

Reversed and Remanded, and Majority and Dissenting Opinions filed April 15, 2025.



In The

Fourteenth Court of Appeals

NO. 14-24-00012-CV

CHIFFON BROWN, Appellant

V.

CHILD ADVOCATES, INC, Appellee

**On Appeal from the 127th District Court
Harris County, Texas
Trial Court Cause No. 2021-46935**

MAJORITY OPINION

In two issues on appeal, appellant Chiffon Brown argues the trial court erred by (1) granting appellee Child Advocates, Inc.'s (CAI) motion to compel arbitration without first holding an evidentiary hearing and (2) denying her motion to vacate the arbitrator's award. We sustain Brown's first issue, reverse the trial court's order granting the motion to compel, and remand the case to the trial court for further proceedings, including an evidentiary hearing.

I. BACKGROUND

In August 2021, Brown filed her original petition, alleging CAI wrongfully terminated her employment for refusing to perform illegal acts. After several months, CAI sent Brown an e-mail with an arbitration agreement allegedly signed by Brown, although she did not remember signing it or ever receiving a copy of it during her employment. The agreement plainly stated “the parties will participate in a mediation before invoking arbitration.” When CAI communicated to Brown its intention to file a motion to compel arbitration, Brown sent CAI an e-mail, suggesting the parties should attempt mediation “since mediation is a condition precedent” to invoking arbitration. In December 2022, without any response to Brown’s e-mail or any attempt to schedule mediation, CAI filed a motion to compel arbitration, alleging Brown electronically signed the arbitration agreement.

Brown filed a response to CAI’s motion, alleging she never intended to enter into an arbitration agreement, she did not remember signing the agreement, and she did not remember ever accessing an electronic version of the agreement. Without holding a hearing, the trial court signed an order granting CAI’s motion to compel arbitration.

Despite ignoring Brown’s request for mediation below, as communication with the arbitrator began, CAI took the position that mediation was a “pre-condition to ‘invoking arbitration,’ not merely to holding the actual arbitration meeting. Thus, mediation should have occurred prior to this proceeding even being filed with the AAA.” Brown agreed that mediation was a condition precedent to invoking arbitration. The arbitrator simply informed the parties that “the reality is that arbitration has already commenced.” The arbitrator subsequently issued a schedule instructing the parties to attempt mediation. After the parties participated in an unsuccessful mediation session, an arbitration hearing commenced in May

2023, in which the arbitrator ruled in favor of CAI and issued a take-nothing award.

CAI filed a motion with the trial court to confirm the arbitration award; and Brown filed a cross-motion to vacate the award. The trial court signed an order confirming the arbitration award. Brown filed a timely appeal.

II. ANALYSIS

In her first issue, Brown argues the trial court erred by failing to hold an evidentiary hearing on whether the parties agreed to arbitrate.

A. Standard of review and applicable law

A trial court's decision to grant or deny a motion to compel arbitration is reviewed on appeal for abuse of discretion. *See Henry v. Cash Biz, LP*, 551 S.W.3d 111, 115 (Tex. 2018). But whether a party has waived its arbitration rights is a question of law we review de novo. *Id.*

Arbitration cannot be ordered in the absence of an agreement to arbitrate. *See Freis v. Canales*, 877 S.W.2d 283, 284 (Tex. 1994). Because arbitration is a creature of contract, a court must first decide whether an agreement was reached, applying state-law principles of contract. *See In re Poly-Am., L.P.*, 262 S.W.3d 337, 348 (Tex. 2008).

The elements of an enforceable contract and valid arbitration agreement are: (1) an offer; (2) acceptance in strict compliance with the terms of the offer; (3) a meeting of the minds; (4) each party's consent to the terms; and (5) execution and delivery of the contract with the intent that it be mutual and binding. *Advantage Physical Therapy, Inc. v. Cruse*, 165 S.W.3d 21, 24 (Tex. App.—Houston [14th Dist.] 2005, no pet.). Contracts require mutual assent to be enforceable. *Baylor Univ. v. Sonnichsen*, 221 S.W.3d 632, 635 (Tex. 2007). “Evidence of mutual assent

in written contracts generally consists of signatures of the parties and delivery with the intent to bind.” *Id.* “[A] party manifests its assent by signing an agreement.” *Rachal v. Reitz*, 403 S.W.3d 840, 845 (Tex. 2013).

