NUMBER 13-19-00580-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

ROLAND'S ROOFING CO., INC., Appellant,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY AND HAIDAR PROPERTIES, L.L.C., Appellees.

On appeal from the 275th District Court of Hidalgo County, Texas.

MEMORANDUM OPINION

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

By one issue, appellant Roland's Roofing Company, Inc. appeals the trial court's denial of its motion to compel arbitration. We reverse and remand.

I. BACKGROUND

A. Factual Background

1. The Roofing Referral Agreements

Appellee Nationwide Mutual Insurance Company (Nationwide) had a contractual agreement called a "Master Services Agreement" with i3Group, LLC. As part of this agreement, i3Group agreed to provide "a roofing contractor network and roofing contractors for the benefit of Nationwide's insurers" under a program called "Best Roof Care."

Roland's Roofing is a roofing company. Separately, it entered into a "Best Roof Care Contractor Agreement" with i3Group to be one of the listed contractors in the "Best Roof Care" program. Among the terms and conditions of this agreement, Roland's Roofing agreed to:

> Defend, indemnify and hold harmless [i3Group, LLC] and [Nationwide], their affiliated corporations, their directors, officers, agents, employees, assigns and representatives, from and against any and all suits, actions, proceedings, liabilities, settlements, claims, damages, losses and attorneys' fees, costs and expenses ("Claims" arising out of or in connection with the acts of omissions of Contractor, or anyone employed, hired or retained by Contractor or acting on Contractor's behalf, including subcontractors ("Contractor's Representatives"), or in any way related to Contractor's or Contractor's Representatives' performance of this Agreement, any services or any work of Contractor or Contractor's Representatives including, but not limited to, any repair of an Insured's property, or any breach of the warranties contained herein or any violation of statute or ordinance.

2. The IHOP Building

Appellee Haidar Properties, LLC operated a building at 1900 South Tenth Street in McAllen, Texas which housed an IHOP. On or about December 26, 2015, a hailstorm severely damaged the IHOP building's metal roof. Haidar submitted a claim to its insurer, Nationwide, which determined that the building required a total roof replacement.

Nationwide then utilized its "Best Roof Care" program to refer Roland's Roofing to Haidar. Haidar and Roland's Roofing entered into a contract to replace the damaged metal roof. Their agreement, called the "Proposal, Specifications, and Estimate" (the Proposal), included the following arbitration provision:

> Any controversy or claim arising out of or relating to this Agreement or breach thereof shall be settled by arbitration binding on both parties in accordance with the Federal Arbitration Act (FAA) and the Construction Industry Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrators may be entered into by any court having jurisdiction thereof. If binding arbitration is found unenforceable by a court of law, then any controversy or claim arising out of or related to this Agreement shall first be mediated prior to the institution of any legal action being instituted in any court. Parties agree that mediation expenses will be shared equally.

Roland's Roofing subcontracted with LS Roofing, LLC to perform the roof replacement. According to Nationwide, on or about May 23, 2016, LS Roofing began the IHOP roof replacement job. LS Roofing employees were in the process of removing the existing, damaged metal roof when they left for the day at approximately 5:00 p.m. At approximately 8:00 p.m., the IHOP restaurant manager saw smoke in the kitchen. He discovered a fire in a second-floor equipment room and immediately called the fire department. The fire department's investigation revealed that the fire originated from a halogen light that was mounted to the exterior roof which faced the roof's wooden decking. The heat produced from the halogen lamp's 500-watt light allegedly ignited the wood decking and caused significant damage to IHOP and its property. IHOP was forced to cease business operations while the building was repaired.

Haidar submitted another claim to Nationwide for the resulting damages from the fire. On August 30, 2017, Nationwide filed a subrogation claim against Roland's Roofing,

LS Roofing, LLC, Luis Santisbon[1], and i3 Group, LLC arising from their alleged negligent actions or omissions. Nationwide sought recovery of all sums that it had paid to its insured Haidar pursuant to its policy of insurance on the property. Haidar filed a petition in intervention.[2]

B. Procedural History

On July 26, 2018, Roland's Roofing filed a "Motion to Compel Arbitration and Motion for a Stay of Discovery and Further Proceedings." Haidar filed a response, arguing that no contract existed because it only had a copy of the Proposal with its own signature, and not a signature from Roland's Roofing. Roland's Roofing filed a reply the day before the hearing with a copy of the contract that had both signatures.

