IN THE UNITED STATES COURT OF APPEALS

for the Fifth Circuit

No. 94-50371
Summary Calendar)

TONY A. JOUDI AND LEILA JOUDI

Plaintiffs-Appellees,

versus

DOERKIN PROPERTIES, INC., ET AL.,

Defendants,

PETER PIPER, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(EP-94-CA-30-H)

(January 13, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:[*]

This is an interlocutory appeal from a district court order which (1) denied appellant's motion to stay proceedings in federal court and (2) granted appellees' motion for preliminary injunction of arbitration proceedings pending a hearing on appellees' request for a permanent injunction.

Defendant, Peter Piper, Inc. ("PPI"), appeals this order which enjoins its arbitration proceeding against plaintiffs, Tony and Leila Joudi ("the Joudis"). PPI asserts that the arbitration

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[*] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

clause in its franchise agreement with the Joudis preempts the Joudis' federal diversity action against it. We disagree. The district court properly determined that the arbitration clause was unenforceable under Arizona law. For this reason, we affirm.

FACTS

Plaintiffs, Tony A. Joudi and Leila Joudi, are Texas citizens who entered into a franchise agreement with defendant, Peter Piper, Inc. (PPI), an Arizona corporation that franchises pizza restaurants, to operate a pizza restaurant in Fontana, California. On February 2, 1994, The Joudis filed a complaint in federal district court in Texas, based on diversity jurisdiction against PPI and Doerkin Properties, Inc.[1] The complaint alleged that PPI, Inc. committed a deceptive trade practice, in violation of the Texas Deceptive Trade Practices-Consumer Protection Act, Tex. Bus. and Com.Code Ann. §§ 17.01, et seq. (DTPA), by failing to inform them that three previous Peter Piper Pizza restaurants had failed within a twenty-mile radius of their Fontana, California site. At the same time, the Joudis moved for a preliminary injunction to stay the arbitration proceeding that had been previously commenced in Arizona. PPI filed a motion to stay the federal action against it, to enable the arbitration in Arizona to proceed, contending that the Joudis' DTPA claims were preempted by an arbitration clause in the franchise agreement itself. The district court found that the arbitration clause was not enforceable under Arizona law,

[1] Doerkin Properties, Inc. is a California corporation. The Joudis' claims against Doerkin Properties are not at issue herein.

granted the Joudis' motion to stay the arbitration proceeding, and denied PPI's motion to stay the federal proceeding. PPI, Inc. appeals, contending that the district court erred in determining that the arbitration clause of the franchise agreement was invalid under Arizona law.[2] PPI also contends that the district court erred by (1) enjoining its arbitration proceedings against the Joudis because they failed to carry their burden of proving each of the factors necessary to support a preliminary injunction, and (2) denying its motion to stay judicial proceedings pending arbitration. We shall address each motion in turn.

THE PRELIMINARY INJUNCTION

We review a district court's decision to grant a preliminary injunction de novo when, as in the instant case, the facts are not in dispute and the central issue is one of contract interpretation. United Offshore Co. v. Southern Deepwater Pipeline Co., 899 F.2d 405, 407 (5th Cir. 1990).

A party that requests a preliminary injunction has the burden of showing the following four requirements: (1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do the defendant, and (4) that granting the preliminary injunction will not disserve the public interest. City of Meridian, Miss. v.

[2] The parties agree that Arizona law determines whether the arbitration clause is enforceable.

Algernon Blair, Inc., 721 F.2d 525, 527 (5th Cir. 1983); United Offshore Co.; Texas Catastrophe Property Ins. Assn. v. Morales, 975 F.2d 1178, 1180 (5th Cir. 1992), cert. denied, --U.S.--, 113 S.Ct. 1815, 123 L.Ed.2d 446 (1993).

The district court concluded that the Joudis had carried their burden of proof regarding these four factors. The predominant factor in the district court's decision was its evaluation of the Joudis' likelihood of prevailing on the merits. However, in order to prevail on the merits, the Joudis had to show that PPI's claim was not arbitrable. We agree with the district court's determination that the arbitration provision is not valid, we therefore remand for entry of a permanent injunction.

