Affirmed and Opinion filed September 21, 2000.

In The

Fourteenth Court of Appeals

———————————

NO. 14-99-01082-CV

———————————

AMERICAN ALLIED SECURITIES, INC. - F/K/A AMERICAN CAPITAL SECURITIES, INC., Appellant

V.

AMERICAN GENERAL SECURITIES, INC. AND AMERICAN GENERAL LIFE INSURANCE, CO., Appellees

---

On Appeal from the 190th District Court
Harris County, Texas
Trial Court Cause No. 96-30356

O P I N I O N

This is an appeal from an order confirming an arbitration award in favor of appellees, American General Securities, Inc. (AG Securities) and American General Life Insurance, Co. (AG Life). Appellant, American Allied Securities, Inc. - f/k/a American Capital Securities, Inc. (American Allied) contends the trial court erred in confirming the award because of the nondisclosure by one of the arbitrators and the qualifications of another.

BACKGROUND

American Allied entered into a Service Agreement (Agreement) with AG Securities, a wholly owned subsidiary of AG Life. American Allied filed suit against AG Securities for breach of contract and against AG Life for tortious interference with the Agreement. The Agreement contained an arbitration clause which provided that disputes, claims, or controversies arising out of the Agreement would be submitted to binding arbitration before the National Association of Securities Dealers (NASD). Based on the arbitration clause, the trial court referred American Allied's claims against both AG Securities and AG Life to arbitration. The NASD named a three-member panel, which, after a hearing, unanimously denied all relief requested by American Allied. AG Life and AG Securities moved to have the panel's decision confirmed in the trial court, while American Allied moved to have the panel's decision vacated. The trial court confirmed the panel's decision and American Allied now appeals.

American Allied raises three issues for review asserting that the trial court erred in confirming the arbitration panel's decision and in referring its claims against AG Life to arbitration. For the reasons that follow, we affirm the trial court's confirmation of the arbitration panel's decision, despite our finding that the claims against AG Life were erroneously referred to arbitration.

EVIDENT PARTIALITY

In its first issue, American Allied complains that the trial court erred in confirming the arbitration panel's decision because of the evident partiality of James Benson, the chairman of the panel.[1] In particular, American Allied asserts that Benson's failure to disclose certain

[1] The original chairperson, Laila Folk, was challenged for cause and James Benson was appointed in her stead. American Allied claims that it was not made aware of the challenge until after Benson was appointed. American Allied, however, did not complain of the substitution until after the panel issued its (continued...)

information created an impression of evident partiality. In light of the facts of this case, we disagree.

Under Texas law, a person appointed as an arbitrator has a duty to disclose "any information that might cause the person's impartiality or independence to be questioned." TEX. CIV. PRAC. & REM. CODE ANN. § 172.056(a) (Vernon Supp. 2000).[2] A party may petition the trial court to vacate an arbitration award if it was prejudiced by the evident partiality of an arbitrator appointed as a neutral arbitrator. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 171.088 (a)(2)(A) (Vernon Supp 2000). In determining the standard for evident partiality, the Texas Supreme Court has adopted a broad approach, relying on the policy arguments enunciated by the United States Supreme Court in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968). *See Burlington N. R.R. Co. v. TUCO Inc.*, 960 S.W.2d 629, 636 (Tex. 1997). The Texas Supreme Court has held that evident partiality is exhibited when a neutral arbitrator does not disclose facts that might create a reasonable impression of the arbitrator's partiality to an objective observer. *See id*. "Evident partiality is established from the nondisclosure itself, regardless of whether the nondisclosed information necessarily establishes partiality or bias." *Id*.

In his disclosure, Benson set out his employment, education, training, and background information, including the fact that he was on a contract assignment with the law firm of Porter & Hedges, L.L.P. (the firm). The firm is not involved in the arbitration in any way. Benson was

---

[1] (...continued)
adverse decision.

[2] The NASD also promulgates rules regarding arbitrations which require each member of the panel to disclose "any direct or indirect financial or personal interest in the outcome of the arbitartion" or "any existing or past financial, business, professional, family, or social relationships that are likely to affect impartiality or might reasonably create an appearance of partiality or bias." NASD CODE OF ARBITRATION PROCEDURE, Rule 10312(a). Persons requested to serve as arbitrators "should make a reasonable effort to inform themselves" of any interests or relationships that may require disclosure. NASD CODE OF ARBITRATION PROCEDURE, Rule 10312(b).

never an employee of the firm. Rather, an outside agency placed him with the firm on a temporary contract basis.

