TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-17-00474-CV

Cardon Healthcare Network, Inc.; and Seton Healthcare Services of Austin d/b/a Seton Medical Center, Appellants

v.

Susan Goldberg, Appellee

FROM THE COUNTY COURT AT LAW NO. 1 OF TRAVIS COUNTY
NO. C-1-CV-11-011434, HONORABLE ERIC SHEPPERD, JUDGE PRESIDING

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

In this interlocutory appeal, Cardon Healthcare Network, Inc. (Cardon) and Seton Healthcare Services of Austin d/b/a Seton Medical Center (Seton) complain of the trial court's order denying their motion to compel arbitration. *See* Tex. Civ. Prac. & Rem. Code §§ 51.016, 171.098(a)(1) (authorizing appeal from order denying application to compel arbitration under Federal Arbitration Act and appeal from order denying application to compel arbitration under Texas Arbitration Act, respectively). Susan Goldberg brought suit against Cardon and Seton asserting claims for fraudulent lien and other statutory and common law causes of action. Cardon and Seton sought to compel mediation based on an arbitration provision in Seton's agreement with Blue Cross Blue Shield of Texas (BCBS), Goldberg's health insurer. For the reasons that follow, we affirm the trial court's order.

BACKGROUND

In June 2008, Goldberg was injured in an automobile accident and was treated at the Seton emergency room, incurring approximately $7,800 in charges. Seton sent Goldberg's heath insurer, BCBS, a bill that included a contractual reduction or adjustment pursuant to an agreement between Seton and BCBS (the Agreement). BCBS paid the bill, which was for approximately $4,600. Seton then billed Goldberg for $1,903.24.[1] Goldberg sought payment for personal injury protection (PIP) from her automobile insurer, Nationwide Mutual Insurance Company (Nationwide), which agreed to pay policy limits of $5,000. According to Goldberg, she directed Nationwide to pay Seton the $1,903.24 for which she had been billed using her PIP coverage. Instead, Nationwide paid the entire $5,000 to Seton. Cardon and Seton contend that Nationwide did so by mistake or for some other unknown reason. According to Goldberg, Cardon, acting as collection agent for Seton, sought payment of $5,000 from Nationwide and informed Seton once Cardon had received the payment. After Seton received payment of $5,000 from Nationwide, BCBS requested that Cardon and Seton return the $4,600 it had previously paid for Goldberg's treatment. Goldberg contends that Seton asked BCBS to request the return of its payment. Seton refunded BCBS's payment, reversed the contractual reduction, and sent Goldberg a new bill for $2,762, the remaining balance on the full charges after the $5,000 payment by Nationwide. In October 2009, Cardon, acting as agent for Seton, filed a hospital lien for this unpaid balance of $2,762. *See* Tex. Prop. Code §§ 55.002 (providing that hospital has lien on claim of individual who receives hospital services for injuries

[1] It appears that this amount was based on Goldberg's co-pay, deductible, or some combination thereof under her insurance contract with BCBS.

caused by accident attributed to negligence of another person), .003(b)(2) (providing that lien does not attach to proceeds of insurance policy in favor of injured individual except liability insurance).

In October 2011, Goldberg filed suit against Cardon and Seton, alleging fraudulent lien, *see generally* Tex. Civ. Prac. & Rem. Code §§ 12.001–.007 (providing in relevant part for limited liability for fraudulent lien against personal property); untimely billing, *see generally id.* §§ 146.001–.004 (requiring in relevant part that health care service providers bill patient for services by date specified in provider's contract with health insurer); and violations of the Texas Deceptive Trade Practice Act (DTPA), *see* Tex. Bus. & Comm. Code § 17.46 (2), (5), (12) (14), & (24).[2] In April 2017, as the trial date of April 24 approached, Goldberg filed several amended petitions. In her third amended petition, she asserted additional statutory claims, including a claim for violations of the Texas Finance Code. *See* Tex. Fin. Code §§ 392.304(a) (8) (prohibiting debt collector from misrepresenting character, extent, or amount of debt), (19) (prohibiting debt collector from using false representation or deceptive means), .404 (making violation of chapter 392 a violation of DTPA).

