2018 WL 4140637
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Court of Appeals of Texas, Fort Worth.

DILIGENT TEXAS DEDICATED LLC d/b/a Diligent Delivery Systems, Appellant
v.
Richard YORK, York Elite Parts Group, LLC d/b/a Elite Parts Group, and Principle Distribution, LLC, Appellees

NO. 02-17-00416-CV
|
DELIVERED: August 30, 2018

FROM THE 342ND DISTRICT COURT OF TARRANT COUNTY, TRIAL COURT NO. 342-289368-16, HON. J. WADE BIRDWELL, JUDGE

Attorneys and Law Firms

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ATTORNEYS FOR APPELLEE PRINCIPLE DISTRIBUTION, LLC: RUSSELL A. DEVENPORT, MCDONALD SANDERS, P.C., FORT WORTH, TEXAS.

PANEL: SUDDERTH, C.J.; MEIER and PITTMAN, JJ.

MEMORANDUM OPINION [1]

MARK T. PITTMAN, JUSTICE

***1** The primary question in this interlocutory appeal is whether the trial court should have granted the motion to compel **arbitration** and motion to abate filed by Appellant Diligent Texas Dedicated LLC d/b/a Diligent Delivery Systems (Diligent). Bound by precedent, we hold that it should have, and we therefore reverse and remand.

BACKGROUND

I. York Becomes Diligent's Employee.

Diligent provides its customers—businesses in the automotive industry, such as car dealerships—with independent contractors to transport parts and other products. Appellee Richard "Rick" York is a former Diligent employee. Before working at Diligent, York worked for a similar business, First Place Logistics. First Place was acquired by Appellee Principle Distribution, Inc. (PDL), and York worked for PDL after the acquisition. When York left PDL, he went to work for another similar business, Noble Logistics, which subsequently became NDLI. York signed a noncompete agreement with Noble and with NDLI (the NDLI agreement). Diligent acquired NDLI in 2015, and after the acquisition York worked for Diligent. Many of York's customers followed him from PDL to Noble/NDLI. These customers became Diligent's customers through its acquisition of NDLI.

After its acquisition of NDLI, Diligent required York to sign another noncompete agreement (the Noncompete) to keep his job. Under the Noncompete, York could not

- "divulge, communicate, or use to the detriment of [Diligent] or affiliates, for [York's] benefit or the benefit of any other person [or] entity, ... proprietary Confidential Information ... of [Diligent]"; or
- within two years of leaving Diligent, work for a competitor, solicit or contact Diligent's customers, or accept business from Diligent's customers.

Under the Noncompete's terms, York agreed "to the issuance of a temporary injunction by a court of proper jurisdiction" to protect Diligent should York breach the Noncompete. If York failed to comply with the Noncompete upon leaving his **employment**, then the Noncompete's two-year term did not begin until the later of (1) the date on which he began to comply or (2)

"the date at which a court order compelling [York's] compliance [went] into effect." [2]

The Noncompete provided that York would not be prohibited from using information he possessed prior to his **employment** with Diligent "and which is listed on Appendix A hereto." Appendix A required York to acknowledge that he knew nothing about Diligent's confidential information except (1) what he learned from Diligent during his **employment** and (2) "as set forth below." In the space below that acknowledgement, he checked a box indicating "None" and left the rest of the space blank. The NDLI Agreement contained the same appendix.

The Noncompete contained this rather sweeping **arbitration** provision:

> If there is any dispute about or involving Employee and Employer, both Employer and Employee agree to exclusive personal jurisdiction and venue in the state and federal courts of the United States located in Harris County, Texas. **Either Employer or Employee may demand that any dispute between Employer and Employee must be settled by arbitration** utilizing the dispute resolution procedures of the American **Arbitration** Association (AAA) (Commercial Rules) only in Harris County, Texas; provided, however, that the foregoing **shall not prevent Employer from seeking injunctive relief** in a court of competent jurisdiction. **The resolution of any dispute will be limited to Employee and Employer. The dispute resolution, or any portion of it, will not be consolidated with any other arbitration or lawsuit** and will not be conducted on a class-wide, class action[,] or other type of mass action basis. [Emphasis added.]