Neither party objected to Benson and the arbitration proceeded with Benson serving as chairman of the panel. After the panel found in favor of appellees, American Allied learned that the firm had represented several of the American General companies, a fact which Benson did not know and therefore did not disclose.

American Allied asserts that Benson did not comply with NASD rule 10312(a) because he did not make an effort to inform himself of interests and relationships that were likely to affect his impartiality or might reasonably have created an appearance of partiality. More specifically, American Allied argues that Benson should have disclosed the fact that the firm had previously represented the American General companies and that his failure to disclose this fact demonstrates his evident partiality.[3]

It is true that the firm had represented the American General companies in the past, but the firm's representation of them had ended approximately one month before Benson's temporary contract assignment at the firm began. The record indicates that Benson was not aware of the firm's prior representation of appellees and did not work on any matters concerning appellees. Because it was impossible for Benson to disclose a fact of which he was unaware, the question then becomes whether Benson was under a duty to inform himself of the existence of such a past relationship.

Rule 10312(b) of the NASD Code of Arbitration Procedure provides that persons requested to accept appointment as arbitrators should make a reasonable effort to inform

[3] In addition to his temporary placement with the firm, American Allied asserts other more tenuous and remote ties between Benson and Porter & Clements, the predecessor of the firm, which we find even less compelling than Benson's temporary contract assignment. Specifically, American Allied asserts that Benson had been retained as an expert witness for a client of the predecessor firm in 1991 and Benson, as general counsel for a corporation, hired the predecessor firm to represent the corporation in 1983.

themselves of any existing or past financial, business, professional, family, or social relationships that are likely to affect impartiality or might reasonably create an appearance of partiality or bias. The record is silent as to any efforts made by Benson to inform himself of the firm's prior representation of appellees. American Allied suggests that a simple conflicts check with the firm would have revealed that the firm had represented appellees. However, at the time of appointment, Benson had been finished with his contract assignment with the firm for approximately six months.[4] We find it unrealistic to expect or require a potential arbitrator to return to a firm, at which he was never an employee, and demand, or even request, that he be allowed to run a conflicts check. We seriously question whether a firm would allow such an outsider to have access to its records.

Under the facts of this case, we hold that it would be unreasonable to suggest that Benson should or could have informed himself of the firm's prior representation of appellees. Therefore, Benson was under no duty to disclose that relationship of which he was unaware. To hold otherwise would effectively require potential arbitrators who have previously worked as independent contractors to apprise themselves of all the clients of the firms they had contracted with. We are not prepared to stretch the breadth of the standard to that degree. To do so would place an unreasonable burden upon potential arbitrators.

Because we find Benson was under no duty to inform himself of the prior representation of one of the parties by a firm not involved in the arbitration and concomitantly under no duty to disclose such an unknown relationship, it can not be said that he failed to disclose information that establishes a finding of evident impartiality under *TUCO*. American Allied's first issue for review is overruled.

---

[4] While the disclosure form faxed to American Allied by the NASD on January 19, 1999 (the day Benson was appointed) stated that Benson was "currently" on contract assignment with the firm, it is clear from affidavits of Benson and a firm representative that his contract assignment began March 12, 1998 and ended June 11, 1998.

In its second issue for review, American Allied asserts that the trial court erred in confirming the arbitration panel's decision because Richard P. Cancelmo, Jr., one of the arbitration panel members, was not from the securities industry as required by the NASD Code of Arbitration Procedure.

Rule 10202(b)(2) of the NASD code requires disputes between members of the NASD with an amount in controversy in excess of $30,000 to be arbitrated before a panel of three arbitrators from the securities industry. Rule 10308(c) then defines who is deemed to be from the securities industry. American Allied asserts Cancelmo's background did not qualify him to act as an arbitrator.

A review of the record indicates that Cancelmo's disclosure form, listing his educational background as well as previous professional affiliations, was provided to the parties prior to the arbitration. At no point prior to the arbitration did American Allied raise a complaint regarding Cancelmo's qualifications. Rather, American Allied made its first complaint approximately two and a half months after the panel rendered a decision in favor of appellees.[5]

"When a party has knowledge of a disqualifying relationship and has an opportunity to object to the arbitrator and does not do so, he may not be heard to complain after award is made." *See Johnson v. Korn*, 117 S.W.2d 514, 520 (Tex. Civ. App.—El Paso 1938, writ ref'd). *See also, Babcock & Wilcox Co. v. PMAC, Ltd.*, 863 S.W.2d 225, 232 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (a party who does not object to the selection of an arbitrator at the time of the hearing waives the right to complain).

