Reverse, Render and Remand and Opinion Filed July 25, 2017

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01096-CV

TANTRUM STREET, LLC, Appellant
V.
KRISTINA "KIT" CARSON, Appellee

IN RE TANTRUM STREET, LLC, Relator

On Appeal and Original Proceeding from the 192nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-15-05170

MEMORANDUM OPINION

Before Justices Fillmore, Whitehill, and Schenck
Opinion by Justice Whitehill

A little more than a year after Kristina Carson sued Tantrum Street, LLC. on a series of Tantrum-issued convertible promissory notes and for fraud, Tantrum moved to compel arbitration. While that motion was pending and set for hearing, and over Tantrum's objection, the trial court granted Carson an interlocutory summary judgment on some of her claims. The trial court later heard and denied Tantrum's arbitration motion. Tantrum perfected an interlocutory appeal from that order and separately sought mandamus relief from the interlocutory summary judgment order. We consolidated the appeal and the original proceeding.

The principal questions before us are whether:

(i) Carson's note claims, which involve the proper construction of certain terms in those notes, and her claim that she was defrauded into buying the notes concern her employment which resulted in part from her willingness to buy those notes and whose duties included marketing similar notes to third parties;

(ii) Tantrum waived its arbitration rights by waiting more than a year to assert them, alleging counterclaims against Carson, defending a Tantrum employee's deposition, engaging in written discovery, and opposing Carson's motion to compel arbitration of Tantrum's claims against her; and

(iii) the Texas General Arbitration Act, contained in Chapter 171 of the civil practice and remedies code, prohibited the trial court from ruling on Carson's summary judgment motion before it ruled on Tantrum's arbitration motion.

We conclude that the trial court erred by denying Tantrum's arbitration motion for these reasons: (i) Carson's claims are within the arbitration agreement's broad scope; and (ii) the record does not show that Tantrum substantially invoked the judicial process.

Moreover, because the Texas General Arbitration Act prohibits trial courts from ruling on a case's merits while a motion to compel arbitration of that case is pending, we conclude that the trial court clearly abused its discretion by granting Carson's summary judgment motion and Tantrum has no adequate remedy by appeal. We therefore conditionally grant the writ of mandamus.

I. BACKGROUND

A. Facts

We draw the following facts from the evidence attached to Tantrum's motion to compel arbitration.

Tantrum was founded in August 2011. It makes mobile payment products and technologies that allow users to make or receive payments on personal electronic devices.

In May 2012, Tantrum hired Carson, an MBA student at Southern Methodist University, as a summer intern. She signed an Employment and Confidential Information Agreement that contained an arbitration clause.

Over three months later, Carson invested $100,000 in Tantrum by purchasing a convertible promissory note. Three months after that, she invested another $50,000 in Tantrum by buying a second convertible promissory note.

Carson continued working for Tantrum after her summer internship, with her ability and willingness to invest in Tantrum through these notes being a significant factor in Tantrum's decision to retain her.

In February 2013, nine months after being hired as a summer intern, Carson became Tantrum's "Director of Corporate Development." One of her duties in that role was to raise money by marketing and selling to investors convertible promissory notes similar to her own.

Also during that February, Carson signed a second Tantrum Employment and Confidential Information Agreement. This agreement had an arbitration clause identical to the one in her first agreement.

During her employment with Tantrum, Carson bought three more such convertible promissory notes, investing a total of $982,000 in Tantrum through the five notes. Each of Carson's notes had a paragraph "9 Event of Default," which provided that:

> If [Tantrum] fails to pay when due any principal or interest payment on the due date hereunder, and such payment shall not have been made within 5 days of [Tantrum's] receipt of the Holder's written notice to [Tantrum] of such failure to pay . . . then in any such case then [sic] Majority Holders may, upon written notice to [Tantrum], declare the Notes (including this Note) in default and immediately due and payable in full.

