Reversed and Remanded and Opinion filed June 16, 2020.

In The

Fourteenth Court of Appeals

NO. 14-19-00258-CV

BERRY Y&V FABRICATORS, LLC, Appellant

V.

STEFANI BAMBACE, Appellee

On Appeal from the 234th District Court
Harris County, Texas
Trial Court Cause No. 2018-27762

O P I N I O N

Appellant Berry Y&V Fabricators, LLC ("Berry Company") appeals the denial of its motion to compel arbitration of appellee Stefani Bambace's employment-related claims. The trial court denied the motion to compel on the ground that the parties' arbitration agreement was void and unenforceable. Specifically, the court ruled that agreed arbitration of sexual harassment claims, such as the one Bambace asserts, violates public policy.

We conclude, however, that the threshold issue of the agreement's enforceability against a public policy challenge was a matter delegated to the arbitrator under this agreement. The trial court therefore erred in denying the motion to compel. We reverse the order and remand the case with instructions that the trial court proceeding be stayed and the parties compelled to arbitration.

Background

Berry Company hired Bambace as a private tutor for the children of its president, Lawrence Berry. When she was hired, Bambace signed an arbitration agreement. Bambace worked principally in Lawrence's home, but it is also alleged that she accompanied the children on family trips. Bambace alleges that after the children began attending school, she became a personal assistant for Lawrence's wife, Danielle. Bambace asserts that during her employment she worked in a sexually charged and hostile work environment and was repeatedly subjected to sexual harassment.

After seven months, Bambace reported the sexual harassment and hostile work environment to Berry Company's human resources department. Bambace was placed on paid leave while the company investigated her complaints. Three weeks after reporting her claim, Berry Company terminated Bambace's employment because, she was told, there was no longer a need for her position.

Bambace filed a "Charge of Discrimination" with the Texas Workforce Commission and received in response a "Notice of Right to File a Civil Action." Bambace then filed the present civil suit against Berry Company, asserting claims for sexual harassment, discrimination, and retaliation under the Texas Commission on Human Rights Act.[1] Bambace also sought a declaratory judgment that the

[1] *See* Tex. Lab. Code §§ 21.001 *et seq.*

parties' arbitration agreement is void as against public policy and therefore her claims are not subject to arbitration.

Berry Company moved to abate the case and compel arbitration, citing the arbitration agreement and asserting that Bambace's claims came within the agreement's scope. Bambace filed a response in which she opposed arbitration because any confidential arbitration of her sexual harassment claim violates public policy.

The trial court granted Berry Company's plea in abatement and motion to compel arbitration. Bambace appealed that order, and this court dismissed the appeal for want of jurisdiction. *See Bambace v. Berry Y&V Fabricators, LLC*, No. 14-18-00889-CV, 2018 WL 6217502, at *1 (Tex. App.—Houston [14th Dist.] Nov. 29, 2018, no pet.) (mem. op.) (per curiam) (orders compelling arbitration are not appealable on interlocutory basis). Bambace also filed a petition for writ of mandamus. A panel of this court issued an opinion denying mandamus relief. *See In re Bambace*, No. 14-18-00953-CV, 2018 WL 5914863, at *1 (Tex. App.—Houston [14th Dist.] Nov. 13, 2018, orig. proceeding) (per curiam) (mem. op.). In the meantime, the trial judge who granted Berry Company's motion to compel arbitration ceased to hold office.

Bambace filed motions for rehearing and en banc reconsideration of the panel's denial of mandamus relief. The panel denied the motion for rehearing. The en banc court abated the mandamus proceeding to allow the successor trial judge an opportunity to reconsider the order compelling arbitration. *See* Tex. R. App. P. 7.2(b).

On March 8, 2019, the successor trial judge signed an order that (1) vacated the predecessor judge's order abating the case and compelling arbitration, and (2) denied Berry Company's plea in abatement and motion to compel arbitration.

