The Arbitration Newsletter

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The Arbitration Newsletter is published periodically by Whitaker Chalk Swindle & Schwartz PLLC, Fort Worth, Texas, to explore the rapidly developing law and practice of commercial arbitration both in the U.S. and other countries.[1]

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MOTIONS TO COMPEL IN TEXAS TRIAL COURTS *In re* Copart, Inc.[2]

At issue in this writ of mandamus to the Texas Supreme Court was whether the trial court abused its discretion in ordering pre-arbitration discovery for a pending motion to compel arbitration.[3]

In 2015, an employee of Copart, Inc. filed internal complaints with her employer alleging religious and ethnic harassment by her manager.[4] Shortly thereafter the employee was asked to resign, and when she refused, she was terminated.[5] The ex-employee filed suit against Copart, claiming harassment and retaliation under chapter 21 of the Texas Labor Code.[6] Copart moved to compel arbitration in the lawsuit, arguing that Copart's employee handbook acknowledgement and agreement, which contained an electronically-signed arbitration agreement, required arbitration.[7]

In support of the motion to compel, Copart presented testimony from a human resources employee showing that, in line with Copart's new-hire policies and procedures, the ex-employee electronically received and signed the arbitration agreement at the beginning of her employment.[8] A copy of the ex-employee's signed arbitration agreement was presented with the Copart's employee's` testimony.[9] The ex-employee denied the existence of an enforceable arbitration agreement, served a

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[1] Nothing in The Arbitration Newsletter is presented as or should be relied on as legal advice to clients or prospective clients. The sole purpose of The Arbitration Newsletter is to inform generally. The application of the comments in The Arbitration Newsletter to specific questions and cases should be discussed with the reader's independent legal counsel. My thanks to Jared Hendrix, a third-year law student at Texas A&M University School of Law, for his research and drafting assistance.

[2] *In re* Copart, Inc., 2021 Tex. LEXIS 208 (Tex. March 21, 2021) (per curiam).

[3] *Id.* at *1.

[4] *Id.*

[5] *Id.* at *2.

[6] *Id.*

[7] *Id.*(although the FAA applied to the arbitration agreement at issue, Texas courts apply Texas procedure when deciding a motion to compel arbitration under the FAA. Jack B. Anglin Co. v. Tipps, 842 S.W.2d 266, 268 (Tex. 1992).).

[8] *Id.*

[9] *Id.*

deposition notice for the human resources employee, and moved to compel pre-arbitration discovery.[10]

The trial court orally granted the ex-employee's motion for discovery and ordered the Copart human resources employee to appear for a deposition.[11] On Copart's writ of mandamus, the El Paso Court of Appeals preliminarily granted Copart's motion to compel and ordered the trial court to vacate its order because the motion for discovery "did not provide a 'colorable basis' for the trial court to conclude it lacked sufficient evidence to decide the motion to compel arbitration."[12] The appeals court also gave the ex-employee thirty days to amend her motion for discovery to include proper support for the discovery motion and instructed the trial court to compel arbitration if the employee failed to substantiate her motion for discovery.[13]

The ex-employee amended her motion and included an affidavit attempting to rebut the human resources employee's testimony and also arguing that the arbitration agreement lacked consideration.[14] The trial court again granted the motion for discovery, and Copart again filed a writ of mandamus to the El Paso Court of Appeals.[15] While the writ was pending, a new judge was elected to the trial court, and the appeals court allowed the new judge time to reconsider the discovery order.[16] The new judge granted the employee's motion for discovery, finding that the employee's affidavit "raised a fact issue regarding the arbitration agreement's validity and enforceability and provided 'reason to believe' [the human resources employee]'s deposition was material to that issue."[17] The trial court ordered limited discovery on the issue of arbitrability. Copart again filed a writ of mandamus to the appeals court, which was denied.[18] Copart then sought another writ of mandamus from the Texas Supreme Court.[19]

In considering whether the trial court erroneously ordered pre-arbitration discovery, the Texas Supreme Court noted that the Texas Arbitration Act (the "TAA"), which also applied procedurally in this FAA case, "authorizes pre-arbitration discovery 'only when a trial court cannot fairly and properly make its decision on the motion to compel because it lacks sufficient information regarding the scope of an arbitration decision or other issues of arbitrability.'"[20] A trial court may exercise discretion to order limited discovery on issues of arbitrability so long as the court does not "act[] without reference to guiding rules or principles or in an arbitrary or unreasonable manner."[21] Trial courts abuse their discretion in ordering pre-arbitration discovery "when the requesting party presents