Additionally, her notes defined "Majority Holders" to be the "holders of Notes owning together in excess of 66 2/3% of the aggregate principal amount of the Notes."

As Tantrum's corporate development director, Carson was required to market and sell convertible promissory notes, with these same terms, to other investors. Nonetheless, although she did not hold more than two-thirds of the aggregate outstanding principal amounts due under all such notes at the time, in March 2015, Carson acting alone demanded payment in full of her five convertible promissory notes. When Tantrum refused to pay, Carson quit her job.

B. Procedural History

Carson sued Tantrum on her notes, alleging: (i) suit on notes, (ii) breach of contract, (iii) quantum meruit, and (iv) unjust enrichment. Tantrum answered.

Less than three months after suing Tantrum, Carson moved for summary judgment on her claims. Tantrum responded to Carson's motion and asserted counterclaims against her alleging breach of fiduciary duty, breach of her employment agreements, and other claims. The trial court denied Carson's summary judgment motion.

Carson then moved to compel arbitration of Tantrum's counterclaims. The trial court compelled that requested arbitration over Tantrum's opposition.

Carson amended her pleadings and joined three additional defendants, one of whom she later nonsuited. Her amended petition also added a fraud claim against Tantrum and dropped her quantum meruit claim.

Next, Carson moved the trial court to reconsider her summary judgment motion. Tantrum responded to that reconsideration motion.

About two months after Carson filed her reconsideration motion, Tantrum moved to compel arbitration of her claims against it. Carson opposed Tantrum's motion. Carson's motion for reconsideration was set for hearing first, and the trial court granted both her motion for

reconsideration and her summary judgment motion over Tantrum's objection to the court's deciding Carson's substantive motions before it ruled on Tantrum's motion to compel arbitration. The trial court later held a hearing on Tantrum's motion and denied it without stating its reasons.

Tantrum timely perfected its interlocutory appeal from the order denying its motion to compel arbitration. *See* TEX. CIV. PRAC. & REM. CODE § 51.016. It also filed a petition for writ of mandamus complaining of the trial court's decision to grant Carson's summary judgment motion before deciding Tantrum's motion to compel arbitration. We consolidated the appeal and the original proceeding. We also stayed proceedings in the trial court pending the interlocutory appeal's outcome.

II. ANALYSIS OF TANTRUM'S INTERLOCUTORY APPEAL

Tantrum's first issue is a general issue asserting that the trial court erred by denying Tantrum's motion to compel arbitration. Its second issue contends that Carson's claims are arbitrable under her employment agreements, either because (i) her claims come within the arbitration clauses' scope or (ii) the arbitrability issue itself should have been referred to the arbitrator. Tantrum's third issue contends that Tantrum did not waive its right to compel arbitration.

A. Issue Two: Are Carson's claims on the notes within the arbitration clauses' scope?

1. Applicable Law

The Federal Arbitration Act governs arbitration provisions in contracts relating to interstate commerce. *See Am. Realty Trust, Inc. v. JDN Real Estate-McKinney, L.P.*, 74 S.W.3d 527, 530 (Tex. App.—Dallas 2002, pet. denied). Here, it is undisputed that Carson's employment contracts relate to interstate commerce. Thus, we apply the FAA's substantive arbitration law.

Under the FAA, Tantrum had the burden to establish that (i) a valid, enforceable arbitration agreement exists and (ii) Carson's claims fall within the agreement's scope. *See Sidley Austin Brown & Wood, LLP v. J.A. Green Dev. Corp.*, 327 S.W.3d 859, 863 (Tex. App.—Dallas 2010, no pet.). Carson then had the burden to raise an affirmative defense to enforcing the agreement. *See id*. Any doubts concerning an arbitration clause's scope are resolved in favor of arbitration. *Id*.