In the March 8 order, the trial court ruled that the arbitration agreement requires Bambace to litigate her sexual harassment claim in confidential and binding arbitration and therefore violates Texas public policy. The court stated that neither the United States Congress nor the Texas Legislature have passed legislation addressing the issue, but cited a letter addressed to Congress signed by fifty-six attorneys general, including Texas's, urging Congress to end forced arbitration in sexual harassment cases due to the confidentiality that may envelop such proceedings. Although no legislative measures preclude arbitration of sexual harassment claims on public policy or other grounds, the trial court determined that the mandatory arbitration provision in the parties' arbitration agreement for sexual harassment claims "violates public policy and is therefore void and unenforceable." Further, the trial court rejected Berry Company's additional arguments in support of compelling arbitration, including its position that the parties' agreement reserves to the arbitrator questions of arbitrability, such as whether any of Bambace's claims are subject to arbitration.

Berry Company timely appealed the order. We have jurisdiction over the interlocutory order.[2]

Analysis

Berry Company presents four issues for our review, three of which can be distilled to whether an agreement mandating arbitration of sexual harassment claims is contrary to public policy and thus unenforceable, and whether state policy in that regard is properly established by the legislative or judicial branch. In a fourth issue, Berry Company contends alternatively that the parties delegated to the

[2] The Federal Arbitration Act ("FAA"), which the parties agree applies here, permits an interlocutory appeal from an order denying a motion to compel arbitration. *See* 9 U.S.C. § 16; *see also* Tex. Civ. Prac. & Rem. Code § 51.016 (providing for appeal of interlocutory order denying motion to compel arbitration under FAA).

arbitrator any disputes concerning whether Bambace's claims are subject to arbitration, including her challenge to the enforceability of the arbitration agreement on public policy grounds. Our answer to this last point is dispositive, so we confine our opinion solely to that issue. *See* Tex. R. App. P. 47.1.

A. Standard of review

We review the denial of a motion to compel arbitration for abuse of discretion. *See Okorafor v. Uncle Sam & Assocs., Inc*., 295 S.W.3d 27, 38 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). When an appeal from such an order turns on a legal determination, however, we apply a de novo standard. *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51, 55 & n.9 (Tex. 2008).

B. The trial court abused its discretion in denying the motion to compel arbitration because Bambace's challenge is for the arbitrator to decide

The contract is entitled "Arbitration Agreement" and is between Bambace and Berry Company. It provides in relevant part:

> In exchange for Company accepting and considering the application, or if applicable, as part of the consideration for Company tendering an offer for employment, or if applicable, retaining [Bambace's] services, [Bambace] and Company agree that upon the demand of either . . . all disputes, claims, damages, injuries, losses, and causes of action (hereinafter collectively known as "Claims") that [Bambace], [her] family, heirs, representatives and assigns may have or to which any of the foregoing may be entitled against the Company . . . shall be submitted to binding arbitration according to the rules of the Commercial Arbitration Section of the American Arbitration Association. To also be included in matters subject to arbitration shall be any question or dispute concerning whether any Claims are subject to arbitration.

A party moving to compel arbitration must establish (1) the existence of a valid, enforceable arbitration agreement and (2) that the claims asserted fall within the scope of that agreement. *In re Rubiola*, 334 S.W.3d 220, 223 (Tex. 2011)

(orig. proceeding) (addressing movant's burden under the FAA); *In re AdvancePCS Health L.P.*, 172 S.W.3d 603, 605 (Tex. 2005) (orig. proceeding) (per curiam). Both Texas and federal law require the enforcement of valid agreements to arbitrate. 9 U.S.C. § 2; Tex. Civ. Prac. & Rem. Code § 171.021. If the movant establishes that an arbitration agreement governs the dispute, the burden then shifts to the party opposing arbitration to establish a defense to the arbitration agreement. *In re Provine*, 312 S.W.3d 824, 829 (Tex. App.—Houston [1st Dist.] 2009, orig. proceeding). A party may defend against the enforceability of the agreement only on a ground that exists at law or in equity for the revocation of a contract. *See* 9 U.S.C. § 2; Tex. Civ. Prac. & Rem. Code § 171.001(b).

