Affirmed and Opinion Filed March 28, 2024

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-23-00199-CV

HSC SOLUTIONS, LLC, LEROY NABORS, ROBIN NABORS, KAYLIE NABORS, GGTG, LLC, AND GIVE GOD THE GLORY, INC., Appellants
V.
EDU-NET, LLC, Appellee

On Appeal from the 95th District Court
Dallas County, Texas
Trial Court Cause No. DC-22-05426

MEMORANDUM OPINION

Before Justices Partida-Kipness, Reichek, and Breedlove
Opinion by Justice Partida-Kipness

In this interlocutory appeal, Appellants seek reversal of the trial court's March 2, 2023 "Order Denying Defendants' Motion to Abate Suit and Motion for Protection Pending Ruling on Motion to Abate." Finding no error, we affirm.

BACKGROUND

In 2008, appellant Leroy Nabors (Leroy) founded appellee Edu-Net, LLC (Edu-Net) as its sole member. In 2013, Leroy granted a thirty-three percent membership interest in Edu-Net to each of two brothers, Stephen Howard (Stephen) and Philip Howard (Flip). Stephen subsequently prepared an Operating Agreement

for Edu-Net, which Leroy, Stephen, and Flip signed on April 26, 2013. The Operating Agreement states the purpose of Edu-Net is to provide computer-related services "to persons, entities, governments and[/]or school districts." Those services included "internet, general IT and telecom services, as well as managed services, hosted e-mail, and data backup." The Operating Agreement designates Leroy, Stephen, and Flip the sole members of Edu-Net, with each owning exactly one-third of the membership interests in the company. The Operating Agreement also restricted the transfer of membership interests. It required unanimous written consent for a member to sell only a portion of his membership interests, and for the company to issue additional membership interests. Further, if a member desired to sell his entire stake in the company and received an offer from an outside party to purchase that stake, the other members were guaranteed a first right of refusal to match the offer.

The Operating Agreement included the following dispute resolution provision:

> **ARTICLE X**
>
> **DISPUTE RESOLUTION**
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> **Disputes Among Members.** The Members agree that in the event of any dispute or disagreement solely between or among any of them arising out of, relating to or in connection with this Agreement or the Company or its organization, formation, business or management ("Member Dispute"), the Members shall use their best efforts to resolve any dispute arising out of or in connection with this Agreement by good-faith negotiation and mutual agreement. However, in the event that the Members are unable to resolve any Member Dispute, such

> parties shall first attempt to settle such dispute through a non-binding mediation proceeding. In the event any party to such mediation proceeding is not satisfied with the results thereof, then any unresolved disputes shall be finally settled in accordance with an arbitration proceeding. In no event shall the results of any mediation proceeding be admissible in any arbitration or judicial proceeding.

The scope and applicability of Article X is at the center of this appeal.

In November 2015, Leroy, Stephen, and Flip executed an amendment to the Operating Agreement acknowledging that Stephen and Leroy would be stepping back from their current daily roles and would be free to pursue outside sources of income not competitive with Edu-Net. They signed a second amendment on November 14, 2016, which granted each Member "the one time right to transfer all of his Membership Interest to an entity of his choice. . . ." The 2016 Amendment documented the members' unanimous approval of Leroy's conveyance of his membership interest in Edu-Net to GGTG, LLC, and Stephen's conveyance of his membership interest to SBH and POH Enterprises, LLC. As required by the 2016 Amendment, Leroy and his wife Robin Nabors owned and controlled GGTG, LLC, and Stephen and his wife Elizabeth Howard owned and controlled SBH and POH Enterprises, LLC. Edu-Net maintains that Leroy continued to manage the sales side of Edu-Net's business after transferring his membership interests to GGTG, LLC. His work included finding clients for and on behalf of Edu-Net and selling services to Edu-Net clients.

In 2019, several events occurred causing friction between Leroy, Stephen, and Flip. First, according to Edu-Net, Leroy "went dark" in 2019 by failing to respond

to text messages and emails from Edu-Net members and no longer providing services to or on behalf of the company. Then, in mid-2019, Leroy attempted to sell and transfer GGTG, LLC's membership interest in Edu-Net to CWM, Inc., a company owned by Leon Zeno. Stephen and Flip, however, blocked the sale. Finally, Edu-Net terminated Robin's employment on October 3, 2019. Ultimately, Leroy resigned from the company in July 2021, assigned his 33.33% equity interest in the company back to Edu-Net, and waived all monetary compensation for the equity interest. In exchange, Edu-Net waived all non-compete provisions of the Operating Agreement and subsequent amendments as to Leroy.