In this case, Brown alleged she raised a fact issue regarding her consent to the agreement. CAI asserted that Brown followed its procedures and electronically signed the agreement, thus consenting to arbitration. The central question, therefore, is whether CAI established that Brown consented to arbitration by signing an electronic contract.

“The party seeking to hold another responsible for signing an electronic contract must come forward with evidence to establish the efficacy of the security procedures utilized in the transaction.” *Hous. ANUSA, LLC v. Shattenkirk*, 693 S.W.3d 513, 518 (Tex. App.—Houston [14th Dist.] 2023, no pet.) (citing *Aerotek, Inc. v. Boyd*, 624 S.W.3d 199, 204 (Tex. 2021)). The Uniform Electronic Transactions Act defines a security procedure as:

[a] procedure employed for the purpose of verifying that an electronic signature, record, or performance is that of a specific person or for detecting changes or errors in the information in an electronic record. The term includes a procedure that requires the use of algorithms or other codes, identifying words or numbers, encryption, or callback or other acknowledgment procedures.

Tex. Bus. & Com. Code § 322.002(13); *see Aerotek*, 624 S.W.3d at 205–06 (noting that security procedures may include requiring personal identifying information—such as social security number or address—to register for an account, having a secure system that prevents unauthorized access to electronic records, business rules that require users to complete all steps before moving on, and timestamps showing when users completed certain actions).

CAI, as the proponent of the arbitration agreement, bears both the initial

burden of establishing the agreement's existence by legally-sufficient evidence, and of negating any contravening evidence from Brown. *See Shattenkirk*, 693 S.W.3d at 518.

B. Application

In support of its motion to compel, CAI attached the arbitration agreement, which included timestamps to indicate when Brown allegedly signed the document electronically. CAI also attached an affidavit by its chief executive officer, Sonya Galvan. Galvan averred that in 2019, CAI's existing employees, including Brown, were required to sign the arbitration agreement, which was a separate document apart from any other employment document. To sign it, the employees logged into a website or mobile application using a unique password and username.

Galvan's affidavit, standing alone, falls short of conclusively establishing the efficacy of the security procedures utilized in the transaction. Regarding the electronic service used to obtain Brown's signature, CAI presented no evidence: (1) that creating an account required personal identifying information; (2) of security procedures that would prevent unauthorized access by users other than Brown; (3) corroborating Brown's unique password and username; or (4) demonstrating that users were required to complete all steps before moving on. *Cf. Solcius, LLC v. Meraz*, No. 08-22-00146-CV, 2023 WL 2261414, at *7 (Tex. App.—El Paso Feb. 27, 2023, no pet.) (mem. op.) (party seeking to compel arbitration provided evidence that it used DocuSign's technology platform, which allows documents transmitted through DocuSign to only be opened by the individual with access to the customer-provided email address and "records the date and time of the execution of the Loan Agreement document by the customer, among other key information."); *Wal-Mart Stores Tex., LLC v. Peavley*, No. 09-21-00403-CV, 2023 WL 1831122, at *4 (Tex. App.—Beaumont Feb. 9,

2023, no pet.) (mem. op.) (employee did not dispute completing the electronic hiring module and evidence showed the module could not be completed without acknowledging and consenting to arbitration agreement); *H-E-B, LP v. Saenz*, No. 01-2000850-CV, 2021 WL 4733460, at *6 (Tex. App.—Houston [1st Dist.] Oct. 12, 2021, pet. denied) (mem. op.) (agreement could only be accessed by a unique identification number and password, which was corroborated by copies of the employee’s paperwork showing her unique identification number). We therefore conclude Galvan’s affidavit did not conclusively establish the security procedures used in securing Brown’s signature.

CAI, however, did provide a copy of the arbitration agreement with Brown’s purported electronic signature and a time and date stamp. In that regard, while CAI failed to conclusively establish the efficacy of the security procedures used to obtain Brown’s purported signature, it furnished more than a scintilla of evidence showing Brown’s consent to the agreement.

