2021 IL App (1st) 210325-U

SIXTH DIVISION
September 10, 2021

No. 1-21-0325

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

IN RE THE MARRIAGE OF:	)	Appeal from the
	)	Circuit Court of
ANTOINETTE R. GREENBERG,	)	Cook County
	)	
Petitioner-Appellee,	)	
	)	No. 2019 D 6941
and	)	
	)	
RONALD I. GREENBERG,	)	Honorable
	)	Edward A. Arce,
Respondent-Appellant.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justice Connors and Justice Mikva concurred in the judgment.

ORDER

¶ 1 *Held*: We reverse and remand for the trial court to make substantive rulings on the arbitrability issues raised by the motion to compel arbitration.

¶ 2 Respondent, Ronald I. Greenberg, appeals the order of the circuit court dismissing his motion to compel arbitration. On appeal, Ronald contends that the court should have granted his motion where the evidence presented to show the existence of an arbitration agreement was

admissible pursuant to Illinois Rule of Evidence 1004 (eff. Jan. 1, 2011). For the following reasons, we reverse and remand for further proceedings.

¶ 3 I. JURISDICTION

¶ 4 On March 8, 2021, the trial court dismissed Ronald's motion to compel arbitration with prejudice. Ronald filed his notice of interlocutory appeal on March 24, 2021. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rule 307(a)(1) (eff. Nov. 1, 2017).

¶ 5 II. BACKGROUND

¶ 6 The parties are practicing Orthodox Jews and were married on October 16, 1994, in Bethesda, Maryland. Rabbi Barry Freundel officiated over their traditional Orthodox wedding. As part of their ceremony the parties signed a Ketubah, or a Jewish marriage contract. Antoinette and Ronald subsequently had five children, all of whom are now emancipated.

¶ 7 On August 13, 2019, Antoinette filed a petition for dissolution of marriage and Ronald filed a counter- petition for dissolution of marriage. During the proceedings, Antoinette filed a motion to compel turnover of personal property and Ronald filed a motion to compel Antoinette to seek employment. The parties also entered a parenting plan on April 20, 2020, which the trial court approved. At the time, their youngest child was a minor. The trial court set the matter for a pretrial conference on September 15, 2020.

¶ 8 On September 3, 2020, Ronald filed a motion to compel arbitration. In his motion, Ronald alleged that on their wedding day, he and Antoinette signed an arbitration agreement in addition to the Ketubah. Rabbi Freundel required the parties to sign the agreement "to ensure civil enforceability of Beth Din jurisdiction in case of a party refusing to comply with Orthodox Jewish divorce practices." The agreement provided that the Beth Din of America, a rabbinical court based

in New York City, would conduct the arbitration. The motion stated that the form agreement used by Rabbi Freundel "was approved and promulgated by the Rabbinical Council of America (RCA)" and associated with the Beth Din. At the time, the form was the only one approved for use by the RCA. Rabbi Freundel informed them that he would not preside over their wedding without execution of the agreement.

¶ 9 Ronald alleged that the parties signed the agreement in front of wedding guests, and his execution of the agreement was captured on video. The video does not show Antoinette signing the document. Ronald and Antoinette were in separate rooms in accordance with the Orthodox Jewish practice of not allowing the bride and groom to see each other for a week before the wedding. Present at Ronald's signing were two witnesses, Robert Levi and Barry Yaillen.

