TADC Commercial Litigation Newsletter

Spring 2017 Edition

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This newsletter is intended to summarize significant cases and issues impacting the commercial litigation practice area in the past six months. It is not a comprehensive digest of every case involving commercial litigation issues during that time period or a recitation of every holding in the cases discussed. This newsletter was not compiled for the purpose of offering legal advice.

OVERVIEW OF NEWSLETTER DECISIONS

Texas Supreme Court Decisions

Levinson Alcoser Assocs., L.P. v. El Pistolon II, Ltd.,

513 S.W.3d 487 (Tex. 2017)

Synopsis

In Chapter 150.002 certificate of merit challenges, the expert providing the affidavit must be a competent third-party who (1) holds the same professional license or registration as the defendant, (2) is licensed or registered in the State of Texas, (3) is actively engaged in the practice, and (4) is knowledgeable in the defendant's area of practice. The evidence necessary to establish the expert's knowledge need not be in the certificate of merit (though this is advisable), but if it is not, it must be available somewhere in the record. An expert's knowledge cannot be inferred from the fact that the expert is licensed/registered and actively engaged in the practice.

Factual Background and Trial Court Proceedings

This lawsuit concerns a commercial retail project constructed on land owned by El Pistolon II, Ltd. in McAllen, Texas. El Pistolon hired Levinson Alcoser Associates, Inc. and Levinson Alcoser Associates, L.P. to design the project and oversee construction. El Pistolon sued for breach of contract and negligence due to its disappointment with Alcoser's services.

El Pistolon included a certificate of merit from Gary Payne, a third-party licensed architect with its Original Petition. Mr. Payne provided his professional opinion about the architect's work and noted the following regarding his credentials:

> 1. My name is Gary Payne. I am a professional architect who is registered to practice in the State of Texas, license number 11655. I have been a registered architect in Texas since 1980, and have an active architecture practice in the State of Texas today.
>
> 2. I am over the age of eighteen years, have never been convicted of a felony or crime of moral turpitude, and am otherwise competent to make this affidavit. I have personal knowledge of the facts contained in this affidavit. Those facts are true and correct.

Alcoser moved to dismiss El Pistolon's suit, objecting that Mr. Payne's affidavit did not meet the requirements for a certificate of merit. Specifically, they argued that the affidavit did not satisfy the statute's knowledge or factual basis requirements. As to knowledge, the statute requires that the affiant be knowledgeable in the defendant's area of practice.

The trial court denied Alcoser's motion to dismiss. Alcoser appealed.

Court of Appeals

The court of appeals affirmed, in part and reversed in part. The court affirmed the trial court's finding that the certificate of merit was sufficient for purposes of El Pistolon's negligence claim, but reversed as to its breach of contract claim. The matter was remanded to the trial court for further proceedings and to determine whether the dismissal on the breach of contract claim was with or without prejudice. Only Alcoser appealed.

Texas Supreme Court's Holding

The Court first examined its jurisdiction over the appeal, noting that it ordinarily does not

extend to review of interlocutory appeals. However, the court identified an exception to this rule when the appellate decision under appeal conflicts with the holding of a prior decision of another court of appeals. A conflict sufficient to give rise to this jurisdiction exists when there is inconsistency in the respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants. After reviewing an opinion from the Fourteenth Court of Appeals in Houston, the Court determined that it had jurisdiction under this exception.

Turning to the merits, the Court noted that a certificate of merit must come from a competent third-party expert who (1) holds the same professional license or registration as the defendant, (2) is licensed or registered in the State of Texas, (3) is actively engaged in the practice, and (4) is knowledgeable in the defendant's area of practice. After reviewing Mr. Payne's affidavit, the Court determined that it provided no information about his knowledge in the area of practice, as required by the statute.

Although the Court acknowledged that an expression of the expert's knowledge does not have to be contained in the affidavit, it must be capable of being inferred from the record. In this case, there were no documents or other materials in the record from which Mr. Payne's knowledge could be inferred. The only item in the record related to Mr. Payne was the affidavit itself.

The Court also concluded that the statute's knowledge requirement was not synonymous with the expert's licensure or active engagement in the practice requirements. As such, merely stating that the expert is licensed and in active practice is not, in and of itself, sufficient to meet the knowledge requirement. The court held that Mr. Payne had not been shown to be qualified to render the certificate of merit affidavit and reversed the court of appeals and remanded the case to the trial court for a determination of prejudice as to both the negligence and breach of contract claims.

Practice Pointer

Always include background information on experts in affidavits proving up their qualifications to render the opinions therein. Alternatively, ensure that records providing such information are made a part of the record so that they can be referred to and relied on by a court at a later time if necessary.

D Magazine Partners, L.P. v. Rosenthal,

60 Tex. Sup. J. 617 (Tex. 2017)

Synopsis

Rosenthal—a private citizen who was the subject of a magazine article about her receipt of food stamps—sued the magazine, asserting defamation and other claims stemming from allegations that the article falsely accused her of committing welfare fraud. The magazine filed a motion to dismiss under the Texas Citizens Participation Act alleging that the magazine article was an exercise of the right of free speech made in connection with a matter of public concern. In making an initial determination of whether a publication is capable of defamatory meaning, courts examine the "gist" of the article, which reflects a reasonable person's perception of the entirety of the article and not merely individual statements. In denying the motion to dismiss, the trial court determined that the "gist" of the article included the assertion that Rosenthal had committed welfare fraud" by

"submitting false information to [the Commission] to continue to receive SNAP benefits to which she otherwise would not have been entitled," and found that Rosenthal presented clear and specific evidence of a prima facie case for each element of defamation

Factual Background

Through conscientious and diligent reporting, the press holds public officials accountable and helps citizens stay informed on matters of public concern. Accordingly, both the U.S. Constitution and the Texas Constitution robustly protect freedom of speech. But, these safeguards are not unlimited and do not categorically deprive individuals of legal recourse when they are injured by false and defamatory speech. The line between the rights of the press and the rights of defamed individuals is not easily drawn. This elusive boundary underlies this dispute about the propriety of a defamation lawsuit's early dismissal under the Texas Citizens Participation Act ("TCPA"), the purpose of which is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.

Under the TCPA, if a legal action is based on, relates to, or is in response to a party's exercise of the right of free speech, right to petition, or right of association, that party may file a motion to dismiss the legal action. The court may not dismiss a legal action under the TCPA if the party bringing the legal action establishes by clear and specific evidence a prima facie case for each element of the claim in question. Notwithstanding this burden, the court shall dismiss a legal action against the moving party if the moving party establishes by a preponderance of the evidence each essential element of a valid defense to the non-movant's claim.

Texas Supreme Court's Holding

The court concluded that a reasonable person could perceive the article as accusing Rosenthal of providing false information to the Commission in order to obtain benefits to which she was not entitled, and that Rosenthal presented clear and specific evidence sufficient to support a prima facie case of defamation. Affirmed in part: dismissal of the TCPA claim was not warranted. Reversed in part: the court of appeals erred in failing to award attorneys' fees to D Magazine in light of dismissal of non-TCPA claims.

Pedernal Energy, LLC v. Bruington Eng'g, Ltd.,

60 Tex. Sup. J 781 (Tex. 2017)

Synopsis

In Chapter 150.002 certificate of merit dismissals, the trial court has discretion to decide whether the dismissal is rendered with or without prejudice, and this decision will not be overturned on appeal under an abuse of discretion standard unless it was made in an arbitrary or unreasonable manner, without reference to guiding rules or principles.

Factual Background and Trial Court Proceedings

Bruington Engineering, LLC was hired as the project engineer on one of Pedernal Energy, Ltd.'s gas wells. The fracing operations did not go well, and Pedernal Energy sued Bruington and others for damages. Pedernal did not file a certificate of merit affidavit with

its Original Petition. Section 150.002 of the Civil Practice and Remedies Code requires that such an affidavit be filed "with the complaint" and directs the court that "[t]he plaintiff's failure to file the affidavit in accordance with this section shall result in dismissal of the complaint against the defendant. This dismissal may be with prejudice."

Relying on this statute, Bruington moved for dismissal with prejudice of Pedernal Energy's claims against it. Before the trial court heard Bruington's motion, Pedernal Energy non-suited Bruington wihtout prejudice. Several months later, Pedernal amended its petition and reasserted the same claims against Bruington, this time attaching a certificate of merit affidavit. Bruington again moved for dismissal with prejudice claiming that Pedernal Energy failed to comply with the statute by not filing the affidavit with its Original Petition and arguing that the affidavit was insufficient to the extent it did not address each of Pedernal Energy's theories of liability. The trial court denied Bruington's motion. Bruington filed an interlocutory appeal, as provided by the statute.

Court of Appeals

The court of appeals construed section 150.002(e) to require a plaintiff to file an affidavit with the first-filed complaint. It therefore dismissed Pedernal Energy's claims against Bruington and remanded the matter to the trial court for it to determine whether the dismissal should be with or without prejudice.

On remand, the trial court held a hearing, and after the presentation of evidence, dismissed Pedernal Energy's claims against Bruington without prejudice. Bruington again appealed, arguing that the trial court abused its discretion by not dismissing with prejudice. The court of appeals agreed, noting that dismissal without prejudice would allow a plaintiff to avoid an unfavorable result by non-suiting and re-filing with a certificate of merit. The court reversed the trial court's ruling and dismissed Pedernal Energy's claim with prejudice.

Texas Supreme Court's Holding

On appeal to the Supreme Court, Pedernal Energy did not dispute that dismissal was required by the statute; rather, it argued that the statute does not require dismissal with prejudice as that decision is within the discretion of the trial court, which here did not abuse its discretion.

In reviewing the language of the statute, the Court noted that use of the word "may" indicates that the legislature intended to provide the trial court with discretion to determine whether a dismissal should be with or without prejudice. But, it observed, that discretion does not allow a trial court to make decisions in an arbitrary or unreasonable manner, without reference to guiding rules or principles. The Court declined to adopt a "good cause" standard for not complying with the statute, and instead set about determining whether the trial court abused its discretion based on the legislature's intent that this provision constitute a sanction to deter meritless claims and bring them quickly to an end.

Recognizing its prior statement that "failure to file a certificate of merit with the original petition cannot be cured by amendment," the court noted that the question here was different. The specific issue under consideration was whether the certificate of merit statute precluded the trial court's dismissal of Pedernal Energy's claims without prejudice. To that question the

Court's answer was "no." Since the trial court was given discretion to make this determination, and since it did so without violating any guiding rules or principles or making arbitrary and unreasonable decisions, the court of appeals erred in reversing its decision and dismissing the case with prejudice.

Accordingly, the Court reversed the court of appeals and reinstated the trial court's judgment dismissing the case without prejudice. Justice Devine concurred in the Court's analysis, but would have remanded the case for the trial court's consideration of a lessor sanction, given the significant passage of time and the probable limitations issues awaiting Pedernal Energy on remand.

El Paso Healthcare Sys. Ltd. v. Murphy,

518 S.W.3d 412 (Tex. 2017)

Synopsis

Nurse filed a retaliatory-discharge and tortious interference with contract claim. She complained that a doctor violated the state's informed-consent law when he got a patient's approval to perform a Cesarean section without explaining all considerations. Held that nurse failed to establish illegal retaliation because while her complaint was made in good faith, there was no evidence to demonstrate her subjective belief was reasonable. Regarding tortious interference, there was no evidence that her contract was breached, therefore no cause of action that the defendant interfered with her contract.