In her fifth amended petition, filed on April 14, 2017, ten days before the trial date, Goldberg added a paragraph alleging that she was a third-party beneficiary under the Agreement between Seton and BCBS and that they had violated the Agreement. She repeated those allegations

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[2] Although the original petition cited section 17.47 of the DTPA, that citation was subsequently corrected to section 17.46 in Goldberg's second amended petition. Goldberg also named Nationwide as a defendant in her original petition and subsequently added BCBS as a defendant but settled with both parties and nonsuited them in amended petitions filed in December 2011 and October 2015, respectively. Nationwide and BCBS are therefore not parties to this appeal.

in her sixth and seventh amended petitions, both filed on April 17.[3] On April 19, Cardon and Seton filed a motion to compel arbitration, arguing that Goldberg was bound by the arbitration provision in the Agreement based on her status as a third-party beneficiary. Upon Cardon's and Seton's filing their motion to compel arbitration, the trial court continued the trial setting and set the motion for hearing at 2:00 p.m. on May 22, 2017. On May 18, Goldberg filed her eighth amended petition, omitting the paragraph containing the third-party beneficiary allegation. On the morning of the hearing, Cardon and Seton filed a supplement to their motion to compel arbitration, arguing that although Goldberg had removed the express reference to "third-party beneficiary," she continued to seek the benefit of the Agreement by "implicitly referencing the terms of the Agreement." At the hearing on the motion, the trial court granted Goldberg permission to file a post-hearing response to Cardon's and Seton's supplement to their motion, which she did, and Cardon and Seton filed a reply. The trial court denied the motion to compel arbitration without stating a basis.[4] This interlocutory appeal followed. *See* Tex. Civ. Prac. & Rem. Code §§ 51.016, 171.098(a)(1).

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[3] Goldberg filed a sixth amended petition at 12:00 a.m. on April 17, 2017, and another amended petition also titled as a sixth amended petition at 7:42 p.m. that same day, which we refer to as her seventh amended petition. In her fifth, sixth, and seventh amended petitions, Goldberg also added claims for promissory estoppel and conversion and alternative claims for money had and received and unjust enrichment.

[4] Neither the Agreement, the parties, nor the trial court specified whether the agreement to arbitrate was pursuant to the Federal Arbitration Act or the Texas Arbitration Act. However, the Texas Supreme Court has stressed the importance of maintaining uniformity of state and federal law on this issue. *In re Vesta Ins. Grp., Inc.*, 192 S.W.3d 759, 763 (Tex. 2006) (orig. proceeding) (per curiam) ("We remain mindful of the importance of keeping federal and state law uniform so that arbitrability does not depend on where one seeks to compel it." (citing *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 739 (Tex. 2005) (orig. proceeding))).

STANDARD OF REVIEW AND APPLICABLE LAW

We review an order denying a motion to compel arbitration for abuse of discretion. *D.R. Horton-Emerald, Ltd. v. Mitchell*, No. 01-17-00426-CV, 2018 Tex. App. LEXIS 731, at *5–6 (Tex. App.—Houston [1st Dist.] Jan. 25, 2018, no pet. h.) (mem. op.); *Santander Consumer USA, Inc. v. Mata*, No. 03-14-00782-CV, 2017 Tex. App. LEXIS 2631, at *3 (Tex. App.—Austin Mar. 29, 2017, no pet.) (mem. op.). "'Under this standard, we defer to a trial court's factual determinations if they are supported by evidence, but we review a trial court's legal determinations de novo.'" *Mitchell*, 2018 Tex. App. LEXIS 731, at *6; (quoting *Rocha v. Marks Transport, Inc.*, 512 S.W.3d 529, 535 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (citing *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 643 (Tex. 2009) (orig. proceeding))); *accord Mata*, 2017 Tex. App. LEXIS 2631, at *3–4; *SEB, Inc. v. Campbell*, No. 03-10-00375-CV, 2011 Tex. App. LEXIS 1588, at *4–5 (Tex. App.—Austin Mar. 2, 2011, no pet.) (mem. op.).

