February 2020

LITIGATION

Case Law Update: Legal Fees and Arbitration Issues in Texas

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This litigation newsletter will address two important issues that come up frequently: (1) how courts slice and dice claims for attorneys' fees; and (2) the prevalence of courts forcing litigants to arbitration and the high burden to avoid that process.

Often the tale of attorney's fees wags the dog of a lawsuit. However, attorneys' fees may not be awarded in Texas, or may not be awarded in full. Langley LLP has decades of experience fighting for and against attorneys' fees in Texas, including being admitted by state and federal courts as experts on fee determination issues.

To avoid litigation, parties often rely on an arbitration provision in a contract. Courts go to great lengths to compel arbitration, and, in the construction context, will often find it in documents incorporated by reference. Waiver of the right to arbitrate is difficult to establish, even where a party participates to some degree in the litigation process. Our firm has much experience in the arbitration arena, including securing a full discharge in favor of the surety during the final hearing of an eight-figure performance bond claim against a highly sympathetic plaintiff.

***Whittington* – you have to win money to win Texas statutory fees**

In a recent newsletter, we discussed a watershed Texas Supreme Court opinion which expressly permits pure defendants (i.e. those not seeking affirmative recovery) to recover contractual attorneys' fees. But what if the contract does not contain a fee-shifting provision? The answer is the fee-seeking party must secure monetary damages.

Even without a contractual fee-shifting clause, a successful breach of contract claimant can potentially win Texas statutory attorneys' fees — so long as several prerequisites are met, including winning monetary damages. In other words, a pure defendant or a claimant who does not secure monetary relief (as opposed to equitable relief, such as a declaration or an injunction) may not be awarded fees based on 38.001 of the Texas Civil Practice and Remedies Code. This is different under a contract providing for attorney's fees to a prevailing party, which is defined by the contract (perhaps altering judicial relief). *Whittington v. Green*, 2020 WL 217165, No. 07-18-00007-CV (Tex. App. – Amarillo Jan. 14 2020). As Whittington received no monetary judgment — but instead only prevailed on a declaratory judgment claim — he was not entitled to statutory attorneys' fees under Section 38.001. *Id.* at *2 (citing *Green International, Inc. v. Solis*, 951 S.W.2d 384 (Tex. 1984) and *Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195 (Tex. 2004)).

The plaintiff Whittington did recover (albeit only a portion of the attorney's fees) under the Declaratory Judgment Act Section 37.009 of the Texas Civil Practice and Remedies Code. Here the fees had to be both reasonable and necessary and legally equitable and just. This "reasonable and necessary" standard is common in Texas law, and the burden is on the claimant to prove both reasonableness and necessity. The Appellate Court determined that the Trial Court did abuse its discretion in awarding only a portion of the fees.

In the case involving Whittington's higher-elevation property and drainage of water onto the Green's lower elevation property, the Appellate Court noted that the legal theory morphed from a trespass claim, to a nuisance claim, to a tort claim, to a breach of contract claim and involved a dispute, a lawsuit, a settlement, another dispute, another lawsuit, a judgment, an appeal, a reversal, another dispute, another judgment, and this appeal. It seems the Court was somewhat tired of the litigants.

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***Gracepoint* – Texas courts strongly prefer arbitration, even when a litigant invokes the litigation process to some degree**

Time and time again, our firm reads of — and is involved in — cases where the Texas judge bends over backwards to compel arbitration. When in doubt, prepare to be compelled. Those resisting a motion to compel arbitration will often argue waiver, e.g. via "substantial invocation of the judicial process." This argument rarely wins.

In *Gracepoint Holding Co.*, FJR sued Gracepoint alleging breach of contract. Gracepoint answered the lawsuit; served discovery; and filed a motion for summary judgment. A month after filing its motion for summary judgment, Gracepoint filed a motion to compel arbitration. The trial court denied the motion to compel, finding that Gracepoint waived arbitration by substantially invoking the litigation process.

The appellate court reversed, and ordered the trial court to compel arbitration. The appellate court reasoned that the law favors arbitration, and the party asserting waiver bears a heavy burden of proof. Both a substantial invocation of the judicial process and prejudice must be shown; without a showing of both, the high burden is not met.

In this case, serving discovery and filing a defensive motion for summary judgment (alleging the claim was time-barred) were not sufficient to show that a party substantially engaged in the litigation process or prejudice. The case was therefore reversed, and arbitration was compelled. *Gracepoint Holding Co. v. FJR Sand, Inc.* 2020 WL 61594, Cause No. 01-19-00574-CV (Tex. App. – Houston [1st Dist.] Jan. 7 2020).

Gracepoint is a residential home builder. FJR agreed to provide grading services and materials to Gracepoint, and Gracepoint agreed to pay. While there was much background involving a prior lawsuit between the parties, some discovery, and a motion for summary judgment by Gracepoint, the appellate court ruled that Gracepoint had not waived its right to arbitrate.

Under the FAA, a party seeking to compel arbitration must establish (1) the existence of a valid arbitration agreement and (2) that the claims in dispute fall within that agreement's scope. *In re Rubiola*, 334 S.W.3d to 220, 223 (Tex. 2011). The party wishing to avoid arbitration must prove an affirmative defense such as waiver. *Henry v. Cash Biz, L.P.*, 551 S.W.3d 111, 115 (Tex. 2018). Any doubts are resolved in favor of arbitration. Whether a party waive its right to arbitrate is a question of law which is reviewed de novo. The agreement did not have to be authenticated because FJR judicially admitted the existence of the contract. *Chilton Ins. Co. v. Pate and Pate Enters.*, Inc., 930 S.W.2d 877, 884 (Tex. App.—San Antonio 1996, writ denied) (*Chilton*, which was cited with approval by this appellate court, and has been cited over 700 times, was a case the author was lead counsel on).

Here the appellate court applied the law favoring arbitration, and a strong presumption against waiver. FJR did not meet its heavy burden to demonstrate waiver. Therefore, the appellate court found that the trial court abused its discretion in denying Gracepoint's motion to compel arbitration and stay proceedings.

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