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United States Court of Appeals
Tenth Circuit

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Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

CAMPBELL INVESTMENTS, LLC; KEVIN CAMPBELL; and KODY CAMPBELL,

Plaintiffs-Appellees,

v.

DICKEY'S BARBECUE RESTAURANTS, INC.,

Defendant-Appellant.

No. 18-4055
(D.C. No. 2:17-CV-00832-DB)
(D. Utah)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, Chief Judge, **EBEL**, and **PHILLIPS**, Circuit Judges.

Campbell Investments, a Utah-based company, purchased and briefly operated a Dickey's Barbecue franchise in South Jordan, Utah. The business relationship deteriorated, and Campbell filed a lawsuit in Utah state court that alleged various business torts.

* This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Dickey's contends a franchise operating agreement requires arbitration to resolve any disputes between the parties. Campbell, in turn, argues it never entered into this operating agreement when purchasing the restaurant from a prior franchisee. Dickey's removed the case to federal court.

The district court sided with Campbell, denying Dickey's motion to compel arbitration and stay the proceedings. Although the court concluded both parties were likely conducting business pursuant to some operative understanding, it found that Dickey's could not identify a valid written agreement that expressed a mutual intention to arbitrate this dispute.

Dickey's appeals that decision, pursuant to the Federal Arbitration Act's (FAA's) provision for interlocutory appeals. We reach the same conclusion as the district court. Campbell and Dickey's never executed a franchise operating agreement that governed the operation of the South Jordan Restaurant. We accordingly affirm the judgment of the district court.

I. Background

A. Factual Background

In Spring 2014, Kevin and Kody Campbell began exploring franchise opportunities with Dickey's Barbecue Pit, a Texas-based network of fast-casual restaurants with locations across the United States. After a brief courtship, they

submitted their formal application on behalf of Campbell Investments. This application was approved in August 2014.

Upon approval, Dickey's provided Campbell its Development Agreement, which detailed plans to open two new locations—the first in Ogden, Utah and the second in nearby South Jordan. Dickey's also provided Campbell with a franchise agreement that would govern the operation of the Ogden Restaurant. Both parties executed both agreements, each of which contained standard provisions to arbitrate most disputes.

For reasons not fully explained, the Ogden Restaurant never came to fruition. Nor did the new location both parties envisioned in South Jordan. Instead, Campbell chose to purchase an existing franchise in South Jordan, which had operated for several years under different ownership. Campbell consummated this transaction in September 2014, through an Asset Purchase Agreement with the prior franchisees.

Although the South Jordan Restaurant had operated pursuant to the franchise agreement executed by Dickey's and the prior franchisee, the Asset Purchase Agreement made no mention of this document. Like both the Development Agreement and the Ogden Franchise Agreement that Campbell had executed, this operating agreement (the South Jordan Franchise Agreement) included a standard provision to arbitrate most disputes. But Dickey's and

Campbell never executed *any* franchise agreement that addressed the operation of the South Jordan Restaurant.

For two years, Campbell operated the South Jordan Restaurant. But the business relationship with Dickey's evidently deteriorated. In July 2015, Dickey's provided Campbell with notice of default against the South Jordan Franchise Agreement. And Campbell, in turn, ceased business operations at the South Jordan Restaurant in November 2016.

B. Procedural Background

This dispute has now given rise to several distinct legal proceedings across multiple forums.

1) The Utah Action

In June 2017, Campbell filed its initial Complaint—which asserted a range of business torts—in Utah state court. Dickey's, a Texas corporation, removed this action to federal district court, pursuant to 28 U.S.C. § 1332. Dickey's then filed a motion to compel arbitration and to stay these proceedings, on the theory that Campbell had assumed the obligations (including the arbitration provision) of the South Jordan Franchise Agreement.

The district court rejected both the motion to compel arbitration and stay proceedings. The court likewise declined Dickey's subsequent attempt to conduct limited discovery and a summary trial on the factual question of whether the

parties had consummated an agreement to arbitrate this dispute. Although it acknowledged the likelihood that the parties were operating pursuant to *some* franchise understanding, the district court concluded Dickey's had presented no evidence to support the theory that Campbell had assumed the South Jordan Franchise Agreement through the Asset Purchase Agreement.