"Gateway matters," such as the validity of the arbitration agreement, are decided by the court rather than the arbitrator. *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 130 (Tex. 2005) (orig. proceeding). A trial court's determination of the arbitration agreement's validity is a legal question subject to de novo review. *Mitchell*, 2018 Tex. App. LEXIS 731, at *7. Whether an agreement to arbitrate binds a nonsignatory is a gateway matter involving validity that must be decided by the court. *Labatt*, 279 S.W.3d at 643; *Mitchell*, 2018 Tex. App. LEXIS 731, at *6–7; *Mata*, 2017 Tex. App. LEXIS 2631, at *5. The party moving to compel arbitration has the burden to show a valid agreement to arbitrate. *Mitchell*, 2018 Tex. App. LEXIS 731, at *7; *Campbell*, 2011 Tex. App. LEXIS 1588, at *7 (citing *In re Oakwood Mobile Homes, Inc.*,

987 S.W.2d 571, 573 (Tex. 1999) (orig. proceeding) (per curiam)). Thus, "[t]he party seeking arbitration bears the burden of establishing that the arbitration agreement binds a nonsignatory." *Mata*, 2017 Tex. App. LEXIS 2631, at *5; *Glassell Producing Co. v. Jared Res., Ltd.*, 422 S.W.3d 68, 81 (Tex. App.—Texarkana 2014, no pet.).

Nonsignatories to an arbitration agreement may be bound when rules of law or equity would bind them to the contract generally. *Labatt*, 279 S.W.3d at 643. According to principles of contract and agency law, arbitration agreements may bind non-signatories under any of six theories: (1) incorporation by reference, (2) assumption, (3) agency, (4) alter ego, (5) equitable estoppel, and (6) third-party beneficiary. *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 739 (Tex. 2005) (orig. proceeding) (citing *Bridas S.A.P.I.C. v. Government of Turkm.*, 345 F.3d 347, 356 (5th Cir. 2003)). Direct benefits estoppel is a type of equitable estoppel. *Rachal v. Reitz*, 403 S.W.3d 840, 845–46 & n.5 (Tex. 2013) (explaining that Texas Supreme Court expressly adopted federal doctrine of direct benefits estoppel in *Kellogg*, 166 S.W.3d at 739). Here, Cardon and Seton raise two of the theories—direct benefits estoppel and third-party beneficiary.

DISCUSSION

In their first issue, Cardon and Seton argue that the trial court erred in refusing to compel arbitration because Goldberg is a third-party beneficiary under the Agreement and seeks to benefit from it. They point to Goldberg's allegation that she was a third-party beneficiary under the Agreement and the breach of contract claims asserted in her fifth and sixth amended petitions,[5]

[5] As noted above, Goldberg made these same allegations in a seventh amended petition mislabeled as a second sixth amended petition.

contending that these claims "necessarily arise out of, relate to, or involve the Agreement" and thus fall within the scope of the arbitration provision. "A third-party beneficiary may enforce a contract to which it is not a party if the parties to the contract intended to secure a benefit to that third party and entered into the contract directly for the third party's benefit." *In re Palm Harbor Homes, Inc.*, 195 S.W.3d 672, 677 (Tex. 2006) (orig. proceeding). In asserting that Goldberg is a third-party beneficiary, Cardon and Seton rely solely on the allegations in her fifth, sixth, and seventh amended petitions that she was a third-party beneficiary. However, Goldberg omitted those allegations in a subsequent eighth amended petition, the live petition at the time of the trial court's ruling. An amended pleading takes the place of the original pleading, and all prior pleadings are superseded and are no longer a part of the live pleadings. Tex. R. Civ. P. 65 (explaining that previous pleadings, once subsequent pleading is filed, "shall no longer be regarded as a part of the pleading in the record of the cause"). Thus, the live pleading at the time of the hearing and the one on which the trial court ruled contained no allegation of Goldberg's status as a third-party beneficiary, and that claim was not before the trial court. *See id.*; *Wilson v. Woodland Hills Apts.*, No. 05-16-01093-CV, 2017 Tex. App. LEXIS 11091, at *4 (Tex. App.—Dallas Nov. 29, 2017, pet. filed) (mem. op.) (concluding that amended petition mooted special exceptions); *Thomas v. Logic Underwriters, Inc.*, No. 02-16-00376-CV, 2017 Tex. App. LEXIS 10805, at *6 (Tex. App.—Fort Worth Nov. 16, 2017, no pet. h.) (mem. op.) (holding that claims set forth in original petition were no longer before trial court because plaintiff had filed amended petitions).

