Affirmed and Majority and Dissenting Opinions filed November 15, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-01509-CV

SHABAHRAM "BOB" YAZDANI-BEIOKY, CAROLYN YAZDANI-BEIOKY, and SOUTHWEST APARTMENT GROUP, INC., Appellants

V.

FEROZE "FRED" BHANDARA, FEROZE "FRED" BHANDARA AS TRUSTEE OF THE BHANDARA LIVING FAMILY TRUST, and REGENCY CROSSING, LLC, Appellees

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On Appeal from the 215th District Court
Harris County, Texas
Trial Court Cause No. 2000-42847

M A J O R I T Y O P I N I O N

This is an interlocutory appeal from an order partially denying a motion to compel arbitration. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 171.098(a)(1) (Vernon Supp. 2001). We affirm the trial court's order.

Regency Crossing, LLC, is a Texas limited liability company formed by Feroze "Fred" Bhandara, Trustee for the Bhandara Family Living Trust ("Bhandara"), and Shabahram "Bob" Yazdani-Beioky ("Yazdani"). Bhandara and Yazdani are equal members and co-managers of Regency Crossing. The regulations for Regency Crossing contain the

following arbitration clause:

> All claims, disputes and other matters in question, arising out of, or relating to these regulations or operation of the business of REGENCY CROSSING, LLC, shall be decided by arbitration . . . .

In 1997, Regency Crossing purchased an apartment complex known as Regency Oaks Apartments. Regency Crossing entered into a Residential Management Agreement ("RMA") with Southwest Apartment Group, Inc. for the management and operation of Regency Oaks. Southwest is a Texas corporation; its president is Yazdani, who signed the RMA on Southwest's behalf. It is undisputed that the RMA does not contain an arbitration provision.

Bhandara and Regency Crossing brought suit against Yazdani, his wife, and Southwest. Bhandara and Regency Crossing's petition raised the following causes of action: (1) breach of fiduciary duty, (2) breach of the Regency Crossing regulations, (3) breach of the RMA, (4) intentional infliction of emotional distress, (5) fraud, and (6) a declaratory judgment action for termination of the RMA. The Yazdanis and Southwest filed a motion to compel arbitration, citing the arbitration clause in the Regency Crossing regulations. They contend that, because Regency Oaks is Regency Crossing's only asset, the entire dispute necessarily "relat[es] to . . . operation of the business" of Regency Crossing. Following a hearing, the trial court granted the motion to compel arbitration with respect to those claims between Bhandara and Yazdani, but denied the motion as to claims made against Southwest. This appeal followed.

In their sole issue, the Yazdanis and Southwest argue the trial court erred by denying their motion to compel arbitration of Regency Crossing's claims against Southwest. The determination whether a claim is subject to arbitration involves analysis of two distinct issues: (1) does a valid arbitration agreement exist; and (2) if so, do the claims asserted fall within the scope of the agreement. *Leander Cut Stone Co. v. Brazos Masonry, Inc.*, 987 S.W.2d 638, 640 (Tex. App.—Waco 1999, no pet.). Whether the parties have agreed to arbitrate is a question of fact to be summarily determined by the trial court. *IKON Office*

Solutions, Inc. v. Eifert, 2 S.W.3d 688, 693 (Tex. App.—Houston [14th Dist.] 1999, no pet.). We review factual questions concerning an order denying arbitration under a "no evidence" standard of review. *Id.*

The parties agree, and the trial court found, that the Regency Crossing regulations contain a valid arbitration agreement that governs claims between Bhandara and Yazdani. It is undisputed that Southwest is not a party to the regulations, nor to any other arbitration agreement. Furthermore, nothing in the record raises a question of fact, or even suggests, that Southwest's corporate existence should be disregarded. We therefore conclude that no valid arbitration agreement exists between Southwest and Regency Crossing or Bhandara.

We note that, in certain circumstances, this court has held that a party to an otherwise valid arbitration agreement may be equitably estopped from avoiding arbitration against a non-party to that agreement. *See, e.g., Valero Energy Corp. v. Teco Pipeline Co.*, 2 S.W.3d 576, 593 (Tex. App.—Houston [14th Dist.] 1999, no pet.). In *Valero*, we held that a non-signatory to an arbitration agreement may compel arbitration of claims against it when those claims are based on the same operative facts and are inherently inseparable from claims against other defendants who are signatories to the arbitration agreement. *Id.* In this case, however, the claims against Southwest are not inherently inseparable from those claims that are subject to arbitration.