Pursuant to 9 U.S.C. § 16(a), which authorizes interlocutory review of orders denying motions to compel arbitration and stay proceedings under the FAA, Dickey's timely filed this appeal.

2) The Demand for Arbitration

After submitting a notice of appeal in the Utah Action, Dickey's also filed a demand for arbitration with the American Arbitration Association (AAA). Campbell opposed this effort, reiterating its contention that no written agreement to arbitrate encompassed this dispute. This conflict, in turn, spawned a second lawsuit—again in Utah state court—filed by Campbell against the AAA. After the AAA conceded it would not proceed with any arbitration until both parties consented, or a court entered an order compelling arbitration—both Campbell and the AAA stipulated to the dismissal of that lawsuit.

3) The Texas Action[1]

Once these efforts to compel arbitration failed—and during the pendency of this appeal—Dickey's filed a second petition to compel arbitration in the Eastern District of Texas. The complaint relied not only upon the theory that Campbell had assumed the South Jordan Franchise Agreement, but also a claim that the Development Agreement's arbitration provision likewise governs this dispute.

The district court in Texas granted the petition to compel arbitration as to claims arising from the Development Agreement; but denied the petition for claims arising from the South Jordan Franchise Agreement.[2] As to the Utah Action and this appeal, the district court observed that neither matter was coextensive, nor should one be considered preclusive for purposes of the other. No appeal followed that order.

II. Analysis

Dickey's contends the district court in the Utah Action erred in failing (1) to compel arbitration and stay proceedings; and (2) to order limited discovery and

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[1] For clarity, we grant Campbell's motion to take judicial notice of the Texas Action.

[2] "Only the Development Agreement is at issue in this case; hence, the Court refers only those disputes arising under the Development Agreement to arbitration. . . . Any claims arising out of the parties' franchise agreements or the Utah Litigation are beyond the scope of the litigation in this [c]ourt." *Dickey's Barbecue Rests., Inc. v. Campbell Invs., LLC*, No. 4:18-cv-00491, 2019 WL 1219118 at *3 (E.D. Tex. Mar. 15, 2019).

a summary trial on the factual question of whether the parties consummated an agreement to arbitrate these claims.[3]

A. Standard of Review

We review *de novo* the district court's decision to grant or to deny a motion to compel arbitration. *Avedon Eng'g, Inc. v. Seatex*, 126 F.3d 1279, 1283 (10th Cir. 1997) (citing *Armijo v. Prudential Ins. Co. of America*, 72 F.3d 793, 796 (10th Cir. 1995)).

Although the Supreme Court has long recognized a "liberal federal policy favoring arbitration agreements," *Nat'l Am. Ins. Co. v. SCOR Reins. Co.*, 362 F.3d 1288, 1290 (10th Cir. 2004) (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)), the question "whether parties have a valid arbitration agreement at all" is a "gateway matter" that is "presumptively for courts to

[3] At oral argument Dickey's appeared to abandon the second argument entirely; and it further refashioned the first solely as a request to stay these proceedings, rather than compel arbitration *and* stay proceedings. Dickey's points to a Supreme Court decision released during the pendency of this appeal, *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019), and a prior Tenth Circuit opinion not mentioned in its briefing, *Ansari v. Qwest Commcs. Corp.*, 414 F.3d 1214 (10th Cir. 2005), as "supplemental authorities" that mandate this outcome. But—even setting aside our reluctance to consider substantive arguments not raised in briefing—these authorities miss the mark because they simply assume the existence of a written agreement to arbitrate a given dispute. Since we must first address the gateway question of whether the parties have consummated such an agreement at all, these cases offer us little guidance.

decide." *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 570 n.2 (2013) (quoting *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003)).