Cardon and Seton offer no other argument to support Goldberg's status as a third-party beneficiary; they do not contend that Seton and BCBS intended to secure a benefit to

Goldberg and entered into the Agreement directly for Goldberg's benefit and do not cite to any evidence in the record that would support such a contention. *See Palm Harbor Homes*, 195 S.W.3d at 677; *Steer Wealth Mgmt., LLC v. Denson*, No. 01-17-00066-CV, 2017 Tex. App. LEXIS 8525, at *14–18 (Tex. App.—Houston [1st Dist.] Sept. 7, 2017, no pet.) (concluding that defendant Steer was not third-party beneficiary under agreement containing arbitration clause where there was no evidence that plaintiff and other defendant entity intended to secure benefit to Steer and entered contract directly for Steer's benefit). We therefore conclude that the trial court did not err to the extent that it denied Cardon's and Seton's motion to compel arbitration on the basis that Goldberg was not a third-party beneficiary to the Agreement.

In their first issue, Cardon and Seton further argue that despite Goldberg's removing the third-party beneficiary allegations from her subsequent amended petitions, she still seeks "to recover the benefits of the Agreement under the guise of other claims." Specifically, they cite the references to the contractual adjustment under the Agreement in Goldberg's pleadings and the measure of damages Goldberg seeks—the difference between the $5,000 Nationwide paid to Cardon and Seton and $1,903.24, the amount she "reasonably owed to Seton" or, in the alternative, the difference between $2,762, the amount eventually billed to Goldberg and claimed by Cardon and Seton under the hospital lien, and $1,903.24, the amount they originally claimed she owed. According to Cardon and Seton, both of these measures of recovery depend entirely on the contractual reduction in fees provided in the Agreement and are therefore direct benefits that Goldberg seeks from the Agreement.

The doctrine of direct benefits estoppel applies when a claimant seeks "direct benefits" under a contract containing an arbitration clause, a determination that "'turns on the substance of the claim, not artful pleading.'" *G.T. Leach Builders, LLC v. Sapphire V.P., L.P.*, 458 S.W.3d 502, 527 (Tex. 2015) (quoting *Weekley Homes*, 180 S.W.3d at 132). "It is not enough, however, that the party's claim 'relates to' the contract that contains the arbitration agreement." *Id.* at 527 (citing *Kellogg*, 166 S.W.3d at 741). Rather, the claims must "'depend on the existence' of the contract," *id.* at 527–28 (quoting *Meyer v. WMCO-GP, LLC*, 211 S.W.3d 302, 305 (Tex. 2006)), and "[t]he alleged liability must 'arise[] solely from the contract or must be determined by reference to it,'" *id.* at 528 (quoting *Weekley Homes*, 180 S.W.3d at 132). A nonsignatory "cannot be compelled to arbitrate on the sole ground that, but for the contract containing the arbitration provision, [she] would have no basis to sue." *Kellogg*, 166 S.W.3d at 740. If a nonsignatory's claims can stand independently of the contract, then arbitration should not be compelled. *Id.* at 739–40. "'[W]hen the substance of the claim arises from general obligations imposed by state law, including statutes, torts and other common law duties or federal law,' rather than from the contract, 'direct benefits' estoppel does not apply, even if the claim refers to or relates to the contract." *G.T. Leach*, 458 S.W.3d at 528 (quoting *In re Morgan Stanley & Co.*, 293 S.W.3d 182, 184 n.2 (Tex. 2009) (orig. proceeding) (holding that equitable estoppel is not applicable when benefit is merely indirect)).

Cardon and Seton contend that Goldberg seeks direct benefits under the Agreement because the references to the contractual reduction and the measure of damages sought in her pleadings show that she seeks the benefit of the contractual reduction, i.e., the benefit of the rate

Seton was to charge BCBS under the Agreement and the resulting payment by BCBS. Put another way, Cardon and Seton argue that Goldberg's claims and damages cannot be determined "without reference to [the Agreement.]" *See id.* We dissagree.

