date and time stamp to coincide with the date she claims she filled out a paper application; (5) and Arteaga managed to include Silva on payroll even though she did not fill out the required online forms. Fries's evidence proves that such a set of events is highly unlikely such that it was sufficient to raise a genuine issue of material fact.[2] *See Holmes v. Air Liquide USA LLC*, No. H-11-2580, 2012 WL 267194, *3 (S.D. Tex. Jan. 30, 2012), *aff'd on other grounds*, 498 Fed. Appx. 405 (5th Cir. 2012)). In other words, the evidence presented by Fries conclusively establishes the opposite of Silva's testimony. *See City of Keller*, 168 S.W.3d at 810. Fries presented uncontested evidence regarding the physical impossibility of completing the talentReef paperwork without electronically signing the mutual agreement to arbitrate. Arteaga also testified that it was impossible for

[2] Silva offered no evidence to explain what happened to the paper application, why it was not found in her file, or why a digital application with her personal information did appear.

an employee to be added to payroll without signing the agreement to arbitrate. Moreover, Arteaga stated he could not have completed Silva's application for her because he would have needed her password and personal information, which was not allowed. Thus, Silva's denials are legally insufficient and no more than a scintilla because Fries's evidence conclusively establishes the opposite. *See City of Keller*, 168 S.W.3d at 810. "[T]estimony by an interested witness may establish a fact as a matter of law only if the testimony could readily be contradicted if untrue, and is clear, direct and positive, and there are no circumstances tending to discredit or impeach it." *Preston Reserve, L.L.C. v. Compass Bank*, 373 S.W.3d 652, 657–58 (Tex. App.—Houston [14th Dist.] 2012, no pet.). Here, Fries submitted timestamped records showing each of Silva's computer records in sequential order, which discredits and impeaches Silva's denials. *Id*.; *see also H.E.B. Grocery Co. L.P. v. Perez*, No. 13-18-0063-CV, 2019 3331466, at *2 (Tex. App.—Corpus Christi–Edinburg July 25, 2019, no pet.) (mem. op.) (providing that "uncontroverted testimony from HEB Human Resources . . . established that Perez had to review and consent to the "Agreement to Arbitrate" before submitting her final work application for consideration). Thus, the foregoing evidence establishes that Silva agreed to arbitration.

Silva relies on *Kmart* to argue that Fries submitted legally insufficient evidence at the evidentiary hearing. *See Kmart*, 510 S.W.3d at 559. In *Kmart*, Kmart introduced an arbitration policy two years after the employee's employment began and asserted the employee confirmed acknowledgment and receipt of the agreement via online portal. *Id*. at 563. The agreement stated that "arbitration [was] not a mandatory condition of [an employee's] employment at Company" as the employee could opt out of arbitration by taking affirmative steps within thirty days. *Id*. Thus, the issue in that case was whether the

employee's acceptance of the agreement was valid absent his signature when the employee "viewed the document and thus had notice of its contents." *See id*. n.3. At the evidentiary hearing, the employee testified he had no knowledge of the arbitration agreement. *Id*. at 564. "Kmart presented no new evidence at the hearing and only moved to admit the evidence it had already submitted with its motion." *Id*. The trial court denied the motion to compel arbitration. *Id*.

*Kmart* is distinguishable from the fact here because Kmart argued "acceptance-by-conduct" of its arbitration agreement, and Fries is not asserting such an argument here. *See id*. at 565. Unlike in *Kmart*, Fries did not introduce an arbitration policy after employment began; rather, Burger King applicants could not be hired without signing and agreeing to arbitrate prior to employment. The uncontradicted evidence here shows that Silva could not "opt out." The issue before us is not whether Silva received notice of an arbitration agreement after she began her employment and thereby agreed to it by continuation of employment. Here, Silva did not merely acknowledge the agreement, she accepted it; the agreement was mandatory prior to employment, and her signature appears on the document itself. *See In re Dallas Peterbilt, Ltd*., *L.L.P*., 196 S.W.3d 161, 163 (Tex. 2006) (per curiam) (holding that by signing the acknowledgment form and commencing his employment, plaintiff accepted the arbitration agreement as a matter of law); *cf*. *Kmart*, 510 S.W.3d at 570 ("We are not unsympathetic to Kmart's concerns that if we credit the trial judge's findings here, the strength of many . . .arbitration agreements distributed through an electronic portal can be undermined by an employee's oral denial of notice at a *Tipps* hearing, should the trial judge believe the employee." But that "is a gamble every employer takes any time it foregoes an employee signature and instead

hangs its hat on a fact finder's determination of whether it met [] notice requirements."). Moreover, in *Kmart*, the court of appeals relied on the fact that Kmart did not present any new evidence at the evidentiary hearing while the employee presented in-court testimony and stated the following: "Kmart has failed to cite any authority requiring the courts to give presumptive credence to an employer's electronic records over an employee's testimony in arbitration determinations, and we will not hold so today." 510 S.W.3d at 570. This reasoning is not applicable here.

Based on the evidence presented from Fries at the evidentiary hearing, the trial court could have drawn only one reasonable conclusion: Silva completed the online job application found in her personnel file, and she consented to the arbitration agreement with her digital signature. *See* TEX. BUS. & COM. CODE ANN. § 322.009(a) ("An electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown . . . [by] a showing of the efficacy of any security procedure applied to determine the person to which the electronic record . . . was attributable."); *Alorica v. Tovar*, 569 S.W.3d 736, 740 (Tex. App.—El Paso 2018, no pet.) ("A signature, electronic or otherwise, is generally deemed to be sufficient to show assent to an arbitration agreement."). Therefore, the trial court erred when it concluded that Silva raised a genuine issue of material fact regarding whether a valid arbitration agreement exists. *See City of Keller*, 168 S.W.3d at 187. We sustain Fries's sole issue.

## III. CONCLUSION

We reverse the trial court's order granting the motion to reconsider the order compelling arbitration, and we remand the case to the trial court for entry of an order compelling the underlying case to arbitration.

JAIME TIJERINA,
Justice

Delivered and filed the
30th day of July, 2020.