In December 2021, Stephen contends he discovered Leroy had formed a competing company, HSC Solutions LLC (HSC), in February 2019. Kaylie Nabors, Leroy's daughter, was listed as HSC's Managing Member and President. In the underlying lawsuit, Edu-Net asserts HSC directly competed against Edu-Net beginning in 2019 by "contracting with various school districts to provide identical IT-related services for which [Edu-Net] provides to its clients, including contracting with school districts that Leroy was supposed to be closing on behalf of [Edu-Net]."

In 2022, Edu-Net sued HSC, Leroy, Robin, Kaylie, GGTG, LLC, and Give God the Glory, Inc.[1] According to Edu-Net, HSC's actions diverted millions of dollars in revenue and profits from Edu-Net. In the underlying proceeding, Edu-Net

[1] Give God the Glory, Inc. is a Texas non-profit corporation.

pleaded causes of action against Leroy and GGTG, LLC for breach of fiduciary duties, fraud by non-disclosure, and breach of contract. Edu-Net contends, in part, that HSC and Leroy breached the non-compete provision of the Operating Agreement. Edu-Net also asserted a cause of action for knowing participation in breach of fiduciary duty against HSC, Robin, Kaylie, and Give God the Glory, Inc, and claims for unjust enrichment and money had and received against HSC and Give God the Glory, Inc.

On January 19, 2023, Appellants filed a motion titled "Defendants' Motion to Abate Suit Pending Compliance with Contractual Dispute Resolution Provision" (the Motion to Abate). In it, Appellants asked the trial court to enforce Article X of the Operating Agreement by either compelling arbitration and dismissing the case or abating the case pending mediation or, as necessary, arbitration. On January 27, 2023, Appellants filed a motion titled "Defendants' Motion for Protection Pending Ruling on Motion to Abate" (the Motion for Protection). In it, they sought a stay of all discovery pending the trial court's resolution of the Motion to Abate. Edu-Net responded to the motions and, after a hearing, the trial court denied the Motion to Abate and the Motion for Protection by written order on March 2, 2023. This appeal followed.

STANDARD OF REVIEW

We review the trial court's denial of a motion to compel arbitration or a motion to abate proceedings under an abuse of discretion standard. *Henry v. Cash*

Biz, LP, 551 S.W.3d 111, 115 (Tex. 2018) (arbitration); *Lee v. GST Transp. Sys., LP*, 334 S.W.3d 16, 19 (Tex. App.—Dallas 2008, pet. denied) (abatement). The trial court abuses its discretion when it acts in an unreasonable and arbitrary manner, or without reference to any guiding rules or principles. *Ashton Grove L.C. v. Jackson Walker L.L.P.*, 366 S.W.3d 790, 794 (Tex. App.—Dallas 2012, no pet.) (citing *Lee*, 334 S.W.3d at 19). Under that standard, we defer to the trial court's factual determinations when they are supported by evidence but review de novo the trial court's legal determinations. *Gray v. Ward*, No. 05-18-00266-CV, 2019 WL 3759466, at *2 (Tex. App.—Dallas Aug. 9, 2019, no pet.) (mem. op.). Whether disputed claims fall within the scope of a valid arbitration agreement is a question of law that we review de novo. *Davis v. Boyd*, No. 05-21-00154-CV, 2022 WL 4354174, at *3 (Tex. App.—Dallas Sept. 20, 2022, no pet.) (mem. op.) (citing *Henry*, 551 S.W.3d at 115); *see also McReynolds v. Elston*, 222 S.W.3d 731, 740 (Tex. App.—Houston [14th Dist.] 2007, no pet.) ("Determining whether a claim falls within the scope of an arbitration agreement involves the trial court's legal interpretation of the agreement, and we review such interpretations de novo.").

APPELLATE JURISDICTION

Before considering the merits of the appeal, we first address Edu-Net's challenge to our jurisdiction over this case. Appellate courts have jurisdiction to consider appeals of interlocutory orders only if a statute explicitly provides appellate jurisdiction. *Dallas Cnty. v. Wadley*, 168 S.W.3d 373, 375 (Tex. App.—Dallas 2005,

pet. denied) (citing *Stary v. DeBord*, 967 S.W.2d 352, 352–53 (Tex. 1998)). We strictly construe statutes giving us jurisdiction over interlocutory appeals. *Wadley*, 168 S.W.3d at 375 (first citing *Potter Cnty. Attorney's Office v. Stars & Stripes Sweepstakes, L.L.C.*, 121 S.W.3d 460, 464 (Tex. App.—Amarillo 2003, no pet.), and then citing *Am. Online, Inc. v. Williams*, 958 S.W.2d 268, 271 (Tex. App.—Houston [14th Dist.] 1997, no writ)).