Courts employ a strong presumption in favor of arbitration when deciding whether claims fall within an arbitration agreement. *In re Signor*, No. 05-16-00703-CV, 2017 WL 1046770, at *4 (Tex. App.—Dallas Mar. 20, 2017, orig. proceeding, no pet.) (mem. op.). This presumption particularly applies where the clause is broad. *Id*. In such cases, absent any express provision excluding a particular grievance from arbitration, only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail. *Id*. An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. *Id*.

Unless material facts are controverted, the trial court may summarily decide whether to compel arbitration based on affidavits, pleadings, discovery, and stipulations. *Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 269 (Tex. 1992) (orig. proceeding). Under this procedure, courts must accept as true the clear, direct, and positive evidence provided by an undisputed affidavit, even of a party's agent. *Id*. at 270.

We review the trial court's order for abuse of discretion. *Sidley Austin*, 327 S.W.3d at 863.

2. Did Tantrum prove the existence of an agreement to arbitrate?

Tantrum argues, and Carson does not dispute, that Tantrum proved the existence of an agreement to arbitrate. Tantrum CEO William Cervin authenticated without challenge Carson's

two employment contracts, which contain identical arbitration clauses. Indeed, Carson herself relied on the second such agreement when she successfully moved to compel arbitration of Tantrum's counterclaims. Tantrum thus proved that Carson's employment agreements contain valid, enforceable arbitration agreements.

3. Are Carson's claims within the arbitration clauses' scope?

We next address whether Carson's claims are within the arbitration clauses' scope, resolving any doubts in favor of arbitration. *See Sidley Austin,* 327 S.W.3d at 863. In so doing, we focus on Carson's factual allegations rather than her legal causes of action. *See In re Rubiola*, 334 S.W.3d 220, 225 (Tex. 2011) (orig. proceeding).

The arbitration clauses in Carson's employment agreements state:

> . . . I agree that any dispute, claim or controversy *concerning* my employment or the termination of my employment or any dispute, claim or controversy arising out of or relating to any interpretation, construction, performance or breach of this Agreement, shall be settled by arbitration to be held in Dallas, Texas in accordance with the rules then in effect of the American Arbitration Association.

(Emphasis added). Thus, this clause covers any dispute, claim, or controversy that:

- concerns Carson's employment;
- concerns the termination of her employment; or
- arises out of or relates to the interpretation, construction, performance, or breach of the employment agreement.

Tantrum argues, and we agree, that in this context "concerning" is a broad term synonymous with "relating to." *See Concern*, THE NEW OXFORD AMERICAN DICTIONARY (2001) (first definition: "relate to; be about"); *see also Schwarz v. Pully*, No. 05-14-00615-CV, 2015 WL 4607423, at *3 (Tex. App.—Dallas Aug. 3, 2015, no pet.) (mem. op.) ("The phrase 'relates to' is a very broad term."). Thus, the clause is a broad one that encompasses claims based on facts that touch, are factually intertwined with, have a significant relationship with, or are inextricably intermeshed with her employment, termination, or the interpretation, construction,

performance, or breach of the employment agreement. *See In re Signor*, 2017 WL 1046770, at *4.

On the other hand, the claims are not subject to arbitration if (i) the facts supporting the claim stand alone and are completely independent of Carson's employment, termination, and the agreement and (ii) the claims can be maintained without referring to Carson's employment, termination, and the agreement. *See id*.

Next we examine each claim's factual basis. Carson's four counts are (i) suit on notes, (ii) breach of contract, (iii) unjust enrichment, and (iv) fraud. The first three counts all rely on the same alleged facts: Tantrum executed the five convertible promissory notes, Carson is the notes' lender and holder, the notes' due dates have passed, and Tantrum failed to pay the notes after Carson demanded payment. The fraud count adds that Tantrum fraudulently induced Carson to loan Tantrum the amounts evidenced in the notes. Carson's amended petition does not mention or rely on her employment relationship with Tantrum. And her appellate brief emphasizes that (i) her note claims would exist even absent her employment relationship with Tantrum and (ii) evidence regarding her employment will be immaterial when her claims are tried.