In addition to their claims against Yazdani for breach of fiduciary duty and breach of the Regency Crossing regulations, Bhandara and Regency Crossing allege that Southwest breached the RMA by (1) failing to refund security deposits, pay cable bills, and pay referring agents, resulting in numerous lawsuits filed against the complex; (2) failing to collect rents promptly; (3) failing to reflect cash deposits on the apartment manager's books; and (4) failing to keep appropriate financial records and reports as required by sections 2.11 and 2.12 of the RMA. Undoubtedly, some of the evidence relating to these allegations overlaps with evidence regarding the claims against Yazdani. However, the claims against Southwest under the RMA in no way depend on the existence of the regulations. In other words, even in the absence of the Regency Crossing regulations, Regency Crossing would

still have a claim against Southwest.

In *Valero*, we specifically noted that the party resisting arbitration in that case had to rely on the terms of the agreement containing the arbitration clause to assert its claims against the non-signatories. *Id.; see also In re Educ. Mgmt. Corp.*, 14 S.W.3d 418, 424-25 (Tex. App.—Houston [14th Dist.] 2000, orig. proceeding) (plaintiffs were estopped from avoiding arbitration where their claims against non-signatories to the agreement containing an arbitration clause were "based only on an 'alter ego' claim and raise no independent basis for liability"); *Carlin v. 3V Inc.*, 928 S.W.2d 291, 295 (Tex. App.—Houston [14th Dist.] 1996, no writ) (plaintiff was equitably estopped from avoiding arbitration where its entire case was based on rights acquired under the agreement containing an arbitration clause and plaintiff "would have no case if it did not exist"). Because the claims against Southwest are not dependent on the Regency Crossing regulations, we conclude that Regency Crossing is not equitably estopped from avoiding arbitration on its claims against Southwest.

Finally, the Yazdanis and Southwest argue that, because Southwest is the party requesting arbitration, no injustice will result from an order requiring it to arbitrate. However, a party's right to litigate a dispute that the party has not agreed to arbitrate is at least as worthy of protection as a bargained-for right to arbitration. *See Freis v. Canales*, 877 S.W.2d 283, 284 (Tex. 1994) (per curiam). Neither Bhandara nor Regency Crossing ever agreed to arbitrate their claims against Southwest. We overrule appellants' sole issue.

The trial court's order is affirmed.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed November 15, 2001.
Panel consists of Justices Yates, Fowler, and Wittig.[1]
Do Not Publish — TEX. R. APP. P. 47.3(b).

[1] Senior Justice Don Wittig sitting by assignment.

Affirmed and Majority and Dissenting Opinions filed November 15, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-001509-CV

SHABAHRAM "BOB" YAZDANI-BEIOKY, CAROLYN YAZDANI-BEIOKY, and SOUTHWEST APARTMENT GROUP, INC., Appellants
V.
FEROZE "FRED" BHANDARA, FEROZE "FRED" BHANDARA AS TRUSTEE OF THE BHANDARA LIVING FAMILY TRUST, AND REGENCY CROSSING, LLC, Appellees

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D I S S E N T I N G O P I N I O N

Three out of four intertwined legal entities are bound to arbitration. The fourth entity agrees to arbitration and in fact joins to compel arbitration. Notwithstanding, we require two primary owners and their companies to engage in duplicative litigation and arbitration simultaneously. I respectfully dissent.

The two primary owners are the sole and equal members of an LLC that owns but a single property. The same two primary owners share the proceeds of the second company,

a property management company. The only activity of the property management company is the care of the single same property owned by the LCC. This management company's income, again is divided solely between the primary owners.

In the underlying lawsuit, Fred sued the other co-owner, Bob, for various breaches of duty at common law and under both contracts. Only the LLC contract contains a broad, all inclusive, arbitration clause; the property management contract, contains none. The views expressed by the trial court and our majority opinion, largely overlook[2] sound public policy principles against multiplicity of claims as well as recognized developing trends of arbitration practice.

Texas law frowns upon a multiplicity of claims and suits. *Jack B. Angle Co., Inc v. Tipps,* 842 S.W.2d 266, 271 (Tex. 1992) (Texas law favors joint resolution of multiple claims to prevent multiple determinations of the same matter). Arbitration provides a rapid, inexpensive alternative to traditional litigation. *Id.* at 273. Here, both the plaintiff Fred and his related company, the LLC, team up to require two entities, both owned by the same two primary owners, to proceed in tandem litigation and arbitration. Thus, duplicative resolution processes are encouraged, not discouraged. How can the courts encourage less expensive and less protracted dispute resolution under these circumstances?

There are at least five theories of law and equity that provide a basis for binding non-signatories to arbitration agreements. *Thomson-CSF, S.A. v. American Arbitration Ass'n.* 64 F.3d 773, 776 (2d Cir. 1995). These principles based on common law contract and agency support enforcement of arbitration clauses against non-signatories in a proper case, (such as the management company here). *International Paper Co. v Schwabedissen Maschinen &*

[2] The trial court clearly, by its comments, considered only a "four corners" type of analysis of the primary owners' dilemma. Appellants' argument at trial and on appeal focuses narrowly on the scope of the arbitration clause. Similarly, appellees argue the fact that the management company is a non-signatory. Accordingly, I am not at all sure the trial court truly abused its discretion, because, under the limited arguments made, its decision was not without a legal basis, nor is the majority holding. However, neither the majority nor the trial court seem to engage the public policy debate and certain legal/equitable principles that dictate, to me, a different result. Accordingly, I dissent, rather than concur, to raise the consciousness of a better approach, and invite our Supreme Court to take a closer look.