The presiding judge of the trial court at that time, the Honorable Juan Partida, presided over a contested hearing on the motion to compel arbitration on September 11, 2018. At the hearing, Haidar maintained its argument that no contract existed because its copy of the contract only had its signature. In response, Roland's Roofing explained to the court that it provided the copy of the contract with both signatures as soon as it realized Haidar was contesting that issue. In the alternative, Roland's Roofing also contended that even if a copy of the proposal only existed with Haidar's signature, there was still an agreement between the parties because the litigation at hand arose from the work Roland's Roofing had undertaken on the IHOP roof. The trial court ordered Roland's

[1] Santisbon is the managing member of LS Roofing, LLC. Neither LS Roofing nor Santisbon are parties to this appeal.

[2] Elizabeth Barbara Harms also intervened. She was the independent executrix of the estate of Frederick James Harms, who owned the building where Haidar operated the IHOP. Harms is not a party to this appeal.

Roofing to provide all parties with an authenticated copy of the original contract and took the motion under advisement.[3]

On September 21, 2018, Roland's Roofing provided a business records affidavit authenticating that the version of the Proposal with signatures from both Haidar and Roland's Roofing was an "original record[] or exact duplicate[] of [the] original record." On December 7, 2018, the court signed an order granting Roland's Roofing's motion to compel arbitration. The order also provided that (1) all parties were compelled to arbitrate all claims, (2) all proceedings were stayed pending arbitration, and (3) all discovery was stayed pending arbitration.

On December 26, 2018, Haidar filed a motion for reconsideration of the trial court's order compelling arbitration. On February 21, 2019, the newly elected judge of the 275th District Court, the Honorable Marla Cuellar, held a hearing on Haidar's motion for reconsideration. At the hearing, the court informed counsel that "all the parties should have an opportunity to present their arguments . . . before there is a ruling by the Court." The court stated that it wanted to review the transcript from the September 11, 2018 hearing and by oral pronouncement set aside the December 7, 2018 order compelling arbitration.

On April 9, 2019, Roland's Roofing filed a "Motion to Enforce Court's Order of December 7, 2018." The court held a hearing on Roland's Roofing's motion to enforce the order compelling arbitration on May 14, 2019. After much discussion, that same day,

[3] The court ordered the original contract to be produced if "that's possible," but otherwise ordered Roland's Roofing to produce an authenticated copy of the original in compliance with Texas Rule of Evidence 803(6).

the trial court formally signed an "Order Granting Plaintiff's Motion for Reconsideration and Order Setting Aside Order Granting Defendant Roland's Motion to Compel Arbitration." The court did not, however, rule on the motion to compel arbitration.

On September 26, 2019, Roland's Roofing filed a petition for writ of mandamus. In its petition, Roland's Roofing contended that (1) the trial court abused its discretion by refusing to rule on Roland's Roofing's motion to compel arbitration, and (2) Roland's Roofing lacked an adequate remedy by appeal. This court conditionally granted the petition for writ of mandamus and ordered writ to issue if the trial court refused to rule. *See In re Roland's Roofing Co., Inc.*, No. 13-19-00469-CV, 2019 WL 5444399 (Tex. App.—Corpus Christi–Edinburg Oct. 23, 2019, no pet.) (mem. op.).

On November 5, 2019, the trial court denied Roland's Roofing's motion to compel arbitration. Roland's Roofing now appeals the denial of its motion to compel arbitration.

II. STANDARD OF REVIEW & APPLICABLE LAW

We review a trial court's order denying a motion to compel arbitration for abuse of discretion. *Henry v. Cash Biz, LP*, 551 S.W.3d 111, 115 (Tex. 2018) (citing *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 642–43 (Tex. 2009)). We defer to the trial court's factual determinations if they are supported by evidence but review its legal determinations de novo. *Id.* Whether the claims in dispute fall within the scope of a valid arbitration agreement and whether a party waived its right to arbitrate are questions of law, which are reviewed de novo. *Id.*; *Perry Homes v. Cull*, 258 S.W.3d 580, 598 & n.102 (Tex. 2008).