Bambace contends that an agreement to arbitrate sexual harassment claims is unenforceable because it violates public policy. Thus, the first prong of Berry Company's burden is at issue—the existence of an enforceable arbitration agreement. Our state supreme court has made clear that there are three distinct ways to challenge the validity of an arbitration clause: (1) challenging the validity of the contract as a whole; (2) challenging the validity of the arbitration provision specifically; and (3) challenging whether an agreement exists at all. *RSL Funding, LLC v. Newsome*, 569 S.W.3d 116, 124 (Tex. 2018); *In re Morgan Stanley & Co.*, 293 S.W.3d 182, 187 (Tex. 2009) (orig. proceeding). The arbitrator decides the first type of challenge as a matter of law. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 446 (2006); *RSL Funding*, 569 S.W.3d at 124. The second type of challenge generally must be resolved by the court. *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010); *Prima Paint Corp. v. Flood & Conkling Mfg. Co.*, 388 U.S. 395, 402-04 (1967); *Longoria v. CKR Prop. Mgmt., LLC*, 577 S.W.3d 263, 267 (Tex. App.—Houston [14th Dist.] 2018, pet. denied). However,

as parties have the right to contract as they see fit,[3] they may delegate to the arbitrator questions concerning validity or enforceability of an arbitration agreement, and we enforce such clauses when the delegation is clear and unmistakable. *Henry Schein, Inc. v. Archer & White Sales, Inc*., --- U.S. ---, 139 S. Ct. 524, 527 (2019); *Rent-A-Ctr.*, 561 U.S. at 69-70; *RSL Funding*, 569 S.W.3d at 121; *Longoria*, 577 S.W.3d at 268; *Dow Roofing Sys., LLC v. Great Comm'n Baptist Church*, No. 02-16-00395-CV, 2017 WL 3298264, at *6-7 (Tex. App.—Fort Worth Aug. 3, 2017, pet. denied) (mem. op.); *Firstlight Fed. Credit Union v. Loya*, 478 S.W.3d 157, 164 (Tex. App.—El Paso 2015, no pet.); *IHS Acquisition No. 171, Inc. v. Beatty-Ortiz*, 387 S.W.3d 799, 807 (Tex. App.—El Paso 2012, no pet.); *see also In re Weekley Homes, L.P.*, 180 S.W.3d 127, 130 (Tex. 2005) (orig. proceeding). The United States Supreme Court has been very clear that arbitrators are competent to decide any legal or factual issues the parties commit to their determination, *see 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 268-69 (2009); *RSL Funding*, 569 S.W.3d at 121, including threshold issues of arbitrability such as whether an enforceable arbitration agreement exists, *see Rent-A-Ctr.*, 561 U.S. at 69-70.[4]

The arbitration agreement contains a delegation clause and it also incorporates the American Arbitration Association ("AAA") rules. The delegation clause states that "included in matters subject to arbitration shall be any question or dispute concerning whether any Claims are subject to arbitration." Further, the

[3] *RSL Funding*, 569 S.W.3d at 121.

[4] Bambace's challenge clearly does not fall into the third type because she does not dispute that she signed the arbitration agreement, and she raises no contract-formation arguments. Whether Bambace's challenge falls into the first category as distinguished from the second is academic on this record because the result is the same in either instance. Bambace's public policy challenge to arbitrating sexual harassment claims must be decided by the arbitrator either by law, *Buckeye*, 546 U.S. at 446, or, as explained below, by delegation.

