TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-19-00738-CV

CPG 220 Holdings 2014, LLC, Appellant

v.

Branigan Mulcahy, Appellee

FROM THE 345TH DISTRICT COURT OF TRAVIS COUNTY
NO. D-1-GN-19-003008, THE HONORABLE JAN SOIFER, JUDGE PRESIDING

C O N C U R R I N G O P I N I O N

Because the appellate controversy is now moot, I concur in the judgment dismissing the appeal. I respectfully disagree, however, with the Court's holding that it lacks statutory jurisdiction over the interlocutory appeal from the trial court's order denying CPG 220's motion for stay (the Motion). In my view, this Court has appellate jurisdiction pursuant to Section 51.016 of the Texas Civil Practice and Remedies Code, which permits an appeal from an interlocutory order "under the same circumstances that an appeal from a federal district court's order" would be permitted by Section 16 of the Federal Arbitration Act. *See* Tex. Civ. Prac. & Rem. Code § 51.016. Section 16 permits an appeal from an order "refusing a stay of any action under section 3." 9 U.S.C. § 16(a)(1)(A). And Section 3 provides that when a suit is brought on an "issue referable to arbitration" by agreement, a party may apply for a stay "until such arbitration has been had" and the trial court must grant the stay "upon being satisfied that

the issue involved in such suit or proceeding is referable to arbitration" under the agreement. *Id.* § 3.

In the Motion, CPG 220 requested that the trial court "should enter a temporary stay of this cause in light of the stay currently applicable to the First Lawsuit," noting that Mulcahy had sued his former employer Cielo Property Group (Cielo) in an earlier lawsuit (the First Lawsuit); Cielo had moved to compel arbitration in the First Lawsuit; the trial court had denied Cielo's motion; Cielo had appealed to this Court; this Court had granted a stay of the First Lawsuit "until the disposition of the appeal," *Cielo Prop. Grp. v. Mulcahy*, No. 03-18-00587-CV, 2018 WL 4517369, at *1 (Tex. App.—Austin Sept. 20, 2018, order) (per curiam); and "[t]he appeal and the stay remain pending." Shortly after CPG 220 filed the Motion, this Court reversed the trial court's order denying Cielo's motion to compel arbitration in the First Lawsuit. *Cielo Prop. Grp. v. Mulcahy*, No. 03-18-00587-CV, 2019 WL 3023312, at *1–3 (Tex. App.—Austin, July 11, 2019, pet. denied) (mem. op.). At the hearing on the Motion, CPG 220 alleged that the claims in this lawsuit "are part and parcel of the [First Lawsuit] that [was] stayed while we deal with the appeal from whether or not those claims need to go to arbitration or not" and that the stay and appeal in the First Lawsuit are still pending because Mulcahy had moved for rehearing. The trial court denied the Motion and CPG 220 appealed to this Court.

By asserting that Mulcahy's claims "are part and parcel of the [First Lawsuit]" that this Court stayed while reviewing the denial of a motion to compel arbitration, CPG 220 effectively argued that the claims in the underlying lawsuit also should be stayed based on this Court's stay of the First Lawsuit so that they could be referred to arbitration upon a final

determination that the First Lawsuit claims should be arbitrated.[1] *See Western Sec. Bank v. Schneider Ltd. P'ship*, 816 F.3d 587, 590 (9th Cir. 2016) ("[I]f the essence of the movant's request is that the issues presented be decided exclusively by an arbitrator and not by any court, then the denial of that motion may be appealed under § 16(a)." (quoting *Conrad v. Phone Directories Co.*, 585 F.3d 1376, 1386 (10th Cir. 2009))). Mulcahy's counsel recognized that this was the essence of CPG 220's request, explaining at the hearing on the Motion:

> Your Honor, what they don't tell you is that -- when they're suggesting a stay and transfer, is that they're trying to ball this all up and say, "We want you to make a decision to compel arbitration right now" without telling you that, because that's what's at issue in the first lawsuit.[2]

Accordingly, I would hold that this Court has statutory jurisdiction over CPG 220's appeal. *See* Tex. Civ. Prac. & Rem. Code § 51.016; *see also* 9 U.S.C. §§ 3, 16(a)(1)(A).

In the trial court, however, CPG 220's only asserted basis for a stay in this lawsuit was this Court's stay of the First Lawsuit. But that stay was "until the disposition of the appeal," *Cielo Prop. Grp.*, 2018 WL 4517369, at *1; this Court disposed of the appeal by reversing the

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[1] The Court agrees that CPG 220 argued at the hearing that the claims are "part and parcel" of the First Lawsuit's claims that must be submitted to arbitration. But the Court asserts, "CPG 220 did not amend its motion to assert the pending arbitration as a basis for the requested stay." *Ante* at ___. However, Mulcahy did not object to CPG 220's argument at the hearing and the Court does not provide authority that CPG 220 is required to amend the Motion to expressly include the argument raised at the hearing. In this context and in the absence of authority, I see no reason why CPG 220 is required to amend the Motion. Additionally, the Court asserts that this Court's stay of the First Lawsuit "was a stay pending the outcome of an appeal—not a stay pending arbitration." *Ante* at __. Importantly, however, it was a stay pending the outcome of an appeal *from an order denying a motion to compel arbitration*.

[2] As the reason to deny the stay, Mulcahy's counsel pointed to the merit issue of whether an arbitration provision applies to CPG 220: "But, your Honor, they've got to show that this entity would even be subject to arbitration, and it's not. . . . We don't believe that any arbitration provision would apply to CPG 220, so we don't believe that there should be any prohibition on moving forward[.]"

trial court's order denying the motion to compel arbitration, *Cielo Prop. Grp.*, 2019 WL 3023312 at *1–3; and the mandate issued on March 3, 2020, after Mulcahy's motion for rehearing and petition for review were denied. The mandate extinguished any live controversy in this appeal as to whether CPG 220 is entitled to a stay based on this Court's stay of the First Lawsuit. Thus, this Court lacks jurisdiction over CPG 220's interlocutory appeal as any decision on the merits of this appeal would not affect the rights of the parties and would constitute an impermissible advisory opinion. *See Zipp v. Wuemling*, 218 S.W.3d 71, 73 (Tex. 2007) (per curiam) ("An appeal is moot when a court's action on the merits cannot affect the rights of the parties."); *National Collegiate Athletic Ass'n v. Jones*, 1 S.W.3d 83, 86 (Tex. 1999) (noting that "[a]ppellate courts are prohibited from deciding moot controversies" and holding that when "temporary injunction becomes inoperative due to a change in the status of the parties or the passage of time, the issue of its validity is also moot" and "[a]n appellate court decision about a temporary injunction's validity under such circumstances would constitute an impermissible advisory opinion"). Because CPG 220's interlocutory appeal is moot, I concur in the Court's judgment dismissing the appeal.

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Melissa Goodwin, Justice

Before Justices Goodwin, Kelly, and Smith

Filed: June 5, 2020