Factual Background and Lower Court Proceedings

Laura Murphy, a certified registered nurse anesthetist, worked as an independent practitioner under contract with West Texas OB Anesthesia in El Paso. West Texas OB had a contract to provide medical staff to El Paso Healthcare's Las Palmas Medical Center. Murphy was not an employee of El Paso Healthcare or Las Palmas. Under these contractual arrangements, Las Palmas would request staffing for particular assignments, and West Texas OB would offer those shifts to Murphy and its other contractors. Neither Las Palmas nor West Texas OB were required to offer Murphy any assignments, and she was not required to accept any assignments that were offered.

While working an overnight shift at Las Palmas, Murphy interacted with a first-time expectant mother with gestational diabetes. This patient was under the care of Dr. Frederick Harlass, a high-risk-delivery specialist. When Murphy arrived that night, the patient's cervix had not sufficiently dilated to allow for a vaginal birth, and her progress appeared to be stalled. Dr. Harlass advised the patient and nurses that he would deliver the baby by Cesarean section if the patient did not dilate further within a particular amount of time. The patient told Murphy that she was worried about having a C-section. Murphy told the patient that she had the right to "ask the doctor what he wants to do and why he wants to do it." She said: "You remember you have the right to do that. You have the right to say who does what to your body."

Dr. Harlass ordered the C-section. The patient asked to speak with Dr. Harlass before she signed the consent form for the procedure. Dr. Harlass and another nurse went into the patient's room to talk to her. Murphy remained outside. When Dr. Harlass came back out, he approached Murphy. He was very angry and believed that Murphy had discouraged the patient from consenting to the C-section. After speaking with Dr.

Harlass, the patient consented to the C-section. Dr. Harlass successfully delivered the baby without complications.

The following morning, Murphy visited with the Las Palmas ethics coordinator and complained about Dr. Harlass's behavior around patients, his tendency to order premature inductions and C-sections, and her belief that he failed to obtain the nineteen-year-old patient's informed consent. She also expressed apprehension about making the complaint, stating that she feared doing so "may become the cause for [her] dismissal." Sometime that same morning, Dr. Harlass called West Texas OB and complained that Murphy had interfered with his treatment and management of the patient. West Texas OB informed Murphy about Dr. Harlass's complaints and indicated that she should not return to work at Las Palmas until further notice. She was not called for any further assignments.

Murphy was then called to attend a meeting with the Las Palmas credentialing committee. She requested that her attorney attend the meeting. When her request was denied, Murphy refused to attend the meeting and filed suit against El Paso Healthcare.

At trial, the court submitted jury questions on Murphy's claims against El Paso Healthcare for statutory retaliation and tortious interference with "the continuation of the business relationship between" Murphy and West Texas OB. The jury found El Paso Healthcare liable on both causes of action and found that Murphy sustained damages of $31,000 in lost wages and $600,000 for past and future emotional pain, mental anguish, loss of enjoyment of life, and damage to her reputation. The trial court entered judgment on the jury's verdict, and the court of appeals affirmed.

Texas Supreme Court's Holding

A major point on appeal was whether a plaintiff in a statutory retaliation claim is required to prove that the reported conduct in fact violated the law. On this issue, the Supreme Court concluded that a plaintiff is not required to prove that an actual violation occurred, but only must prove that the plaintiff reported a violation of law in good faith.

The good faith inquiry is two-pronged. "Good faith" means that (1) the employee believed that the conduct reported was a violation of law and (2) the employee's belief was reasonable in light of the employee's training and experience.

As for the first prong, Murphy testified that she subjectively believed that Dr. Harlass did not obtain the patient's informed consent as the law requires. Her belief was based on Dr. Harlass's statements and demeanor after he left the patient's room.

As for the second prong, the Court concluded that there was no evidence in the record to demonstrate that Murphy's subjective belief was objectively reasonable in light of her training and experience. Murphy admitted that she was not in the room during the "four or five minutes" when Dr. Harlass spoke to the patient, and conceded that she did not know what Dr. Harlass said to the patient or whether he had properly disclosed the risks to the patient during that time. Murphy also admitted that she could only assume that Dr. Harlass had scared the patient and could only guess at what he told her. In short, the Court concluded that Murphy's conclusion was merely conjecture and surmise and lacking any evidence to support her subjective conclusion. The record therefore did not support a finding that Murphy's belief

was objectively reasonable. Her retaliation claim failed as a matter of law.

Regarding her tortious interference claim, Murphy argued that El Paso Healthcare interfered with her business relationship with West Texas OB by requesting that Murphy not be scheduled at Las Palmas while it conducted its investigation into Murphy's complaints.

El Paso Healthcare argues that it cannot be liable for tortious interference on two grounds. First, because the conduct by which it interfered with Murphy's contract with West Texas OB was legally justified. Second, because Murphy did not prove that El Paso Healthcare engaged in any independently tortious or unlawful conduct.

The Court first looked at the defense of legal justification, which is a defense to tortious interference when "one is privileged to interfere with another's contract" either by "a bona fide exercise of his own rights" or "if he has an equal or superior right in the subject matter to that of the other party."

The trial court asked the jury whether El Paso Healthcare "interfere[d] because it had a good faith belief that it had a right to do so," and the jury answered "no." El Paso Healthcare did not challenged that finding on appeal. The Supreme Court therefore concluded that it could not rely on its justification defense to defeat Murphy's tortious interference claim.

The Court then looked at whether the tortious interference claim was to an existing contract or a prospective business relationship. The latter requires a finding that the defendant engaged in independently tortious or unlawful conduct, while interference with an existing contract does not.

El Paso Healthcare contended that Murphy's claim for tortious interference could only relate to a prospective business relationship. It points to evidence that Murphy's contract with West Texas OB was "oral, non-binding," and neither required West Texas OB to assign Murphy any shifts at Las Palmas nor obligated her to work any shifts assigned.

Murphy admitted that West Texas OB had no contractual obligation to assign her shifts and that she had no contractual obligation to accept any such assignments, and that either party could terminate their relationship at will. Nevertheless, she argued that their agreement could support a claim for tortious interference with an existing contract. According to Murphy, the jury charge asked only whether El Paso Healthcare interfered with an *existing* contract, and the jury found that it did. Murphy contended that El Paso Healthcare waived its argument that she had to prove independently tortious or unlawful conduct because it failed to object to the tortious-interference question as submitted or to the omission of any question about independently tortious or unlawful conduct.

The Court concluded that it did not need to resolve these issues. It found that even assuming that (1) the jury found interference with an existing contract and that (2) Murphy's agreement with West Texas OB could support a claim for interference with an existing contract and that (3) El Paso Healthcare waived any argument that Murphy could only recover for interference with prospective business relations, that there was no evidence to support the jury's finding that El Paso Healthcare interfered with Murphy's existing contract.

To prevail on a claim for tortious interference with an existing contract, Murphy had to

present evidence that El Paso Healthcare induced West Texas OB to "breach the contract," Murphy had alleged that El Paso Healthcare interfered with her existing contract by causing West Texas OB to remove Murphy from the schedule at Las Palmas and stop assigning her to shifts there. But the Court noted that Murphy admitted that her existing contract with West Texas OB had no obligation to provide employment. Although West Texas OB had agreed to pay Murphy at a particular rate on a monthly basis for the hours she worked, it had not agreed to schedule Murphy at Las Palmas, or any other hospital. As there was no evidence to support the jury finding that El Paso Healthcare interfered with Murphy's legal rights under her existing agreement with West Texas OB, Murphy's tortious-interference claim failed as well.

The Supreme Court reversed the trial court's judgment and rendered judgment that Murphy take nothing on her claims.

Bartush-Schnitzius Foods Co. v. Cimco Refrigeration, Inc.,

518 S.W.3d 432 (Tex. 2017)

Synopsis

This is a contract dispute involving competing breach of contract claims between Bartush-Schnitzuis Foods Co., a food product manufacturer, and Cimco Refrigeration, Inc., a refrigeration company. The Texas Supreme Court reversed the judgment of the court of appeals and remanded the matter to that court to consider unaddressed issues.

Factual Background and Trial Court Proceedings

Bartush planned to expand its line of food products to include seafood dips. In order to manufacture the dips, Bartush's production facilities needed to maintain a constant temperature no higher than thirty-eight degrees—which was lower than the existing refrigeration system could sustain. Bartush contracted with Cimco to install a new system. Cimco provided Bartush with three quoted options—none of which made a reference to particular temperature ranges. Bartush selected the most expensive and began making agreed-upon installment payments to Cimco.

After installation, Bartush began to operate the new system at a temperature of thirty-five degrees. This subsequently resulted in ice forming on the motor fans because the system was not designed to operate at such a low temperature. The ice caused the motors to overheat and fail which caused the temperatures to climb into the 50s and 60s. Bartush communicated with Cimco about the problem but no workable agreement was reached to resolve the matter. Thereafter, Bartush withheld further payment and hired an independent refrigeration engineer. The engineer recommended a warm-glycol defrost unit—which was installed and the system was able to maintain the target temperature of thirty-five degrees.

Cimco sued Bartush for non-payment of the balance owed on the contract. Bartush filed a counterclaim for breach of contract seeking damages for the costs associated with installing the warm-glycol defrost unit. Bartush claimed that its failure to pay was justified by Cimco's prior material breach.

The jury found that both Bartush and Cimco failed to comply with the contract. The jury further found that Cimco failed to comply with the contract first but that Bartush's failure to comply was not excused. The jury awarded Bartush $168,079 for the cost of installing the warm-glycol defrost unit plus

attorney's fees. The jury also awarded Cimco $113,400, which represented the balance due on the contract. The jury did not answer the question on Cimco's attorneys' fees because that question was conditioned on a finding that Bartush breached first.

Despite the jury's findings, the trial court stated in its final judgment that "it appears to the Court that the verdict of the jury was for Bartush and against Cimco." The trial court then rendered judgment in Bartush's favor for $168,079 in damages, costs, attorneys' fees, and pre and post judgment interest. The judgment did not award anything to Cimco and Cimco appealed.

Court of Appeals

The court of appeals reversed and remanded to the trial court for entry of the judgment that Bartush take nothing and that Cimco recover $113,400 in damages, plus interest and costs. The court of appeals held that because the jury found that Bartush's failure to comply was not excused, then there was an implied finding that Cimco's prior breach was nonmaterial. The court of appeals further held that Bartush's failure to pay the balance due under the agreement was a material breach as a matter of law, which rendered the jury finding that Cimco breached first irrelevant. The court of appeals also held that Cimco waived its challenge to the jury's failure to award attorneys' fees.

Both Bartush and Cimco filed petitions for review. Bartush contended that the trial court's judgment should be reinstated because Cimco's first breach was material as a matter of law and therefore excused Bartush's subsequent failure to comply with the contract. Cimco argued that the court of appeals correctly concluded its nonmaterial breach was excused by Bartush's material breach. Cimco also challenged the court of appeals's holding that Cimco waived error regarding the jury's failure to award attorneys' fees.