AAA rules incorporated into the agreement specifically empower the arbitrator to decide issues of arbitrability, including the validity or enforceability of the arbitration agreement. *See* Am. Arbitration Ass'n, Commercial Arbitration Rules & Mediation Procedures, R-7(a) (amended and effective Oct. 1, 2013) ("The 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.") (emphasis added), *available at* https://adr.org/sites/default/files/CommercialRules_Web.pdf. This court has held that when a broad arbitration agreement exists between the parties, and when that agreement incorporates arbitration rules specifically empowering the arbitrator to decide issues of arbitrability, then the incorporation of those rules constitutes clear and unmistakable evidence of the parties' intent to delegate arbitrability to the arbitrator. *See Trafigura Pte. Ltd. v. CNA Metals Ltd.*, 526 S.W.3d 612, 616-18 (Tex. App.—Houston [14th Dist.] 2017, no pet.). Other courts of appeals have agreed. *See Gilbert v. Rain & Hail Ins.*, No. 02-16-00277-CV, 2017 WL 710702, at *4 (Tex. App.—Fort Worth Feb. 23, 2017, pet. denied) (mem. op.); *Schlumberger Tech. Corp. v. Baker Hughes Inc.*, 355 S.W.3d 791, 803 (Tex. App.—Houston [1st Dist.] 2011, no pet.); *Saxa Inc. v. DFD Architecture Inc.*, 312 S.W.3d 224, 229-31 (Tex. App.—Dallas 2010, pet. denied); *Rio Grande Xarin II, Ltd. v. Wolverine Robstown, L.P.*, Nos. 13-10-00115-CV & 13-10-00116-CV, 2010 WL 2697145, at *8-9 (Tex. App.—Corpus Christi July 6, 2010, pet. dism'd) (mem. op.); *see also Dow Roofing*, 2017 WL 3298264, at *6-7 (holding that challenge to unconscionability of arbitration provision was delegated to arbitrator); *Firstlight*, 478 S.W.3d at 164. Accordingly, due to the delegation clause and the agreement's incorporation of the AAA rules, we hold that the parties have clearly and unmistakably delegated to the arbitrator any questions or disputes concerning the validity or enforceability of the arbitration agreement. *See*

Trafigura, 526 S.W.3d at 616-18; *Dow Roofing*, 2017 WL 3298264, at *6-7; *IHS*, 387 S.W.3d at 808.

The agreement is a standalone arbitration agreement in the sense that all of its material terms relate to its essential purpose of arbitration. Similar agreements were at issue in *Rent-A-Center* and *IHS*. *Rent-A-Ctr.*, 561 U.S. at 69-70; *IHS*, 387 S.W.3d at 803-04. A delegation provision is "an agreement to arbitrate threshold issues concerning the arbitration agreement." *Rent-A-Ctr.*, 561 U.S. at 68. Because it is a "written provision . . . to settle by arbitration a controversy," 9 U.S.C. § 2; *Rent-A-Ctr.*, 561 U.S. at 71, the delegation clause is itself a separate and severable arbitration agreement. *See Rent-A-Ctr.*, 561 U.S. at 72. When presented with a standalone arbitration agreement that also delegates to the arbitrator questions of validity or enforceability of that agreement, a court may not intervene in evaluating those questions unless the party opposing arbitration challenges the delegation clause specifically on legal or public policy grounds. *Rent-A-Ctr.*, 561 U.S. at 72; *RSL Funding*, 569 S.W.3d at 121 (citing *Forest Oil*, 268 S.W.3d at 61); *IHS*, 387 S.W.3d at 808.

Bambace has presented no challenge the delegation clause on any ground. She argues that being compelled to arbitrate her sexual harassment claim violates public policy, but she does not argue that law or public policy precludes an arbitrator from deciding that question. Thus, we have no choice but to leave the parties to their commitment to have the arbitrator decide Bambace's public policy challenge to the enforceability of the arbitration agreement. *See Rent-A-Ctr.*, 561 U.S. at 72; *RSL Funding*, 569 S.W.3d at 121, 123; *Dow Roofing*, 2017 WL 3298264, at *6-7; *IHS*, 387 S.W.3d at 808.

Conclusion

Because the parties clearly and unmistakably delegated to the arbitrator all questions concerning whether Bambace's claims are subject to arbitration, including enforceability questions, Bambace's public policy argument must be decided by the arbitrator. The trial court abused its discretion by removing that issue from the arbitrator and denying Berry Company's plea in abatement and motion to compel arbitration. We reverse the trial court's order and remand the case to the trial court with instructions that the proceeding be stayed and the parties compelled to arbitration.

/s/ Kevin Jewell
Justice

Panel consists of Justices Wise, Jewell, and Poissant.