***2** Diligent terminated York's **employment** in August 2016. York then began working for Appellee York Elite Parts Group, LLC d/b/a Elite Parts Group (Elite). Elite works in the auto business but does not provide the same service as Diligent and does not compete with Diligent. At Elite, York works as a parts representative, representing dealerships in the wholesale parts business to local body shops and other dealerships. However, Elite has an agreement with PDL, Diligent's competitor and York's former employer, under which PDL pays Elite a monthly fee to provide customer leads to PDL.

II. Diligent Sues York, Elite, and PDL.

On December 8, 2016, Diligent brought this suit against York for breach of the NDLI Agreement and the Noncompete and for misappropriation of trade secrets. [3] By amended petition, it also added Elite and PDL as defendants. It sought damages and a temporary injunction enjoining York and Elite from using Diligent's and NDLI's confidential and proprietary information; soliciting or contacting any Diligent customers; transacting business for logistics services with any Diligent customers; attempting to divert or diverting the business of any Diligent customer; and using or disseminating any information about Diligent that is not publicly available. It sought a permanent injunction enjoining York and Elite from contacting any of Diligent's customers for two years starting from the date of the temporary injunction's entry. Diligent further requested that, if the trial court should find that the Noncompete was "unreasonable as to time, geographic area, and scope of activity to be restrained that are beyond what is necessary to protect Diligent's goodwill and business interests," the trial court reform the Noncompete "at the earliest stage possible, including the temporary injunction hearing." Diligent also sued Elite and PDL for conspiracy and for tortious interference with contract and added a claim against York for conspiracy with Elite and PDL.

Diligent further pled "for entry of an order compelling **arbitration**" and "reserve[d] the right to compel **arbitration** upon entry of a temporary injunction."

III. The Trial Court Issues a Temporary Injunction.

In March 2017, the trial court held an evidentiary hearing on the temporary injunction. At a follow-up hearing in June 2017, the trial court announced that it would enjoin York from some activities but would not give Diligent all the relief it sought. The trial court stated that "[p]art of the difficulty with this case is that there is a reasonable

inference that what was actually purchased by Diligent with regard to Mr. York's services in purchasing NDLI, was the goodwill that Mr. York himself has" and that

> Diligent effectively purchased his knowledge, et cetera, et cetera; and in an attempt to make his knowledge Diligent's knowledge and, therefore, not subject for his use in the future, had him sign a noncompete agreement. I don't think you can do that. So what you can do, though, is keep him from disclosing information concerning what the active accounts are, and that type of information.

Accordingly, the trial court enjoined York from actively soliciting clients on PDL's behalf and from using any specific information he obtained from Diligent, including pricing he prepared on Diligent's behalf. Though the trial court orally ruled on the application for temporary injunction, it did not sign an order at that time.

The parties filed various motions in the trial court. York, Elite, and PDL each filed a motion for summary judgment; Elite filed its motion for summary judgment after the first temporary injunction hearing and before the second, while York and PDL filed their motions after the second hearing but prior to the trial court's written temporary injunction order. Diligent moved to compel discovery responses from Elite and to quash the deposition of its own corporate representative. Then, on October 10, 2017, ten months after filing the lawsuit, Diligent moved to compel **arbitration** of its claims against York and to stay litigation of its claims against Elite and PDL. It followed up its motion to compel **arbitration** with a plea to the jurisdiction challenging the trial court's authority to decide questions of **arbitrability**.

IV. The Trial Court Denies Diligent's Motion to Compel Arbitration.

***3** After a hearing, the trial court denied Diligent's motion to compel **arbitration** and its jurisdictional challenge. At the hearing, the trial court stated that Diligent had waived its right to **arbitrate** and that its actions over the previous ten-months had prejudiced York, Elite, and PDL.

The trial court explained its reasoning at the end of the hearing. The trial court noted that Diligent chose to file its suit in court and clearly was aware of the **arbitration** provision; that its pretrial activity related to the merits of its claims rather than to **arbitrability** or jurisdiction; and that Diligent sought a temporary injunction, which, while not a final judgment, "was a merits-based motion." It further stated that Diligent appeared to be forcing its opponents to litigate and then later **arbitrate** the same issue and to hope to use the **arbitration** proceeding to give it an advantage in its claims against Elite and PDL, which were not subject to the **arbitration** provision. The trial court stated,

> Diligent did not obtain all of the relief it sought [through the temporary injunction]. It retained some of it, but it didn't retain all of it. And now it's asking this Court, it's challenging this Court's jurisdiction, saying that an **arbitrator** should make all of the decisions that the Court has already made and then come back with an **arbitration** agreement that will substantially eviscerate what this Court has already ruled with regard to the merits.