Texas Supreme Court's Holding

The Texas Supreme Court held that while a party's nonmaterial breach does not excuse further performance by the other party, neither does the second breach excuse the first. To the contrary, a material breach does not discharge a claim for damages that has already arisen. The Court noted that the court of appeals turned that doctrine on its head and held that Bartush's nonpayment retroactively excused Cimco's prior breach. The Court held that, in sum, the jury's findings that Cimco failed to comply with the agreement first and that its failure to comply was not material mean that 1) Bartush remained liable for its subsequent failure to comply, but 2) Bartush's claim for damages caused by Cimco's prior breach remained viable.

Accordingly, the Texas Supreme Court held that the court of appeals erred in holding that Bartush's breach barred its recovery of damages and reversed the court of appeals's judgment. Because the lower appellate court did not consider Cimco's second alternative argument that the trial court's judgment should be reversed on the grounds that no evidence supported the jury's findings that Cimco failed to comply with the parties' agreement, the Texas Supreme Court remanded the case to the court of appeals to do so. With respect to the issue of attorneys' fees raised in Cimco's cross-petition, because the Texas Supreme Court did not consider whether any evidence supported Cimco's breach, the Court left this issue to the court of appeals to address on remand.

Texas Supreme Court Oral Arguments

Pinto Tech. Ventures, L.P. v. Sheldon

Oral argument occurred February 28, 2017
Case No. 16-0007
Fourteenth Court of Appeals,
477 S.W.3d 411

Issues Considered

1. Did minority shareholders' claims fall within the scope of the forum-selection clause in the shareholders' agreement?

2. Can a forum-selection clause in an amended shareholders' agreement be enforced against a minority shareholder who did not sign the amended version?

3. Can defendant officers who did not sign the shareholders' agreement enforce the forum-selection clause

In re Nat'l Lloyds Ins. Co.

Oral argument occurred February 7, 2017
Case No. 15-0591
Thirteenth Court of Appeals,
__ S.W.3d. __

Issue Considered

Whether an insurance company's attorneys' fees and the basis for them are discoverable when the insurer is contesting fees the insureds seek for underpayment of their damage claims. In this case the plaintiffs sought discovery of the insurer's attorneys' fees after, in a related case, National Lloyds's counsel testified that his fee structure could be a factor in assessing reasonableness of an opposing party's fees. Plaintiffs then sought discovery of National Lloyds's counsel fees, arguing their bearing on the reasonableness of their fee request. The trial court adopted a special master's recommendation that the fees should be disclosed. The court of appeals denied the insurance company its requested mandamus relief.

First Bank v. Brumitt

Oral argument occurred February 8, 2017
Case No. 15-0844
Fourteenth Court of Appeals,
472 S.W.3d 1

Issue Considered

Whether extrinsic evidence—evidence of factors beyond an unambiguous contract—may be considered to show a third party was a contract beneficiary. In this case Brumitt intervened in a lawsuit against First Bank by companies suing for breach of contract and misrepresentation over a loan the bank promised but never made that would have financed the purchase of Brumitt's company. A bank officer assured Brumitt the loan would be approved after he expressed concern to his would-be purchaser about the loan's closing, but the loan-commitment letter never mentioned Brumitt or the company he was selling. A jury awarded him damages as a third-party beneficiary. The court of appeals affirmed.

Longview Energy Co. v. Huff Energy Fund LP

Oral argument occurred February 9, 2017
Case No. 15-0968
Fourth Court of Appeals,
482 S.W.3d 184

Issues Considered

1. Did Longview plead its claim that the directors competed with it without Longview's informed consent?

2. Did the appeals court err in applying Delaware corporate-opportunity law by recognizing a director's loyalty may be breached by competing against his company without authorization?

3. Was there sufficient evidence supporting Longview's contention it had an interest or expectancy in the Eagle Ford shale property it was considering for investment?

Horizon Health Corp. v. Acadia Healthcare Co., Inc.

Oral argument occurred March 1, 2017
Case No. 15-0819
Second Court of Appeals,
472 S.W.3d 74

Issues Considered

1. Are non-compete agreements with the corporate officers' previous employer invalid for lack of geographic limits?

2. Is there sufficient evidence to support damages for lost profits?

3. Did the appeals court's exemplary-damages modification suggested against the former Horizon managers violate their due-process rights?

Cmty. Health Sys. Prof'l Servs. Corp. v. Hansen

Oral argument occurred March 2, 2017
Case No. 14-1033
Thirteenth Court of Appeals,
__ S.W.3d __

Issues Considered

1. Should a cardiovascular surgeon's firing under a contract provision allowing termination without cause after a set employment period require the employer to prove it fired the surgeon on without-cause grounds to disprove a breach of contract claim?

2. Was the employment contract's stipulation for "annual practice losses" ambiguous and, if not, did the hospital employer establish the condition to terminate without cause?

3. Is a tortious interference-with-contract claim precluded if the contract was not breached?

4. Should the Second Torts Restatement's truthful-information defense (section 772) be adopted in this case and, if so, would it cover a consultant's performance assessment to preclude the tortious-interference claim?

Melden & Hunt, Inc. v. E. Rio Hondo Water Supply Corp.

Oral argument occurred March 22, 2017
Case No. 16-0078
Thirteenth Court of Appeals,
511 S.W.3d 743

Issues Considered

The principal issues in this merit-certificate challenge call for defining the expert's knowledge requirement, the expert's active engagement in the field in which the expert bases his opinion, and the factual basis for the opinion. Two other principal issues are (1) whether the negligent-design lawsuit in this case must be dismissed if the certificate is not sufficient and, if so, (2) whether that dismissal must be with prejudice.

Fifth Circuit Court of Appeals

Spear Marketing, Inc. v. BancorpSouth Bank,

844 F.3d 464 (5th Cir. 2016)

Synopsis

As, at the time of awarding attorneys' fees, no court had declared the Texas Theft Liability Act ("TTLA") claims in the plaintiff's live complaint had been preempted by the Copyright Act and as the TTLA allegations had been dismissed on their merits, the TTLA provided the statutory authority to award attorneys' fees.

Factual Background and Trial Court Ruling/Verdict

This is the matter's second trip to the Fifth Circuit. In the first visit, the Fifth Circuit upheld the district court's granting of a summary judgment against the Plaintiff, Spear Marketing, Inc. ("SMI"), and in favor of the Defendant, BancorpSouth ("BCS"), on the Plaintiff's misappropriation of trade secrets and TTLA claims. The district court, having dismissed the state law claims on the merits of those claims never reached the preemption argument. However, in its first opinion, the Fifth Circuit found that removal was proper as all of the SMI's claims as plead in its original petition were, in fact, preempted by the Copyright Act. Further, the Fifth Circuit upheld the dismissal on the merits of all the claims in SMI's first amended complaint, including the misappropriation and TTLA claims.

On remand, the district court awarded BCS nearly $1 million in attorneys' fees. On appeal, SMI complained that the federal Copyright Act preempts the TTLA (which provides that the prevailing party shall be awarded its attorneys' fees) and, alternatively, the district court erred in awarding the defendant attorneys' fees under the Copyright Act (which provided that the court, in its discretion, can award attorneys' fees and may also award fees to the prevailing party). The district court granted BCS's motion for attorneys' fees under the TTLA or, alternatively, under the Copyright Act, explaining that its award would not vary between the two statutes.

Court of Appeals Ruling

The Fifth Circuit began by recognizing that a district court may not award attorneys' fees "unless a statute or contract provides" the basis for such an award, which raises the question of whether the preempted TTLA could provide a statutory basis for attorneys' fees. The Fifth Circuit initially sidestepped this hurdle by stating that it had NOT ruled that SMI's TTLA claims in the first amended complaint were preempted, only those TTLA claims in the original petition were preempted. (Note: Likewise, the district court never found that SMI's TTLA claims in the first amended complaint were preempted.) So, BCS had prevailed on SMI's live TTLA claims. The Fifth Circuit

> Conclude[d] that, at the time of the motion for attorneys' fees, no court had ever held that the TTLA claim in the [First Amended Complaint] was preempted. Rather, the district court adjudicated the TTLA claim in the [First Amended Complaint] on the merits, dismissing it with prejudice. The TTLA therefore supplied the rule of decision in this case, and, accordingly, the district court did not err by awarding attorneys' fees under the TTLA

Having found the award proper under the TTLA, the Fifth Circuit did not address the alternative grounds for the award.

Practice Pointers

This result seems inequitable. Estoppel was raised on appeal, but found to have been waived as it was first raised in the reply brief. Perhaps, in addition to estoppel, SMI could have raised on appeal that the TTLA claims in the first amended complaint were likewise preempted, but the district court clearly presumed that they were. However, the result may not have changed given the alternative grounds for the award.

Hoffman v. L&M Arts,

838 F.3d 568 (5th Cir. 2016)

Synopsis

According to the Fifth Circuit, the contractual term "all aspects of the transaction" does not necessarily encompass the fact of the transaction itself. In a fraudulent inducement claim, a statement about the future is essentially an expression of opinion and is generally not actionable unless it is completely intertwined with direct representations of present facts.

Factual Background and Trial Court Ruling/Verdict

This case arose out of the sale and public re-sale of a Mark Rothko painting. Marguerite Hoffman purchased Mark Rothko's *Untitled* 1961 ("the Red Rothko") in 1998. In February 2007, an agreement was reached through intermediaries, including L&M Arts, for Hoffman to sell the painting privately to David Martinez. The sale price was $17.6 million. The agreement contained a specific confidentiality provision, which provided that the sale and terms of the sale will remain confidential, and that confidentiality be maintained indefinitely. In March 2007, Hoffman learned the Red Rothko was for sale because Martinez, in the midst of negotiations, had consulted with the chairman of Christie's International for his advice on an appropriate price. Hoffman immediately canceled the sale.

In April 2007, a new agreement for the sale of the Red Rothko was reached between the parties. The new agreement reflected the same sale price as the February agreement, however, it also contained some additional obligations by the buyer and further modified the original confidentiality language to the extent that: "All parties agree to make maximum efforts to keep all aspects of this transaction confidential indefinitely." After attempting to privately re-sell the Red Rothko, Martinez decided to sell it at public auction at Sotheby's. On May 12, 2010, Sotheby's auctioned the Red Rothko for approximately $31 million.

Hoffman sued Martinez and L&M Arts for breach of contract. She argued that she was fraudulently induced into selling the painting with assurances of secrecy and that the eventual public re-sale of the painting constituted a breach of a confidentiality provision in her agreement. In denying defendants' motion to dismiss, the district court held that the confidentiality provision was enforceable as a best-efforts clause, and that the fact of the sale was among the "aspects of the transaction" that the parties were obligated to make best efforts to keep confidential. The court subsequently granted L&M Arts' motion for summary judgment as to Hoffman's fraudulent inducement claim. A jury trial took place on Hoffman's remaining breach-of-contract claims against each defendant. The jury found defendants liable and awarded damages. Hoffman moved for attorneys' fees from L&M Arts

under Texas Civil Practice & Remedies Code § 38.001(8), and the district court denied the motion based on an *Erie* guess that the Supreme Court of Texas would not consider limited liability company like L&M Arts to be "an individual or corporation" under § 38.001(8).

