2021 IL App (5th) 210213-U

NO. 5-21-0213

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT



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| EARL L. HENDERSON TRUCKING COMPANY, a/k/a EARL L. HENDERSON TRUCKING COMPANY, INC., a/k/a HENDERSON TRUCKING CO., INC. *et al.*, | ) | Appeal from the Circuit Court of St. Clair County. |
| Plaintiff-Appellee, | ) | |
| v. | ) | No. 17-L-227 |
| ED LEWIS TRUCKING, SARA McGEE, and VASCOR, LTD., | ) | |
| Defendants | ) | Honorable Christopher T. Kolker, |
| (Vascor, Ltd., Defendant-Appellant). | ) | Judge, presiding. |

JUSTICE MOORE delivered the judgment of the court.
Presiding Justice Boie and Justice Wharton concurred in the judgment.

**ORDER**

¶ 1 *Held*: Circuit court properly denied the defendant's motion to compel arbitration where claims brought by the plaintiff fell outside of the scope of the applicable arbitration clause.

¶ 2 The defendant-appellant, Vascor, Ltd. (Vascor), appeals the June 15, 2021, order entered by the circuit court of St. Clair County that denied Vascor's motion to dismiss and compel arbitration, brought pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2020)). For the following reasons, we affirm the circuit court's order.

¶ 3 I. BACKGROUND

¶ 4 The facts relevant to this matter are not in dispute. The plaintiff-appellee, Earl L. Henderson Trucking Company, a.k.a. Earl L. Henderson Trucking Company, Inc., a.k.a. Henderson Trucking Co., Inc., *et al.* (Henderson) is a motor carrier who had an ongoing business relationship with North American Lighting, Inc. (NAL), in that Henderson transported NAL freight and products. Henderson received these trucking routes through NAL's previous logistics firm, Marquette Transportation.

¶ 5 Vascor is a freight transport logistics firm that manages the logistics of distributing various products for entities like NAL. In its course of business as a logistics firm, Vascor regularly subcontracts with companies, like Henderson, that directly handle freight transport routes for Vascor's clients. During the course of Henderson's ongoing business relationship with NAL, NAL hired Vascor to take over the handling of NAL logistics.

¶ 6 Following the hiring of Vascor, on January 17, 2017, Vascor entered into a motor carrier agreement (Agreement) with Henderson where Vascor agreed to assign and pay Henderson for Henderson's handling of nonspecific trucking routes. Henderson further agreed to take the freight and routes Vascor assigned to it. While the language of the contract was nondescript as to which exact routes would be assigned to Henderson by Vascor, the Agreement incorporated by reference an "Appendix A" that contained copies of invoices from Henderson's previous handling of the NAL routes. Further, the Agreement contained an arbitration clause which reads as follows:

> "The parties agree that any disputes between them concerning the meaning of this Agreement or concerning their rights, obligations, or performance hereunder except as to the extent of their rights set forth in Paragraph 10, shall (at the request of either of them)

be submitted to binding arbitration pursuant to the Transportation ADR Council Rules. Disputes shall be decided by a panel of three arbitrators with knowledge and experience in transportation industry, although the parties may agree to use only one mutually acceptable arbitrator. In selecting an arbitration panel, each party shall select one arbitrator and the two arbitrators shall jointly select the third. The sole right of the arbitrators shall be to enforce or interpret the terms of this Agreement and not to expand the rights or obligations of the parties beyond its express terms. In any action decided by arbitration, the prevailing party shall be entitled to recover reasonable attorney's fees and arbitration costs, including the fees and expenses of the arbitrator, from the losing party. Any dispute under this Agreement shall be decided with reference to Kentucky and federal law, and the forum for such arbitration shall be a mutually agreeable location in Kentucky, unless the parties agree to hold it elsewhere. This section shall not be applicable to disputes arising under Paragraph 11 (Confidentiality and Unfair Competition) nor shall it be interpreted to limit VASCOR's right to enforce Paragraph 11 in a court of law or equity."

¶ 7 Henderson alleges that following NAL's hiring of Vascor, Vascor along with two other named defendants, Sara McGee and Ed Lewis Trucking, conspired to lure employee-drivers away from Henderson to Ed Lewis Trucking so that Vascor could then assign NAL routes to Ed Lewis Trucking, instead of Henderson. According to Henderson, Vascor did not want to interrupt distribution of NAL's product by immediately switching to Ed Lewis Trucking so Vascor entered into the Agreement with Henderson in order to have Henderson continue servicing the NAL routes while the defendants pulled Henderson's drivers away to Ed Lewis Trucking and began reassigning the NAL routes once they had the appropriate drivers. Eventually, the

Agreement was terminated by Vascor, and Henderson stopped servicing the NAL routes which resulted in Henderson's business relationship with NAL ending.

