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

M E M O R A N D U M O P I N I O N

This is the third appeal arising from a dispute between Austin-based developer Cielo Property Group, LLC, and former employee Branigan Mulcahy.[1] Appellant CPG 220 Holdings 2014, LLC—a real-estate venture and self-styled "special-purpose affiliate" of Cielo's—challenges the district court's denial of its motion to stay litigation pending resolution of claims originally brought by Mulcahy against his former employer. CPG 220 also asks this Court to issue an emergency stay of all proceedings until this appeal is resolved. Because we

[1] *See generally Mulcahy v. Cielo Prop. Grp.*, No. 03-19-00117-CV, 2019 WL 4383960, at *1 (Tex. App.—Austin Sept. 13, 2019, pet. denied) (mem. op) (affirming denial of Cielo's motion to dismiss all claims under the Texas Citizens Participation Act, Tex. Gov't Code § 27.005); *Cielo Prop. Grp. v. Mulcahy*, No. 03-18-00587-CV, 2019 WL 3023312, at *1 (Tex. App.—Austin, July 11, 2019, pet. denied) (mem. op.) (holding all claims subject to arbitration pursuant to terms of employment agreement); *cf. Mulcahy v. Cielo Prop. Grp.*, No. 03-19-00117-CV, 2019 WL 2384150, at *1 (Tex. App.—Austin June 6, 2019, order) (per curiam) (on Mulcahy's motion, ordering appellant's counsel to obtain and maintain possession of computer hardware and certain business records).

conclude we have no authority to reach this interlocutory order, we will dismiss this appeal for want of jurisdiction. We dismiss CPG 220's emergency motion as moot in light of our holdings herein.

BACKGROUND[2]

Mulcahy worked in property acquisitions for Cielo from 2014 to 2018 pursuant to an employment contract that offered him a salary and a partial ownership interest in certain projects. Cielo terminated Mulcahy in 2018, and the separation was not an amicable one. Mulcahy sued Cielo and its principals in Travis County's 250th district court for breach of contract and wrongful termination, seeking damages and the property interests he had allegedly earned, including an asserted interest in CPG 220. This Court stayed that litigation in September of 2018, and Mulcahy's claims are currently in arbitration pursuant to prior holdings from this Court and the denial of a subsequent petition for review filed at the Supreme Court of Texas. *Cielo Prop. Grp. v. Mulcahy*, No. 03-18-00587-CV, 2019 WL 3023312 (Tex. App.—Austin, July 11, 2019, pet. denied) (mem. op.) (holding claims subject to arbitration pursuant to terms of employment agreement).

For approximately four months in early 2019, while the stay was in place, Mulcahy repeatedly asked to inspect CPG 220's books and records to better understand "the status of CPG [220] and whether any distributions had been made" to interest holders. He also asserted his right to any such distributions. When CPG 220 refused, Mulcahy sued CPG 220 in Travis County's 345th district court, alleging breach of contract and seeking declaratory and mandamus relief. According to Mulcahy's petition, "Under Section 101.502 of the Texas

[2] The parties are well versed in this dispute's history, which we will summarize only to the extent necessary to provide the context for our holdings. *See* Tex. R. App. P. 44.1.

Business Organizations Code, a member of a limited liability company or the member's assignee, on written request and for a proper purpose, may examine and copy [certain records] at any reasonable time and at the requester's expense." Mulcahy alleged that he "is a member of CPG [220] and has been since 2014" but complained that CPG 220 has wrongfully denied him access to the requested records. He asked the Court to declare "that he is a member of CPG, has been since 2014, and is entitled to all distributions associated with CPG [220]" and to order CPG to allow Mulcahy access to the records.

CPG 220 responded with a general denial and a motion to stay the matter and transfer it to the 250th district court, pointing out that the present cause "is substantially related to, and involves common questions of law or fact with" Mulcahy's first lawsuit. When CPG 220 filed its motion, the claims in the first suit had been stayed and had not yet been submitted to arbitration. At a hearing on the matter, the district court denied the motion to transfer from the bench but took the motion to stay under advisement. The court subsequently denied the motion to stay and CPG 220 timely perfected this appeal.

DISCUSSION

In a single issue on appeal, CPG 220 contends the district court abused its discretion by declining to stay litigation of this matter. But as a predicate matter, and with an argument that CPG 220 anticipated in its appellant's brief, Mulcahy challenges our jurisdiction over this appeal, arguing that this court has no interlocutory jurisdiction over the disposition of the motion. We agree with Mulcahy.

Ours is a court of limited jurisdiction. *See Branch Law Firm L.L.P. v. Osborn*, 532 S.W.3d 1, 10 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (discussing interlocutory

jurisdiction under the Texas Arbitration Act, Tex. Civ. Prac. & Rem. Code §§ 171.001–098). Interlocutory orders may be appealed only if permitted by statute and only to the extent jurisdiction is conferred by statute. *See id.* (citing *Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 272 (Tex. 1992) (orig. proceeding)). We strictly construe statutes authorizing interlocutory appeals because they are a narrow exception to the general rule that interlocutory orders are not immediately appealable. *See id.* (citing *CMH Homes v. Perez*, 340 S.W.3d 444, 447–48 (Tex. 2011)).