Under the Federal Arbitration Act (the FAA), a presumption exists in favor of agreements to arbitrate. *See Henry*, 551 S.W.3d at 115 (citing *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 753 (Tex. 2001)). A "party seeking to compel arbitration must establish the existence of a valid arbitration agreement and that the claims at issue fall within the scope of that agreement." *Id*. (citing *Venture Cotton Coop. v. Freeman*, 435 S.W.3d 222, 227 (Tex. 2014)). When the party that seeks to compel arbitration meets this burden, the burden shifts and the opposing party must prove an affirmative defense to avoid arbitration. *Id.* "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Id*. (citing *In re Serv. Corp. Intern.*, 85 S.W.3d 171, 174 (Tex. 2002)).

Courts determine whether an enforceable agreement to arbitrate exists by applying "ordinary principles of state contract law." *G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 524 (Tex. 2015). Generally, "parties must sign arbitration agreements before being bound by them." *Id.* (quoting *In re Rubiola*, 334 S.W.3d 220, 224 (Tex. 2011) (orig. proceeding)). But the question of who is actually bound by an arbitration agreement is essentially "a function of the intent of the parties, as expressed in the terms of the agreement." *In re Rubiola*, 334 S.W.3d at 224. Whether an agreement to arbitrate is enforceable is a question of law that we review de novo. *Rachal v. Reitz*, 403 S.W.3d 840, 843 (Tex. 2013).

III. ANALYSIS

The appellees in this case, Haidar and Nationwide, assert different arguments

contending why the trial court's denial of arbitration was not an abuse of discretion. We address each party's arguments in turn.

A. Haidar's Arguments

Haidar sets forth two main arguments in its responsive brief. First, it contends that no valid arbitration agreement existed between the parties because it did not receive a copy of the original Proposal signed by Roland's Roofing. Second, Haidar argues that even if the agreement did exist, its claims against Roland's Roofing did not fall within the Proposal's arbitration provision.

1. The Existence of a Valid Arbitration Agreement

Haidar first challenges the existence of a valid arbitration agreement. It contends that no agreement existed because originally it only had a copy of the contract signed by itself and not a contract signed by both Haidar and Roland's Roofing. Haidar cites *Huckaba v. Ref-Chem, L.P.*, 892 F.3d 686, 689 (5th Cir. 2018), and *In re Bunzl USA, Inc.*, 155 S.W.3d 202 (Tex. App.—El Paso 2004, orig. proceeding [mand. denied]), for the proposition that an arbitration agreement cannot be enforced when only one party has signed a contract that includes an arbitration agreement. We find *Huckaba* and *In Re Bunzl USA* inapposite, however, because the clerk's record shows that Roland's Roofing supplemented its motion to compel arbitration with a copy of the contract signed by both parties along with a business records affidavit authenticating it as a copy of the original

document.[4] Accordingly, we conclude that a valid arbitration agreement exists.[5] *See Henry*, 551 S.W.3d at 115; *In re FirstMerit Bank, N.A.*, 52 S.W.3d at 753.

2. Whether the Arbitration Agreement Encompasses Haidar's Claims

Haidar also argues that its claims against Roland's Roofing sound in tort (such as "negligence and misrepresentations of fact") and not in breach of contract, so even if an arbitration agreement existed between the parties, it should not apply.