¶ 10 The form agreement stated, in part, the following:

> "I. SHOULD A DISPUTE ARISE BETWEEN THE PARTIES AFTER THEY ARE MARRIED, HEAVEN FORBID, SO THAT THEY DO NOT LIVE TOGETHER AS HUSBAND AND WIFE, THEY AGREE TO REFER THEIR MARITAL DISPUTE TO AN ARBITRATION PANEL, NAMELY THE *BET DIN* OF _____ FOR A BINDING DECISION. EACH OF THE PARTIES AGREES TO APPEAR IN PERSON BEFORE THE *BET DIN* AT THE DEMAND OF THE OTHER PARTY.
>
> II. THE DECISION OF THE PANEL, OR A MAJORITY OF THEM, SHALL BE FULLY ENFORCEABLE IN ANY COURT OF COMPETENT JURISDICTION.
>
> III. (A) THE PARTIES AGREE THAT THE *BET DIN* IS AUTHORIZED TO DECIDE ALL ISSUES RELATING TO A GET (JEWISH DIVORCE) AS WELL AS

ANY ISSUES ARISING FROM PREMARITAL AGREEMENTS (E.G. KETUBAH, *TENA'IM*), ENTERED INTO BY THE HUSBAND AND THE WIFE.

[THE FOLLOWING THREE CLAUSES (B, C, D) ARE *OPTIONAL*, EACH TO BE SEPARATELY INCLUDED OR EXCLUDED, BY MUTUAL CONSENT, WHEN SIGNING THIS AGREEMENT].

(B) THE PARTIES AGREE THAT THE *BET DIN* IS AUTHORIZED TO DECIDE ANY OTHER MONETARY DISPUTES THAT MAY ARISE BETWEEN THEM.

(C) THE PARTIES AGREE THAT THE *BET DIN* IS AUTHORIZED TO DECIDE ISSUES OF CHILD SUPPORT, VISITATION AND CUSTODY (IF BOTH PARENTS CONSENT TO THE INCLUSION OF THIS PROVISION IN THE ARBITRATION AT THE TIME THAT THE ARBITRATION ITSELF BEGINS).

(D) IN DECIDING DISPUTES PURSUANT TO PARAGRAPH III B, THE PARTIES AGREE THAT THE *BET DIN* SHALL APPLY THE EQUITABLE DISTRIBUTION LAW OF THE STATE/PROVINCE OF _____ AS INTERPRETED AS OF THE DATE OF THIS AGREEMENT, TO ANY PROPERTY DISPUTES WHICH MAY ARISE BETWEEN THEM, THE DIVISION OF THEIR PROPERTY, AND QUESTIONS OF SUPPORT."

¶ 11 The parties were told that a copy of the agreement would be filed with the Beth Din of America. Ronald also learned that copies of the executed agreement should have been sent to the bride, the groom, and Rabbi Freundel. Although he searched his files as well as the files of the Beth Din of America and Rabbi Freundel, Ronald could not find the signed arbitration agreement. Ronald alleged that "[u]pon information and belief, the original and all copies were lost by Rabbi

Freundel's secretarial assistant at the time of the wedding or during packing moving, and storage of Rabbi Freundel's files that was not done under his supervision." Ronald stated that the agreement was lost through no fault of his own and that "he has engaged in a diligent, cross-country search, for the executed Arbitration Agreement."

¶ 12 Attached to the motion to compel was the affidavit of Rabbi Freundel. He stated that "[a]s was my practice any time I officiated at a wedding, I oversaw the signing of the Jewish arbitration and prenuptial agreements adopted by the" RCA. He further stated that "[t]he standard practice was that the optional clauses III b, III c, and III d, remained in the arbitration agreement, though the form indicates that a couple could choose to strike them out." The affidavit continued:

> "I am confident that Antoinette and Ronald did not strike any provisions of the agreement, since I would otherwise recall the unusual case of meeting to agree on emendations. What is a noteworthy recollection of Antoinette and Ronald is that they were my first couple to sign the agreements publicly at the wedding receptions, out of a strong feeling that these agreements were important to establish as regular community practice.
>
> ***
>
> Since Antoinette, Ronald, and the RCA have not been able to find a copy of the agreements, I mounted a search through my own stored files. Unfortunately, the files were packed, boxed, and moved, without my direct supervision, and a search through my own boxes has not turned up the agreements signed by Antoinette and Ronald. No executed prenuptial agreements from this time period (mid-to late 1990's) were found. Only some copies of the blank forms were found, and this was used to prepare the facsimile in the next two pages."

