STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1816
A08-1901

ev3 Inc., a Delaware corporation, et al.,
Respondents,

vs.

Sean Collins, et al.,
Defendants,
Aaron Lew, et al.,
Appellants (A08-1816),
Cardiovascular Systems, Inc.,
Appellant (A08-1901).

Filed August 11, 2009
Affirmed
Stauber, Judge

Ramsey County District Court
File No. 62CV075977

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Considered and decided by Stauber, Presiding Judge; Stoneburner, Judge; and Bjorkman, Judge.

U N P U B L I S H E D O P I N I O N

STAUBER, Judge

In this consolidated appeal, appellants argue that the district court erred in (1) failing to apply the doctrine of equitable estoppel to compel respondents to arbitrate their claims against appellants and (2) refusing to stay the action until respondents' arbitration with certain individual defendants concluded. Because there was no abuse of discretion, we affirm.

FACTS

Respondent ev3, Inc. is the parent company of wholly-owned subsidiaries respondent ev3 Endovascular, Inc. (ev3 Endovascular), and respondent FoxHollow Technologies (FoxHollow). ev3 Endovascular is based in Minnesota, and is in the business of designing, manufacturing, and marketing medical devices. FoxHollow is a Delaware corporation that merged with ev3, Inc. in October 2007. Prior to the merger, FoxHollow was an independent manufacturer and distributor of medical devices, one of which is known as the SilverHawk. The SilverHawk is a device designed to treat patients suffering from peripheral arterial disease (PAD), a disease resulting from plaque accumulating in the arteries and blocking blood flow in the legs.

Appellant Cardiovascular Systems, Inc. (CSI) is a Minnesota corporation that designs, manufactures, and markets a medical device known as the Diamondback 360 Orbital Atherectomy System (Diamondback). The Diamondback is also used to treat patients suffering from PAD and is in direct competition with the SilverHawk.

Defendants Sean Collins, David Gardner, Michael Micheli, Kevin Moore, Steve Pringle, Jason Proffitt, Thadd Taylor, and Rene Treanor (collectively "individual defendants"), and appellants Aaron Lew and Paul Tyska, are all former FoxHollow or ev3 employees who are presently employed by CSI. Each of these defendants signed employment agreements during their employment with either FoxHollow or ev3. The employment agreements signed by the individual defendants are identical, and contain a mandatory arbitration clause. This arbitration clause provides in relevant part:

> A. *Arbitration*. In consideration of my employment with the company, its promise to arbitrate all employment-related disputes and my receipt of the compensation, pay raises and other benefits paid to me by the company, at present and in the future, I agree that any and all controversies, claims or disputes with anyone (including the company and any employee, officer, director, shareholder or benefit plan of the company in their capacity as such or otherwise) arising out of, relating to, or resulting from my employment with the company or the termination of my employment with the company, including any breach of this agreement, shall be subject to binding arbitration . . . . I further understand that this agreement to arbitrate also applies to any disputes that the company may have with me.

The employment agreements also mandated that any arbitration be administered by the American Arbitration Association, and contained a California choice-of-laws provision. It is undisputed that Lew and Tyska signed employment agreements that are identical except that they do not contain arbitration clauses.

In December 2007, ev3, Inc., ev3 Endovascular, and FoxHollow (collectively "respondents") filed suit against Lew, Collins, and CSI. Respondents subsequently amended their complaint to add Tyska and the seven individual defendants. Respondents

asserted claims against Lew, Tyska, and the individual defendants for breach of their employment agreements, breach of the duty of loyalty, misappropriation of trade secrets, unfair competition, and conspiracy. Respondents asserted related claims against CSI for tortious interference with contracts between FoxHollow and its employees, misappropriation of trade secrets, unfair competition, and conspiracy.

Seven months into the litigation, CSI, Lew, Tyska, and the individual defendants moved to dismiss respondents' claims in favor of arbitration, or, in the alternative, to compel arbitration and stay the proceedings in district court pending resolution of the claims in arbitration. The district court granted the motion to stay the proceeding "pending the outcome of any arbitration proceeding initiated pursuant to the employment agreements" as to the individual defendants with mandatory arbitration clauses in their employment contracts, and ruled that claims against them "may only be resolved in arbitration." But the court denied Lew, Tyska, and CSI's motion to compel arbitration. The court concluded that because "Lew and Tyska were not parties to the Employment agreements containing the mandatory arbitration language, the Court does have jurisdiction to accept [respondents'] claims." Lew, Tyska, and CSI (collectively "appellants") subsequently appealed, and the appeals were consolidated by order of this court.