On the same date that the trial court signed the order denying the motion to compel, it signed the order on the temporary injunction. [4]

Diligent now appeals.

DISCUSSION

I. Diligent Did Not Waive Arbitration.

Diligent raises one issue asserting that the trial court committed reversible error when it denied Diligent's plea to the jurisdiction and its motion to compel **arbitration** and to stay all proceedings. Under that issue, Diligent makes six main arguments. Because two of those arguments are dispositive, we address only those two arguments. We begin with Diligent's argument that York failed to show that it waived **arbitration**. [5] Under the current state of Texas jurisprudence on this issue, we must agree. [6] Even if

Diligent substantially invoked the judicial process, York did not show any prejudice by its doing so.

A. Standard of Review.

***4** We review a trial court's denial of a motion to compel **arbitration** for an abuse of discretion. *Legoland Discovery Ctr. (Dallas), LLC v. Superior Builders, LLC*, 531 S.W.3d 218, 221 (Tex. App.—Fort Worth 2017, no pet.). However, we review de novo a trial court's determination of whether the party resisting **arbitration** demonstrated that the opposing party waived its right to **arbitration**. *Id.* A party may waive its right to enforce **arbitration** through its conduct. *Id.* The party resisting **arbitration** may establish waiver by proving that the opposing party both (1) " 'substantially invoked the judicial process'—engaged in conduct inconsistent with a claimed right to compel **arbitration**"—and (2) the inconsistent conduct prejudiced the resisting party. *Id.* (citation omitted). Prejudice in this context is "inherent unfairness—that is, a party's attempt to have it both ways by switching between litigation and **arbitration** to its own advantage"; "the inherent unfairness in terms of delay, expense, or damage to a party's legal position that occurs when the party's opponent forces it to litigate an issue and later seeks to **arbitrate** that same issue." *Perry Homes v. Cull*, 258 S.W.3d 580, 597 (Tex. 2008) (citation and quotation marks omitted). "The prejudice on which courts focus includes such things as (1) the movant's access to information that is not discoverable in **arbitration** and (2) the opponent's incurring costs and fees due to the movant's actions or delay." *Williams Indus., Inc. v. Earth Dev. Sys. Corp.*, 110 S.W.3d 131, 135 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (footnotes omitted).

B. York Has Not Shown Prejudice.

The only evidence of detriment to York came through two unsworn declarations from an attorney representing Elite and York and the affidavit of York's former attorney in the case.[7] *See* Tex. Civ. Prac. & Rem. Code Ann. § 132.001 (West Supp. 2017) (providing that, except where otherwise specified, an unsworn declaration may be used in lieu of an affidavit). In the declarations, Elite and York's attorney stated that (1) York incurred attorney's fees in filing a motion for summary judgment, which he would not have done if Diligent had more quickly moved for **arbitration**; (2) Diligent served requests for disclosure under Texas Rule of Civil Procedure 194.1 and received responses, and requests for disclosure are not available in **arbitration**; (3) Diligent benefitted from Texas procedure by refusing to appear at a noticed deposition of corporate representatives and filing motions to quash, which automatically stop the scheduled deposition from going forward. The attorney further declared that if the matter had been filed in **arbitration** to begin with, York would have incurred minimal attorney's fees. In York's former attorney's affidavit, he averred that York had incurred and paid $33,526.02 in attorney's fees. He stated that the fees had been incurred in filing the original answer, answering written discovery, defending the deposition of York, taking the deposition of Diligent's corporate representatives,[8] and filing a response to the request for injunctive relief.

York's evidence does not clear the high bar of proving prejudice. *See G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 512 (Tex. 2015) (stating that because the law favors **arbitration**, the "hurdle" of proving waiver "is a high one" (citations and quotation marks omitted)). It is true that "[p]rejudice may result when a party seeking **arbitration** first sought to use the judicial process to gain access to information that would not have been available in **arbitration**." *Garg v. Pham*, 485 S.W.3d 91, 111 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (citing *G.T. Leach Builders*, 458 S.W.3d at 515). But while York asserted that the discovery procedure of requests for disclosures is not available in **arbitration**, he did not show that through his responses to the requests, Diligent obtained information that would not have been available in **arbitration**. *See In re Bruce Terminix Co.*, 988 S.W.2d 702, 704 (Tex. 1998) (orig. proceeding) ("[W]hen only a minimal amount of discovery has been conducted, which may also be useful for the purpose of **arbitration**, the court should not ordinarily infer waiver based upon prejudice." (citation and quotation marks omitted)). Likewise, that Diligent was able to file motions to quash and thereby stop scheduled depositions does not show prejudice to York from a delay by Diligent in demanding **arbitration**.

