Affirmed; Opinion Filed November 16, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00277-CV

FC BACKGROUND, LLC, Appellant
V.
LEE FRITZE, Appellee

On Appeal from the 14th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-16-14736

MEMORANDUM OPINION

Before Justices Lang, Evans, and Schenck
Opinion by Justice Evans

FC Background, LLC (FCB) appeals the trial court's denial of its motion to compel arbitration on the claims its former employee Lee Fritze filed against it. FCB asserts the trial court erred in denying its motion because Fritze signed an employment application that required arbitration of all disputes that might arise out of the submission of the application and his employment with the company. We conclude the employment application containing the arbitration clause was superseded by a later agreement between the parties that did not provide for arbitration and instead explicitly provided for litigation in court. Accordingly, we affirm the trial court's order.

BACKGROUND

In 2012, Fritze signed an employment application with FCB that stated in relevant part:

> I HEREBY AGREE TO SUBMIT TO BINDING ARBITRATION ALL DISPUTES AND CLAIMS ARISING OUT OF THE SUBMISSION OF THIS APPLICATION. I FURTHER AGREE, IN THE EVENT THAT I AM HIRED BY THE COMPANY, THAT ALL DISPUTES THAT CANNOT BE RESOLVED BY INFORMAL INTERNAL RESOLUTION WHICH MIGHT ARISE OUT OF MY EMPLOYMENT WITH THE COMPANY, WHETHER DURING OR AFTER THAT EMPLOYMENT, WILL BE SUBMITTED TO BINDING ARBITRATION. I AGREE THAT SUCH ARBITRATION SHALL BE CONDUCTED UNDER THE RULES OF THE AMERICAN ARBITRATION ASSOCIATION. THIS APPLICATION CONTAINS THE ENTIRE AGREEMENT BETWEEN THE PARTIES WITH REGARD TO DISPUTE RESOLUTION, AND THERE ARE NO OTHER AGREEMENTS AS TO DISPUTE RESOLUTION, EITHER ORAL OR IN WRITING.

FCB formally hired Fritze as vice president of sales and marketing in 2013. In 2015, the parties negotiated an employment agreement for 2016 that required Fritze to execute (1) an employment agreement dated December 28, 2015 setting forth his compensation, benefits, and other items, and (2) a non-compete agreement. Among other things, the non-compete agreement incorporated by reference the December 28 employment agreement, generally set forth Fritze's responsibilities as vice president of sales, addressed his ability to bind the company, provided for the protection of confidential information, and also provided the following:

> Prior Agreements and Modifications. This Agreement expressly supersedes an[y[1]] previous written or oral agreements between you and FCB relating to employment. It represents the complete understanding between you and FCB and may only be modified by written agreement signed by you and an owner of FCB.

Neither the non-compete agreement nor the December 28 employment agreement that was incorporated by reference included an arbitration clause. Instead, the non-compete agreement stated as follows:

> Applicable Law. Except as expressly stated to the contrary, this document is to be governed under the laws of the State of Texas. The Employee and the Company each submit to the exclusive jurisdiction of any state or federal court sitting in the State of Texas, in any action or proceeding arising out of or relating to this Agreement and irrevocably waive any objection to proceeding before such courts

[1] All parties recognized "and" is a typographical error for "any" as evidence by FCB's use of "sic" in its brief, after quoting "and."

> based upon lack of personal jurisdiction of [sic] inconvenient forum. The Company and the Employee irrevocably consent to the service of process out of any of the aforementioned courts by the mailing of copies thereof by registered or certified mail, postage prepaid, to such party at the address stated in the this [sic] Agreement under Notices.

Fritze sued FCB in November 2016 alleging various claims arising from FCB's termination of his employment in July 2016. FCB filed a motion to stay proceedings and compel arbitration pursuant to the clause in the application for employment signed by Fritze. Fritze opposed the motion. At the hearing on the motion to compel arbitration, the trial court stated its reliance on the merger clause in the non-compete agreement as superseding the arbitration clause in the employment application. The trial court, however, did not limit the bases of its order denying FCB's motion by identifying in writing any ground or reason. This appeal followed.

ANALYSIS

FCB contends that the trial court erred in refusing to compel arbitration under the clause in the employment application. We review an order denying a motion to compel arbitration for an abuse of discretion. *See Carr v. Main Carr Dev., LLC*, 337 S.W.3d 489, 494 (Tex. App.—Dallas 2011, pet. denied). Under that standard, we review the trial court's legal determination de novo but defer to the trial court's factual determinations when supported by the evidence. *See id*.