Court of Appeals Ruling

On an ancillary note, although the Fifth Circuit declined to consider the district court's interpretation of § 38.001 because the panel held that there was no compensable breach of contract, it noted in a footnote that *Choice! Power, L.P. v. Feeley*, 501 S.W.3d 199, 214 (Tex. App.—Houston [1st Dist.] 2016, no pet.), an intervening Texas Court of Appeals decision, supported the court's *Erie* guess that an LLC is not "an individual or corporation" under section 38.001(8).

On appeal, L&M Arts challenged the court's denial of its Rule 50(b) motion for judgment as a matter of law as to the breach-of-contract claim arguing there was insufficient evidence of breach and causation to support the jury verdict. The court of appeals agreed and held that L&M Arts was entitled to judgment as a matter of law because the confidentiality clause did not require secrecy as to the fact of the 2007 sale. The court made this determination based upon: (1) the agreement itself which only requires maximum effort to keep secret all *aspects of the transaction*—not the fact of the sale itself (noting "aspects" generally describe features of the object rather than the object itself); (2) the first version of the contract expressly required "that the sale and the terms of the sale remain confidential," however, the second contract did not mention "the sale" evidencing it was an intentional omission; and (3) other terms of the agreement showing the parties did not intend to forbid the buyer from displaying the painting once a fixed time period had passed—suggesting a public (or even private) display would likely fall short of "maximum effort" to keep changed ownership confidential.

With respect to the appeal of the dismissed fraudulent inducement claim, the court of appeals affirmed the district court's grant of summary judgment for L&M Arts on Hoffman's fraudulent inducement claim noting that Hoffman failed to show that a genuine dispute of material fact existed. Hoffman's main alleged misrepresentation involved the allegation that the Red Rothko would "disappear" into the undisclosed buyer's "very private" "European collection." On this issue, the court held the "disappear" statement was not an actionable representation, noting that a representation of fact can constitute actionable fraudulent inducement only if it "(1) admits of being adjudged true or false in a way that (2) admits of empirical verification." The court noted that because a statement about the future is essentially an expression of opinion, future predictions are generally not actionable. It held the "disappear" statement is a non-actionable prediction of future events which depended on the actions of a third party, the buyer, which Hoffman should have known was not within L&M Arts' predictive powers.

The court further noted that only in rare cases can a prediction of future events be "so intertwined with" "direct representations of present facts" as to be actionable noting that this is not a case in which one party's special knowledge warrants treating an opinion as actionable. The court explained that though the "disappear" statement incorporated falsifiable facts—that the buyer was an "individual" with a "European collection"—these facts were not so intertwined with L&M Arts' prediction as to make the entire statement actionable.

Practice Pointer

If you want the fact of the transaction itself protected from disclosure, make sure you expressly provide for it in your confidentiality agreement.

State Courts of Appeals

ADT Security Servs., Inc. v. Van Peterson Fine Jewelers,

No. 05-15-01224, 2016 Tex. App. LEXIS 11178 (Tex. App.—Dallas Oct. 13, 2016,no pet.)

Synopsis

Van Peterson Fine Jewelers filed suit against ADT Security Services, Inc. because ADT failed to provide a UL-compliant alarm system it contractually promised. Van Peterson alleged that ADT violated the Deceptive Trade Practices Act ("DTPA") by making false representations and breaching its warranty. However, the parties had a contract regarding the UL-complaint alarm system. The Dallas Court of Appeals held that this was solely a contract action and not a tort action. Therefore, Van Peterson did not have a cause of action under the DTPA.

Overview

Van Peterson operated a retail jewelry store in Irving, Texas. In 1999, Van Peterson and ADT entered into a contract under which ADT agreed to provide commercial alarm services to Van Peterson. On the night of September 12, 2007, the alarm failed and the burglars stole at least $1,000,000 worth of jewelry. Van Peterson alleged that the alarm did not work properly because it failed to meet the standards for the contractually-required Underwriters Laboratory ("UL") certificate. Specifically, the contract between Van Peterson and ADT required ADT to obtain and periodically renew a certificate from UL to ensure that the alarm system met UL's standards.

Van Peterson alleged that a few months before the burglary, an ADT employee worked on the alarm system. Van Peterson contends that the ADT employee represented that he would replace the two-way radio, an integral part of the alarm system, with a "cellular back-up" that would be an improvement over the radio back-up. The employee began work and possibly disconnected the radio back-up and never returned to complete the installation of the cellular back-up. According to Kurt Peterson, Van Peterson's owner, the ADT employee also represented that the cellular back-up met the standards for the contractually-required UL certificate, which was false. ADT denied everything Van Peterson alleged. ADT denied that any of its employees performed work on the alarm a few months prior to the burglary and that a two-way radio back-up was replaced with a non-complying cellular back-up. ADT also denied any representations other than those set forth in the contract.

Van Peterson sued ADT for negligence, gross negligence, breach of contract, negligent misrepresentation, civil conspiracy, fraud, and violations of the DTPA. The only issue before this court was the DTPA claims, as all other issues had been decided on a previous interlocutory appeal. The only claim that proceeded to a jury trial was Van Peterson's DTPA claim. The jury found both a "false, misleading, or deceptive act or practice" and a failure to comply with a warranty that the alarm system functioned in compliance with all applicable UL standards. The trial court entered judgment against ADT.

The appellate court looked into whether Van Peterson's claim was exclusively a contract claim or was both a contract and tort claim. If just a contract claim, then the DTPA would not be a viable cause of action. To determine whether an allegation is a contract claim or also a tort claim, courts analyze both the source of the duty and the nature of the loss. If a defendant's conduct would give rise to liability independent of the fact that a contract exists between the parties, the plaintiff's claim may be a contract claim as well as a tort claim. If the defendant's conduct would give rise to liability only because it breaches the contract, the plaintiff's claim generally is only a contract claim. In other words, nonperformance of a contract is not actionable under the DTPA. The court noted that "[a]n allegation of a mere breach of contract, without more, does not constitute a 'false, misleading or deceptive act' in violation of the DTPA."

In this case, Van Peterson had two theories that ADT violated the DTPA. One theory was that ADT misrepresented that the alarm system was in compliance with the UL standards and that this representation was a "false, misleading or deceptive act or practice." However, the contract between the parties called for ADT to provide an alarm that was UL certified. Since this UL compliance was part of the contract terms, the court concluded that there was no evidence that ADT made a misrepresentation actionable under the DTPA. The second theory was that ADT breached its warranty, both expressed and implied, to Van Peterson. The court concluded that the limitation of liability provision in the contract between the two parties was enforceable because the express warranty became part of the basis of the bargain between the parties. Thus, only a contract claim. The implied warranty claim was also struck down because Texas law does not recognize an implied warranty to "install and/or maintain" an alarm system in a good and workmanlike manner as such.

As a result, the Dallas Court of Appeals reversed and rendered judgment that Van Person take nothing. It also ordered that ADT recover its costs of this appeal from Van Peterson.

Bruce v. Cauthen,

515 S.W.3d 495 (Tex. App.—Houston [14th Dist.] 2017, pet. denied)

Synopsis

Attorneys' fees are not recoverable in a breach of fiduciary duty case even when the plaintiff also obtains a breach of contract finding and the breach of fiduciary duty subsumes a breach of contract and vice versa. Modifications to a partnership agreement allowing a majority owner/limited partner to buy a minority owner's/limited partner's shares at private sale must be express, not implied.

Factual Background and Trial Court Ruling/Verdict

Bruce and Cauthen were business partners. They were the only two shareholders in a medical staffing company, Alliance, and the only two limited partners in a limited partnership, Kingwood Place, dealing in real estate that owned one tract of land upon which there was a mortgage. Cauthen left Alliance and started a competing staffing company, but she remained a partner in the real estate company. She requested Bruce (1) dissolve the partnership and sell the tract of land or (2) buy her out. Bruce refused. Cauthen stopped paying her share of the mortgage. The partnership declared her in default and sold her shares in a foreclosure sale at which Bruce was the only bidder and he "paid" her outstanding share of the

mortgage payments. Cauthen sued for breach of contract and breach of fiduciary duty.

Bruce ultimately admitted that Cauthen was not in default. Indeed, he admitted that he created a false debt to foreclose on Cauthen's partnership interest and take it for himself based on the value of the nonexistent debt, thereby obtaining Cauthen's interest in the partnership while paying her nothing for it through a "private foreclose sale" in violation of the Uniform Commercial Code ("UCC"). After a series of favorable rulings on summary judgment, directed verdict, and eventually jury findings at trial, Cauthen recovered actual damages on both claims, attorneys' fees on the breach of contract claim, and exemplary damages on the breach of fiduciary duty claim. Cauthen elected to recover on her breach of fiduciary duty and exemplary damages claims. This appeal ensued.

Court of Appeals Ruling

With respect to the wrongful foreclosure claim, the court of appeals found that the partnership agreement could have modified section 9.610(c) of the UCC to allow for a private sale of the minority interest owner's shares to her limited partner and the majority interest owner; however, despite some language in the partnership agreement discussing the possible need for a private sale, such a modification needed to be express, which it was not.

Attorneys' fees incurred by a party to litigation are not recoverable against an adversary in an action in tort. Breach of fiduciary duty is a tort claim for which attorneys' fees generally may not be recovered. Although she recovered on both her breach of contract and her breach of fiduciary duty claims, Cauthen elected to recover under breach of fiduciary duty in order to collect the exemplary damages award. As a result and relying heavily upon *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299 310-314 (Tex. 2006) and *MBM Financial Corp. v. Woodlands Operating Co., L.P.*, 292 S.W.3d 660, 666-67 (Tex. 2009), the court of appeals rejected her argument that when the breach of fiduciary duty "subsumes a breach of contract and vice versa," and when the plaintiff receives jury findings on both theories, Texas courts have permitted recovery of exemplary damages and attorneys' fees in addition to actual damages.

Practice Pointer

Appellate briefing space is limited. Pick your best arguments and fully brief and articulate them with substantial citations to the record and legal authority. You may feel that the trial court made countless errors. Unfortunately, there simply is not room in your brief to fully develop them all. If you really think you have that many strong points of error, seek leave to exceed to word/page limits.

FinServ Cas. Corp. v. Transamerica Life Ins. Co.,

No. 14-14-00838, 2016 Tex. App. LEXIS 11416 (Tex. App.—Houston [14th Dist.] 2016, pet. filed)

Synopsis

An interpleader who seeks a portion of the interpleaded funds is not a disinterested stakeholder and, therefore, may not recover attorneys' fees on its interpleader claim. Contemporaneous time records that, while block billed and heavily redacted, met the bare minimum of the criteria to support an award of attorneys' fees, particularly when the appellant did not point to specific offending entries.

Factual Background and Trial Court Ruling/Verdict

The FinServ plaintiffs claimed that the Transamerica defendants failed to make structured settlement payments. FinServ asserted claims for alleged violations of the Insurance Code chapter 541, the Deceptive Trade Practices Act, the Unfair Claim Settlement Practices Act, and the Prompt Payment of Claims Act. They also asserted claims based on alleged breaches of an insurer's duty of good faith and fair dealing, alleged breaches of contract, anticipatory repudiation, and, in addition, they requested relief under the Declaratory Judgments Act. In turn, Transamerica plead offset, interpleader, and sought attorneys' fees related to the interpleader and declaratory judgment.