Courts will accordingly review this question *de novo*, absent clear and unmistakable evidence that the parties intended an arbitrator to resolve the dispute. *See AT&T Techs. v. Commc'ns Workers*, 475 U.S. 643, 649 (1986) (citing *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 580 (1960)).

B. The Motion to Compel Arbitration and Stay Proceedings

An agreement to arbitrate "is simply a matter of contract between the parties." *Walker v. BuildDirect.com Techs., Inc.*, 733 F.3d 1001, 1004 (10th Cir. 2013) (quoting *Avedon Eng'g*, 126 F.3d at 1283). We accordingly will "apply ordinary state-law principles governing the formation of contracts to determine whether the parties have agreed to arbitrate a given dispute." *Id*. (quoting *Hardin v. First Cash Fin. Servs., Inc.*, 465 F.3d 470, 475 (10th Cir. 2006)).

The Utah Supreme Court has explained that arbitration agreements "must be contained in a written document setting forth the scope of the dispute to be arbitrated." *Pac. Dev., L.C. v. Orton*, 23 P.3d 1035, 1039 (Utah 2001) (citations omitted); *see also Bybee v. Abdulla*, 189 P.3d 40, 47 (Utah 2008). The requirement that parties identify a written agreement of appropriate "scope" is consistent with the FAA, which demands a "written provision . . . to settle by

arbitration a controversy *thereafter arising out of such contract or transaction . . .*" 9 U.S.C. § 2. (emphasis added); *see also* § 3 ("any issue referable to arbitration under an agreement in writing").

Dickey's argues that: (1) Campbell assumed the obligations of the South Jordan Franchise Agreement—including the arbitration provision—when it acquired the South Jordan Restaurant through the Asset Purchase Agreement; (2) Campbell manifested its consent to the South Jordan Franchise Agreement through its conduct; and (3) Campbell knew—through other documents received from Dickey's—that disputes would be subject to arbitration.[4]

These contentions direct us to three written agreements: (1) the South Jordan Franchise Agreement; (2) the Development Agreement; and (3) the Franchise Disclosure Documents.[5] Because Dickey's cannot demonstrate that

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[4] We need not address a fourth argument raised by Dickey's—that Campbell admitted in its complaint to entering into a franchise agreement with Dickey's—because the parties acknowledge that Campbell was, at the time of filing, operating under the assumption that the *Ogden Franchise Agreement* governed this dispute. Both parties have subsequently averred that Campbell's premise was mistaken, and in any event, the complaint makes no reference to the South Jordan Franchise Agreement.

[5] Although Campbell had, initially, styled its claims as arising under the operating agreement for the Ogden Restaurant—which never opened—the parties now agree the Ogden Franchise Agreement cannot govern claims arising from the operation of the South Jordan Restaurant. This conclusion is likewise dictated by the plain language of Section 1.2 ("Accepted Location") of the Ogden Franchise Agreement: "This Agreement does not grant you the right or franchise to operate the Restaurant or to offer or sell any products or services described under this

(continued...)

Campbell assented to the written terms of the South Jordan Franchise Agreement, we conclude that document cannot serve as the basis for compelling arbitration in this dispute. Moreover—because neither the Development Agreement nor the Franchise Disclosure Documents deals with the *operation* of the South Jordan Restaurant—we likewise conclude that neither may serve as the basis for compelling arbitration in this dispute.[6]

1) The South Jordan Franchise Agreement

Dickey's contends the South Jordan Franchise Agreement governs this dispute because Campbell assumed all obligations thereunder—originally consummated between Dickey's and the prior franchisee—when acquiring the South Jordan Restaurant through the Asset Purchase Agreement. But Dickey's cannot demonstrate—through recourse either to the text of the Asset Purchase Agreement or evidence presented to bolster its "course of dealing" theory—that Campbell ever assumed the written obligations of the South Jordan Franchise Agreement.

Nowhere does the Asset Purchase Agreement—consummated between the prior franchisee and Campbell—mention the South Jordan Franchise Agreement.

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[5](...continued)
Agreement *at or from any other location*." (emphasis added). R. 176.