On the other hand, Tantrum argues that Carson's claims concern her employment or the termination of her employment because:

(i) Carson invested in the notes while employed by Tantrum;

(ii) her ability to make such investments in Tantrum was a significant factor in her continued employment and the only reason she was given the title "co-founder";

(iii) she claims that the notes matured and went into default during her employment, and she demanded payment while still employed by Tantrum;

(iv) she quit promptly after Tantrum refused to pay, and she never returned to Tantrum's offices;

(v) if Carson is correct that she, a single investor, can declare the notes due and payable, then she misrepresented the contrary to other Tantrum investors in her capacity as Tantrum's director of corporate development; and

(vi) Carson's pre-suit demand and lawsuit violate her employment agreements.

We conclude that facts (i), (ii), and (v), which Tantrum proved (for purposes of its arbitration motion) with uncontroverted evidence, prevail for Tantrum because they connect the sued-on obligations to her employment.

Carson's claims will require her to prove that Tantrum made the notes (suit on notes and breach of contract) or that she invested the funds she is suing for (unjust enrichment and fraud). Tantrum's evidence establishes that those facts are factually intertwined with and have a significant relationship to her employment with Tantrum. Specifically, Tantrum CEO William Cervin testified that:

> Carson's ability and willingness to make capital investments in Tantrum Street through the purchase of 2012 Convertible Promissory Notes was a significant factor in Tantrum Street's decision to retain Carson following the conclusion of her summer internship.
>
> . . .
>
> . . . Following her second investment in a convertible promissory note, Carson conditioned further investments upon the receipt of new job titles at Tantrum Street. Although Carson was not in any way involved with Tantrum Street when I founded the company in 2011, Carson specifically demanded and was given the title "Co-Founder" in August, 2013, because of her investments in the convertible promissory notes. Had Carson not invested significant sums in Tantrum Street through the purchase of convertible promissory notes, she would not have been given the title "Co-Founder" of the company.

Because Carson produced no controverting evidence, Cervin's affidavit established that Carson's post-internship employment with Tantrum depended on her investing in the notes.

Moreover, the parties' dispute involves whether Carson lawfully declared her notes in default given their paragraph nine Majority Holder requirement. If the presiding authority determines that the Majority Holders requirement is ambiguous, the factfinder could consider the

meaning Carson placed on that term while she was promoting similar notes to other investors to aid in resolving these parties' dispute over how that requirement applies here. *See Superior Oil Co. v. Stanolind Oil & Gas Co.*, 240 S.W.2d 281, 284 (Tex. 1951).

Given these scenarios, we conclude that Carson's claims meet the test enunciated in *In re Signor*: that is, the claims are based on facts that touch, are factually intertwined with, have a significant relationship with, or are inextricably intermeshed with her employment. *See* 2017 WL 1046770, at *4. Thus, under the evidence discussed above, and resolving any doubts in favor of arbitration, we conclude that the material facts are not completely independent of Carson's employment. Accordingly, Carson's claims are within the arbitration clauses' scope.

Because Carson's claims are within the arbitration clauses' scope, we need not address Tantrum's alternative argument that the trial court should have referred the question of arbitrability to the arbitrator.

Therefore, we sustain Tantrum's second issue.

B. Issue Three: Did Tantrum waive its right to arbitration?

1. Applicable Law

A party waives its right to arbitration by substantially invoking the judicial process to the other party's detriment or prejudice. *Perry Homes v. Cull*, 258 S.W.3d 580, 589–90 (Tex. 2008). Under the FAA there is a strong presumption against waiver of arbitration. *RSL Funding, LLC v. Pippins*, 499 S.W.3d 423, 430 (Tex. 2016) (per curiam). In close cases, the presumption against waiver controls. *Id*. When the facts are undisputed, waiver is a question of law that we review de novo. *Id*.