We disagree. "Both Texas policy and federal policy favor arbitration." *Henry*, 551 S.W.3d at 115–16 (citing *In re FirstMerit Bank*, 52 S.W.3d at 753). Thus, courts "resolve any doubts about an arbitration agreement's scope in favor of arbitration." *Id.* In questions like those before us, we must focus on the factual allegations and not on the legal causes of action asserted. *In re FirstMerit Bank*, 52 S.W.3d at 754; *see Brown v. Anderson*, 102 S.W.3d 245, 249 (Tex. App.—Beaumont 2003, pet. denied) ("[A]rbitration may not be avoided by simply casting claims as torts, rather than contracts."). The presumption in favor of arbitration "is so compelling that a court should not deny arbitration *'unless it can*

[4] The record reflects that Haidar filed objections to the authenticated copy of the signed contract by both parties and to the affidavit of Julia Farias, an administrative assistant at Roland's Roofing, in "Plaintiff Intervenor's Response to Defendant's Motion to Compel Arbitration and Stay." The trial court did not, however, rule on these objections.

[5] Assuming for the sake of argument that only a copy of the contract with Haidar's signature was produced, we would still conclude that an arbitration agreement existed. The courts in *Huckaba* and *In Re Bunzl USA, Inc.* both held that no signature is required for contract formation, but that parties may require mutual signatures as a condition precedent to contract formation. *See Huckaba v. Ref. Chem., L.P.*, 892 F.3d 686, 688 (5th Cir. 2018); *In Re Bunzl USA*, 155 S.W.3d 202, 209 (Tex. App.—El Paso 2004, orig proceeding [mand. denied]). In *Huckaba*, the contract provided that, "by *signing* this agreement the parties are giving up any right they may have to sue each other" and that the agreement "may not be changed, except in writing and *signed* by all parties." *See* 892 F.3d at 688 (emphasis added). Similarly, in *In Re Bunzl USA*, the agreement provided that "no modification or amendment of any provision of this Agreement is effective unless it is in writing *and signed by the parties to this Agreement.*" *See* 155 S.W.3d at 211 (emphasis original). No such language was apparent in the Proposal. In fact, the Proposal provided that the contract could "be withdrawn by [Roland's Roofing] if not accepted within 15 days," indicating that a contract would arise once Haidar signed the contract, not Roland's Roofing.

be said with positive assurance that an arbitration clause is *not* susceptible of an interpretation which would cover the dispute at issue.'" *Prudential Sec. Inc. v. Marshall*, 909 S.W.2d 896, 899 (Tex. 1995) (quoting *Neal v. Hardee's Food Sys., Inc.*, 918 F.2d 34, 37 (5th Cir. 1990)). Further, the scope of an arbitration clause that includes all "disputes," and not just claims, is very broad and encompasses more than claims "based solely on rights originating exclusively from the contract." *Id*.; *see Pinto Tech. Ventures, L.P. v. Sheldon*, 526 S.W.3d 428, 439 (Tex. 2017).

Here, the arbitration clause between the parties provided that "any controversy or claim arising out of or relating to [the Proposal] or breach thereof shall be settled by arbitration binding on both parties in accordance with the Federal Arbitration Act (FAA). . . ." Although Haidar argues that the arbitration clause should be construed narrowly because it is found under the "warranty" section of the Proposal and not under the "terms and general conditions" section, the language "any controversy or claim" is all encompassing. *See Prudential*, 909 S.W.2d at 899. And, in fact, the first provision under the "terms and general conditions" section provides that "in the event of a dispute, all parties agree to binding arbitration in lieu of other legal remedies." Because under Texas law we must indulge every reasonable presumption to uphold arbitration proceedings, we conclude Haidar's claims are covered by the arbitration agreement in the Proposal. *See Wetzel v. Sullivan, King & Sabom, P.C.*, 745 S.W.2d 78, 81 (Tex. App.—Houston [1st Dist.] 1988, no writ).

Haidar correctly points out that the trial court in this case did not issue findings of fact and conclusions of law when it denied the motion to compel arbitration. Accordingly,

it contends we "must uphold the trial court's decision if there is sufficient evidence to support it on any legal theory asserted." *Shamrock Foods Co. v. Munn & Associates, Ltd.*, 392 S.W.3d 839, 844 (Tex. App.—Texarkana 2013, no pet.); *Wetzel v. Sullivan, King & Sabom, P.C.,* 745 S.W.2d 78, 81 (Tex. App.—Houston [1st Dist.] 1988, no writ). However, we review whether an enforceable arbitration agreement exists under a de novo review, not for evidentiary sufficiency. *See Henry*, 551 S.W.3d at 115. Here, the record shows that we have an arbitration agreement signed by both parties and legal claims that are covered by that same agreement. In light of the foregoing, we conclude that the trial court abused its discretion in denying the motion to compel arbitration with respect to Haidar.