The trial court granted various summary judgments disposing of all claims, other than Transamerica's request for attorneys' fees. Following jury findings as to the amount of reasonable and necessary attorneys' fees, the trial court rendered a final judgment dismissing FinServ's claims, granting Transamerica's summary judgment on their right to interpleader and to an offset, and awarding Transamerica reasonable and necessary attorneys' fees for prosecuting the interpleader action, defending against FinServ's declaratory-judgment claims, and prosecuting their declaratory-judgment claims, holding FinServ jointly and severally liable for the awarded attorneys' fees.

Court of Appeals Ruling

Despite failing to explicitly recite that the attorneys' fees awarded under the declaratory judgment action were equitable and just (as mandated by Tex. Civ. Prac. & Rem. Code Ann. § 37.009), the Fourteenth Court of Appeals presumed the trial court followed the statutory requirements. Likewise, the Fourteenth Court of Appeals found no error in the trial court determining that it would award Transamerica's attorneys' fees under the Declaratory Judgment Act before the jury had determined an amount.

While the Fourteenth Court of Appeals affirmed that a disinterested stakeholder who has reasonable doubts as to the party entitled to the funds in its possession and who in good faith interpleads the funds may recover its reasonable attorneys' fees, it found that Transamerica were not disinterested as they applied for and obtained an offset of over two-thirds of the amount interpleaded. Put simply: "Under the unambiguous meaning of the term 'disinterested stakeholder,' a party who asserts a claim to the interpleaded funds is not a disinterested stakeholder."

With respect to FinServ's assertion that Transamerica failed to properly segregate fees, FinServ made four global, bare challenges: (1) Transamerica provided insufficient evidence of which fees were recoverable and which were not, and failed to present evidence of work performed for the fees requested; (2) Transamerica improperly shifted fees from a separate federal court case; (3) Transamerica's billing records are inadequate because they include block billing, heavy redaction, vague entries, clerical work, and duplicative tasks; and (4) Transamerica presented no proof of its paralegals' qualifications. The Fourteenth Court of Appeals rejected each of these challenges beginning with the observation that FinServ failed to point to specific examples of the offending fees and concluded that, even under a liberal construction of FinServ's briefing, they had not adequately briefed this point. The 14th Court of Appeals then noted that Transamerica's counsel had specifically testified (1) that he had removed the federal

court case fees and (2) about his paralegals' qualifications. Further, the Fourteenth Court acknowledged that Transamerica submitted contemporaneous time records that, while block billed and redacted, met the bare minimum of the criteria.

FinServ challenged Transamerica's failure to obtain a jury question on joint and several liability for the attorneys' fees and on percentages each FinServ party owed. Indeed, Transamerica objected to the trial court's proposed charge asking these question. However, the Fourteenth Court of Appeals determined that joint and several liability is a question of law for which no jury question was required. As FinServ briefed this issue only from a procedural point and failed to brief the substantive issue of whether joint and several liability for attorneys' fees was appropriate, they waived this issue.

Practice Pointers

No. 1. Sometimes, special exceptions really work. Ask for the plaintiff to specify the contracts at issue, if they have not done so. Also, this is a good case for upholding the striking of plaintiff's amended pleadings filed after a deadline set in an order granting special exceptions. Alternatively, if the court gives you seven days to re-plead, file your amended pleading within that deadline or request an extension.

No. 2 If you are going to object to the opponent's fees, you must give specific examples of those failings in your brief. You cannot rely on sweeping, global, bald assertions. You have to get into the weeds and cite examples in the record. If word limits are a problem, try making an enumerated list of failings and then denoting those numbers on a set of the offending bills in an appendix. Do not rely on the bills merely being in the record for the court to review and assess on their own.

Loya v. Loya,

507 S.W.3d 871 (Tex. App.—Houston [1st Dist.] 2016, no pet.)

Synopsis

Leticia Loya sued Miguel Loya, among others, in Texas under shareholders agreements containing forum-selection clauses providing that "any dispute arising out of or in connection with" the agreements "shall be submitted exclusively to the jurisdiction of the courts of Rotterdam, Netherlands." Letitia Loya argues that the trial court erred in dismissing her claims, based on the forum-selection clauses, because she was "not a signatory" to the agreements and her claims "do not fall within the scope of the forum-selection clauses."

Analysis

Forum-selection clauses are generally enforceable and presumptively valid. Enforcement of a forum-selection clause is required unless the party opposing enforcement clearly shows that (1) enforcement would be unreasonable and unjust, (2) the clause is invalid for such reasons as fraud or overreaching, (3) enforcement would contravene a strong public policy of the forum where the suit was brought, or (4) the selected forum would be seriously inconvenient for trial. In determining the validity and enforceability of a forum-selection clause, a trial court first determines, by applying ordinary principles of contract interpretation, whether the contract at issue in fact contains a forum-selection clause and whether the claims fall within the scope of the clause. The court bases its determination on the language of the clause and the nature of the claims

purportedly subject to the clause. If the claims fall within the scope, the court must determine whether to enforce the clause.

Texas law has long recognized that nonparties may be bound to a contract under various legal principles. Under direct-benefits estoppel, a non-signatory who is seeking the benefits of a contract or seeking to enforce it is estopped from simultaneously attempting to avoid the contract's burdens. Whether a claim seeks a direct benefit from the contract turns on the substance of the claim, not artful pleading.

Holding

The court of appeals found that Letitia Loya sought direct benefits from the shareholders agreements and was thus bound by the forum selection clauses, and held that the trial court did not err in granting the motions to dismiss under Texas Business and Commerce Code section 27.01 because the court could have reasonably concluded that equity prevented the shareholder from avoiding the forum-selection clauses in the shareholders agreements.

Port of Houston Auth. of Harris Cty. v. Zachary Constr.,

513 S.W.3d 543 (Tex. App.—Houston [14th Dist.] 2016, pet. filed)

Synopsis

Upon granting contractor right to control "means and methods" of construction to insulate itself from liability, owner surrendered its ability to order contractor to revise and resubmit its chosen means.

Factual Background and Trial Court

Zachry Construction contracted with the Port of Houston Authority of Harris County for the construction of a wharf in Galveston Bay at the Bayport Ship Channel. The contract provided that Zachry would be an independent contractor and control the "means and methods" of construction, thus insulating the Port Authority from liability to which it might be exposed were it exercising control over Zachry's work. Zachry's bid on the plan (which was ultimately accepted) called for the wharf to be built "in the dry" using an innovative frozen earthen wall to seal out Galveston Bay water during construction efforts. After work began, the Port Authority rejected a plan modification submitted by Zachry, ultimately forcing Zachry to complete the necessary work "in the wet" to meet the strict project timeline at substantial additional cost. Zachry completed the project and sued the Port Authority for beach of contract due, in part, to the additional cost incurred as a result of the Port Authority's rejection of Zachry's "in the dry" construction plans. At trial, the jury found that the Port Authority breached its contract with Zachry, awarding damages for the increased costs for switching to working "in the wet."

Court of Appeals

On direct appeal, the Fourteenth Court of Appeals reversed and rendered in favor of the Port Authority. Zachry then appealed to the Texas Supreme Court who reversed the ruling of the Fourteenth Court of Appeals and remanded the case for consideration of whether the jury's finding that the Port Authority breached its contract with Zachry was supported by legally sufficient evidence.

On remand, the Port Authority argued that it had no liability for contract damages as a matter of law based upon the jury's misreading of the relevant contract provisions to impose such liability. Engaging in extensive contractual interpretation, the

Fourteenth Court of Appeals ultimately rejected the Port Authority's argument, holding instead that the Port Authority breached its contractual obligations to Zachry since it had no authority to reject the contract modification to continue building "in the dry." Zachry's decision to build "in the dry" fell within Zachry's right to control the "means and methods" of construction, which the Port Authority contractually granted control over to Zachry in exchange for the benefit of limiting liability, particularly with respect to ensuring on-site safety.

Khoury v. Tomlinson,

518 S.W.3d 568 (Tex. App.—Houston [1st Dist.] 2017, no pet.)

Synopsis

Based on an analysis of the Texas Uniform Electronic Transactions Act, the email name or address in the "from" field satisfies the definition of a signature under existing law and overcomes a statute of frauds defense. Attorneys' fees must be segregated between recoverable and unrecoverable claims and between parties against whom recovery is awarded and those receiving a defense verdict, except where the discrete legal tasks advance both recoverable and unrecoverable claims and parties.

Factual Background and Trial Court Ruling/Verdict

Khoury sued Tomlinson alleging securities violations under the Texas Securities Act, common-law fraud, and breach of contract after investing $400,00 in Tomlinson's business, PetroGulf (a trader of Iraqi oil into various places, like pre-civil war Syria and Kurdistan, and for which he claimed he had a Syrian contract). As part of the investment, Khoury also signed a note. Three years later, a dissatisfied Khoury confronted Tomlinson who agreed to personally repay the debt over 4-5 years, which agreement was confirmed in an e-mail exchange ending with Tomlinson replying in an e-mail he acknowledged typing and sending "We're in agreement." Tomlinson did not pay and, in response to Khoury's breach of contract allegations, pleaded the statute of frauds claiming that, while the e-mail constituted a writing, it was not signed. At trial, he also admitted he had declined the Syrian contract before he met with Khoury to solicit his investment. He also admitted that the representations about the Syrian contract "should not have been in" the business plan.

The jury found in favor of Khoury on all three claims awarding Khoury $400,000 plus attorneys' fees. In response to Tomlinson's motion for judgment notwithstanding the verdict, the trial court disregarded the jury's findings of liability on Khoury's securities violations and breach of contract claims, but upheld the findings on common law fraud. Khoury appealed and Tomlinson cross-appealed. The First Court of Appeals issued an opinion, but withdrew it upon granting a request for rehearing and writing a superseding opinion.

Court of Appeals Ruling

On rehearing, the First Court of Appeals recognized that (1) under the statute of frauds (Tex. Bus. & Com. Code § 26.01), a promise is not enforceable unless in writing and signed and (2) e-mail correspondence is governed by the Texas Uniform Electronic Transactions Act ("UETA") (Tex. Bus. & Com. Code §§ 322.001-.021). After analyzing the e-mail and concluding it satisfied all the requirements of UETA, the First Court of Appeals found that the name or email address in a "from" field functions as a signature in an email and thereby satisfying the statute of frauds and creating a contract.

The First Court of Appeals distinguished *Cunningham v. Zurich American Insurance Co.*, 352 S.W.3d 519, 529-30 (Tex. App.—Fort Worth 2011, pet. denied) (holding the automatically generated signature block on an e-mail does not constitute a signature) and sided with *Williamson v. Bank of New York Mellon*, 947 F. Supp. 2d 704, 710-11 (N.D. Tex. 2013) (holding the automatically generated signature block on an e-mail constitutes a signature and authenticates the e-mail). Likewise, to the extent UETA requires an intent to sign, typing and sending the e-mail satisfies that requirement.

Tomlinson also objected that the four or five year term was too indefinite to be enforceable. The agreement set the amount to be paid, the interest rate, and the frequency (monthly). The parties agreed that Tomlinson would elect whether to pay over four years or five. Thus, the four or five year term did not require further negotiations of any type. Accordingly, the 1st Court of Appeals found the agreement sufficiently certain and upheld the jury's findings on breach of contract.