VALIDITY OF THE ARBITRATION AGREEMENT

The Federal Arbitration Act, 9 U.S.C. §§ 1 et seq., establishes a strong presumption in favor of arbitration and limits the role of the court to determining whether the claim is referable to arbitration. City of Meridian, Miss., 721 F.2d at 528. An arbitration provision in a contract such as the instant franchise agreement is valid, irrevocable, and enforceable. However, arbitration clauses may be invalidated, revoked, and rendered unenforceable due to "such grounds as exist at law or in equity for revocation of any contract." 9 U.S.C. § 2; see and compare, Hull at 1551. Therefore, mere presence of an arbitration clause is insufficient to enforce the arbitration agreement. See Hull v. Norcom, Inc., 750 F.2d 1547, 1550 (11th Cir. 1985).

If a court determines that a valid arbitration agreement does not exist, it is obliged to enjoin arbitration; on the other hand, if the court determines that an agreement exists and the dispute falls within the scope of the agreement, it then must refer the matter to arbitration without considering the merits of the dispute. Painewebber Inc. v. Hartmann, 921 F.2d 507, 511 (3rd Cir. 1990). See also, Schauss v. Metals Depository Corp., 757 F.2d 649, 653 (5th Cir. 1985) (The district court may, in its discretion, enjoin the filing of related lawsuits in other federal courts).

Under Arizona law, legal or equitable grounds for revoking any contract include allegations that the contract is void for lack of mutual consent, consideration or capacity or voidable for fraud, duress, lack of capacity, mistake, or violation of a public purpose. Stevens/Leinweber/Sullens, Inc. v. Holm Development and Management, Inc., 165 Ariz. 25, 795 P.2d 1308, 1311-1312 (Ariz.App. 1990). Mutuality of obligation is an essential element of every enforceable agreement. Gates v. Arizona Brewing Co., 54 Ariz. 266, 272, 95 P.2d 49, 51-52 (1939). Mutuality is absent when one only of the parties is bound to perform, and the rights of the parties exist at the option of one only. Id. Thus, where there is no mutual obligation to submit contractual disputes to an arbitrator, mutuality is absent. See and compare Stevens/Leinweber/Sullens, Inc., 795 P.2d at 1313.

The Joudis' maintain, and the district court found, that the instant arbitration agreement is invalid under Arizona law because

it lacks mutuality of the obligation to arbitrate.[3] The relevant parts of the agreement, sections 16 and 17, provide as follows:

> 16. RIGHTS OF FRANCHISOR
>
> 16.1 Optional Rights. In the event of a material breach of this Agreement, Franchisor may, at its election, and after the grace period set forth in Section 15.1 in the case of material breach that is curable, do any one or more of the following:
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> 16.1.1 Arbitration and Judicial Remedies. Terminate this Agreement and thereafter commence arbitration proceedings and/or seek provisional remedies, protect its rights hereunder.
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> 16.1.2 Damages. Bring suit against Franchisees or any of them for any amounts due under this Agreement, plus interest on all such amounts from the date they were due at the greater of eighteen percent (18%) per annum or four percent (4%) in excess of the published prime interest rate of The Valley National Bank of Arizona, a national banking association, as in effect from time to time ("Default Interest").
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> 16.1.3 Provisional Relief. Bring any such action in any court of competent jurisdiction for injunctive and other provisional relief as Franchisor deems to be necessary or appropriate to compel Franchisees to comply with their obligations hereunder or to protect the PPI Trademarks or other property rights of Franchisor.
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> 16.1.4 Purchase of Assets. Purchase from Franchisees all inventory, supplies, furniture, fixtures and equipment at the Franchised Restaurant at such fair market value as shall be determined by Franchisor. No payment shall

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[3] Even if subject to arbitration, courts are divided on whether the Federal Arbitration Act bars a court from issuing a preliminary injunction or requires a stay of further proceedings pending arbitration. See Merrill Lynch, Pierce, Fenner, & Smith, Inc. v. McCollum, 469 U.S. 1127, 105 S.Ct. 811, 812-813, 83 L.Ed.2d 804 (1985). However, regarding a district court's refusal to stay judicial proceedings pending arbitration, this circuit has stated that "If the claims are covered by the arbitration clause, we must order the district court to stay its proceedings. If the claims are not covered, the cause of action can proceed in the court." Neal v. Hardees Food Systems, Inc., 918 F.2d 34, 36 (5th Cir. 1990).

be made for any going-concern value, intangibles, or goodwill arising from the operation of the Franchised Restaurant.