In deciding whether a party substantially invoked the judicial process, we consider the totality of the circumstances, including:

- whether the party asserting the right to arbitrate was plaintiff or defendant in the lawsuit,

- how long the party waited before seeking arbitration,
- the reasons for any delay in seeking to arbitrate,
- how much discovery and other pretrial activity the party seeking to arbitrate conducted before seeking arbitration,
- whether the party seeking to arbitrate requested the court to dispose of claims on the merits,
- whether the party seeking to arbitrate asserted affirmative claims for relief in court,
- the amount of time and expense the parties have expended in litigation, and
- whether the discovery conducted would be unavailable or useful in arbitration.

Id. Generally, no one factor controls. *Id.*

In the waiver context, prejudice means "inherent unfairness in terms of delay, expense, or damage to a party's legal position that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue." *Perry Homes*, 258 S.W.3d at 597 (internal quotations and footnote omitted).

"The party asserting waiver bears a heavy burden of proof to show the party seeking arbitration has waived its arbitration right." *RSL Funding*, 499 S.W.3d at 430.

2. Application of the Law to the Facts

After analyzing the *RSL Funding* factors, we conclude that Carson did not carry her heavy burden to show that Tantrum waived its arbitration right because the record does not show that Tantrum substantially invoked the litigation process before seeking to compel arbitration.

Plaintiff or Defendant?

Tantrum is the defendant in this action, which weighs against a waiver finding. *See G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 512–13 (Tex. 2015).

Length of and Reason for Delay

Tantrum sought arbitration about thirteen months after answering Carson's lawsuit. But mere delay in moving to compel arbitration alone does not establish waiver. *Richmont Holdings, Inc. v. Superior Recharge Sys., L.L.C.*, 455 S.W.3d 573, 575–76 (Tex. 2014) (per curiam) (no waiver despite a nineteen-month delay).

Here, the record does not explain Tantrum's delay. Although Carson urges that she has now prevailed on her summary judgment motion, we do not agree this shows that Tantrum delayed seeking arbitration for an improper reason. When Tantrum moved to compel arbitration, the trial court had already denied Carson's summary judgment motion. Although Carson moved for reconsideration of that denial about two months before Tantrum moved to compel arbitration, there is no indication other than timing that the reconsideration motion caused Tantrum to seek arbitration. We conclude that the record does not establish that Tantrum had an improper motive for the delay. *Cf. id*. at 576 (concluding that nineteen month delay did not establish waiver even though movant proffered only an implausible explanation for the delay).

Amount of Pretrial Activity

Next, we consider the amount of discovery and other pretrial activity Tantrum conducted. Tantrum asserts, and Carson does not dispute, that Tantrum conducted no oral depositions. The parties agree that Tantrum propounded written discovery requests to Carson. But the Texas Supreme Court has held that waiver was not established in several cases in which the movant propounded written discovery. *See G.T. Leach Builders*, 458 S.W.3d at 514–15 (collecting cases).

Tantrum joined Carson's motion to continue the first trial setting, and Carson urges that Tantrum also agreed to extend various discovery deadlines. But these acts do not establish waiver. *See id*. at 513 (continuance and venue transfer motions did not waive arbitration).

Carson also points out that Tantrum opposed Carson's motion to compel arbitration of Tantrum's counterclaims. But Tantrum opposed Carson's motion based on (i) waiver and (ii) an interpretation of the employment agreements under which Tantrum, unlike Carson, had the option to pursue any claim against Carson in arbitration or in Texas courts. Taking this position as to the arbitrability of its own counterclaims did not substantially invoke the judicial process as to Carson's claims.

Request for a Merits Disposition

Tantrum never asked the trial court to dispose of Carson's claims on the merits, which fact weighs heavily against waiver. *See Richmont Holdings*, 455 S.W.3d at 575 (whether the movant sought a merits disposition a key waiver factor).