[6] For clarity, we grant Dickey's motion to take judicial notice of the Franchise Disclosure Documents.

See R. Supp. 70–81. To the contrary, Section 3.02(e) expressly states that "[p]urchaser acknowledges that it shall be solely responsible for obtaining franchise approval from Dickey's Barbecue Pit franchise and for meeting all continuing obligations of the same." *Id.* at 76.

Particularly in light of its integration provision—which explicitly raises the possibility of incorporating as a schedule or exhibit other relevant documents—we conclude the Asset Purchase Agreement intended much as it reads. *See id.* at 79 (6.06). It was to burden solely Campbell—independent of its arrangement with the prior franchisee—with the obligation of securing operating authority from Dickey's.

A close reading of the South Jordan Franchise Agreement likewise supports this conclusion. Indeed, the provision addressing transfer of interest expressly provides that rights and duties may not be assigned "without the prior written consent of Dickey's." *Id*. at 114 (15.2.1). The absence of such written consent—coupled, once again, with an integration clause that requires any amendment to come in writing—compels the conclusion that Campbell did not assume the terms of the South Jordan Franchise Agreement. *Id.* at 130 (25).

Dickey's seeks to overcome this absence of evidence by contending Campbell accepted *all* terms of the South Jordan Franchise Agreement through conduct or course of dealing. Dickey's points primarily to a "Default Warning

Notice," mailed in July 2015, that threatened imminent default against Campbell's obligations under the South Jordan Franchise Agreement. R. 268–69. In briefing, Dickey's also notes that—for several years—Campbell paid royalties and used proprietary marks in a manner consistent with the terms of the South Jordan Franchise Agreement.

It is true these assertions suggest the existence of *some* operative understanding, as the district court acknowledged. But we must remain mindful of the FAA's mandate that any agreement to arbitrate a given dispute must come in writing. *See* 9 U.S.C. § 2 ("A *written provision* in any . . . contract . . . to settle by arbitration . . . shall be valid . . .) (emphasis added). So, absent any evidence that Campbell had assented to the written terms of the South Jordan Franchise Agreement—and its arbitration provision, in particular—we must reach the same conclusion as did the district court.

2) The Development Agreement

Although it did not raise this argument before the district court, Dickey's now contends the Development Agreement provides an alternative avenue with which to recognize the parties' mutual intention to arbitrate this dispute. Since it was not raised below, the district court never contemplated this possibility.[7] We

[7] In fact, the district court went so far as to observe that "[n]either party has argued that the arbitration provision in the Development Agreement would (continued...)

do not ordinarily consider arguments not raised below for the first time on appeal. *Cf. Cummings v. Norton*, 393 F.3d 1186, 1192 (10th Cir. 2005) (declining to consider an argument for the first time on appeal when a related theory was raised below). We accordingly conclude that Dickey's has waived any reliance on the arbitration provision contained within the Development Agreement. Even so, and bearing in mind that the district court in the Texas Action accepted a version of this theory, we would nonetheless reject this claim if it had not been waived.[8]

It is true that—as the district court in the Texas lawsuit observed—"the Development Agreement created an ongoing relationship between the parties, with both rights and obligations by each." *Dickey's Barbecue Rests., Inc. v. Campbell Invs., LLC*, No. 4:18-cv-491, 2019 WL 2301367 at *7 (E.D. Tex. Feb. 11, 2019). But the Development Agreement likewise delineates clear boundaries for what relationship its execution does and—more tellingly—*does not*

[7](...continued)
apply to [Campbell's] claims here." R. 300 (n.1).

[8] To the extent a "theory was intentionally relinquished or abandoned in the district court, we usually deem it waived and refuse to consider it." *Richison v. Ernest Group, Inc.*, 634 F.3d 1123, 1127 (10th Cir. 2011) (citations and quotation marks omitted). If, however, a "theory simply wasn't raised before the district court, we usually hold it forfeited. . . . Unlike waived theories, we will entertain forfeited theories on appeal, but we will reverse a district court's judgment on the basis of a forfeited theory only if failing to do so would entrench a plainly erroneous result." *Id.* at 1128. Dickey's has not argued the district court plainly erred in failing to consider the Development Agreement. Nor can Dickey's demonstrate it would constitute error—let alone *plain* error—for us to conclude the Development Agreement does not govern this dispute.

create: "This Agreement is *not* a franchise agreement and does *not* grant to you any right or franchise to operate a Restaurant or any right to use or any interest in the Proprietary Marks or the System." R. Supp. 34 (1.E) (emphases added).