Both parties agree that the Federal Arbitration Act governs this dispute. A party seeking to compel arbitration under the FAA must establish there is a valid agreement and that the claims fall within the agreement's scope. *See In re Bank One, N.A.*, 216 S.W.3d 825, 826 (Tex. 2007) (orig. proceeding) (per curiam). Here, it is undisputed that the employment application Fritze signed contained an arbitration clause. At issue is the enforceability of that arbitration agreement in light of the subsequent agreements executed by the parties. Among other things, Fritze argues that the merger and forum selection clauses in the non-compete agreement preclude enforcement of the arbitration clause contained in the employment application. We agree.

Because the court must determine the threshold issue of whether a valid arbitration agreement exists, it is the trial court's duty to determine whether a later agreement between the parties revokes or supersedes an arbitration clause. *See TransCore Holdings, Inc. v. Rayner*, 104 S.W.3d 317, 322–23 (Tex. App.—Dallas 2003, pet. denied); *Valero Energy Corp. v. Teco Pipeline, Co.*, 2 S.W.3d 576, 586 (Tex. App.—Houston [14th Dist.] 1999, no pet.). Our primary concern in contract construction is to ascertain the true intentions of the parties as expressed in the agreement. *FPL Energy, LLC v. TXU Portfolio Mgmt. Co., L.P.*, 426 S.W.3d 59, 63 (Tex. 2014).

Here, the non-compete agreement incorporated the parties' December 28 employment agreement. Further, the non-compete agreement contained, among other things, provisions for Fritze's employment responsibilities, compensation, employee benefits, performance bonus, and equity options. Consistent with the combined non-compete and December 28 employment agreements containing complete terms of employment, the non-compete agreement provided it (1) "expressly supersedes an[y] previous written or oral agreements" between Fritze and FCB relating to employment, and (2) "represents the complete understanding between you and FCB and may only be modified by written agreement signed by you and an owner of FCB." Neither the non-compete agreement nor the 2016 employment agreement contained an arbitration clause. Instead, the non-compete agreement reflects the parties' desire to no longer be bound by arbitration. The non-compete agreement specifically provides, "The Employee and the Company each submit to the exclusive jurisdiction of any state or federal court sitting in the State of Texas, in any action or proceeding arising out of or relating to this Agreement and irrevocably waive any objection to proceeding before such courts based upon lack of personal jurisdiction of [sic] inconvenient forum." Because the merger clause in the non-compete

agreement superseded the earlier employment application containing the arbitration clause, FCB has failed to establish a valid and enforceable arbitration agreement.

In reaching our conclusion, we necessarily reject FCB's argument that because the jurisdiction and merger provisions can be harmonized with the earlier agreement to arbitrate, these clauses do not invalidate the arbitration agreement. To support its contention, FCB relies on opinions deciding whether merger clauses providing the later agreements were the "entire agreement" of the parties with respect "to the subject matter hereof" rendered unenforceable earlier agreements containing arbitration clauses. *See Phytel, Inc. v. Smiley*, No. 05-12-00607-CV, 2013 WL 1397085, at *3 (Tex. App.—Dallas Apr. 5, 2013, no pet.) (mem. op.); *Transwestern Pipeline Co. v. Horizon Oil & Gas Co*., 809 S.W.2d 589, 592 (Tex. App.—Dallas 1991, writ dism'd w.o.j.); *Valerus Compression Servs., L.P. v. Austin*, 417 S.W.3d 202, 210 (Tex. App.—Houston [1st Dist.] 2013, no pet.). In all three cases, the subsequent agreement with the merger clause expressly provided for the continued enforceability of prior agreements, at least one of which contained the arbitration clause that was sought to be enforced. *See Valerus*, 417 S.W.3d at 205–06, 210; *Transwestern*, 809 S.W.2d at 592; *Phytel*, 2013 WL 1397085, at *3. These cases are distinguishable because the merger clause before us does not contain the limiting language, "with respect to the subject matter hereof," and the non-compete agreement incorporates by reference only the December 28 employment agreement but not the employment application that has the arbitration clause sought to be enforced. The merger clause here expressly supersedes any previous written or oral agreements between Fritze and FCB *relating to employment*. We conclude this provision unequivocally supersedes the arbitration clause contained in the 2012 employment application. Accordingly, the trial court did not err in denying FCB's motion to compel arbitration.

CONCLUSION

Based on the record before us, we conclude the parties' subsequent agreement superseded their previous agreement to arbitrate, relieving them of their obligation to arbitrate. We therefore affirm the trial court's order denying FCB's motion to compel arbitration.

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/David W. Evans/
DAVID EVANS
JUSTICE

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

FC BACKGROUND, LLC, Appellant

No. 05-17-00277-CV V.

LEE FRITZE, Appellee

On Appeal from the 14th Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-16-14736
Opinion delivered by Justice Evans, Justices Lang and Schenck participating.

In accordance with this Court's opinion of this date, the trial court's order denying appellant's motion to compel arbitration is **AFFIRMED**.

It is **ORDERED** that appellee Lee Fritze recover his costs of this appeal from appellant FC Background, LLC.

Judgment entered this 16th day of October, 2017.