Affirmative Claims for Relief

Tantrum asserted counterclaims against Carson, which is a factor favoring waiver. Those counterclaims, however, were arguably compulsory counterclaims. *See* TEX. R. CIV. P. 97(a) (counterclaim is compulsory if it "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction"). One counterclaim was for a declaratory judgment regarding the enforceability of the notes' Event of Default/Majority Holders terms. If proper, this counterclaim was compulsory. The other counterclaims were for various breaches of Carson's employment related duties, and thus arguably arise from the same general transactions and occurrences giving rise to Carson's claims. Therefore, that Tantrum asserted potentially compulsory counterclaims does not weigh heavily in favor of waiver. *See RSL Funding*, 499 S.W.3d at 431 (asserting claims as required by rule or statute to avoid forfeiture does not waive right to arbitrate). Moreover, "[m]erely filing suit does not waive arbitration." *Richmont Holdings*, 455 S.W.3d at 576.

For these reasons, this factor does not strongly favor a waiver finding.

Time and Expense

There is little record concerning the time and expense the parties had expended in litigation. But the case had been pending about fifteen months when Tantrum filed its motion. And when Tantrum opposed Carson's motion to arbitrate Tantrum's counterclaims, Tantrum filed evidence that it had incurred over $50,000 in attorneys' fees as of March 14, 2016 (about four and a half months before Tantrum moved to compel arbitration). This is some evidence of time and expense, but this amount does not strongly favor a waiver finding.

Availability and Usefulness of Discovery in Arbitration

Finally, there appears to be no evidence as to whether the discovery done in the litigation would be unavailable or useful in the arbitration.

Conclusion

The Texas Supreme Court has said that a party can waive arbitration by conducting full discovery, filing motions going to the merits, and seeking arbitration only on the eve of trial. *In re Vesta Ins. Grp., Inc.*, 192 S.W.3d 759, 764 (Tex. 2006) (orig. proceeding) (per curiam). In *Perry Homes*, those facts, plus the fact that the parties seeking arbitration were the plaintiffs in the case, led to a waiver finding. *See* 258 S.W.3d at 595–97. But this case is not *Perry Homes*.

In short, many factors weigh against a waiver finding: (i) Tantrum is the defendant, not the plaintiff, (ii) Tantrum's delay in seeking arbitration was not extreme, and Carson has not shown an improper reason for the delay, (iii) Tantrum did not seek a merits disposition of Carson's claims, and it did not conduct an inordinate amount of discovery, (iv) Tantrum's counterclaims are arguably compulsory counterclaims, (v) Carson did not show that the parties have spent an inordinate amount of time or money litigating this case, and (vi) Carson did not

show that the discovery Tantrum conducted would have been unavailable in arbitration or would not be useful in the arbitration.

Given all these factors, we conclude that Carson did not carry her heavy burden to prove that Tantrum substantially invoked the judicial process. Accordingly, we need not address whether Carson was prejudiced by the delay. *See Richmont Holdings*, 455 S.W.3d at 576 (deciding case based solely on basis that movant did not substantially invoke judicial process).

We therefore sustain Tantrum's third issue.

C. Conclusion

Having sustained Tantrum's second and third issues, we also sustain its first issue and conclude that the trial court erred by denying Tantrum's motion to compel arbitration.

III. Analysis of Tantrum's Mandamus Petition

Tantrum's mandamus petition raises one issue: did the trial court clearly abuse its discretion by granting summary judgment for Carson on her claims while Tantrum's arbitration motion was pending? We sustain Tantrum's issue because (i) the trial court was statutorily required to rule on Tantrum's motion to compel arbitration first and (ii) Tantrum has no adequate remedy by appeal.

A. Applicable Law

We will grant mandamus relief if Tantrum has shown (i) a clear abuse of discretion and (ii) that it has no adequate remedy by appeal. *See In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding).