The First Court of Appeals acknowledged that attorneys' fees must be segregated between claims for which they are recoverable and claims for which they are not, except where discrete legal services advance both recoverable and unrecoverable claims. Unfortunately, Khoury's counsel testified that he did not segregate relying on *Stewart Title*, which held that segregation is not necessary where the facts of the causes of action are so intertwined. The First Court of Appeals noted simply: "This is not the law, however." The discrete legal services must be intertwined. As some of the attorneys' fees were for unrecoverable claims and against parties against whom Khoury did not recover, he did not present sufficient information to support his claim that none of the attorneys' fees needed to be segregated. The case was remanded for a new trial on attorneys' fees, which is the proper remedy when a party fails to segregate fees.

Practice Pointer

For heaven's sake, STOP RELYING ON *STEWART TITLE*. *Tony Gullo Motors I, L.P. v. Chapa* is over a decade old.

Viajes Gerpa, S.A. v. Fazeli,

No. 14-15-00608, 2016 Tex. App. LEXIS 13777 (Tex. App.—Houston [14th Dist.] 2016, pet. filed)

Synopsis

Travel agencies purchased tickets for the World Cup Soccer tournament in Germany. After the travel agencies did not receive many of the tickets or refunds, the agencies brought suit. The plaintiffs and defendants entered into a Master Settlement Agreement and Release. When the payments were not made, suit was filed with allegations of corporate veil-piercing, breach of contract, fraudulent transfer of assets, and conspiracy. The jury returned a verdict in favor of plaintiffs. The trial court originally rendered judgment in favor of one plaintiff, awarding damages against one defendant. A motion and supplemental motion to disregard jury findings and enter judgment notwithstanding the verdict and a motion for new trial, motion to reconsider, and motion to modify were filed. The Houston Fourteenth Court of Appeals affirmed.

Factual Background and Trial Court Ruling/Verdict

In 2006, certain Mexican travel agencies purchased tickets for the World Cup Soccer tournament in Germany from various ticket fulfillment websites, including

Onlinetickets.com, operated by The Ticket Company. After the travel agencies did not receive many of the tickets or refunds for them, the agency plaintiffs, including Viajes Gerpa, S.A., brought suit against corporate defendants, including The Ticket Company, and individual defendants, including Seyed (Ali) Reza Fazeli and Dubai Financial, LLC.

In April 2007, the agency plaintiffs, corporate defendants, and individual defendants entered into a Master Settlement Agreement and Release ("MSA"). Under the MSA, the corporate defendants agreed to certain payments. In addition, the corporate defendants agreed to pay to the agency plaintiffs 50% of their net cash flow. Net cash flow payments were to continue until the earlier of (1) full payment of the agreed judgment amount or (2) four years and six months.

Pursuant to the MSA, the individual defendants executed employment agreements that covered the same payment period of the MSA and made the agency plaintiffs third-party beneficiaries. The corporate defendants were to execute agreed judgments in favor of the agency plaintiffs that were to be recorded or otherwise executed upon default of the terms of the MSA. The agency plaintiffs in turn agreed to execute agreed orders dismissing their claims against the individual defendants with prejudice. In May 2007, the parties to the underlying action filed an agreed motion to dismiss with prejudice all claims made or asserted against the individual defendants. Also in May 2007, the trial court entered an agreed final judgment against The Ticket Company and the other corporate defendants in favor of Viajes Gerpa S.A. in the amount of $1,176,500.

Initial upfront payments under the MSA were made. The Ticket Company did not pay any additional amounts to Viajes Gerpa S.A. based on net cash flow under the MSA. In October 2008, and again in August, September, and October 2011, The Ticket Company received notice of default from Viajes Gerpa S.A. In September 2011, Ali received notice of individual default from Viajes Gerpa S.A. Under the MSA, upon the declaration of default, the parties were to submit to nonbinding mediation before taking any action, including steps to record or enforce the agreed judgments. Mediation was to take place within 30 days of the receipt of the notice of default by the defaulting party. If the meditation "failed," then the non-defaulting parties could take action to enforce the MSA, including legal action to enforce the agreed judgments. In October 2011, Ali and The Ticket Company received notice that Viajes Gerpa S.A. demanded that The Ticket Company submit to mediation. No mediation ever took place.

In January 2010, The Ticket Company entered into an Asset Purchase Agreement, a Bill of Sale, and an Assignment and Assumption Agreement with Dubai Financial, LLC. The Ticket Company also assigned, and Dubai Financial assumed, interests and obligations in connection with real property leases in Houston and Las Vegas, and with a license agreement.

Viajes Gerpa S.A. filed an abstract of the 2007 judgment in November 2011. In December 2011, Viajes Gerpa S.A. filed its original petition in this case. In its live petition, Viajes Gerpa S.A. alleged claims for breach of contract against Ali and Christopher Toy, and against The Ticket Company. Viajes Gerpa S.A. alleged that under section 171.255 of the Texas Tax Code, Ali and Toy were liable individually for the 2007 judgment because The Ticket Company forfeited its good standing for nonpayment of franchise taxes. It further alleged that Ali was liable individually for the

debts of The Ticket Company under section 21.223 of the Texas Business Organizations Code. Finally, Viajes Gerpa, S.A. alleged that Ali, The Ticket Company, and Dubai Financial, LLC conspired to commit fraud in the transfer of assets from The Ticket Company to Dubai Financial, LLC. It also alleged that it was entitled to a constructive trust on the assets of Dubai Financial, LLC, or rescission of the sale of assets by The Ticket Company to Dubai Financial, LLC.

At trial, the jury found the following:

1) Ali was responsible for the conduct of The Ticket Company;
2) Ali breached the MSA;
3) The Ticket Company breached the MSA;
4) Due to Ali's breach, Viajes Gerpa, S.A. should be awarded $1,113,500 in damages;
5) The transfer of The Ticket Company's assets to Dubai Financial, LLC was fraudulent as to Viajes Gerpa, S.A.;
6) Dubai Financial, LLC did not purchase the transferred assets from The Ticket Company in good faith;
7) Due to the fraudulent transfer Viajes Gerpa, S.A. should be awarded $700,000 in damages as the value for which The Ticket Company would have sold the assets in an arms-length transaction; and $150,000 in damages as the amount necessary to satisfy Viajes Gerpa, S.A.'s claim;
8) Ali and Dubai Financial, LLC engaged in a conspiracy that damaged Viajes Gerpa, S.A.;
9) There was clear and convincing evidence that the harm to Viajes Gerpa, S.A. resulted from the fraudulent transfer by The Ticket Company;
10) A sum of $350,000 in exemplary damages should be assessed against The Ticket Company and awarded to Viajes Gerpa, S.A.; and
11) Viajes Gerpa, S.A. should be awarded attorneys' fees in the amount of $113,250 for representation in the trial court; $15,000 for representation in the court of appeals; $15,000 for representation at the petition for review stage, $15,000 for representation at the merits briefing stage, and $15,000 for representation through oral argument and completion of proceedings in the Supreme Court of Texas.

Viajes Gerpa, S.A. moved for entry of judgment on the verdict. Ali and Dubai Financial, LLC filed their opposition to judgment on the verdict, as well as a motion and a supplemental motion to disregard jury findings and enter judgment notwithstanding the verdict.

The trial court rendered a judgment on the verdict, ordering that Viajes Gerpa, S.A. recover damages against Ali in the amount of $1,113,500. Ali and Dubai Financial, LLC filed a motion for new trial, motion to reconsider, and motion to modify.

After considering these motions and Ali's and Dubai Financial, LLC's motion and supplemental motion to disregard, the trial court vacated its prior judgment and rendered a judgment that Viajes Gerpa, S.A. take nothing on its claims against Ali, Dubai Financial, LLC, and The Ticket Company.

Court of Appeals Ruling

Ali and Dubai Financial, LLC argued various bases to disregard the jury's finding that Ali personally was responsible for the conduct of The Ticket Company. First, they contended that Viajes Gerpa, S.A. failed to meet the requirements to pierce The Ticket Company's corporate veil on the ground of alter ego. They argued there was no evidence that Ali used The Ticket Company as a means

of perpetuating an actual fraud by making any misrepresentation to Viajes Gerpa, S.A. meeting all the elements of fraud. They argued that there was no proof of fraud relating to the MSA, particularly in connection with its execution. And, they asserted there was no evidence that Ali used The Ticket Company's funds for his direct personal benefit. The court of appeals agreed finding that the evidence failed to demonstrate that any fraudulent conduct by Ali in connection with large cash withdrawals from The Ticket Company's bank account and failure to track ticket inventory allegedly purchased with cash related to the MSA with Viajes Gerpa, S.A.or the 2007 judgment executed pursuant to the MSA.

Plaintiff Viajes Gerpa, S.A. also sought to hold defendant Ali personally liable under Chapter 171 of the Texas Tax Code. It governs franchise taxes for business organizations. Under section 171.251, the comptroller is required to forfeit the corporate privileges of a corporation on which the franchise tax is imposed if the corporation fails to pay the tax. If the corporate privileges of a corporation are forfeited, then each director or officer of the corporation is liable for a debt of the corporation.

In their JNOV motion, Ali and Dubai Financial, LLC argued that because the 2007 judgment was a debt that was created or incurred before The Ticket Company forfeited its corporate charter on July 30, 2010, there was no individual liability of Ali.

The plaintiff Viajes Gerpa S.A. agreed that The Ticket Company forfeited its charter in July 2010, for failure to pay franchise taxes. However, it argued that it was not until after mediation failed in November 2011 that The Ticket Company forfeited its charter. Therefore, an event of default under the MSA did not occur until 2011. Only then was a debt created or incurred.

The court noted that an event of default existed as of October 2008, based on The Ticket Company's alleged breach of the MSA and failure to remedy the breach within ten days. Viajes Gerpa, S.A. had the right at that time to pursue the debt. Once the event of default existed in 2008, the MSA provided that the 2007 judgment could then be recorded or otherwise executed. Just because the Viajes Gerpa, S.A. did not affirmatively exercise its right to enforce the MSA and the 2007 judgment when the event of default took place, did not excuse inaction.

The court concluded, therefore, that The Ticket Company's debt for the remaining portion of the 2007 judgment was created or incurred well before July 2010, when it forfeited its charter. Viajes Gerpa, S.A. could have sued to enforce its rights before The Ticket Company failed to pay its franchise tax and forfeited its charter. Ali, therefore was not individually liable for the debt.

Regarding the breach of contract claim, the court concluded that Viajes Gerpa, S.A. failed to present legally sufficient evidence that it sustained damages of $1,113,500 as a result of any breach of the MSA by Ali. While the MSA may have entitled Viajes Gerpa, S.A. to record or execute the 2007 judgment, if an event of default existed based on any party's breach of the MSA, the 2007 judgment was rendered against corporate defendant The Ticket Company, not against individual defendant Ali. In other words, in the event of default, Viajes Gerpa, S.A. had to seek any remaining "liquidated damages" provided for in the 2007 judgment against The Ticket Company.

Further, the court noted that the MSA expressly stated that the only remedies Viajes Gerpa, S.A. could seek against Ali were limited to breach of the non-compete and non-solicitation provisions of the employment agreement and of the MSA's individual representations and warranties. The MSA does not state that the agreed judgments against The Ticket Company would be the measure of damages for any breach by the individual defendants. Further, the MSA did not say anything that could be construed as eliminating any requisite element of an individual contract breach, including damages resulting from such breach.