The parties concede this case arises from the *operation* of the South Jordan Restaurant. In the absence of such plain language to the contrary, we might be tempted to conclude the analytic distinction between *development* and *operation* is sufficiently flexible to encompass the instant action. But we will not override the preferences manifested by both parties to create one of these relationships while expressly disclaiming the other.

3) The Franchise Disclosure Documents

Alongside its opening brief, Dickey's moved that we take judicial notice of certain form documents—including both a model franchise agreement, as well as a model development agreement—that Campbell acknowledged reviewing as a part of its franchise-application process. Campbell filed a memorandum in opposition, contending in part that Dickey's was attempting to subvert rules regarding the waiver or forfeiture of arguments not raised before the district court.

We are ordinarily disinclined to take judicial notice where, as here, a party has failed to enter documents within its possession into the record. But our review of the Franchise Disclosure Documents does nothing to disturb the

foregoing analysis. Although these documents reiterate Dickey's general policy in favor of arbitration, nowhere do they purport to create the specific operating relationship at issue here.

4*) Summary*

In summary, the record presents no evidence that both parties manifested an intention through written agreement to arbitrate disputes arising from the operation of the South Jordan Restaurant.

C. The Motion for Limited Discovery and a Summary Trial

Finally, Dickey's contends the district court erred in failing to order limited discovery and proceed with a summary trial on the factual question of whether the parties consummated a written agreement to arbitrate this dispute.[9]

When parties dispute whether they have indeed consummated an agreement to arbitrate, "a jury trial on the existence of the agreement is warranted unless there are no genuine issues of material fact regarding the parties' agreement." *First Cash Fin. Servs.*, 465 F.3d at 475 (quoting *Avedon Eng'g*, 126 F.3d at 1283). When, by contrast, it is "apparent . . . that no material disputes of fact exist[,] it may be permissible and efficient for a district court to decide the

[9] At oral argument, Dickey' appeared to abandon this argument, instead seeking only that proceedings in the District of Utah be stayed entirely. But because our conclusion regarding the argument that was briefed is compelled quite naturally by the foregoing analysis, we nonetheless address it here.

arbitration question as a matter of law." *Howard v. Ferrellgas Partners, L.P.*, 748 F.3d 975, 978 (10th Cir. 2014).

In determining whether any questions of material fact may remain, we give the non-moving party "the benefit of all reasonable doubts and inferences that may arise." *Hancock v. Am. Tel. and Tel. Co., Inc.*, 701 F.3d 1248, 1261 (10th Cir. 2012). We have treated this analytic framework similarly to the summary-judgment standard. *Id*. The party moving to compel arbitration bears the initial burden of presenting evidence sufficient to demonstrate the existence of an enforceable agreement. *Id*. *Only if* the moving party does so will the burden shift. *Id*. (emphasis added).

Because this record admits of no evidence suggesting the existence of a written agreement to arbitrate this dispute, *see supra* II.B, we accordingly affirm the district court's refusal to order limited discovery and a summary trial on this otherwise-fact-intensive question. *See Howard*, 748 F.3d at 984 ("Summary-judgment-like motions practice may be a permissible and expedient way to resolve arbitrability questions when it's clear no material disputes of fact exist and only legal questions remain.").

III. Conclusion

We accordingly AFFIRM the district court's refusal to compel arbitration and stay proceedings. We likewise AFFIRM the district court's refusal to order

limited discovery and a summary trial on the factual question of whether an agreement to arbitrate this dispute existed.

ENTERED FOR THE COURT

Timothy M. Tymkovich
Chief Judge