Although the FAA governs the enforceability of the arbitration clauses involved in this case, we apply Texas procedural law such as that found in Texas Civil Practice and Remedies Code Chapter 171. *See In re Houston Pipe Line Co.*, 311 S.W.3d 449, 450 (Tex. 2009) (orig. proceeding) (per curiam).

Under the Texas General Arbitration Act, as contained in Chapter 171, a party make seek certain court orders "[b]efore arbitration proceedings begin, in support of arbitration." TEX. CIV. PRAC. & REM. CODE § 171.086(a). Consistent with this language, the statute authorizes various orders that promote case resolution through arbitration, such as orders (i) preventing the destruction of evidence or of the controversy's subject matter, (ii) appointing arbitrators, or (iii) granting other relief needed "to permit the arbitration to be conducted in an orderly manner and to prevent improper interference [with] or delay of the arbitration." *Id.* § 171.086(a)(3), (5), (6).

The Texas Supreme Court has construed Chapter 171 to permit a trial court to order discovery necessary to permit the court to make a proper decision on a motion to compel arbitration but not to authorize discovery into the case's merits. *In re Houston Pipe Line*, 311 S.W.3d at 451; *accord In re Susan Newell Custom Home Builders, Inc.*, 420 S.W.3d 459, 460 (Tex. App.—Dallas 2014, orig. proceeding). In short, Chapter 171 "provides courts a limited authorization to issue certain types of orders in support of arbitration as opposed to the merits." *Comed Med. Sys. Co., Ltd. v. AADCO Imaging, LLC*, No. 03-14-00593-CV, 2015 WL 869456, at *4 (Tex. App.—Austin Feb. 25, 2015, no pet.) (mem. op.) (internal quotations and footnote omitted).

Consistent with these principles, Texas appellate courts have frequently corrected trial courts that, during the pendency of a motion to compel arbitration, issued orders not listed in § 171.086(a). *See, e.g.*, *In re Houston Pipe Line*, 311 S.W.3d at 452; *Kelly v. Hinson*, 387 S.W.3d 906, 913 (Tex. App.—Fort Worth 2012, pet. denied) *In re Heritage Bldg. Sys., Inc.*, 185 S.W.3d 539, 543 (Tex. App.—Beaumont 2006, orig. proceeding).

B. Did the trial court clearly abuse its discretion?

Based on the legal principles discussed in the preceding section and the facts discussed below, we conclude that the trial court clearly abused its discretion by ruling on Carson's summary judgment motion.

The trial court denied Carson's summary judgment motion on her claims against Tantrum in September 2015. The clerk's record and docket sheet do not reflect much activity in the case until the next summer, when the following events occurred:

June 9, 2016	Carson filed a motion to reconsider her summary judgment motion.
July 11	The trial court heard Carson's motion to reconsider, but other matters consumed most of the hearing, and the court did not reach or rule on the motion to reconsider.
July 27	Carson gave notice that her motion to reconsider had been rescheduled for hearing on August 30.
August 3	Tantrum filed its motion to compel arbitration.
August 10	Tantrum gave notice that its motion to compel arbitration had been set for hearing on September 12.
August 30	Over Tantrum's stated objection, the trial court heard Carson's motion to reconsider and took it under advisement.
September 2	The trial court signed an order granting Carson's motion to reconsider.
September 9	The trial court signed an order granting Carson's summary judgment motion.
September 12	The trial court heard Tantrum's motion to compel arbitration and signed an order denying the motion.

Under the authorities cited above, we conclude that the trial court clearly abused its discretion by ruling on Carson's summary judgment motion while Tantrum's motion to compel arbitration was pending and, indeed, was set for hearing. At the August 30 hearing of Carson's motion to reconsider, Tantrum advised the court that its motion to compel arbitration was

pending, and it objected to the court's proceeding on the motion to reconsider until it first ruled on the motion to compel. The trial judge decided to proceed with the hearing, but said, "I may not rule until after the September 12th hearing on the motion to compel." Nonetheless, the trial judge granted summary judgment for Carson three days before hearing Tantrum's motion to compel.