D E C I S I O N

I.

Appellants argue that the district court erred in refusing to apply the doctrine of equitable estoppel to compel respondents to arbitrate their claims against appellants.[1] "Equitable estoppel is an equitable remedy." *Lowry's Reports, Inc. v. Legg Mason Inc.*, 271 F. Supp. 2d 737, 747 (D. Md. 2003). A district court's exercise of its equitable powers is reviewed for an abuse of discretion. *Edin v. Josten's, Inc.*, 343 N.W.2d 691, 693 (Minn. App. 1984); *see Sharkey v. Lasmo*, 214 F.3d 371, 374 (2d Cir. 2000) (holding that a reviewing court reviews the district court's grant of relief in equity for abuse of discretion). Therefore, although appellate courts generally review de novo the district court's decision on a petition to compel arbitration, when "the district court's decision is based on principles of equitable estoppel," the decision is reviewed for an abuse of discretion. *Am. Bankers Ins. Group, Inc. v. Long*, 453 F.3d 623, 629 (4th Cir. 2006); *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 528 (5th Cir. 2000) (using an abuse-of-discretion standard to review the district court's application of equitable estoppel to decide whether to compel arbitration).

[1] Respondents initially claimed that because the underlying motion is based on equitable estoppel rather than a written arbitration agreement, this court lacked jurisdiction under the Federal Arbitration Act (FAA) to consider this appeal. But recently, the Supreme Court held that appellate courts have jurisdiction under the FAA to review denials of stays requested by litigants who were not parties to the relevant arbitration agreement. *Arthur Anderson LLP v. Carlisle*, 129 S. Ct. 1896, 1903 (2009). At oral argument, respondents conceded that based on the *Carlisle* decision, this court has jurisdiction over this appeal.

"Generally, arbitration clauses are contractual and cannot be enforced by persons who are not parties to the contract." *Onvoy, Inc. v. SHAL, LLC*, 669 N.W.2d 344, 356 (Minn. 2003). But the Minnesota Supreme Court has recognized that there are exceptions to this rule: "Federal cases have set out at least three principles on which a nonsignatory to a contract can compel arbitration: equitable estoppel, agency, and third-party beneficiary. Equitable estoppel prevents a signatory from relying on the underlying contract to make his or her claim against the nonsignatory." *Id.* (citation and footnote omitted).

Although the supreme court in *Onvoy* recognized that the principles of equitable estoppel may be applied to compel arbitration, the court did not formally apply the doctrine to the facts before it. *See id.* But in *MS Dealer Serv. Corp. v. Franklin*, cited by the supreme court in *Onvoy*, the Eleventh Circuit stated that equitable estoppel allows a nonsignatory to compel arbitration in two different situations:

> First, equitable estoppel applies when the signatory to a written agreement containing an arbitration clause "must rely on the terms of the written agreement in asserting [its] claims" against the nonsignatory. When each of a signatory's claims against a nonsignatory "makes reference to" or "presumes the existence of" the written agreement, the signatory's claims "arise[ ] out of and relate[ ] directly to the [written] agreement," and arbitration is appropriate. Second, "application of equitable estoppel is warranted . . . when the signatory [to the contract containing the arbitration clause] raises allegations of . . . substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract."

177 F.3d 942, 947 (11th Cir. 1999) (citations omitted). Several other federal circuits have adopted this language in determining whether equitable estoppel applies against a

signatory to an arbitration clause. *See, e.g., Long*, 453 F.3d at 627 (Fourth Circuit); *Grigson*, 210 F.3d at 527 (Fifth Circuit); *CD Partners, LLC v. Grizzle*, 424 F.3d 795, 798 (8th Cir. 2005).