***5** As for the incurring of attorney's fees, that also does not show prejudice under the facts of this case. York has not argued or provided evidence showing that the answering of discovery requests and attending his deposition gave Diligent information that it would not have had access to in **arbitration**. He did not argue or show that in taking the deposition of Diligent's corporate representatives, he gained no information useful for

arbitration. As for incurring fees in filing a response to the request for injunctive relief, the parties contractually agreed that Diligent could both seek injunctive relief in a trial court and have its claims resolved by arbitration. *Cf. Parker v. Schlumberger Tech. Corp.*, 475 S.W.3d 914, 926 (Tex. App.—Houston [1st Dist.] 2015, no pet.) ("Because the APA expressly carves out injunctive relief from the matters to be arbitrated, the trial court did not err in proceeding with an injunction hearing."). Thus, York's filing a response to the request for injunctive relief cannot support a finding of waiver of arbitration.

Although Diligent, at a minimum, certainly tip-toed very close to "substantially invoking the judicial process," because York did not show prejudice from Diligent's delay in invoking arbitration, the trial court abused its discretion by not compelling arbitration. *See G.T. Leach Builders*, 458 S.W.3d at 512.

II. Diligent's Trial Court Litigation Against Elite and PDL Must Be Stayed.

A. Litigation That Would Moot Arbitration Must Wait for Arbitration.

Diligent further argues that the trial court must stay all litigation against Elite and PDL while the arbitration proceeds. We are again compelled to agree.

"Both the Federal and Texas Arbitration Acts require courts to stay litigation of issues that are subject to arbitration." *In re Merrill Lynch Tr. Co. FSB*, 235 S.W.3d 185, 195 (Tex. 2007) (orig. proceeding). In *In re Merrill Lynch Trust Company*, the plaintiffs sued multiple defendants, alleging "a dozen multifarious claims, ... all asserted against the defendants collectively without differentiating the actions of each." *Id.* at 188. One defendant was subject to an arbitration agreement, but the others were not. *Id.* Thus, the exact same issues would be decided both in arbitration (against the defendant who was a party to the arbitration agreement) and in trial (against the parties who were not). *Id.* at 195. The trial of those issues therefore had the potential to moot the arbitration of those same issues. *Id.* at 196. A few years later, the Texas Supreme Court again addressed the issue in a case involving another Merrill Lynch entity. *In re Merrill Lynch & Co.*, 315 S.W.3d 888, 889 (Tex. 2010) (orig. proceeding). There, two plaintiffs asserted identical claims with virtually identical facts against the Merrill Lynch entity; the two plaintiffs, both affiliate subsidiaries of the same corporation, "d[id] not meaningfully distinguish between the two affiliates" in their pleadings. *Id.* Both plaintiffs had an agreement with the Merrill Lynch entity. *Id.* The first plaintiff's agreement contained an arbitration clause with a class-action carve-out clause. *Id.* at 890. The second plaintiff's agreement with the defendant did not contain an arbitration clause. *Id.* at 889–90. The Texas Supreme Court held that the second plaintiff's claims, which were not subject to arbitration, had to be stayed while the first plaintiff's identical claims were decided by arbitration or until that plaintiff became a member of a class action lawsuit. *Id.*; *cf. In re Devon Energy Corp.*, 332 S.W.3d 543, 548 (Tex. App.—Houston [1st Dist.] 2009) (orig. proceeding) (stating that the Federal Arbitration Act's mandatory stay "applies to a non-signatory to an arbitration agreement if (1) the arbitrated and litigated disputes involve the same operative facts, (2) the claims asserted in the arbitration and litigation are 'inherently inseparable,' and (3) the litigation has a 'critical impact' on the arbitration"). Like in the prior *Merrill Lynch* case, the Texas Supreme Court expressed concern that the litigation with the second plaintiff would moot the arbitration with the first plaintiff. *Merrill Lynch & Co.*, 315 S.W.3d at 891. However, the fact that nonarbitrable claims against third parties are based on facts related to arbitrable claims does not alone make a stay of those claims necessary. *See, e.g.*, *Star Sys. Int'l Ltd. v. 3M Co.*, No. 05-15-00669-CV, 2016 WL 2970272, at *4 (Tex. App.—Dallas May 19, 2016, no pet.) (mem. op.). Rather, the focus is on whether the trial of related claims will effectively undermine the arbitration.