Because Texas law prohibits trial courts from ruling on a case's merits while a motion to compel arbitration is pending, we conclude that the trial court clearly abused its discretion by doing so. *See Kelly*, 387 S.W.3d at 913 (reversing summary judgment because trial court did not first hear and rule on defendants' motion to compel arbitration); *see also* CIV. PRAC. & REM. § 171.025 (providing for stay of judicial proceedings once order compelling arbitration is made).

C. Is Tantrum's remedy by appeal inadequate?

Tantrum argues that its appellate remedy is inadequate because, one, the arbitral tribunal may believe itself bound or at least be influenced by the summary judgment order and that this harm may be non-remediable by appeal from a later judgment confirming the arbitration award. And, two, the trial court's order denies Tantrum its right to a confidential dispute resolution procedure. For the following reasons, we agree with Tantrum.

Whether an appellate remedy is adequate is a practical, prudential determination based on a balancing of public and private interests. *See In re Prudential*, 148 S.W.3d at 136.

> Mandamus review of significant rulings in exceptional cases may be essential to preserve important substantive and procedural rights from impairment or loss, allow the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments, and spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings.

Id.

Here, the *Prudential* factors favor granting mandamus relief. First, the right to arbitration is important, as evidenced by appellate decisions enforcing arbitration clauses by mandamus.

See, e.g., *Jack B. Anglin Co.*, 842 S.W.2d at 272–73. It follows that a party's right to arbitration encompasses a right to an arbitration unaffected by erroneously rendered judicial rulings on the case's merits.

Second, as Tantrum argues, it might be difficult for an appellate court to address the trial court's error after final judgment confirming an award for Carson. For example, the summary judgment's effect on the arbitration proceeding and ultimate award may be difficult to demonstrate on the cold record. Moreover, there are limited grounds upon which a party may challenge an arbitration award, and those grounds do not include an error of law or even a manifest disregard of the law. *See* 9 U.S.C. § 10; *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 578 (2008); *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 350 (5th Cir. 2009).

Third, even if Tantrum can show in a future appeal from judgment after arbitration that it was harmed by the summary judgment order's existence, the waste of time and expense in allowing the arbitration to go forward under the cloud of the summary judgment order is unjustifiable.

For these reasons, we conclude that Tantrum does not have an adequate remedy by appeal from the trial court's erroneous decision to rule on Carson's summary judgment motion.

IV. DISPOSITION

We reverse the trial court's order denying Tantrum's motion to compel arbitration, render judgment granting that motion, and remand for further proceedings consistent with this opinion.

We also conditionally grant Tantrum's petition for writ of mandamus.

A writ will issue only in the event the trial court fails to vacate its September 2, 2016 order granting Carson's motion to reconsider and its September 9, 2016 order granting Carson's motion for summary judgment.

/Bill Whitehill/
BILL WHITEHILL
JUSTICE

161096F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

TANTRUM STREET, LLC, Appellant

No. 05-16-01096-CV V.

KRISTINA "KIT" CARSON, Appellee

On Appeal from the 192nd Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-15-05170.
Opinion delivered by Justice Whitehill.
Justices Fillmore and Schenck participating.

In accordance with this Court's opinion of this date, we **REVERSE** the trial court's order denying appellant Tantrum Street, LLC's motion to compel arbitration, **RENDER** judgment that the motion to compel arbitration is granted, and **REMAND** the case to the trial court for further proceedings consistent with the opinion.

It is **ORDERED** that appellant Tantrum Street, LLC recover its costs of this appeal from appellee Kristina "Kit" Carson.

It is further **ORDERED** that the stay of trial court proceedings imposed by our order of September 27, 2016 is **LIFTED**.

Judgment entered July 25, 2017.