Appellants bring this appeal pursuant to section 171.098(a)(1) of the civil practice and remedies code, which provides for the interlocutory appeal of an order "denying an application to compel arbitration made under Section 171.021; . . ." TEX. CIV. PRAC. & REM. CODE § 171.098(a)(1). Edu-Net argues the order denying the Motion to Abate did not deny a motion to compel arbitration and, therefore, does not fall under section 171.098. *See* TEX. CIV. PRAC. & REM. CODE § 171.098(a)(1); *see also Walker Sand, Inc. v. Baytown Asphalt Materials, Ltd.*, 95 S.W.3d 511, 516 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (dismissing interlocutory appeal of order denying motion to stay or abate trial court proceedings). We disagree with Edu- Net.

It is the substance and function of the order being appealed, viewed in the context of the record, that controls our interlocutory jurisdiction, not the caption of the order or a party's characterization of it. *Chapa v. Chapa*, No. 04-12-00519-CV, 2012 WL 6728242, at *5 (Tex. App.—San Antonio Dec. 28, 2012, no pet.) (mem. op.) ("Our interlocutory jurisdiction is controlled by the substance and function of

an order, viewed in the context of the record, not the title or form of the order or the parties' characterization of the order."); *Walker Sand, Inc.*, 95 S.W.3d at 515 (citing *Markel v. World Flight, Inc.*, 938 S.W.2d 74, 78 (Tex. App.—San Antonio 1996, no writ)); *see also Del Valle Indep. Sch. Dist. v. Lopez*, 845 S.W.2d 808, 809 (Tex. 1992) ("We reject the notion that such matters of form control the nature of the order itself—it is the character and function of an order that determines its classification.").

Here, the Motion to Abate was titled "Defendants' Motion to Abate Suit Pending Compliance with Contractual Dispute Resolution Provision," and the Motion for Protection was titled "Defendants' Motion for Protection Pending Ruling on Motion to Abate." In the Motion to Abate, Appellants asked the trial court to enforce Article X of the Operating Agreement by "abating this cause pending mediation and, as necessary, submission of any outstanding disputes to arbitration." The Motion to Abate is then divided into two substantive sections. First, Appellants moved to compel mediation and abate the suit. They argued Article X requires the parties to mediate their dispute and then "failing resolution, submission of all unresolved disputes to arbitration." Next, they argued Edu-Net's claims are subject to arbitration and moved the court "to compel arbitration and dismiss the case or, alternatively, abate the case pending the conclusion of arbitration." In their conclusion to the Motion to Abate, Appellants requested the following relief:

> Defendants . . . respectfully request the Court dismiss this case for lack of jurisdiction or, alternatively, abate this case so that the parties may resolve their disputes via mediation and, failing resolution at mediation,

> in arbitration, and further that the Court grant Defendants all such further relief to which they may be entitled.

Appellants, thus, sought both abatement of the trial court proceedings and orders compelling mediation and arbitration. *See Toll Austin, TX, LLC v. Dusing*, No. 03-16-00621-CV, 2016 WL 7187482, at *1–2 (Tex. App.—Austin Dec. 7, 2016, no pet.) (mem. op.) (construing order denying a "Plea in Abatement" as also denying an implicit motion to compel arbitration in light of substance of parties' arguments in the trial court); *see also In re Bridges*, 28 S.W.3d 191, 195 (Tex. App.—Fort Worth 2000, orig. proceeding) ("A motion's substance is not to be determined by its caption, however, but from the body and prayer for relief."); *Mercer v. Band*, 454 S.W.2d 833, 835 (Tex. Civ. App.–Houston [14th Dist.] 1970, no writ) (same). At the hearing on the Motion to Abate, Appellants' counsel similarly requested the trial court abate the case pending arbitration.

The order denying the Motion to Abate and Motion for Protection denied all, not some, of the relief requested in those motions. The order states, without elaboration, that "Defendants' Motion to Abate Suit Pending Compliance with Contractual Dispute Resolution Provision" and Defendants' "Motion for Protection Pending Ruling on Motion to Abate" are "hereby in all things DENIED." Under this record, we conclude the Motion to Abate functioned as both a motion to abate the trial court proceedings and a motion to compel arbitration. *See Toll* Austin, 2016 WL 7187482, at *2. We, therefore, have subject-matter jurisdiction over the trial court's order denying the Motion to Abate. *See id.*

ANALYSIS

On appeal, Appellants argue the underlying proceeding is subject to arbitration, and the trial court erred by denying the Motion to Abate. They ask this Court to remand the case to the trial court "with instructions to abate the underlying lawsuit until the parties have concluded arbitration." In support, they maintain (1) Edu-Net is subject to the Operating Agreement and cannot avoid Article X of that agreement, (2) an arbitrator must decide if the conditions precedent to arbitration have been met, and (3) they did not waive their right to arbitration by participating in the underlying litigation.