¶ 8 On December 16, 2020, Henderson filed its third amended complaint (complaint) based upon the above alleged actions by Vascor and two other defendants. This was the first time in the lawsuit that Vascor was named as a defendant. In total, Henderson alleged three counts against Vascor.

¶ 9 Count 8 of Henderson's complaint is based on tortious interference with a prospective business advantage (tortious interference count). Henderson alleges that Vascor "was aware of [Henderson's] business relationship with NAL and purposely interfered and unfairly competed with [Henderson] in an effort to pull [Henderson] drivers away from [Henderson] and to Ed Lewis Trucking as a part of a larger plan to transfer NAL routes from [Henderson] to Ed Lewis Trucking." Henderson then claims that as a result of these actions, it "lost its business relationship with NAL" and was "harmed by losing said business relationship with NAL."

¶ 10 Count 9 of Henderson's complaint is based on promissory fraud (promissory fraud count). Henderson alleges that Vascor "put together a scheme to defraud [Henderson] of its business with NAL before entering into [the Agreement] with [Henderson]" and "communicated with others its plans to defraud [Henderson] of its NAL business before entering into the [Agreement]." It further alleges that Vascor "made false promises and representations to [Henderson] regarding its intentions for [Henderson] to provide carrier services" and that Henderson "relied on [Vascor's] misrepresentations and continued to concentrate a substantial portion of its company resources on the NAL routes."

¶ 11 Count 12 of Henderson's complaint is based on a claim of civil conspiracy (civil conspiracy count). Henderson alleges that Vascor agreed with Ed Lewis Trucking and Sara

McGee to interfere with Henderson's business relationship, unfairly compete with Henderson by way of a scheme to defraud Henderson of the NAL routes, and generally act as alleged in the previous two counts discussed.

¶ 12 In response to Henderson's filing of the complaint, Vascor sent Henderson's counsel a request to arbitrate as outlined in the Agreement. Henderson denied said request and Vascor filed "Defendant Vascor's § 2-619 Motion to Dismiss and Compel Arbitration and Memorandum in Support" (motion to compel) with the circuit court on March 16, 2021. On June 11, 2021, Henderson filed its response to Vascor's motion to compel in which it admitted the Agreement and the arbitration clause contained therein was valid and binding but argued that its claims against Vascor did not fall within the scope of the arbitration clause. On June 15, 2021, the circuit court held a nonevidentiary hearing on Vascor's motion to compel. The circuit court denied Vascor's motion to compel in a written order but did not articulate any findings of fact or reasoning for its decision. Vascor then filed this timely appeal on July 15, 2021.

¶ 13 Importantly, as articulated in the pleadings in the circuit court and in the appellate briefs before this court, the parties both agree that the Agreement was a valid and binding contract. Additionally, Henderson does not claim that any of its rights have been violated under the Agreement. Henderson does not claim that any obligations under the Agreement have not been fulfilled by either party. Henderson does not claim that either party has failed to perform in accordance with the terms of the Agreement, and Henderson has not brought any breach of contract claims against Vascor.

¶ 14 II. ANALYSIS

¶ 15 Initially, we note that although this appeal does not stem from a final order, this court has jurisdiction over this interlocutory order under Illinois Supreme Court Rule 307(a)(1) (eff. Nov.

1, 2017), because a motion to compel arbitration is analogous to a motion for injunctive relief. *Nagle v. Nadelhoffer, Nagle, Kuhn, Mitchell, Moss & Saloga, P.C.*, 244 Ill. App. 3d 920, 924 (1993). "The only question before us on an interlocutory appeal of this type is whether there was a sufficient showing to sustain the order of the trial court granting or denying the relief sought." *Bass v. SMG, Inc*., 328 Ill. App. 3d 492, 496 (2002). "In the instant case, the record does not reflect that the trial court held an evidentiary hearing prior to entering its order, but because the facts at issue were not in dispute, such a hearing was not required." *Id*. However, because there is no record of factual findings by the circuit court, the decision to deny Vascor's motion to compel arbitration is reviewed *de novo*. *Id.* As an additional, preliminary matter, we acknowledge that the arbitration clause at issue has both a choice of law provision indicating that Kentucky law applies, as well as a choice of venue provision indicating Kentucky would be the proper venue. Vascor in its brief cites Illinois law, federal law, and Kentucky law. Vascor does not articulate a position as to which particular law applies to this case. It does acknowledge that generally the laws are not in conflict as to the issues before this court. Because Vascor fails to articulate a clear position, we find it has forfeited any argument that Kentucky law applies, and we proceed applying Illinois law. See Ill. S. Ct. R. 341(h)(7) (eff. Oct. 1, 2020) (argument must contain the contentions of the appellant, the reasons therefor, and the citation of authorities; points not argued in an opening brief are forfeited). Further, we note that the choice of law and venue provisions appear to relate to the arbitration clause itself, thus in a matter wherein we are tasked with determining whether or not the arbitration clause is even applicable, Illinois law would control as this matter has been brought in Illinois without contest from either party.