Based on the fact that American Allied was provided Cancelmo's disclosure form prior

[5] American Allied raised its first complaint concerning the appointment of Cancelmo in a motion for rehearing of its motion to vacate the award. American Allied based its complaint on information it learned from Cancelmo's disclosure report, which American Allied had prior to the arbitration. American Allied does not claim it learned any additional facts after the arbitration that would have disqualified Cancelmo.

to the arbitration and did not challenge him for cause or raise an objection as to Cancelmo's qualifications, we hold that American Allied has waived any complaint concerning the qualifications of Cancelmo. American Allied's second issue for review is overruled.

American Allied's third issue asserts that the trial court erred in referring its claims against AG Life to arbitration because AG Life was not a party to the Agreement containing the arbitration clause. American Allied argues that Texas law is black and white - there must be an agreement to arbitrate. AG Life, however, urges an exception to what is admittedly the general rule.

The general rule is that a party cannot be compelled to submit a dispute to arbitration unless there is a contractual agreement to do so. *See Babcock & Wilcox Co. v. PMAC, Ltd.*, 863 S.W.2d 225, 230 (Tex. App.—Houston [14th Dist.] 1993, writ denied). However, this court has recently held that a party may be precluded from avoiding arbitration of claims against nonsignatories if those claims and the claims against the signatory are based on the same operative facts and are inherently inseparable. *See Valero Energy Corp. v. Teco Pipeline Co.*, 2 S.W.3d 576, 592-93 (Tex. App.—Houston [14th Dist.] 1999, pet. filed). *Valero* cited with approval an analogous federal court holding that "when the charges against a parent company and subsidiary are based on the same facts and are inherently inseparable, a court may refer claims against the parent corporation to arbitration even though the parent is not formally a party to the arbitration agreement." *See Valero*, 2 S.W.3d at 593 (quoting *J.J. Ryan & Sons ,Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 320-21 (4th Cir. 1988)).

In this case, American Allied's breach of contract claim necessarily focuses on the alleged breaching conduct of AG Securities, while its tortious interference claim focuses on the alleged interfering conduct of AG Life. The proof required for each of these causes of action is separate and distinct. The facts necessary to prove breaching conduct *vis a vis* interfering conduct are not the same. These two claims are not based on the same operative facts and are not inherently inseparable. *Compare Holloway v. Skinner*, 898 S.W.2d 793, 795

(Tex. 1995) (elements of tortious interference) *with Ryan v. Superior Oil Co.*, 813 S.W.2d 594, 596 (Tex. App.—Houston [14th Dist.] 1991, writ denied) (elements of breach of contract); *Stegman v. Chavers*, 704 S.W.2d 793, 795 (Tex. App.—Dallas 1985, no writ). The two claims could be severed and tried separately. Therefore, in this case, the limited exception to the general rule requiring an agreement to arbitrate between the parties does not apply. Because AG Life was not a party to the agreement to arbitrate, we hold that the trial court erred in referring American Allied's claims against AG Life to arbitration.

The Rules of Appellate procedure mandate that we may not reverse the trial court's judgment unless we conclude that the error complained of probably caused the rendition of an improper judgment. *See* TEX. R. APP. P. 44.1(a)(1). While we have found that the trial court erred in referring the claims against AG Life to arbitration, we do not find that doing so caused an improper judgment against American Allied. This court has held that, as a matter of law, a parent cannot tortiously interfere with a subsidiary's contracts. *See American Medical Int'l v. Giurintano*, 821 S.W.2d 331, 336-37 (Tex. App.—Houston [14th Dist.] 1991, no writ); *but see, Valores Corporativos, S.A. de C.V. v. McLane Co, Inc.*, 945 S.W.2d 160, 168 (Tex. App.—San Antonio 1997, writ denied) (expressly "declining to follow [its] sister courts" and reaching opposite conclusion, "hold[ing] that a parent corporation is legally capable of tortiously interfering with its wholly-owned subsidiary's contractual relations"). Because American Allied alleged a cause of action against AG Life that this court has held invalid, we conclude that any error in referring AG Life to arbitration was harmless and does not merit reversal. American Allied's third point of error is overruled.

Accordingly, the judgment of the trial court is affirmed.

/s/ Ruby K. Sondock
Justice

Judgment rendered and Opinion filed September 21, 2000.

Panel consists of Justices Amidei, Edelman, and Sondock.[6]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[6] Senior Justice Ruby Sondock sitting by assignment.