Article X of the Operating Agreement is titled "Dispute Resolution" and states:

> **Disputes Among Members.** The Members agree that in the event of *any dispute or disagreement solely between or among any of them* arising out of, relating to or in connection with this Agreement or the Company or its organization, formation, business or management ("Member Dispute"), the Members shall use their best efforts to resolve any dispute arising out of or in connection with this Agreement by good-faith negotiation and mutual agreement. However, in the event that the Members are unable to resolve any Member Dispute, such parties shall first attempt to settle such dispute through a non-binding mediation proceeding. In the event any party to such mediation proceeding is not satisfied with the results thereof, then any unresolved disputes shall be finally settled in accordance with an arbitration proceeding. In no event shall the results of any mediation proceeding be admissible in any arbitration or judicial proceeding.

(emphasis added). The parties disagree on the meaning of "any dispute or disagreement solely between or among of them." Edu-Net contends that language limits the scope of Article X by providing for a dispute resolution process in disputes

involving only members of Edu-Net. Under Edu-Net's interpretation, the underlying proceeding is not subject to Article X and may not be abated for or compelled to mediation or arbitration because none of the parties to this litigation are members of Edu-Net. Appellants, in contrast, read Article X more broadly. They maintain Article X applies because Edu-Net's claims are based on the Operating Agreement. Therefore, those claims are subject to arbitration under Article X of the Operating Agreement. We agree with Edu-Net.

When interpreting a contract, we must ascertain and give effect to the contracting parties' intent. *Perry Homes v. Cull*, 258 S.W.3d 580, 606 (Tex. 2008). We focus on the language used in the contract because it is the best indication of the parties' intent. *Id.* We must examine the entire contract to harmonize and effectuate all of its provisions so that none are rendered meaningless. *Seagull Energy E & P, Inc. v. Eland Energy, Inc.*, 207 S.W.3d 342, 345 (Tex. 2006). We may not rewrite the contract or add to its language under the guise of interpretation. *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 162 (Tex. 2003); *Abdullatif v. Choudhri*, 561 S.W.3d 590, 602 (Tex. App.—Houston [14th Dist.] 2018, pet. denied). Rather, we must enforce the contract as written. *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 862 (Tex. 2000); *Cammack the Cook, L.L.C. v. Eastburn*, 296 S.W.3d 884, 891 (Tex. App.—Texarkana 2009, pet. denied) ("We cannot ignore the clear language of an unambiguous contract.").

Here, the clear and unambiguous language of Article X provides that Article X is limited to "any dispute or disagreement solely between or among any of [the Members]" of Edu-Net. The parties to the underlying proceeding are Edu-Net, HSC, Leroy, Robin, Kaylie, GGTG, LLC, and Give God the Glory, Inc. It is undisputed that none of the parties are members of Edu-Net now, nor were they Edu-Net members when Edu-Net discovered Appellants' alleged conduct or when the lawsuit was filed. Leroy has not been a member of Edu-Net since November 2016, GGTG, LLC relinquished its membership interests in July 2021, and HSC, Robin, Kaylie, and Give God the Glory, Inc. were never members of Edu-Net. Accordingly, this dispute does not involve a dispute between or among any Edu-Net members and, therefore, is not a dispute or disagreement "solely between or among" the members of Edu-Net. Applying the unambiguous language of Article X, we conclude the underlying proceeding is not subject to that provision. We do not address whether Edu-Net can be considered a member of itself because resolving that issue does not change the result. Even assuming Edu-Net can be considered a member under the Operating Agreement, it brought no claims against any other member of the company. Therefore, this proceeding still does not involve a dispute "between or among" members of Edu-Net, and the claims asserted do not fall within the scope of Article X.

Appellants also accuse Edu-Net of avoiding arbitration through artful pleading and contend Edu-Net is equitably estopped from avoiding Article X.

Appellants maintain equitable estoppel applies because Edu-Net's claims arise out of the Operating Agreement, and Edu-Net seeks to recover under that agreement. While we agree Edu-Net's claims against Appellants arise at least in part from the Operating Agreement, we disagree that Edu-Net is estopped from avoiding the obligations set out in Article X.