¶ 16 "The Uniform Arbitration Act *** (710 ILCS 5/1 *et seq.* (West [2020])) empowers courts, upon application of a party showing an agreement to arbitrate, to compel or stay court

action pending arbitration." *Bass*, 328 Ill. App. 3d at 496. On appeal, Vascor argues that the three claims as alleged by Henderson fall within the scope of the arbitration clause contained in the Agreement, and therefore, the circuit court erred when it denied Vascor's motion to compel. More specifically, Vascor's position is that the language of the arbitration clause is broad and encompasses the claims despite Henderson's efforts to carefully couch all of them in tort, instead of contract. Vascor further attests that Henderson's claims all "concern," "relate to," or are "intertwined" with the contract and the contractual relationship between the parties, which brings those claims within the purview of the arbitration clause.

¶ 17 Henderson, however, argues that the circuit court properly denied Vascor's motion to compel because its claims of tortious interference, promissory fraud, and conspiracy fall outside of the scope of the language of the arbitration clause contained in the Agreement between the parties. For the following reasons, we agree with Henderson's position and the circuit court's denial of Vascor's motion to compel.

¶ 18 "The Illinois Uniform Arbitration Act [(Arbitration Act)] *** was enacted in 1961 and is substantially the Uniform Act promulgated by the National Conference of Commissioners on Uniform State Laws in 1955." *Flood v. Country Mutual Insurance Co*., 41 Ill. 2d 91, 93 (1968). "As an initial interpretive matter, we note that our supreme court has held that judicial opinions from other jurisdictions interpreting such acts are given greater than usual deference since the general purpose of a uniform act is to make consistent the laws of the states that have enacted it." *Bass*, 328 Ill. App. 3d at 497. "Similarly, because the [Arbitration] Act and the Federal Arbitration Act (9 U.S.C. §§ 1 *et seq.* (1976)) share a common origin, courts interpreting the former look for guidance to federal court decisions interpreting similar provisions in the federal act." *Id*.

¶ 19 "In considering appellate review of motions to compel arbitration, our supreme court has concluded that '[t]he [Arbitration] Act embodies a legislative policy favoring enforcement of agreements to arbitrate future disputes.' " *Id.* (quoting *Donaldson, Lufkin & Jenrette Futures, Inc. v. Barr*, 124 Ill. 2d 435, 443 (1988)). "The court has further opined, '[i]t is a well-established principle that arbitration is a favored alternative to litigation by state, federal and common law because it is "a speedy, informal, and relatively inexpensive procedure for resolving controversies arising out of commercial transactions." ' " *Id.* (quoting *Board of Managers of Courtyards at Woodlands Condominium Ass'n v. IKO Chicago, Inc.*, 183 Ill. 2d 66, 71 (1998), quoting *J&K Cement Construction, Inc. v. Montalbano Builders, Inc.*, 119 Ill. App. 3d 663, 667-68 (1983)). Thus, the implicated policy is that, wherever possible, "the courts construe arbitration awards so as to uphold their validity." *Salsitz v. Kreiss*, 198 Ill. 2d 1, 13 (2001). However, "[w]hile arbitration is a favored method of dispute resolution, this court has consistently cautioned that an agreement to arbitrate is a matter of contract." *Id.* "The parties to an agreement are bound to arbitrate only those issues they have agreed to arbitrate, as shown by the clear language of the agreement and their intentions expressed in that language." *Id.*

¶ 20 Thus, when a court is considering whether to compel arbitration, the court must answer the question of whether the parties agreed to arbitrate the particular subject matter of the dispute at issue. As first stated in *Donaldson* and reiterated in *Bass*, the Illinois Supreme Court has outlined three alternatives for courts faced with this question:

> "First, where the language of the arbitration agreement is clear, and it is apparent that the dispute sought to be arbitrated falls within the scope of the arbitration clause, the court should decide the arbitrability issue and compel arbitration. Second, if it is apparent that the issue sought to be arbitrated is not within the ambit of the arbitration clause, the court

should decide the arbitrability issue in favor of the opposing party, because there is no agreement to arbitrate. Third, where the parties are in conflict as to the scope of the provision for arbitration and the question of the parties' contractual intention as to scope is reasonably debatable, the issue of arbitrability should be initially determined by the arbitrator." *Bass*, 328 Ill. App. 3d at 498 (citing *Donaldson*, 124 Ill. 2d at 445).