Anlagen GMBH, 206 F.3d 411, 416-17 (4th Cir. 2000). These five legal bases included: (1) incorporation by reference; (2) assumption; (3) agency; (4) veil piercing/alter ego; and (5) estoppel. *Thomson-CSF, S.A.*, 64 F.3d at 776. Estoppel includes promissory estoppel or equitable estoppel.

Today the majority focuses on the fact that the management company is not a signatory and therefore cannot be bound by the arbitration agreement. When a contract itself does not bind parties to arbitrate, it does not follow that the Federal Arbitration Act obligations attach only to one who personally signed the arbitration provision. *International Paper Co.*, 206 F.3d at 416 (citation omitted). "Rather, a *party can agree* to submit to arbitration by means other than personally signing a contract containing an arbitration clause." *Id.* (emphasis added). Here, the management company as a non-signatory not only agreed to arbitration but also sought to enforce the arbitration clause in the underlying contract.

Both primary owners are unquestionably bound to arbitrate with each other, yet, one who is bound, seeks to escape his contractual commitment by insisting his co-owner's management company (in which he has an interest) is not a signatory. Can a signatory co-owner equitably insist on non-arbitration? *Grigson* answers such an inquiry in the negative. *See Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 528 (5th Cir. 2000), *cert. denied*, 121 S.Ct. 570 (2000).

Grigson holds that a non-signatory to arbitration may be unwillingly compelled to arbitration when he has consistently maintained that other provisions of the same contract should be enforced to his benefit, or where he has received a direct benefit from the arbitration contract. *Grigson*, 210 F.3d at 417-18. Some courts require arbitration in these instances when "intimately founded in and intertwined with the underlying contract obligations." *See, e.g., Sunkist Soft Drinks v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir. 1993). Here, the LLC, as well as Fred, are bound to arbitrate[3]. This factor is overlooked

[3] There is certainly no question the broad-form language of the arbitration clause encompasses all the claims made here.

by the majority. Furthermore, the core fact giving rise to the claims asserted is mismanagement by the signatory Bob and its management company, the agent of the LLC. As noted by the majority, Fred is an equal (primary) member and *co-manager* of the LLC. As a co-manager, bound to arbitrate, Fred seeks to shift his own status as manager solely upon the property management company. Fred receives benefits from, and contracted with the property management company. In turn, the property management company's duties and responsibilities are inextricably intertwined with running the sole asset at issue, the apartments.

Additionally, I find error in the majority opinion's reliance upon the *claims* made against Southwest (management company). Rather, the analysis of determining the applicability of an arbitration clause correctly focuses upon the operative facts, not the claims asserted. *Prudential-Bache Securities, Inc. v. Garza*, 848 S.W.2d 803, 900 (Tex. App.—Corpus Christi 1993, no writ) (orig. proceeding). Virtually all the facts surrounding the alleged mismanagement arise out of the use and management of the one property held by the LLC. These facts give rise to every claim asserted. Therefore, I would hold that both Fred and the LLC are estopped from refusing to arbitrate. *See International Paper Co.*, 206 F.3d at 418. When a signatory to the arbitration raises "substantially interdependent and concerted conduct by both the non-signatory and one or more of the signatories to the contract", the application of equitable estoppel is warranted. *Grigson*, 210 F.3d at 527. Otherwise, the policy in favor of arbitration is effectively thwarted. *Id.*

While I agree with the majority that appellant did not develop the alter ego/veil piercing theory, I observe that only the barest of amplification of the facts would likely support this alternative ground to compel arbitration. Likewise, a developed record could well support an agency theory in favor of arbitration.

Finally, the management company contract makes reference to both the LLC and its sole apartment asset. The management company exists only to fulfill the purposes of the LCC. Once the apartments are sold or otherwise disposed, the management company ceases to exist. Three separate indemnity provisions within the management agreement further

intertwine the inseparable relationships. The enterprises and contracts are totally intertwined. I would hold that the LLC regulations and its arbitration clause are necessarily incorporated by reference. Thus, I would also require arbitration under the incorporation by reference doctrine.

For these reasons above, I would not allow Fred "to have it both ways."

/s/ Don Wittig
Senior Justice

Judgment rendered and Opinions filed November 15, 2001.
Panel consists of Justices Yates, Fowler, and Wittig.[4]
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[4] Senior Justice Don Wittig sitting by assignment.