Attached to Rabbi Freundel's affidavit was the form agreement in which he filled in the blanks with the information that purportedly was on the original executed agreement.

¶ 13 Witnesses Levi and Yaillen also provided affidavits stating that they witnessed "the signing of the prenuptial documents" at Antoinette and Ronald's wedding. Both also stated that "the documents were promptly and readily signed without any discussion, objection, or emendation by Ronald or Antoinette."

¶ 14 Antoinette filed an "Affirmative Matters and Response to Motion to Compel Arbitration." She also requested that the trial court strike and dismiss Ronald's motion to compel arbitration pursuant to sections 2-615 and 2-606 of the Code of Civil Procedure (735 ILCS 5/2-615, 2-606 (West 2018)). In her response, Antoinette stated that Ronald's "baseless" motion asks the court "to enforce a religious Jewish contract ***that he cannot prove exists.***" [Emphasis in the original.] Furthermore,

> "Ronald's untenable position is 'supported' by the self-serving affidavits of himself and third parties regarding the terms of a religious agreement that was allegedly signed ***twenty-six* (26) *years ago***, including a video of himself signing a document on the parties' wedding day. Most notably, there is ***no video*** of Antoinette signing any such agreement (or video of Antoinette at all, for that matter), there is ***no recitation of the alleged agreement's terms contained on the video***, and Antoinette does not recall signing any such agreement." [Emphasis in the original.]

In support of her motion to strike and dismiss, Antoinette responded that "Ronald does not have a copy of the alleged religious arbitration agreement and he cannot prove that the document exists, let alone its terms. Ronald's motion must be stricken because it relies on, and seeks relief based

on, a document (alleged religious arbitration agreement) that he cannot produce and is not attached to his Motion."

¶ 15 Ronald filed a reply, arguing that his motion to compel was not subject to dismissal under section 2-615 because it was not a pleading. He also pointed out that Antoinette did not attach a counteraffidavit or other evidence to refute the evidentiary facts asserted by the affidavits attached to the motion to compel. Rather than outright deny the allegations in the motion to compel regarding the arbitration agreement, Antoinette responded that she "lacks information sufficient to admit or deny the allegations *** and therefore denies those allegations." He alleged that her purported denials were not credible. Regarding his failure to attach the original agreement to his motion to compel, Ronald argued that secondary evidence of an instrument is admissible where the original was lost and its absence accounted for.

¶ 16 Without conducting a hearing, the trial court issued its order on March 8, 2021. The order stated that the matter was before the court for ruling on Ronald's motion to compel arbitration and Antoinette "having filed "a Response to Ronald's motion" and Ronald having filed a reply. The court found that the motion to compel was a separate cause of action subject to a section 2-615 motion to dismiss. The court further found that "the jurisdiction of the circuit court depended upon the existence of a written contract for arbitration between the parties." It noted that "[t]here is no dispute that [Ronald] does not possess an executed original or a copy of an arbitration agreement between the parties." The court reviewed the secondary evidence Ronald submitted and concluded that it was inadmissible under Illinois Rule of Evidence 1004, because they did not relate to collateral matters but were closely related to the controlling issue. As a result, the trial court found

Ronald's motion to compel "substantially insufficient as a matter of law" and dismissed it with prejudice.

¶ 17 Ronald filed this appeal.

¶ 18 III. ANALYSIS

¶ 19 First, we address Antoinette's concerns regarding the nature of the motion to compel considered by the trial court and this court's jurisdiction in this appeal. It is true that "[a] motion to compel arbitration is essentially a section 2–619(a)(9) motion to dismiss or stay an action in the trial court based on an affirmative matter, the exclusive remedy of arbitration." *Sturgill v. Santander Consumer USA, Inc.*, 2016 IL App (5th) 140380, ¶ 21. However, we disagree with Antoinette that, as a result, this court has no jurisdiction because the trial court's denial of Ronald's motion is a non-appealable denial of a motion to dismiss.