Here, the district court's memorandum of law in support of its order denying appellants' motion to compel arbitration does not address equitable estoppel. But the record reflects that the issue was thoroughly briefed and argued below, and the parties agree that equitable estoppel is the pivotal issue before this court. Thus, we review the district court's implicit denial of appellants' equitable estoppel argument. *See Roberge v. Cambridge Coop. Creamery Co.*, 248 Minn. 184, 195, 79 N.W.2d 142, 149 (1956) (holding the denial of motion for amended findings is equivalent to a finding contrary to that sought in the motion).

Appellants argue that the principles of equitable estoppel require that respondents arbitrate their claims because (1) respondents' claims against appellants refer to and presume the existence of the employment agreements with the other individual defendants and (2) respondents' claims against appellants allege substantially interdependent and concerted misconduct with the other individual defendants. Appellants further contend that the notions of fair play and justice warrant application of the doctrine of equitable estoppel.

a. Allegations that respondents' claims arise from obligations contained in the individual defendants' employment agreements

In the second amended complaint, respondents asserted (1) breach of contract claim against Lew; (2) breach-of-fiduciary-duty and breach-of-duty-of-loyalty claims

against Lew; (3) misappropriation-of-trade-secrets claims against CSI and Lew; (4) unfair-competition claims against CSI, Lew, and Tyska; (5) tortuous-interference-with-contract claims against Lew and CSI; and (6) conspiracy claims against CSI, Lew and Tyska. We consider each claim in turn, to determine whether the district court abused its discretion in declining to compel arbitration. *See MS Dealer*, 177 F.3d at 947.

1. Breach-of-contract claims

Respondents' breach-of-contract claims allege that Lew breached the confidentiality provision of his employment agreement. Respondents also allege that Lew and Tyska breached the non-recruitment/encouragement provisions of their employment contracts. These allegations stem directly from the contracts between Lew and Tyska and respondents. They do not implicate the contracts of the individual defendants that contain the mandatory arbitration provisions. Because respondents' breach-of-contract claims arise directly out of the employment contracts between respondents and Lew and Tyska, the record supports the conclusion that respondents' claims for breach of contract do not arise out of the individual defendants' employment agreements. *See Grizzle*, 424 F.3d at 798.

2. Breach of fiduciary duty–duty of loyalty claims

Respondents' breach-of-fiduciary-duty and breach-of-duty-of-loyalty claim alleges that: "Lew breached his duty of loyalty to FoxHollow by, among other actions, misappropriating FoxHollow's confidential information while still employed by FoxHollow and, upon information and belief, using such information for his own pecuniary gain, the gain of CSI and to FoxHollow's detriment." Respondents further

alleged that "Lew engaged in intentional and deceptive acts while employed by FoxHollow, which created conflicts of interest, which Lew failed to disclose to FoxHollow." These claims do not relate to the contracts of the individual defendants. If any contract is implicated, it is the contract Lew signed with respondents that does not contain an arbitration clause.

3. Misappropriation-of-trade-secrets claims

Respondents' second amended complaint alleges that Lew "willfully and maliciously misappropriated ev3's trade secrets as prohibited by the Minnesota Uniform Trade Secret Act, the California Uniform Trade Secret Act, and common law." We agree with respondents that this claim arises from statutory and common law duties rather than the contract between the individual defendants and respondents.

With respect to CSI, the second amended complaint also alleges that CSI "willfully and maliciously misappropriated and threatens to further misappropriate ev3's trade secrets as prohibited by the Minnesota Uniform Trade Secret Act, the California Uniform Trade Secret Act, and common law." Like the misappropriation-of-trade-secrets claim against Lew, this claim also arises from statutory common law duties rather than the contract between the individual defendants and respondents. Thus, the misappropriation-of-trade-secrets claims do not rely on the contracts of the individual defendants.

4. Unfair-competition claims

Respondents' unfair-competition claim alleges that CSI, Lew, and Tyska

> have engaged in unfair competition by: wrongfully taking and using ev3's confidential and proprietary information, improperly encouraging ev3's employees to quit and begin work for CSI, promoting CSI and selling and attempting to sell CSI's device while employees of ev3, misappropriating ev3's trade secrets for CSI's commercial gain to the detriment of ev3, and by other wrongful actions described in this Amended Complaint.

But again, these claims exist apart from the employment agreements signed by the individual defendants. Rather the claims are premised on appellants' wrongful acts.