B. Litigation of the Claims Against Elite and PDL Must Wait for Arbitration of the Claims Against York.

***6** Here, arbitration cannot affect the pending claims against Elite and PDL because the arbitration agreement states that it will not. The agreement provides, "The resolution of any dispute [in arbitration] will be limited to Employee and Employer ... [and] will not be consolidated with any other arbitration or lawsuit." For purposes of deciding whether the litigation against Elite and PDL should be stayed, however, the question is whether the reverse is true—will moving forward with the trial against Elite and PDL moot the arbitration with York? *See Merrill Lynch Tr.*, 235 S.W.3d at 196. While Diligent's claims against Elite and PDL are not all identical to the claims against York—unlike in either *Merrill Lynch* case—the claims against Elite and PDL all rely on alleged acts of York that also form the basis of the arbitrable claims against York. Against York, Diligent

alleged breach of contract, misappropriation of trade secrets, and conspiracy with Elite and PDL. Against Elite and PDL, Diligent alleged tortious interference with York's contract; conspiracy among Elite, PDL, and York; and conspiracy between Elite and PDL. Diligent further alleged misappropriation of trade secrets against Elite. The misappropriation of trade secrets claim against Elite was identical to the misappropriation of trade secrets claim against York. For conspiracy among all three defendants, Diligent alleged that they all three acted with the intent of depriving Diligent of confidential information. For the conspiracy between Elite and PDL, Diligent alleged that Elite and PDL diverted certain Diligent clients through York. For the tortious interference claims against Elite and PDL, Diligent alleged that York, at the instruction of Elite and PDL, contacted Diligent's clients to divert them to PDL. The facts alleged to support the conspiracy and tortious interference claims are some of the same facts alleged to support the breach of contract claims against York—that York, in violation of his agreements with NDLI and Diligent, contacted Diligent's customers and referred them to PDL. Because a resolution at trial in favor of Elite and PDL would moot at least some of the claims in **arbitration**, the trial of the claims against Elite and PDL must be stayed. [9] *See Merrill Lynch Tr.*, 235 S.W.3d at 196.

Elite and PDL argue that staying the claims is not necessary because the trial court's modification of the Noncompete and the NDLI Agreement for purposes of the temporary injunction mooted the claims against them. They contend that because the trial court reformed the covenants not to compete and rendered the temporary injunction based on that reformation, under the terms of Texas Business and Commerce Code Section 15.51(c), Diligent is limited to injunctive relief, and no damages may be awarded. Thus, they argue, "the questions of breach of contract and tortious interference with contract have already been decided as a matter of law."

Elite and PDL are correct that under Section 15.51(c), a trial court must reform an unreasonable noncompete covenant before enforcing it and that if the court reforms the covenant, "the court may not award the promisee damages for a breach of the covenant before its reformation, and the relief granted to the promisee shall be limited to injunctive relief." *See* Tex. Bus. & Comm. Code Ann. § 15.51(c); *see also Franlink, Inc. v. GJMS Unlimited, Inc.*, 401 S.W.3d 705, 712 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (holding that because attorney's fees are not "injunctive relief," a party seeking to enforce an unreasonable covenant not to compete may not recover them). But even if all Diligent's claims for monetary damages are ruled out by Section 15.51, that still leaves pending Diligent's claim for permanent injunctive relief against Elite. Further, there is no final judgment as to Elite and Diligent, and Diligent is not barred from further amending its petition to seek damages for conduct occurring after the reformation of the Noncompete. *See* Tex. Bus. & Comm. Code Ann. § 15.51(c) (providing that after reformation of a covenant not to compete the promisee seeks to enforce, the promisee may not recover damages for a breach of the covenant before its reformation). The reformation may have mooted some claims—a question we do not address—but in any case, it did not dispose of all nonarbitrable claims in the trial court and make a stay of proceedings moot.

***7** We sustain Diligent's sole issue on appeal.

CONCLUSION

Having sustained Diligent's one issue, we reverse the trial court's order denying Diligent's motion to compel **arbitration** and motion to stay proceedings against Elite and PDL, and remand this case to the trial court with instructions to grant those motions.