B. Nationwide's Arguments

Nationwide also set forth two arguments in its response. First, it argues that there is no arbitration agreement between it and Roland's Roofing because it was not a signatory to the Proposal. Second, Nationwide asserts that the motion to compel became moot when it amended its claims to bring them outside the terms of the arbitration provision.

In its first point of issue, Nationwide contends that the arbitration clause at issue is in a contract between Haidar and Roland's Roofing—Nationwide did not "sign or agree to" this agreement. Therefore, it argues that it should not be compelled to arbitration. The Texas Supreme Court, however, has held that "a nonparty may be compelled to arbitrate if it deliberately seeks and obtains substantial benefits from the contract itself." *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 132 (Tex. 2005). Here, Nationwide seeks relief as an insurance company subrogee. When an insurer brings a subrogation claim

following payment of a loss under a policy, the "insurer's right to subrogation derives from the right of the insured, and is limited to those rights; there can be no subrogation where the insured has no cause of action against the defendant." *Nat'l Union Fire Ins. Co. of Pittsburgh, Penn. v. John Zink Co*., 972 S.W.2d 839, 843–44 (Tex. App.—Corpus Christi–Edinburg 1998, pet. denied). Because Nationwide is standing "in the shoes of the one whose rights they claim"—i.e., Haidar—we find this argument unpersuasive. *Id*. at 844 (providing that "the subrogees stand in the shoes of the one whose rights they claim, and the extent of the subrogees' remedy and the measure of their rights are controlled by those possessed by the subrogor.").

Second, Nationwide claims that these issues are now moot because it amended its petition to limit its claims to the enforcement of the "Best Roof Care Contractor Agreement" (BRCA) between Roland's Roofing and i3Group, and these claims are not related to the Proposal. Nationwide's original subrogation claims against Roland's Roofing were for negligence "in the roofing work it had contracted to perform at IHOP." The record shows that Roland's Roofing filed its Notice of Appeal regarding the trial court's denial of its motion to compel arbitration on November 12, 2019. Two days later, on November 14, 2019, Nationwide amended its petition to allegedly include "only" claims regarding the BRCA, not the Proposal. We note that the amended petition, however, still maintained the following claim:

> Nationwide Mutual Insurance Company, an insurance company authorized to do business in the State of Texas, is the Real Party in Interest and true Plaintiff deriving its subrogee status/standing from both contractual and equitable rights of subrogation. Nationwide Mutual Insurance Company further pleads to the Court for the recovery from Defendants for all sums due which benefits have been paid under that certain policy of property

insurance issued by Nationwide Mutual Insurance Company with rights of subrogation.

Because we must focus our analysis on the factual allegations and not on the legal causes of action asserted, and because "a nonparty may be compelled to arbitrate if it deliberately seeks and obtains substantial benefits from the contract itself," we conclude Nationwide's claims are still within the Proposal's arbitration provision. *See In re FirstMerit Bank*, 52 S.W.3d at 754; *In re Weekley Homes, L.P.*, 180 S.W.3d at 132.[6] We hold that the trial court also abused its discretion in denying Roland's Roofing's motion to compel with regard to Nationwide, as well.

We sustain Roland's Roofing's issue.

IV. CONCLUSION

We reverse the judgment of the trial court and remand for proceedings consistent with this opinion.

LETICIA HINOJOSA
Justice

Delivered and filed the
25th day of June, 2020.

[6] In its reply to Nationwide's brief, Roland's Roofing also points out that the BRCA was included in Nationwide's brief appendix and is not in our appellate record. *See Till v. Thomas,* 10 S.W.3d 730, 733 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (holding that a court of appeals must determine a case on the record filed and may not consider documents attached to briefs). Because our previous analysis is dispositive of the issue regarding whether Nationwide should be subjected to arbitration, we need not address this point.