5. Tortious-interference-with-contract claims

Respondents' second amended complaint alleges that CSI and Lew knew that the individual defendants had confidentiality agreements with ev3/FoxHollow and that CSI and Lew procured multiple breaches of these employment agreements. Unlike the previous claims discussed, respondents' tortious-interference-with-contracts claims do arise from obligations contained in the individual defendants' contracts. Accordingly, the principles of equitable estoppel could support arbitration of this claim.

6. Conspiracy claims

Respondents' conspiracy claims allege that CSI, Lew, and Tyska "agreed and conspired to engage in a concerted effort to gain an unfair competitive and economic advantage for CSI to the detriment of ev3." The complaint alleges that in furtherance of this conspiracy, appellants committed numerous wrongful acts. Thus, the conspiracy claim is based on the alleged wrongful acts committed by appellants. We note that the conspiracy count alleges that CSI, Lew, and Tyska "had knowledge of ev3's contractual and legal interests and acted with the intent to unlawfully deprive ev3 of those interests."

But the fact that the count references the individual defendants' employment contracts does not mean that the claim arises from the obligations in the individual defendants' contracts. Rather, the claim arises out of appellants' "numerous wrongful acts."

Based on a review of the individual claims raised by respondents in the second amended complaint, we conclude that the district court did not abuse its discretion in finding that equity does not mandate arbitration of the claims against appellants. Respondents' claims do not arise out of and relate directly to the individual defendants' employment contracts because most of the claims asserted by respondents do not refer to or presume the existence of the individual defendants' employment contracts. *See MS Dealer*, 177 F.3d at 947. Although the tortious-interference-with-contract claims do arise out of the individual defendants' employment agreements, the principles of equitable estoppel should not be invoked on this claim alone because equitable estoppel applies "[w]hen *each* of the signatory's claims against a nonsignatory makes reference to or presumes the existence of the written agreement." *Id.* (emphasis added) (quotation omitted). Because the record reflects that each of respondents' claims do not make reference to or presume the existence of the individual defendants' employment contracts, appellants cannot establish the first circumstance in which equitable estoppel allows a nonsignatory to compel arbitration, supporting the district court's exercise of discretion to deny application of equitable estoppel. *See id.* (noting that "[e]xisting case law demonstrates that equitable estoppel allows a nonsignatory to compel arbitration in two different circumstances").

Appellants assert that in the "Overview of the Action" section of the second amended complaint, respondents include several specific allegations that refer to the employment agreements containing the mandatory arbitration clauses. Appellants argue that because respondents reallege and incorporate by reference each of the allegations contained in all previous paragraphs of the amended complaint, each claim refers to or presumes the existence of the employment contracts. We disagree. Based on appellants' reasoning, any claim alleged by respondents would arise out of the individual defendants' employment agreements as long as the count contained the operative language realleging the allegations contained on the proceeding paragraphs. When focusing on each count alleged in the complaint, the individual claims, with the exception of the tortious-interference-of-contracts claim, have little or nothing to do with the individual defendants' employment contracts. Accordingly, failure to satisfy the first consideration permitting the application of the principles of equitable estoppel supports the district court's decision.

b. Allegations that appellants and the individual defendants engaged in substantially interdependent and concerted misconduct

The principles of equitable estoppel may also apply to compel arbitration for non-signatories when the claim involves a close relationship between the signatory and non-signatory parties, raising allegations of substantially interdependent and concerted misconduct. *Grigson*, 210 F.3d at 527.

Appellants argue that equitable estoppel applies because respondents raise allegations of substantially interdependent and concerted misconduct by both CSI and the

individual defendants. A review of the second amended complaint reveals that respondents made such allegations. As appellants point out, the second amended complaint contains the following allegations: (1) CSI was aware of the provisions of the FoxHollow employment agreements and knowingly procured breaches of the individual defendants' agreements; (2) CSI and the individual defendants agreed and conspired to engage in at least seven enumerated wrongful acts together; (3) the individual defendants and CSI worked together to willfully and maliciously misappropriate respondents' trade secrets; and (4) CSI and the individual defendants jointly engaged in numerous activities that purportedly amounted to unfair competition. The essence of these allegations is that CSI and the individual defendants engaged in substantially interdependent and concerted misconduct.