¶ 20 In dismissing Ronald's motion, the trial court in essence denied his motion to compel arbitration. It is well-established that a trial court's order denying a motion to compel arbitration is injunctive in nature and subject to interlocutory appeal under Illinois Supreme Court Rule 307 (a) (eff. Nov. 1, 2017). *Salsitz v. Kreiss*, 198 Ill. 2d 1, 11, (2001). "Actions of the circuit court having the force and effect of injunctions are still appealable even if called something else." *Marsh v. Illinois Racing Board*, 179 Ill. 2d 488, 491 (1997). We find that we have jurisdiction to consider this appeal pursuant to Rule 307(a)(1).

¶ 21 Antoinette also argues that Ronald waived consideration of his arbitration claim on appeal because he substantially participated in the court proceedings before raising the issue. We note, however, that Antoinette did not raise the waiver issue below but does so for the first time on appeal. "[I]ssues not raised in the trial court are deemed waived and may not be raised for the first

time on appeal." *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536 (1996). If one party neglects to raise an argument before the trial court, the other party has no opportunity to address the argument or to present evidence in rebuttal. "[T]hus it is proper to bar the first party from springing the argument at the appellate level where the presentation of evidence is no longer possible. *Daniels v. Anderson,* 162 Ill.2d 47, 59 (1994).

¶ 22 When the issue concerns waiver of a right to arbitrate, "the crucial inquiry is whether the party has acted inconsistently with its right to arbitrate." *Shroeder Murchie Laya Associates, Ltd. v. 1000 West Lofts, LLC*, 319 Ill. App. 3d 1089, 1098 (2007). Determination of this issue requires the presentation of evidence and findings by the trial court that are absent from the record on appeal because the trial court never considered waiver. Furthermore, finding that a party has waived its right to arbitrate is disfavored by Illinois courts and therefore, such a waiver "'is not to be lightly inferred.'" *Glazer's Distributors of Illinois, Inc. v. NWS-Illinois, LLC*, 376 Ill. App. 3d 411, 425 (2007) quoting *Atlas v. 7101 Partnership*, 109 Ill.App.3d 236, 240 (1982). For these reasons, we will address Ronald's arbitration claim.

¶ 23 Ronald contends that the trial court erred in denying his motion to compel arbitration. On a motion to compel arbitration, the only issue before the trial court is whether there exists an agreement to arbitrate the dispute in question. *Board of Managers of the Courtyards at the Woodlands Condominium Association v. IKO Chicago, Inc.*, 183 Ill. 2d 66, 70-71 (1998). "Whether a contract to arbitrate exists must be determined by the trial court, not an arbitrator." *Brookner v. General Motors Corp*., 2019 IL App (3d) 170629, ¶ 17. Court proceedings on a motion to compel arbitration "are governed in accordance with the Illinois rules of procedure, including

the procedures set forth in section 2(a)" of the Uniform Arbitration Act (Act) (710 ILCS 5/2(a) (West 2018)). *Sturgill v. Santander Consumer USA, Inc.*, 2016 IL App (5th) 140380, ¶ 23.

¶ 24 Where the opposing party denies the existence of an agreement to arbitrate, the Act "contemplates a substantive disposition of the issues presented to the court." *Id.*; 710 ILCS 5/2(a) (West 2018) (providing that if the opposing party denies the existence of an arbitration agreement, "the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied"). "Where a trial court has failed to articulate any specific reasons for ruling on the motion to compel arbitration, the court has not issued a substantive disposition." *Sturgill*, 2016 IL App (5th) 140380, ¶ 27. On appeal, the sole issue before a reviewing court is whether there was a showing sufficient to sustain the trial court's order. *Cohen v. Blockbuster Entertainment, Inc.*, 338 Ill. App. 3d 171, 177 (2003).