16.1.5 Assumption of Lease. Succeed to all rights of Franchisees under the Lease pursuant to Section 11.3.

16.2 Remedies Not Exclusive. The remedies contained herein are not the exclusive remedies available to Franchisor hereunder and shall be in addition to such other remedies as may be available to it at law or equity.

17. ARBITRATION

Any controversy or claim arising out of or relating to this Agreement or any breach hereof including without limitation any claim that this Agreement or any portion hereof is invalid, illegal or otherwise voidable for any reason, including without limitation, fraudulent inducement with respect to this Agreement or this Article 17 specifically, antitrust or securities violations, or violations of franchise disclosure laws or laws with respect to the relationship of franchisor and franchisee shall be submitted to arbitration before and in accordance with the rules of the American Arbitration Association, and judgment upon the award may be entered in any court having jurisdiction thereof; provided, however, that this Article 17 shall not (1) limit Franchisor's right to obtain any provisional remedy, including without limitation injunctive relief, writs of recovery of possession, or similar relief, from any court of competent jurisdiction, as Franchisor deems to be necessary or appropriate in Franchisor's sole subjective judgment, to compel Franchisees to comply with their obligations hereunder or to protect the PPI Trademarks or other property rights of Franchisor, or (2) affect any rights or remedies that Franchisor may have under the Sublease. Franchisor may, as part of such action or proceeding, seek damages, costs and expenses caused to or incurred by it by reason of the act or action or non-action of Franchisees which caused Franchisor to institute such action or proceeding. The institution of any such action or proceeding by Franchisor shall not be deemed a waiver on its part to institute an arbitration proceeding pursuant to the provisions of this Article 17. The situs of arbitration proceedings shall be Phoenix, Arizona, or such other city in which Franchisor maintains its principal offices, and the arbitration panel shall consist of three (3) people. The arbitration panel shall have no authority to award punitive damages or preliminary relief or the authority to compel the attendance of witnesses or the production of documents.

PPI contends that the words "bring suit" in § 16.1.2 readily can and therefore should be construed as referring to commencement

of arbitration proceedings rather than to judicial proceedings because, ". . . under section 16, PPI has the right to seek damages for any breach of the Franchise Agreement, but it may seek those damages in an arbitration proceeding." We are not persuaded by PPI's interpretation of the § 16.1.2 "bring suit" language. Section 16 of the franchise agreement provides separately for "Arbitration and Judicial Remedies", "Damages", and "Provisional Relief". The "Damages" subsection (§ 16.1.2) has no meaning apart from either § 17 or § 16.1.1 if "bring suit" refers only to institution of arbitration proceedings. Moreover, if this language only "encompasses" arbitration proceedings, then it also leaves PPI the option of seeking damages in judicial proceedings.

The arbitration clause in section 17 specifies that it is applicable to a claim of fraudulent inducement or violations of franchise disclosure laws. However, section 17 expressly states that it shall not limit PPI's right to obtain "any provisional remedy", "from any court of competent jurisdiction", as PPI deems necessary or appropriate in PPI's "sole subjective judgment", to compel the Joudis to comply with their franchise obligations, or to protect PPI's trademarks or other property rights. This section further states that, as part of such action or proceeding, PPI may seek damages, costs and expenses caused to or incurred due to the conduct by the Joudis which caused it to institute such action or proceeding. This language removes the limitations upon PPI's ability to choose whether, and on what grounds, to seek judicial relief for whatever PPI deems to be necessary or appropriate

provisional relief. This language also allows PPI to seek non-provisional relief as part of its action for provisional relief. For these reasons, this language gives us pause, when combined with subsections 16.1.2 and 16.2, as to the enforceability of the arbitration provision because the other parts of sections 16 and 17 are facially consistent with arbitration.[4].

