Not Reported in S.W.3d, 2011 WL 386860 (Tex.App.-Dallas)
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SEE TX R RAP RULE 47.2 FOR DESIGNATION AND SIGNING OF OPINIONS.

MEMORANDUM OPINION

Court of Appeals of Texas,
Dallas.
TITUS ENERGY, LLC, Appellant
v.
AEA, L.P. d/b/a Acock Engineering & Associates, L.P., Appellee.

No. 05–09–01261–CV.
Feb. 8, 2011.

On Appeal from the County Court at Law No. 4, Dallas County, Texas, Trial Court Cause No. cc–09–03690–D, Ken Tapscott, Judge.
Martin P. Averill, Nugent D. Beaty, Shackelford, Melton & McKinley, LLP, Dallas, for Titus Energy, LLC.

David Royce Thrasher, Misty Hataway–Cone, Kane Russell Coleman & Logan, P.C., Houston, for AEA, L.P. d/b/a Acock Engineering & Associates, L.P.

Before Justices MORRIS, FRANCIS, and MURPHY.

MEMORANDUM OPINION

Opinion by Justice FRANCIS.

*1 Titus Energy appeals the trial court's order denying Titus's motion to dismiss with prejudice and granting summary judgment in favor of Acock Engineering. Titus claims the trial court abused its discretion by denying its motion to dismiss. Titus also claims the trial court erred by finding Titus waived its right to arbitrate and by granting summary judgment in Acock's favor. We affirm.

Acock and Titus entered into a Master Service Agreement in which Acock agreed to perform services for Titus in exchange for prompt payment of "all bills [and] other indebtedness for labor and for materials." The Agreement contained an arbitration clause providing "[a]ll claims, disputes or controversies arising out of, or in relation to" the Agreement "shall be decided by arbitration" under the Federal Arbitration Act. When Titus failed to pay the amounts due under several invoices, Acock filed its original petition alleging a suit on a sworn account. Titus filed a general denial. Acock then filed a motion for summary judgment on the ground that Titus failed to file a verified denial and therefore waived its right to deny Acock's claim. In response, Titus filed a motion to dismiss the case with prejudice. In the motion, Titus asserted the case should not have been filed because the parties' agreement contained an arbitration clause, and "[i]t is because of this clause, which was reviewed and signed by both parties that this suit should have never been filed and should now be dismissed with prejudice." The motion did not ask the trial court to compel arbitration. The trial court denied Titus's motion to dismiss and granted Acock's motion for summary judgment.

In its first issue, Titus contends the trial court abused its discretion in denying Titus's motion to dismiss the case with prejudice.

We review a trial court's ruling on a motion to dismiss under an abuse of discretion standard. *See Jernigan v. Langley*, 195 S.W.3d 91, 93 (Tex.2006); *Vann v. Brown*, 244 S.W.3d 612, 614 (Tex.App.-Dallas 2008, no pet.). A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner without reference to guiding rules or principles. *See Garcia v. Martinez*, 988 S.W.2d 219, 222 (Tex.1999). When reviewing matters committed to the trial court's discretion, we may not substitute our own judgment for that of the trial court. *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex.1992). A trial court does not abuse its discretion merely because it decides a discretionary matter differently than an appellate court would in a similar circumstance. *See Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex.1985).

The FAA provides

> 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.

*2 9 U.S.C.A. § 3 (2009) (emphasis added). When a plaintiff files suit against a defendant and the subject matter of the lawsuit is controlled by an arbitration clause, the appropriate mechanism for the defendant to initiate arbitration is to file a motion or application to stay the proceedings pending arbitration. *See id.*

In this case, Titus did not file a motion or application to stay the proceedings or any other request to compel arbitration. Rather, Titus filed a motion to dismiss the cause with prejudice. In the motion, Titus did not ask the trial court to determine whether Acock's claim was arbitrable or whether to send the dispute to arbitration; Titus simply asked the case be dismissed with prejudice. Under these circumstances, we cannot conclude the trial court abused its discretion in denying Titus's motion to dismiss with prejudice.

In reaching this conclusion, we reject Titus's argument that its motion to dismiss was a "proper application" for arbitration under section 3 of the FAA. In support of its claim, Titus cites three federal cases for the proposition that the "FAA can be enforced via a motion to dismiss." *See Fedmet Corp. v. M/V Buyalyk*, 194 F.3d 674 (5th Cir.1999); *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161 (5th Cir.1992); *Third Party Advantage Adm'r, Inc. v. J.P. Farley Corp.*, 2006 WL 3445216 (N.D.Tex. Nov.27, 2006). These cases are distinguishable. In *Fedmet* and *Alford*, the district court dismissed the case in favor of arbitration after the defendant filed a motion to compel arbitration and after the court concluded the arbitration clause was enforceable and all issues raised in the action were arbitrable. *Fedmet*, 194 F.3d at 676; *Alford*, 975 F.2d at 1164. Likewise, in *J.P. Farley*, the district court granted the defendants' motion to compel arbitration after considering the scope of the arbitration clause and whether the claims raised were arbitrable. *J.P. Farley Corp.*, 2006 WL 3445216, at *4–8. While the district court did not initially dismiss the case in *J.P. Farley*, it indicated the claims would be dismissed provided proof of certain actions involving the arbitration process be filed with the court within sixty days. *J.P. Farley Corp.*, 2006 WL 3445216, at *10. Thus, in each of these cases, a motion to dismiss was filed along with a motion to compel arbitration or a motion to stay proceedings pending arbitration. We overrule Titus's first issue.

In its second issue, Titus claims the trial court erred in "holding that Titus waived its right to arbitrate this case." We have reviewed the record, and nothing in the record supports Titus's contention the trial court considered, let alone held, that Titus waived its right to arbitrate. Acock's motion for summary judgment does not contain a ground alleging waiver, Acock's response to the motion to dismiss does not address waiver, and the trial court's order does not hold that Titus waived its right to arbitrate. We conclude Titus's second issue lacks merit.

*3 In its third issue, Titus claims the trial court erred in granting summary judgment in Acock's favor. Under this issue, Titus argues only that the merits of the case were not properly before the court "since the arbitration clause raised by Titus clearly reserved the case's merits to arbitration." We have already concluded Titus's motion to dismiss with prejudice did not request trial court to determine whether Acock's claim was arbitrable or to compel arbitration. It therefore follows that the merits of the case were properly before the trial court. Titus does not otherwise challenge the summary judgment. Under these circumstances, we cannot conclude the trial court erred in granting summary judgment. We overrule Titus's third issue.

We affirm the trial court's judgment.

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