Throughout the case, the only contract damages Viajes Gerpa, S.A. had ever sought to recover for Ali's breach was the outstanding amount owed by The Ticket Company on the 2007 judgment. The only damages Viajes Gerpa, S.A.'s corporate representative testified to involved the exact amount The Ticket Company agreed to pay in the 2007 judgment. The only damages Viajes Gerpa, S.A. argued during closing was the remaining amount of the 2007 judgment.

The court ruled the trial court properly disregarded the breach of contract finding against Ali as immaterial. With regard to the breach finding against The Ticket Company, Viajes Gerpa, S.A. had not sought entry of a judgment against The Ticket Company.

The court next rejected the fraudulent-transfer liability finding. It concluded that the lack of a breach of contract damage finding renders the fraudulent-transfer liability issue immaterial and any error harmless.

As for civil conspiracy claim, in the absence of liability for an underlying tort, the court concluded that there can be no independent liability for civil conspiracy.

The jury awarded a total of $173,250 in attorneys' fees. The Court agreed with Ali and Dubai Financial, LLC that no attorneys' fees were appropriate because no contract damages were established.

The court of appeals affirmed the trial court's final judgment that Viajes Gerpa, S.A. take nothing on its claims against Ali, Dubai Financial, LLC and The Ticket Company.

Chico Auto Parts & Serv., Inc. v. Crockett,

512 S.W.3d 560 (Tex. App.—El Paso 2017, pet. denied)

Synopsis

Chico Auto Parts & Service, Inc. appealed from an order granting summary judgment in favor of Craig Crockett and another defendant on its claims for breach of contract, quantum meruit, and fraud, in which Chico sought reimbursement for cleaning services provided to an oil well. However, Crockett did not individually contract with Chico, and Chico tried to hold him personally responsible under the Texas Natural Resources Code as owner of the well and in his capacity as the managing member or president of Black Strata, LLC. The court upheld Crockett's motion for summary judgment based on the fact that there was no privity between Crockett and Chico and no veil-piercing theories were alleged.

Overview

A dispute arose over the payment for cleanup services provided by Chico Auto Parts & Service, Inc. for an oil well known as the Maxey I Well (the "Well"). Black Strata, LLC, who was the operator of the well, was notified by the Texas Railroad Commission in May of 2011 that it received a complaint alleging that produced water was leaking

from the Well into a drilling pit at the Well site. This was confirmed and the Railroad Commission notified Black Strata to remediate the drilling pit by July 25, 2011. There is no dispute that Chico performed the remediation services on the Well. The dispute is over who exactly contracted with Chico for its cleanup services. There were no records of any written agreement or any written correspondence between the parties leading up to Chico's performance of cleanup services. The record contains one invoice sent by Chico to Montcrest Energy Inc., who was one of the part-owners of the oil and gas interests in the Well. At the time, Craig Crockett was the president and CEO of Montcrest, as well as a part-owner in the oil and gas interests in the Well. The record also contains two checks for partial payment written to Chico on Black Strata's bank account, presumably in response to the invoice.

For background purposes, Chico sued Montcrest for breach of Contract and quantum meruit for the fees owed and an agreed judgment was entered by the court. Montcrest filed for bankruptcy before making any payments as required by the agreed judgment. Crockett was president of and CEO of Montcrest, but he resigned after the bankruptcy. This lawsuit was filed by Chico against several defendants including Black Strata and Crockett to recover payments for the fees owed for the services provided on the Well. Black Strata and Crockett filed traditional motions for summary judgment on the following grounds: (1) there was no privity of contract between Chico and Black Strata and/or Crockett; (2) the lawsuit was barred by collateral estoppel and judicial estoppel; and (3) Crockett was immune from liability under the Texas Business Organizations Code. The trial court granted Crockett's motion on all three grounds. This summary only addresses whether Crockett was in privity of contract with Chico.

Chico sued Crockett for breach of contract claiming that he was responsible for the cleanup for the Well under the Texas Natural Resources Code as owner of the Well, as well as in his capacity as the managing member or president of Black Strata, a limited liability corporation. However, to recover for a breach of contract, privity must exist between the party damaged and the party sought to be held liable. The court held that Chico was misguided on its reliance of Section 91.113 of the Natural Resources Code to show privity in that this section gives only the Railroad Commission the authority to take action against a "responsible person" when oil and gas wastes or other substances are polluting surface or subsurface water, allowing it to notify a responsible person of the need to take action to cleanup a well site, and to seek reimbursement for any cleanup efforts conducted by the Railroad Commission if the responsible person refuses to take action. The court held that even if Crockett could be considered a "responsible person" under the Code, whether the Railroad Commission could have theoretically sought reimbursement from Crockett in no way established that Crockett was as a party to a contract with Chico to perform remediation services.

The court also upheld the trial court's ruling that Crockett could not be liable for breach of contract as Black Strata's managing member. There were two relevant statues, sections 101.114 and 101.113 of the Texas Business Organizations Code, that were in effect that severely limited the circumstances under which a member of a limited liability company can be held personally liable for the entity's contractual obligations. Section 101.114 provides that except to the extent the company agreement specifically provides

otherwise, "a member or manager is not liable for a debt, obligation, or liability of a limited liability company" and section 101.113 further limits a member's liability, providing that: "[a] member of a limited liability company may be named as a party in an action by or against the limited liability company only if the action is brought to enforce the member's right against or liability to the company" (the Legislature eliminated the "alter ego" theory as a basis for disregarding the corporate structure when it adopted what is now section 21.223 of the Texas Business Organizations Code). However, these two statues were not a complete shield and an individual member could be sued under any veil-piercing theories. In this case, the court held that Chico failed to assert any alter ego theory in its responses and failed to allege any facts or to produce any evidence to hold Crockett personally liable for any of Black Strata's alleged contractual obligations to Chico.

Wooters v. Unitech Int'l, Inc.,

513 S.W.3d 754 (Tex. App.—Houston [1st Dist.] 2017, pet. filed)

Synopsis

Unitech International, Inc. sued two former employees for theft of trade secrets, conversion of intellectual property, and breach of fiduciary duties. Unitech also sued Tim Wooters, a retired individual who was never employed by Unitech, for conspiracy to breach the fiduciary duties owed by the former employees. A jury found the former employees breached fiduciary duties owed to their employer and that Wooters was part of a conspiracy to breach fiduciary duties. The trial court entered a judgment against Wooters finding him jointly and severally liable with the former employees for Unitech's damages. Wooters appealed. The First Court of Appeals held there was no evidence to support a finding that Wooters was involved in a civil conspiracy to breach any fiduciary duty the employees owed to Unitech, reversed the judgment against Wooters, and rendered judgment that Unitech take nothing from Wooters.

Factual Background and Trial Court Ruling/Verdict

Chris Kutach and Jason Pennington, both of whom were employed by Unitech International, Inc., developed plans to form a new company to compete with Unitech. While still employed by Unitech, Pennington stole product designs that were locked in a safe in the President's office and tendered those designs to a company that Kutach and Pennington intended to partner with after forming their new company.

Kutach worked with Tim Wooters while employed by another company that competes with Unitech; Wooters was retired at the time of the events made the basis of this lawsuit. After Pennington stole the product designs and conveyed them to the partnering company, Kutach approached Wooters to become part of their new company. Unitech learned of the theft and plans to start a competing business and fired Kutach and Pennington. Unitech subsequently filed a lawsuit against Kutach, Pennington, Wooters (and others) seeking injunctive relief and monetary damages. A jury found Kutach and Pennington breached fiduciary duties owed to their employer Unitech, and that Wooters was part of a conspiracy to breach those fiduciary duties. The jury awarded $7,344.049 in actual damages and the trial court entered a judgment holding Kutach, Pennington, and Wooters jointly and severally liable for Unitech's damages. The trial court also entered a permanent injunction barring the use or disclosure of Unitech's intellectual property. Wooters

appealed the portion of the judgment holding him jointly and severally liable for money damages.

Court of Appeals Ruling

In a somewhat lengthy, fact-intensive analysis, the First Court of Appeals noted that Unitech's conspiracy claim against Wooters was based on the underlying wrongful conduct of breach of a fiduciary duty owed by an employee against an employer. After analyzing the evidence and applicable law, the Court held that Wooters did not participate in any activity that constituted a breach of a fiduciary duty owed by an employee to an employer. The court held an employee does not breach a fiduciary duty owed to an employer simply by planning to go into competition with his employer and taking active steps to do so while still employed. The court pointed to the jury finding that Wooters did not conspire with Kutach and Pennington to commit the theft of Unitech's product designs (which is a breach of fiduciary duty). The court held that "the jury's negative finding on Wooters's involvement in the theft necessarily confines the affirmative finding that Wooters participated in the conspiracy to breach [the employees'] fiduciary duties to their conduct in developing the competing company"—which is not wrongful conduct that constituted a breach of an employee's fiduciary duty to an employer. Because Wooters was not involved in any activity that constitutes a breach of a fiduciary duty Kutach and Pennington owed to Unitech, the court reversed the judgment against Wooters and rendered judgment that Unitech take nothing from Wooters.

Practice Pointer

Make sure you object to any jury question whose answer could be used to alter the jury's answer to another jury question because a jury's finding on an issue can be used to "refine" or "interpret" a jury finding on a separate issue (in this case a finding that Wooters was not involved in the theft of Unitech's intellectual property refined or interpreted the jury's finding that Wooters conspired with the employees to breach fiduciary duties they owed to their employee, and as a result Plaintiff lost what may have been the only judgment debtor with sufficient assets to satisfy the $7MM+ judgment).

Duradril, L.L.C. v. Dynomax Drilling Tools, Inc.,

516 S.W.3d 147 (Tex. App.—Houston [14th Dist.] 2017, no pet.)

Synopsis

The statute of frauds provisions of Chapters 2 and 26 of the Texas Business and Commerce Code can be overcome by partial-performance. However, the partial performance must be "unequivocally referable" to the agreement and corroborative of the fact that a contract actually was made.

Factual Background and Trial Court Ruling/Verdict

Manufacturer and Distributor entered into a distribution agreement whereby Distributor would be exclusive distributor in the United States for drilling motors and related parts. Distributor subsequently failed to meet its minimum-purchase requirements under the distribution agreement accruing substantial debt. In order to resolve the increasing arrearage, Manufacturer and Distributor agreed to an asset exchange that exchanged Distributor's assets for its debt. The agreement, known as an asset purchase agreement ("APA"), was orally agreed to, although it had been memorialized in the planner of Manufacturer's representative.

The APA involved, *inter alia*, the Manufacturer clearing the payables owed by Distributor. In exchange Distributor would transfer $701,000 of its accounts receivable and just under $2,890,000 in fixed assets, free and clear of debt, to Manufacturer. By mid-August 2013, Manufacturer discovered that certain assets transferred by Distributor were not free and clear of liens. Suit followed. At trial, the jury found: (1) Manufacturer and Distributor had agreed to the terms of an APA; (2) Distributor ratified the APA; (3) Distributor failed to comply with the APA; (4) said failures were not excused; and (5) the sum of $1,004,000 would compensate Manufacturer for its damages.