Only PPI has these "optional rights" in § 16. PPI's § 16 option to exercise its rights to such other remedies as are available at law or equity, combined with PPI's right to seek damages, costs, and expenses as part of its judicial proceeding for provisional remedies, in effect abrogates the parties' mutual obligation to arbitrate. Unlike Lawrence v. Comprehensive Business Services Co., 833 F.2d 1159, 1162 (5th Cir. 1987) (where none of the contract provisions provided a unilateral right either to a judicial forum for any breach of the agreement or to remedies of damages or specific performance), § 16.2 of the instant agreement leaves open PPI's option to seek any remedy available at law or equity, and only PPI has the right to "bring suit" for damages for amounts due. Although § 17 prescribes arbitration for any controversy regarding, or breach of, the agreement, only PPI has the right to determine what constitutes a necessary or appropriate provisional remedy and to seek, judicially, both the provisional

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[4] In general, provisional relief is not inconsistent with arbitration, as the arbitrators usually do not have the power to order or enforce provisional remedies. See PMS Distributing Co., Inc., v. Hubert Suhner, A. G., 863 F.2d 639, 641 (9th Cir. 1988), and cases cited therein. See also, Roso-Lino Beverage Distributors, Inc., v. Coca Cola Bottling Co. of New York, 749 F.2d 124, 125 (2nd Cir. 1984).

remedy and damages for the acts which gave rise to the action for provisional remedies.

For the foregoing reasons, we find no error in the district court determination that the instant franchise agreement grants PPI the option in its sole discretion to arbitrate, to sue for damages, or to seek injunctive relief and that the Joudis do not retain a similar option. The instant arbitration agreement is unenforceable because it lacks mutuality of obligation. The district court properly concluded that the parties' arbitration agreement is invalid and was therefore obliged to enjoin concurrent litigation of these claims before the arbitral tribunal. For this reason, we find no error in the district court's ruling on the preliminary injunction, and we do not address PPI's remaining argument that preliminary injunction was improper for other reasons.

THE MOTION TO STAY JUDICIAL PROCEEDINGS

The denial of PPI's motion to stay this action pending arbitration is appealable pursuant to 9 U.S.C. § 16(a)(1),[5] and is reviewed de novo. Complaint of Hornbeck Offshore (1984) Corp. v. Coastal Carriers Corp., 981 F.2d 752, 754 (5th Cir. 1993). The Federal Arbitration Act provides as follows:

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[5] The relevant parts of the Federal Arbitration Act's jurisdictional section reads as follows:

§ 16. Appeals

(a) An appeal may be taken--

(1) an order--

(A) refusing a stay of any action under section 3 of this title . . . .

§ 3. Stay of proceedings where issue therein referable to arbitration

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Most of the jurisprudence arising from a district court's denial of a motion to stay court proceedings centers around whether the claims fall within the scope of the agreement to arbitrate. However, the instant issue is the validity, rather than the scope, of the arbitration agreement. The stay required by § 3 presupposes a valid arbitration agreement. For the reasons discussed above, the district court properly found that there is no valid agreement to arbitrate under which the merits may be referred to arbitration. Because these claims were not covered by a valid arbitration agreement, the district court was not required to grant the stay requested by PPI.

CONCLUSION

We agree that the arbitration provision in this Franchise Agreement lacks mutuality of obligation and is therefore invalid under Arizona law. For this reason, we find (1) no valid arbitration agreement, (2) no error in the district court's denial of PPI's motion to stay pending the arbitration proceedings. Because there is no valid arbitration agreement, neither the policy which favors arbitration nor the Federal Arbitration Act applies to

this case. We AFFIRM and REMAND the matter for further proceedings on the Joudis claims, and for entry of a permanent injunction against arbitration on their claims.