Arbitration cannot be compelled unless it falls within the scope of a valid arbitration agreement. *Henry*, 551 S.W.3d at 115 ("A party seeking to compel arbitration must establish the existence of a valid arbitration agreement and that the claims at issue fall within the scope of that agreement."). We have already determined Edu-Net's claims do not fall within the scope of Article X. Equitable estoppel, therefore, is inapplicable here. *See*, *e.g.*, *Taylor Morrison of Tex., Inc. v. Ha*, 660 S.W.3d 529, 533 (Tex. 2023) ("If a nonsignatory seeks the benefits of a contract with an arbitration clause, then the nonsignatory must arbitrate all claims *that fall within the scope of that arbitration clause*.") (emphasis added); *see also Left Gate Prop. Holding, LLC v. Nelson*, No. 14-19-00247-CV, 2021 WL 1183863, at *3 (Tex. App.—Houston [14th Dist.] Mar. 30, 2021, no pet.) (mem. op.) (rejecting estoppel argument where the arbitration agreement was inapplicable to the transaction at issue).

This is not a case involving artful pleading. *See*, *e.g.*, *In re Merrill Lynch Tr. Co. FSB*, 235 S.W.3d 185, 188 (Tex. 2007) (noting artful pleading may occur when a plaintiff names "individual agents of the party to the arbitration clause and suing

them in their individual capacity."). Edu-Net has not engaged in such conduct here. Rather, Edu-Net sued the parties it contends breached duties owed Edu-Net, either directly or derivatively. Although none of those parties are members of Edu-Net, nothing in the record indicates Edu-Net chose to sue Appellants instead of a potentially liable Edu-Net member who would be subject to Article X.

Nor is this a situation where Edu-Net wants to enforce only parts of the Operating Agreement. *See*, *e.g.*, *Meyer v. WMCO-GP, LLC*, 211 S.W.3d 302, 308 (Tex. 2006) (WMCO was equitably estopped from evading arbitration because "WMCO is trying to have it both ways: it is asserting rights that it would not have but for the PSA, but refusing to honor its agreement to arbitrate disputes over those rights."). The opposite is true in this case. Edu-Net seeks to enforce the Operating Agreement as written. Article X does not require arbitration of disputes between non-members. Edu-Net, therefore, maintains Article X should not be enforced here because it is inapplicable to Edu-Net's claims against Appellants, none of whom are Edu-Net members. Whether Appellants may be held liable under other provisions of the Operating Agreement is not a question before this Court. We simply conclude Appellants may not enforce Article X because the claims asserted against Appellants do not fall within the scope of Article X.

Accepting Appellants' arguments would require us to rewrite Article X by removing the "solely between or among [Members]" language and to give Appellants a greater right to arbitration than Edu-Net members would have under

the Operating Agreement. This we cannot do. *See Schaefer*, 124 S.W.3d at 162 ("[W]e may neither rewrite the parties' contract nor add to its language."); *see also In re Trammell*, 246 S.W.3d 815, 820–21 (Tex. App.—Dallas 2008, no pet.) (equitable estoppel cannot give non-signatories a greater right to arbitration than the signatories themselves have) (citing *Meyer*, 211 S.W.3d at 306).

For these reasons, we overrule Appellants' first issue. Our resolution on the question of scope is dispositive. We, therefore, do not reach Appellants' remaining issues.

CONCLUSION

The trial court properly denied the Motion to Abate because the dispute resolution provision in the Operating Agreement applies only to disputes between members, and no parties to this dispute are members of Edu-Net. Accordingly, we affirm the trial court's March 2, 2023 order denying the Motion to Abate.

/Robbie Partida-Kipness/
ROBBIE PARTIDA-KIPNESS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

HSC SOLUTIONS, LLC, LEROY NABORS, ROBIN NABORS, KAYLIE NABORS, GGTG, LLC, AND GIVE GOD THE GLORY, INC., Appellants

No. 05-23-00199-CV V.

EDU-NET, LLC, Appellee

On Appeal from the 95th District Court, Dallas County, Texas
Trial Court Cause No. DC-22-05426.
Opinion delivered by Justice Partida-Kipness. Justices Reichek and Breedlove participating.

In accordance with this Court's opinion of this date, the trial court's March 2, 2023 "Order Denying Defendants' Motion to Abate Suit and Motion for Protection Pending Ruling on Motion to Abate" is **AFFIRMED**.

It is **ORDERED** that appellee EDU-NET, LLC recover its costs of this appeal from appellants HSC SOLUTIONS, LLC, LEROY NABORS, ROBIN NABORS, KAYLIE NABORS, GGTG, LLC, AND GIVE GOD THE GLORY, INC..

Judgment entered this 28th day of March 2024.