Respondents argue that in order for the principles of equitable estoppel to be applicable, the non-signatories must share a close relationship with the signatories. Respondents contend that because appellants and the individual defendants do not share a sufficiently close relationship, equitable estoppel is not applicable.

We disagree with respondents. Lew, Tyska, and the individual defendants were employees of CSI at the time the complaint was filed. Many of the allegations of misconduct occurred while some of the individual defendants were employed by CSI and some of the other individual defendants were still employed by ev3/FoxHollow. This employer/employee relationship is sufficient to establish a "close" relationship. Moreover, equitable estoppel is applicable when the signatory raises allegations of substantially interdependent misconduct by both the nonsignatory and one or more

signatories to the contract. *MS Dealer*, 77 F.3d at 947. The requisite "close" relationship is established by showing allegations of substantially interdependent misconduct by both appellants and the individual defendants. Because respondents raised these types of allegations, we conclude that the principles of equitable estoppel could be applied here.

c. Allegation that equity and the notion of fair play and justice warrant the application of equitable estoppel

The "linchpin for equitable estoppel is equity-fairness." *Grigson*, 210 F.3d at 528. "[W]hether to utilize equitable estoppel . . . is within the district court's discretion." *Id.* Therefore, even though we conclude that the principles of equitable estoppel could be applied, we will reverse the district court's decision not to apply equitable estoppel only if the district court abused its discretion in making that determination. *See id.*

Appellants argue that equity and notions of fair play and justice warrant the application of the doctrine of equitable estoppel. To support their arguments, appellants assert that requiring them to litigate respondents' claims against appellants, while respondents' claims against the individual defendants are arbitrated, invites the risk of inconsistent judgments and damages awards. Moreover, appellants argue that arbitration clauses contained in the individual defendants' employment agreements mandate that respondents arbitrate "any and all" claims "with anyone." Appellants further argue that based on this language contained in the agreements signed by respondents, fundamental fairness mandates that respondents adhere to this language and arbitrate with appellants.

Appellants' fairness arguments ignore the cardinal principle that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute

which he has not agreed so to submit." *AT&T Tech., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648, 106 S. Ct. 1415, 1418 (1986) (quotation omitted). Here, it is undisputed that respondents are not signatories to any contract with appellants that contain an arbitration clause. If Lew and Tyska, who actually have contracts with respondents, wanted arbitration clauses in their contracts, they could have negotiated such clauses into their contracts with respondents. Moreover, the language in the arbitration clauses stating that respondents agreed to arbitrate "any and all" claims "with anyone" does not force respondents to arbitrate their claims with appellants. Again, this contractual language is between the individual defendants and respondents, not between respondents and appellants. Finally, the record reflects that even though respondents raised allegations that appellants and the individual defendants engaged in certain acts of substantially interdependent and concerted misconduct, not all of the allegations are appropriate for arbitration because many of the claims raised by respondents have nothing to do with the individual defendants' contracts, in which the arbitration clauses are contained. Thus, we conclude that the district court did not abuse its discretion in concluding that equity-fairness does not mandate submission of respondents' claims against appellants to arbitration.

II.

Finally, appellants argue that the district court erred in refusing to stay the action until respondents' arbitration with the individual defendants concluded. Appellants argue that permitting respondents to proceed with parallel actions in arbitration and in district court would be inefficient and confusing, and could lead to conflicting results.

Although the reasons cited by appellants might provide an adequate basis to stay the proceedings if adopted by the district court, appellants failed to show that the refusal to stay the action was an abuse of discretion. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 103 S. Ct. 927, 939 n.23, 460 U.S. 1, 21 n.23 (1983) (stating that in some cases it may be advisable to stay litigation among the non-arbitrating parties pending the outcome of the arbitration, and that decision is one left to the district court as a matter of its discretion to control its docket). At the time of appellants' motions, the parties had litigated the action for at least seven months, and the parties were deep into discovery. A decision to stay the action would simply prolong the proceedings. Accordingly, the district court's refusal to stay the action was not an abuse of discretion. Because we affirm the denial of appellants' motion to compel arbitration, we need not address respondents' argument that the doctrine of laches and unclean hands bars the application of equitable estoppel.

Affirmed.