As the alleged source of our interlocutory jurisdiction, CPG 220 offers Section 51.016 of the Civil Practice and Remedies Code, which provides that "a person may take an appeal or writ of error to the court of appeals from the judgment or interlocutory order of a district court, county court at law, or county court under the same circumstances that an appeal from a federal district court's order or decision would be permitted by 9 U.S.C. Section 16" of the Federal Arbitration Act (FAA). Tex. Civ. Prac. & Rem. Code § 51.016. Section 16 provides, "An appeal may be taken from an order refusing a stay of any action under section 3 of this title." 9 U.S.C. § 16(a)(1)(A) (punctuation revised). And Section 3 in turn provides:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Id. § 3.

The federal courts have held that reviewing courts must look to the substance of a litigant's motion in determining whether Section 16 affords interlocutory jurisdiction over the

disposition of the motion. *See Western Sec. Bank v. Schneider Ltd. P'ship*, 816 F.3d 587, 588–90 (9th Cir. 2016). After gathering authority among its sister circuits, the Ninth Circuit explained:

> The first, simplest, and surest way to guarantee appellate jurisdiction under § 16(a) is to caption the motion in the district court as one brought under FAA §§ 3 or 4. . . . If a motion denied by the district court is not explicitly styled as a motion under the FAA, or the court suspects that the motion has been miscaptioned in an attempt to take advantage of § 16(a), the court must look beyond the caption to the essential attributes of the motion itself. The goal of this inquiry is to determine whether it is plainly apparent . . . that the movant seeks only the relief provided for in the FAA, rather than any other judicially-provided remedy.

Id. at 589 (citations omitted). The court continued, "[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)." *Id*. at 590. "'If, on the other hand, the movant in the district court requests a judicial remedy that is inconsistent with the position that the issues' in the litigation 'may be decided only by the arbitrator, the movant is no longer proceeding exclusively under the FAA and has forfeited their right to interlocutory review under § 16(a).'" *Id*. (quoting *Conrad v. Phone Directories Co*., 585 F.3d 1376, 1386 (10th Cir. 2009)); *see also Schlumberger Tech. Corp. v. Baker Hughes Inc*., 355 S.W.3d 791, 797 (Tex. App.—Houston [1st Dist. 2011, no pet.) (holding, with respect to similar provision of interlocutory jurisdiction in the Texas Arbitration Act, Tex. Civ. Prac. & Rem. Code § 171.098, that "it is the *substance* and *function* of the application viewed in the context of the record that controls our interlocutory jurisdiction" (emphasis added)).

Here, CPG 220's motion does not even purport to be a motion filed pursuant to 9 U.S.C. § 3. It is styled a "Motion for Stay, Transfer, and Sanctions." Turning to the substance

and function of that motion, it makes no reference to the FAA or to federal law. It does not assert that the claims before the court must be arbitrated or stayed pending arbitration. And it could not have raised the latter argument, as there was no arbitration pending at the time CPG 220 filed its motion. As the basis for its requested stay, the motion emphasizes the fact that allegedly predicate claims in the first lawsuit were stayed. But that was a stay pending the outcome of an appeal—not a stay pending arbitration. Nothing in "the essence of" this motion, *Western Sec. Bank*, 816 F.3d at 589, suggests that CPG 220 was seeking a stay pending arbitration. Moreover, by seeking a transfer rather than filing a motion to compel,[3] CPG 220 sought to avail itself of judicial remedies rather than arbitration. *See id*.

CPG 220 correctly observes that by the time its motion was heard, this Court had already reversed the denial of the motion to compel arbitration in the first lawsuit and had held that some of Mulcahy's claims must be arbitrated. At the hearing, CPG 220 asserted that the claims in the present case are "part and parcel of the same claims" that must be submitted to arbitration:

> [Mulcahy] was not entitled to a distribution [from CPG 220] because his grant of ownership interest specifically says that there is an offset right to the company if [he's] caused harm to the company [i.e., an issue in the first lawsuit]. And if there is such an offset right, if that right is not determinable at this point in time, then the money gets to be held pending the outcome of that dispute.

But for whatever reason, CPG 220 did not amend its motion to assert the pending arbitration as a basis for the requested stay. CPG 220 did not ask the district court to determine if any issue in the present suit might be "referable to arbitration," 9 U.S.C. § 3, and did not offer the court the governing law on that question. On this record, and construing the legislative grant of

[3] CPG 220 subsequently filed a motion to compel, which the court denied. CPG 220 did not appeal from that denial.

interlocutory jurisdiction narrowly, as we must, *CMH Homes*, 340 S.W.3d at 447–48, we reject CPG 220's characterization of its Motion for Stay, Transfer, and Sanctions as a motion filed pursuant to Section 3 of the United States Code. As a consequence, Section 51.016 of the Civil Practice and Remedies Code affords us no jurisdiction to reach the district court's alleged abuse of discretion, and we must dismiss this appeal.

CONCLUSION

For the reasons stated herein, we dismiss this appeal for want of jurisdiction. We dismiss as moot CPG 220's motion for emergency stay.

Edward Smith, Justice

Before Justices Goodwin, Kelly, and Smith
Concurring Opinion by Justice Goodwin

Dismissed for Want of Jurisdiction

Filed: June 5, 2020