All Citations

Not Reported in S.W. Rptr., 2018 WL 4140637

Footnotes

1 *See* Tex. R. App. P. 47.4.

2 Thus, assuming York is complying with the trial court's temporary injunction, under the terms of the Noncompete, the two-year term has begun to run.

3 Despite the venue provision in the Noncompete, which provided for venue in Harris County, Texas, Diligent filed the matter in Tarrant County.

4 This court has been disappointed in both the tone and manner in which Diligent has opted to criticize the trial court in its briefing. Such hostile invective is not warranted. As the late jurist Eldon B. Mahon fittingly observed after his decades on the federal bench, "name-calling and personal attacks, like those present in several of the parties' filings, do little to advance a party's position and only serve to cloud the real issues before the Court." *U.S. Fleet Servs. v. City of Fort Worth*, 141 F. Supp. 2d 631, 634 (N.D. Tex. 2001). Indeed, the Texas Lawyers Creed explicitly mandates that "[l]awyers and judges owe each other respect, diligence, candor, punctuality, and protection against unjust and improper criticism and attack." Texas Lawyer's Creed—A Mandate for Professionalism, *reprinted in* Texas Rules of Court 723–24 (West 2017), available at https://www.texasbar.com/AM/Template.cfm?Section=Ethics_Resources & Template=/CM/ContentDisplay.cfm & ContentID=30311 (last viewed Aug. 23, 2018).

5 York does not dispute that the claims against him fall within the scope of the Noncompete's **arbitration** provision.

6 We have previously held that the incorporation of AAA rules in an **arbitration** agreement generally, though not always, indicates that the parties have agreed that the **arbitrator** rather than the trial court will decide **arbitrability** questions. *Haddock v. Quinn*, 287 S.W.3d 158, 172 (Tex. App.—Fort Worth 2009, pet. denied) (noting that courts require unmistakable evidence that parties intend for an **arbitrator** to decide gateway matters so as not to "force unwilling parties to **arbitrate** a matter they reasonably would have thought a judge, not an **arbitrator**, would decide" (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944–95, 115 S. Ct. 1920, 1924–25 (1995))); *see also* Am. **Arbitration** Ass'n, Commercial **Arbitration** Rules & Mediation Procedures, Rule 7(a) (effective Oct. 1, 2013), https://www.adr.org/Rules (providing that "[t]he **arbitrator** shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the **arbitration** agreement"). The Texas Supreme Court recently held that between a signatory to an **arbitration** agreement and a non-signatory, incorporating AAA rules does not show a clear intent to **arbitrate** questions of **arbitrability**, but it declined to address the effect of incorporation between signatories. *Jody James Farms, JV v. Altman Grp., Inc.*, 547 S.W.3d 624, 631–32 (Tex. 2018).

7 York substituted counsel during the proceedings below.

8 York's current attorney declared that Diligent had stopped the deposition of its corporate representative, while his former attorney averred that York incurred attorney's fees in taking a representative's deposition. It appears, then, that at some point a deposition of a Diligent representative took place.

9 By agreeing contractually that the issue of temporary injunctive relief could be submitted to the trial court, and by actually doing so, and by further requesting that the trial court reform the Noncompete as necessary, Diligent agreed that the trial court could decide the Noncompete's enforceability as drafted. Under the facts of this case, the trial court had a statutory duty to reform the covenant before issuing the requested injunctive relief if it found the Noncompete was unreasonable as to time, geographical area, or scope of activity as written or if it imposed a greater restraint than was necessary to protect Diligent's goodwill or business interest. *See* Tex. Bus. & Comm. Code Ann. § 15.51(c) (West 2011); *The Burks Grp., Inc. v. Integrated Partners, Inc.*, No. 07-14-00443-CV, 2015 WL 5766494, at *2–3 (Tex. App.—Amarillo Sept. 28, 2015, no pet.) (mem. op.). Diligent acknowledges that the trial court had jurisdiction to amend the restrictive covenants in the agreements. Accordingly, by the Noncompete's terms and by Diligent's voluntarily submitting the issue to the trial court, and by Diligent's asking that court to reform the Noncompete if it was unreasonable, Diligent agreed to have the trial court rather than the **arbitrator** adjudicate the Noncompete's reasonableness, regardless of whether the trial court's reformation mooted issues that would otherwise have been decided by the **arbitrator**. We express no opinion on whether any **arbitrable** issues are in fact now moot.

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