¶ 25 To prove that an arbitration agreement exists, Ronald presented secondary evidence because "[u]pon information and belief, the original and all copies were lost by Rabbi Freundel's secretarial assistant at the time of the wedding or during packing moving" through no fault of his own. The Illinois Rule of Evidence 1002 requires "the original writing, recording, or photograph," to prove its contents. IL R EVID Rule 1002 (eff. Jan. 1, 2011). Rule 1004, however, provides exceptions for the admissibility of secondary evidence when the original is not available.

¶ 26 In denying Ronald's motion to compel, the trial court's order stated that:

> "8. Pursuant to Illinois Rule of Evidence 1004, the original of a writing is not required, and other evidence of the contents of a writing is admissible if (1) all the originals are lost or destroyed; (2) the original is not obtainable; (3) the original is in the possession of an

> opponent; *and* (4) the writing relates to collateral matters and is not closely related to a controlling issue.
>
> 9. The secondary evidence of the purported writing [Ronald] seeks to introduce is not collateral because the contents of the writing are directly at issue.
>
> 10. Accordingly, [Ronald's] secondary evidence to establish the contents of the writing is inadmissible.
>
> 11. [Ronald's] Motion to Compel Arbitration is, therefore, substantially insufficient as a matter of law." [Emphasis added.]

The rule provides, however, that "[t]he original is not required and other evidence of the contents of a writing, recording, or photograph is admissible if" (1), *or* (2), *or* (3), *or* (4) is established. IL R EVID Rule 1004 (eff. Jan. 1, 2011). The trial court misinterpreted Rule 1004 in finding that (1), (2), (3), *and* (4) are required for secondary evidence to be admissible. It therefore erred in finding that Ronald's secondary evidence was inadmissible solely based on (4), because the contents directly related to the issue at hand. The court gave no other reason for finding the evidence inadmissible.

¶ 27 Ronald sought admission of secondary evidence to prove the existence of the arbitration agreement under (1) of Rule 1004, which pertains to lost or destroyed original documents. Whether an agreement to arbitrate exists here thus depends on the trial court's finding that Ronald's secondary evidence of the agreement is admissible. For evidence to be admissible under this exception, the proponent must prove the prior existence of the original, its unavailability, and his own diligence in attempting to procure the original. *People v. Baptist*, 76 Ill. 2d 19, 26 (1979).

However, due to its misinterpretation of Rule 1004, the trial court below made no findings on whether Ronald proved the prior existence of the original agreement, its unavailability, and his diligence in attempting to find it. The trial court also did not address Antoinette's denial that she signed such an agreement.

¶ 28 On a motion to compel, the only task before the trial court is to determine whether there exists an agreement to arbitrate the dispute in question. *Courtyards*, 183 Ill. 2d at 70-71. In making that determination, the Act requires the court to "separately address each issue raised by the motion [to compel arbitration], supporting its resolution of each with specific reasons, be they legal or findings of fact." *Onni v. Apartment Investment and Management Co.*, 344 Ill. App. 3d 1099, 1104 (2003). The trial court did not do so here. Accordingly, we find that there was no sufficient showing to sustain the trial court's order. See *Herns v. Symphony Jackson Square LLC*, 2021 IL App (1st) 201064, ¶ 31 (finding no sufficient showing to sustain the trial court's order where the court's denial of a motion to compel failed to make substantive rulings on the arbitrability issues raised by the parties).

¶ 29 For these reasons, we reverse and remand so that the trial court can make factual and legal findings regarding the issues raised by the motion to compel arbitration, and to make a determination thereon.

¶ 30 IV. CONCLUSION

¶ 31 For the foregoing reasons, we reverse the judgment of the circuit court and remand the matter for further proceedings consistent with this opinion.

¶ 32 Reversed and remanded.