¶ 21 Before we further analyze the specific language, we briefly reiterate what Henderson is alleging against Vascor in its complaint. Henderson is alleging that it had an ongoing business relationship with NAL prior to Vascor being hired by NAL. Henderson claims that following NAL's hiring of Vascor, Vascor and the other two defendants conspired against Henderson to lure Henderson drivers, who handled the NAL routes, away from Henderson and move them to Ed Lewis Trucking so that Vascor could then reassign NAL routes away from Henderson and to Ed Lewis Trucking, thereby "unfairly compet[ing]" with Henderson and "purposefully interfere[ing]" with Henderson's business relationship with NAL. Henderson alleges that Vascor "made false promises and representations" regarding Vascor's intention to use Henderson to provide carrier services and "induced" Henderson into entering into the Agreement under that premise in order to ensure that the NAL routes would not be delayed while Henderson drivers and routes were moved to Ed Lewis Trucking. As far as the relief sought by Henderson against Vascor, Henderson seeks to recover for the loss of its business relationship with NAL. We note that Henderson does not argue that any provision of the Agreement has been violated or that Vascor has violated any obligations or provisions of the Agreement.

¶ 22 We now turn to the language of the arbitration clause to determine whether the parties have agreed to arbitrate the claims at issue. We first address Vascor's invitation for this court to find that the language of the arbitration clause is broad and constitutes a "generic" arbitration

clause which would encompass any claim that "arises out of" or "relates to" the Agreement. In support of the general propositions favoring arbitration noted above, "courts have generally construed 'generic' arbitration clauses broadly, concluding that the parties are obligated to arbitrate *any* dispute that arguably arises under an agreement containing a 'generic' provision." (Emphasis in original.) *Bass*, 328 Ill. App. 3d at 498. "The particular language which courts have in the past labeled 'generic' demands arbitration of either 'disputes arising out of' or 'disputes arising out of or related to' the agreement at issue." *Id.* The *Donaldson* court noted that "[t]he broadest arbitration clauses typically provide that 'any claim or controversy arising out of this agreement' is to be submitted to arbitration." *Donaldson*, 124 Ill. 2d at 445. Here, the relevant language from the arbitration clause is as follows:

> "The parties agree that any disputes between them concerning the meaning of this Agreement or concerning their rights, obligations, or performance hereunder except as to the extent of their rights set forth in Paragraph 10, shall (at the request of either of them) be submitted to binding arbitration pursuant to the Transportation ADR Council Rules. *** The sole right of the arbitrators shall be to enforce or interpret the terms of this Agreement and not to expand the rights or obligations of the parties beyond its express terms."

¶ 23 While we acknowledge that some of the words used in the present arbitration clause such as "any disputes" and "concerning" may sometimes be found in generic arbitration clauses, we must examine the clause as a whole to determine if it constitutes a broad generic clause. When read together, it is apparent that the arbitration clause at issue has specific nongeneric wording and is limited in scope. The arbitration clause does not contain a simple, ordinary phrase or term such as that typically found in generic arbitration clauses. See, *e.g.*, *Donaldson*, 124 Ill. 2d at 445

("The broadest arbitration clauses typically provide that 'any claim or controversy arising out of this agreement' is to be submitted to arbitration."); *Bass*, 328 Ill. App. 3d at 498 (finding " '[i]n the event of any dispute, claim or controversy between the parties regarding this Agreement' " (emphasis omitted) to be broad and generic). We further note that courts have held that "[t]he parties' failure to use phrases or terms ordinarily included in an arbitration clause is evidence that they did not agree to arbitrate all the issues arising out of their business relationship." *Beckham v. William Bayley Co.*, 655 F. Supp. 288, 291 (N.D. Tex. 1987). Thus, having determined that the arbitration clause is not generic, but is limited in scope, we examine the wording further to determine whether the parties intended to arbitrate Henderson's claims.