Therefore, we turn now to Brown’s evidence that she did not consent to the agreement. *See Kmart Stores of Tex., L.L.C. v. Ramirez*, 510 S.W.3d 559, 568–69 (Tex. App.—El Paso 2016, pet. denied) (if the movant can furnish more than a scintilla of evidence showing the non-movant’s assent, the burden shifts to the non-movant to create a fact issue or else to raise technical legal arguments as to why the agreement fails despite the non-movant’s apparent assent).

In support of Brown’s position that she never agreed to be bound by the arbitration agreement, Brown presented her own declaration, averring:

- She never intended to enter a binding arbitration agreement.
- “I cannot confirm that the electronic signature is mine.”
- She had no recollection of signing an arbitration agreement.
- Brown never received a copy of the arbitration agreement while she was employed, and does not remember accessing an electronic version of the

document.

- If she had known about the possibility of opting-out of the agreement at the time that she allegedly signed the document, she “would have certainly completed the proper form in order not to be bound by arbitration[.]”

CAI argues that Brown’s declaration merely stated that she could not recall consenting to the arbitration agreement, which would not be sufficient to raise a fact issue. However, Brown averred that she never intended to enter into a binding arbitration agreement, did not remember ever signing an arbitration agreement, and could not even confirm whether that was her signature on the arbitration agreement. We conclude Brown’s declaration constitutes some evidence that she did not consent to the arbitration agreement through the use of an electronic signature.

Motions to compel arbitration are ordinarily decided in summary proceedings “on the basis of affidavits, pleadings, discovery, and stipulations.” *Jack B. Anglin Co., Inc., v. Tipps*, 842 S.W.2d 266, 269 (Tex. 1992). Therefore, a motion to compel arbitration is procedurally akin to a motion for summary judgment and is subject to the same evidentiary standards. See *In re Jebbia*, 26 S.W.3d 753, 756–57 (Tex. App.—Houston [14th Dist.] 2000, orig. proceeding). Thus, the party alleging an arbitration agreement must present summary judgment proof that an agreement to arbitrate requires arbitration of the dispute. *In re Jim Walter Homes, Inc.*, 207 S.W.3d 888, 897 (Tex. App.—Houston [14th Dist.] 2006, orig. proceeding). If a material issue of fact is raised, an evidentiary hearing is required. *Tipps*, 842 S.W.2d at 269. Trial courts do not have the authority to resolve disputed fact issues concerning the formation of an agreement to arbitrate based solely upon affidavits. *In re Weeks Marine, Inc.*, 242 S.W.3d 849, 862–63 (Tex. App.—Houston [14th Dist.] 2007, orig. proceeding).

Pursuant to the supreme court’s holding in *Tipps*, the trial court must resolve

the question of consent in this case with an evidentiary hearing. *Shattenkirk*, 693 S.W.3d at 521–22 (reversing arbitration order and remanding for evidentiary hearing where employer had a purported signed copy of arbitration agreement that employee denied ever seeing or signing). CAI did not produce clear evidence of reliable security procedures for recording and maintaining electronic signatures, and Brown’s declaration was sufficient to raise a fact question as to her consent to the agreement. *Aerotek*, 624 S.W.3d at 207, 209. Furthermore, this court has held that “Texas authority requires the trial court to order an evidentiary *Tipps* hearing sua sponte where the facts are in dispute.” *Shattenkirk*, 693 S.W.3d at 523. Thus, the trial court abused its discretion by granting the motion to compel arbitration because it could not decide the issue of consent without holding an evidentiary hearing. *See Tipps*, 842 S.W.2d at 269.

Accordingly, we sustain Brown’s first issue.¹

III. CONCLUSION

We reverse the trial court’s order granting the motion to compel and remand the case to the trial court for further proceedings, including an evidentiary hearing.

/s Tonya McLaughlin
Justice

Panel consists of Justices McLaughlin, Bridges, and Boatman (Boatman, J., dissenting).

¹ Having sustained Brown’s first issue, we need not address her second issue.