[10] *Id.* at *3.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.* at *3–4, and 10-11 (Nothing in the ex-employee's affidavit factually contradicted the Copart employee's prior testimony or authenticity of the signed arbitration agreement but rather focused on the ex-employee's "naked 'belief'" that the Copart employee's prior testimony was not based on personal knowledge.).
[15] *Id.* at *4.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.* at *5-8 (citing *In re* Houston Pipe Line, 311 S.W.3d 449, 451-52 (Tex. 2009)); Tex. Civ. Prac. & Rem. Code §171.086(a)(4) and (6).); two El Paso Court of Appeals cases; and a Tyler Court of Appeals case.
[21] *Id.* at *5 (citing *In re* Garza, 544 S.W.3d 266, 268 (Tex. 1992)).

no colorable basis or reason to believe that the discovery would be material in resolving any disputed issues of arbitrability."[22]

> "Conclusory assertions regarding an arbitration agreement's validity and factual assertions that have no bearing on the arbitrability of the plaintiff's claims do not justify pre-arbitration discovery because such assertions provide no reasonable basis to conclude that discovery would aid the trial court in its determination."[23]

In reviewing the ex-employee's second motion for discovery, the Texas Supreme Court found no colorable basis that was also missing in the first motion.[24] The ex-employee's second motion contained merely "naked beliefs" about the human resources employee's personal knowledge and did not contain factual assertions to support her claim denying the existence of an enforceable arbitration agreement.[25] Specifically, the Court noted that the employee failed to deny "(1) receiving the agreement, (2) signing the agreement, (3) sending or receiving the various emails . . . in which [the ex-employee] confirmed receiving and signing the agreement, or (4) continuing to work after she received the agreement."[26] Additionally, the ex-employee failed to dispute the authenticity of the human resources documents and did not establish that the arbitration agreement lacked consideration.[27]

Given the employee's failure to provide a colorable basis for granting the motion to compel discovery, the Supreme Court held that the trial court abused its discretion.[28] The Court conditionally granted Copart mandamus relief and ordered the trial court to "vacate the discovery order and rule on Copart's motion to compel arbitration."[29]

OBSERVATIONS

1. The TAA provides statutory guidance to both movants and trial courts regarding motions to compel arbitration at Texas Civil Practices & Remedies Code §171.021.

2. When a party "denies the existence of the [arbitration] agreement, **the court shall summarily determine that issue**." §171.021(b)(emphasis added).

3. If the trial court determines "a substantial bona fide dispute as to whether an agreement to arbitrate **exists**, the court shall try the issue [i.e., whether an agreement to arbitrate **exists**] **promptly and summarily**." §171.023(b) (emphasis added).

4. Based on the trial court's finding "the existence of the [arbitration] agreement," the trial court is **required** (i.e., "shall") to "order the arbitration" or "deny the application." §171.021(b).

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[22] *Id.* at *9.
[23] Id. at *8 (*citing* In re DISH Network, 563 S.W.3d 433, 440-41 (Tex.App. – El Paso 2018, orig. proceeding)).
[24] *Id.* at *10.
[25] *Id.*
[26] *Id.* at *12.
[27] *Id.* at *12–13.
[28] *Id.* at *13.
[29] *Id.* at *14.

5. The trial court has the discretion (i.e., "may") to not enforce "an agreement to arbitrate if the court finds the [arbitration] agreement was unconscionable at the time the [arbitration] agreement **was made**." §171.022.

6. None of these statutory provisions permits the trial court considering a motion to compel to dabble in the "merits" of the parties' dispute.

7. The trial court may have as many as four questions to answer (promptly and summarily) when presented with a motion to compel:

    a. Does a contract to arbitrate exist?
    b. Is there sufficient information provided the trial court to rule on a motion to compel without ordering discovery?
    c. Does the contract to arbitrate include a delegation of arbitrability authority to the arbitrator?
    d. Does the contract to arbitrate cover or include the pending disputes?

8. A delegation clause in the parties' arbitration agreement, clearly and unmistakably drafted, supports transfer to the arbitrator of the determination of all arbitrability issues raised by a motion to compel.