Goldberg has asserted statutory and common law causes of action, including claims for fraudulent lien, untimely billing, violations of the DTPA and the Finance Code, promissory estoppel, conversion, and alternative claims for money had and received and unjust enrichment. She bases these claims of statutory and common law violations on Cardon's and Seton's alleged conduct—billing her the amount she owed under her insurance contract with BCBS after BCBS's payment; seeking, obtaining, and retaining her PIP benefits; returning BCBS's payment; and then billing her for a greater amount. Thus, Goldberg's claims are rooted in statutory and common law and arise from Seton's and Cardon's conduct toward Goldberg independently of Seton's relationship with BCBS and from Goldberg's status as a consumer, an insured, and the owner of personal property—not from the terms of the Agreement between Cardon and Seton. As damages, Goldberg seeks to recover the difference between the $5,000 in PIP coverage Nationwide paid Seton and the amount Seton initially billed her or, in the alternative, the difference between the $2,762 eventually billed to Goldberg and claimed by Cardon and Seton under the hospital lien and the amount Seton originally billed her. While the amount Seton initially billed Goldberg was related to the contractually reduced amount BCBS paid under the Agreement, Goldberg's alternative measures of damages are based on the amount Nationwide paid Seton, pursuant to Goldberg's insurance contract with Nationwide, and the two bills Seton sent to Goldberg, and can therefore be determined without reference to the Agreement. *See id.*

We conclude that Cardon and Seton did not meet their burden to establish that Goldberg relies on or seeks to enforce the terms of the Agreement or that her claims depend on and must be determined by reference to the Agreement, which would then make her bound by the arbitration provision. *See Kellogg*, 166 S.W.3d at 740–41 (concluding that nonsignatory subcontractor Kellogg was not required to arbitrate quantum meruit claim against contractor based on arbitration clause in agreement between contractor and another subcontractor where Kellogg did not seek direct benefit from that agreement even though its work was related to and to some degree was defined by that agreement); *Mata*, 2017 Tex. App. LEXIS 2631, at *5; *ENGlobal U.S., Inc. v. Gatlin*, 449 S.W.3d 269, 277–78 (Tex. App.—Beaumont 2014, no pet.) (holding that subcontractor's employee who brought premises liability claim against refinery owner was not bound by arbitration clause in owner's agreement with contractor where employee's pleadings did not clearly establish that he relied on contract to establish control of premises); *VSR Fin. Servs. v. McLendon*, 409 S.W.3d 817, 832–33 (Tex. App.—Dallas 2013, no pet.) (holding that nonsignatories were not bound by arbitration provision where their live pleading referred to agreements containing arbitration clause but did not rely on or seek to enforce terms of agreements in alleging causes of action for breach of fiduciary duty, negligence, negligent misrepresentation, fraud, breach of contract, and civil conspiracy); *Karlin v. DCP Midstream, LP*, No. 07-13-00059-CV, 2013 Tex. App. LEXIS 6966, at *8 (Tex. App.—Amarillo June 6, 2013, pet. denied) (mem. op.) (holding that direct benefits estoppel did not require natural gas buyer to arbitrate claims against nonsignatory corporate officer because although contract was alleged, buyer did not seek to hold officer liable pursuant to duties imposed by contract, but asserted only tort claims);

Mohamed v. Auto Nation USA Corp., 89 S.W.3d 830, 837 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (refusing request by nonsignatory successor employer to apply equitable estoppel and compel arbitration in suit by employee where employee did not rely on employment contract with predecessor employer containing arbitration provision to assert claims for race discrimination, intentional infliction of emotional distress, or negligent hiring, supervision, and retention); *see also R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n*, 384 F.3d 157, 162–64 (4th Cir. 2004) (holding that builder's legal duties to homeowners association arose from common law, not from contract between builder and development corporation, so that homeowners association's common law claims against builder did not seek direct benefit of contract and homeowners association was not bound by arbitration clause in contract); *Westmoreland v. Sadoux*, 299 F.3d 462, 467 (5th Cir. 2002) (vacating lower court's order compelling nonsignatory to arbitrate and refusing to apply equitable estoppel where signatory's suit alleging fraudulent inducement to sell shares did not rely upon terms of, or seek to enforce duty created by, shareholder agreement containing arbitration clause).

We therefore further conclude that the trial court did not err to the extent it denied Cardon's and Seton's motion to compel arbitration on the basis that Goldberg did not seek direct benefits under the Agreement. Accordingly, we overrule Cardon's and Seton's first issue. Because our resolution of their first issue is dispositive, we do not reach their second issue.

CONCLUSION

Having overruled Cardon's and Seton's dispositive issue, we affirm the trial court's order.

Melissa Goodwin, Justice

Before Chief Justice Rose, Justices Goodwin and Field

Affirmed

Filed: March 2, 2018