¶ 24 The arbitration clause first states, in relevant part, that "[t]he parties agree that any disputes between them *concerning the meaning of this Agreement or concerning their rights, obligations, or performance hereunder* except as to the extent of their rights set forth in Paragraph 10, shall (at the request of either of them) be submitted to binding arbitration." (Emphasis added.) The plain language of this portion of the arbitration clause limits arbitration to only those disputes requiring interpretation of the meaning of the Agreement, whether that involves the parties' rights under the Agreement, the parties' obligations under the Agreement, or the parties' performance under the Agreement. This is logical because the meaning of the Agreement would naturally include the extent of the parties' respective rights, obligations, and performance pursuant to it. However, where a dispute does not call into question the rights, obligations, or performance of the parties under the Agreement, those disputes would fall outside of the scope of the arbitration clause.

¶ 25 The arbitration clause then goes on to further state that "[t]he *sole right of the arbitrators shall be to enforce or interpret the terms of this Agreement* and not to expand the rights or

obligations of the parties beyond its express terms." (Emphasis added.) This aspect of the arbitration clause further illustrates the limitation previously discussed in that it limits the power of the arbitrators and confines their role as arbitrators. This provision allows the arbitrators to only enforce or interpret the terms of the Agreement, which is consistent with the previous provision of the arbitration requiring an interpretation of the meaning of the Agreement.

¶ 26 Having discussed the arbitration language, we now apply it to the present facts. All three of Henderson's claims are focused on issues outside of the Agreement. Henderson's tortious interference claim focuses on the alleged actions that Vascor took to deprive Henderson of its prospective business advantage with NAL, mainly pulling away Henderson's drivers so NAL routes could be transferred to a competitor. Henderson's promissory fraud claim focuses on Vascor's alleged misrepresentations and false promises that were made to induce Henderson to enter into the Agreement in the first place. It also alleges further misrepresentations and false promises were made to ensure Henderson continued servicing the NAL routes while it lured Henderson's drivers away to a competitor. The civil conspiracy claim focuses on agreements and communications which occurred outside of the Agreement, and which aimed to interfere with Henderson's business relationship with NAL. Henderson's claims do not concern the rights of the parties under the Agreement, the obligations of the parties under the Agreement, or either party's performance under the Agreement. Henderson has not asserted any type of breach of contract claim against Vascor, nor has it argued that Vascor violated any terms or provisions of the Agreement. None of Henderson's claims involve a dispute regarding the interpretation of the Agreement's terms or ask the court to enforce any terms of the Agreement. Further, both parties agree the Agreement was valid and enforceable.

¶ 27 Vascor argues in its brief that the Agreement is integral in deciding the three claims brought by Henderson in that a factfinder will have to look to the Agreement to determine the outcome of the claims. Vascor articulates various defenses it believes it may be able to raise based upon the Agreement. One of those defenses is that Vascor believes it had the right to reassign NAL routes under the Agreement and did so in order to protect its own interests with NAL. Thus, it argues that because it had the "right" to take certain action under the Agreement, the claims fall under the scope of the arbitration clause. This argument by Vascor misconstrues the claims that Henderson has raised. Henderson is not claiming that Vascor reassigned the NAL routes in violation of the Agreement or took action that violated the Agreement. In fact, Henderson has acknowledged that Vascor had the right to reassign NAL routes. Thus, there is no dispute as to the "right" Vascor had pursuant to the Agreement. Instead, Henderson claims that Vascor schemed to defraud it and to unfairly compete with it by pulling its drivers away in order to ensure Vascor could transfer drivers and routes away from Henderson to Ed Lewis Trucking in an effort to interfere with Henderson's business relationship with NAL. Thus, Henderson bases its claims not on Vascor's transfer of the NAL routes, but instead, on the fraudulent and tortious actions of Vascor taken to perpetuate a scheme to defraud Henderson which existed outside of the Agreement. As alleged by Henderson, the Agreement is only relevant in that it was the tool which allowed Vascor to perpetuate the fraud and to allow the tortious activity to occur without resulting in a delay which would have alerted or harmed NAL.

¶ 28 The arbitration clause set forth in the Agreement is limited to disputes relating to the interpretation of the meaning of the Agreement, and the rights, obligations, and performances related to the Agreement. Here, Henderson's claims simply do not dispute the Agreement, any rights of the parties under the Agreement, the parties' obligations under the Agreement, or the

parties' performance under the Agreement. While we acknowledge a strong policy that favors arbitration, we cannot "stretch a contractual clause beyond the scope intended by the parties." *Beckham*, 655 F. Supp. at 292. Therefore, we conclude that the parties did not agree to submit to arbitration the tort claims of tortious interference with a prospective advantage, promissory fraud, and civil conspiracy.

¶ 29 III. CONCLUSION

¶ 30 For the foregoing reasons, we find the circuit court of St. Clair County did not err in its June 15, 2021, order denying the defendant Vascor's motion to compel.

¶ 31 Affirmed.