Court of Appeals Ruling

Distributor's primary issue on appeal involved the partial-performance exception to the statute of frauds. According to Distributor, the trial court erred in finding there was an APA with which it failed to comply because there was no written APA, nor was there a finding of full performance or performance in a manner unequivocally referable to the existence of a pertinent agreement. The crux of the complaint was that the trial court erred in refusing Distributor's jury instruction that would have required a finding of full performance in a manner unequivocally referable to the existence of an agreement for the sale of assets or the assumption of liabilities of another, as required to except the requirement of such a written agreement from the statute of frauds. According to Distributor, the trial court erred in refusing to provide their "properly worded" instruction on "full" performance (1) because at trial Manufacturer "stipulated" in a valid Rule 11 agreement to proceeding on only the "full performance exception to the statute of frauds" and (2) under Texas law, full performance is necessary.

Upon review, the court found that there was no valid Rule 11 agreement or stipulation. Because there was no valid Rule 11 agreement, the trial court did not violate any duty to enforce such agreement by overruling Distributor's objection and their requested instruction on that basis. With regard to what Texas law requires, the court noted that, as a general matter, the partial-performance exception to the statute of frauds does not require full or even substantial performance by a party. Under the partial-performance exception to the statute of frauds, contracts that have been partly performed but do not meet the requirements of the statute of frauds may be enforced in equity if denial of enforcement would amount to a virtual fraud. The court noted that partial performance takes a contract out of the statute of frauds when the party seeking enforcement of the contract *partially performed*. However, the partial performance must be "unequivocally referable" to the agreement and corroborative of the fact that a contract actually was made. In other words, the performance a party relies on to remove a parol agreement from the statute of frauds must be such as could have been done with no other design than to fulfill the particular agreement sought to be enforced. According to the court, the instruction given provided for an exception to the statute of frauds upon a showing that one of the parties "performed or partially performed in a manner unequivocally referable to the existence of the agreement." This was permissible based on case law applying the partial-performance exception. The court also noted that the Pattern Jury Charge acknowledges the existence of equitable exceptions to the statute of frauds "due to partial or full performance of the oral agreement."

Practice Pointer

If you are relying on the partial-performance exception to the statute of frauds, make sure the partial performance is "unequivocally referable" to the agreement and corroborative of the fact that a contract actually was made.

E-Learning LLC v. AT&T Corp.,

517 S.W.3d 849 (Tex. App.—San Antonio 2017, no pet.)

Synopsis

Affidavit clearly contradicting earlier deposition testimony held to constitute a "sham affidavit" and therefore excluded from consideration during summary judgment.

Factual Background and Trial Court

E-Learning LLC and its affiliates claimed they entered into a contract with AT&T Corp. for creation of a new project entitled Interactive Applications Simulations ("IAS") which could be used for employee training. AT&T refused payment for creation of IAS, denying it ever contracted with E-Learning for it. As a result, E-Learning filed suit against AT&T, asserting various contract theories. The trial court ultimately granted AT&T's motion for summary judgment, refusing during the hearing to consider an affidavit prepared by E-Learning that was determined to be a "sham affidavit" due to significant variances between the author's deposition testimony and the facts sworn to in the affidavit.

Court of Appeals

Among other issues considered on appeal, the San Antonio Court of Appeals evaluated the trial court's determination that a pivotal affidavit tendered by E-Learning was a "sham affidavit." The court began by recounting the standard applicable to a sham affidavit analysis, recounting that in assessing whether a witness's affidavit creates a sham fact issue, courts examine the nature and extent of the difference between the facts asserted in the deposition and the affidavit, looking to see whether they constitute a variation on a theme that is nonetheless consistent in the major allegations or are clearly contradictory as to material points without explanation. The former presents grounds for potential impeachment while the latter results in disregarding the affidavit.

In considering the nature and extent of the difference in the facts asserted in the relevant deposition and affidavit, the court found that differences were not a variation of a theme, but clearly contradictory as to the key issues of whether AT&T approved and/or accepted the IAS project. Therefore, the San Antonio Court of Appeals held the trial court did not abuse its discretion in sustaining AT&T's objection and excluding the affidavit.

QTAT BPO Solutions, Inc. v. Lee & Murphy Law Firm, G.P.,

No. 14-16-00148, 2017 Tex. App. LEXIS 1861 (Tex. App.—Houston [14th Dist.] 2017, pet. filed)

Synopsis

After a litigation screening services firm, QTAT BPO Solutions, Inc., was not paid for pre-suit screening services performed on behalf of certain law firms' clients, and in attempt to get paid for the services they provided, QTAT disclosed to its attorney information about the law firms' clients that they agreed not to disclose in non-disclosure agreements with the law firms. QTAT sued the law firms several months later and the law firms filed counter-claims against QTAT for

breach of the non-disclosure agreements. QTAT filed a motion to dismiss the counter-claims, which the trial court denied. QTAT filed an interlocutory appeal. The Fourteenth Court of Appeals dismissed the interlocutory appeal, holding they did not have appellate jurisdiction because QTAT's pre-suit communications to its attorney were not a communication in or pertaining to a judicial proceeding and therefore was not an exercise of QTAT's right to petition as that term is defined by the Texas Civil Practice and Remedies Code.

Factual Background and Trial Court Ruling/Verdict

Appellees are two law firms that entered into a contract with a straw entity who entered into a contract with Appellant, QTAT BPO Solutions, Inc., to screen the law firms' clients to determine if said clients had potential claims for personal injury caused by pharmaceutical products. Ancillary to that contract was a confidentiality and non-disclosure agreement between Appellant and each law firm prohibiting Appellant from disclosing the law firms' clients' information. Appellant reviewed approximately 40,000 medical records pertaining to approximately 30,000 clients but was not paid for invoices totaling approximately $15 million dollars. In an effort to collect money owed to them, Appellants retained an attorney. Appellants attorney sent correspondence to one of the law firms seeking additional information regarding approximately 26,768 clients screened by Appellant; the letter included a (rather large) spreadsheet containing information on each client that Appellant agreed not to disclose in the non-disclosure agreement.

The law firms did not respond to the letter and Appellant sued the straw entity and the law firms to collect the $15 million unpaid invoices under various theories of recovery. The law firms filed counter-claims for breach of the non-disclosure agreements based on Appellant's disclosure of client information to its attorney before a lawsuit was filed. Appellant (Counter-Defendant in the trial court) filed a motion to dismiss the breach of contract counter-claims pursuant to Texas Civil Practice & Remedies Code sections 27.003 and 27.005. The trial court denied QTAT's Motion to Dismiss. QTAT filed an interlocutory appeal arguing that the breach of contract claims implicated QTAT's protected right under the Texas Citizen's Protection Act (Texas Civil Practice & Remedies Code §§ 27.001 through 27.011).

Court of Appeals Ruling

The only argument QTAT made in the trial court (and thus preserved on appeal) was that the pre-suit communications to its attorneys was an exercise of its right to petition because it was a communication "in or pertaining to a judicial proceeding." Relying primarily on the Fifth Court of Appeals's opinion in *Levatino v. Apple Tree Café Touring, Inc.*, 486 S.W.3d 724 (Tex. App.—Dallas 2017, pet. denied), the Fourteenth Court of Appeals held QTAT's pre-suit communication with its attorney was not made in or pertaining to a judicial proceeding and therefore not an exercise of QTAT's protected right to petition. The interlocutory appeal was dismissed because QTAT did not meet its burden of proving the counterclaims for breach of contract were based on, relate to, or are in response to QTAT's exercise fo the right of association, right of free speech, or right to petition.

Current Status

QTAT filed a Petition for Review on May 5, 2017. The Cause Number in the Texas Supreme Court is 17-0301.

Practice Pointer

Don't mess with pre-suit settlement attempts unless required to do so.

Long Canyon Phase II & III Homeowners Ass'n v. Cashion,

517 S.W.3d 212 (Tex. App.—Austin 2017, no pet.)

Synopsis

Homeowners association's letter to property owners threatening suit for noncompliance with association rules was an exercise of the right to petition as protected by the Texas Citizens Participation Act, requiring a prima facie showing of Plaintiffs' claims.

Factual Background and Trial Court

The Long Canyon Phase II and III Homeowners Association ("HOA") sent property owners Chris and Lisa Cashion a letter alleging damages to a drainage easement. The letter, part of a long-standing dispute, threatened fines and a lawsuit. In response, the Cashions sued the HOA for harassment, negligence, and infliction of emotional distress, as well as injunctive and declaratory relief. The HOA moved to dismiss the Cashions' claims under the anti-SLAPP Texas Citizens Participation Act ("TCPA") which provides a mechanism for dismissal of a "legal action" that is "based on, relates to, or is in response to a party's exercise of the rights of free speech, right to petition, or right of association." The trial court denied the HOA's motion to dismiss.

Court of Appeals

The sole issue on appeal was whether the trial court erred in denying the HOA's motion to dismiss pursuant to the TCPA.

The HOA contended that the Cashions' claims improperly infringed on the HOA's First Amendment right to petition because the claims were based on the HOA's letter that gave notice of its intent to sue. The Austin Court of Appeals found that while the HOA's motion sought dismissal of the Cashions' monetary and injunctive claims in their entirety under the premise that the claims complained solely of the pre-suit notice letter, the factual basis of the Cashions' claims was actually much broader. Although the Cashions' suit did complain about the letter in the petition on file, it included the letter within the context of a larger "pattern of harassment" and "bad faith" or "ultra vires" conduct by the HOA. The behavior complained of encompassed "constant monitor[ing] visitors of the Cashions, watch[ing] whenever someone comes to work in the [Cashions'] yard," and "mak[ing] their presence known," as well as "trespass[ing] on the Cashions' property and tak[ing] pictures [there] without their consent." As a result, the Austin Court of Appeals held that the HOA preserved a TCPA challenge to the Cashions' monetary and injunctive claims only to the limited extent those claims were factually predicated on the pre-suit notice letter, affirming the trial court's denial of the TCPA motion to dismiss as to the other complained-of conduct.

As to the remaining claims arising from the pre-suit notice letter itself, the Austin Court of Appeals held that while the HOA's letter to the homeowners giving notice of its intent to sue for noncompliance with HOA rules was an exercise of the HOA's right to petition as protected by the TCPA, the homeowners

nonetheless failed to put forth a prima facie case on their claims arising from the letter as required by the TCPA for suits involving protected expression. As a result, it held that the trial court erred in denying the HOA's motion to dismiss to the extent the Cashions' claims were factually predicated on the pre-suit notice letter.

Great N. Energy, Inc. v. Circle Ridge Prod., Inc.,

No. 06-16-00015, 2017 Tex. App. LEXIS 2415 (Tex. App.—Texarkana 2017, pet. filed)

Synopsis

Not all promissory notes are negotiable instruments subject to UCC Chapter 3. Promises (intent to perform in the future) do not constitute assignments. When pursuing and defending tort claims as well as contractual claims, attorneys' fees must be segregated.

Factual Background and Trial Court Ruling/Verdict

Circle Ridge Production, Inc. and Kevin Stephens sued Great Northern Energy, Inc. in a complex dispute arising out of the sale and foreclosure of certain oil and gas interests. Great Northern bought leases and partially secured the purchase with a note and deed of trust. Great Northern defaulted and Circle Ridge initiated foreclosure proceedings, buying all of Great Northern's interests at the public auction. However, great Northern remained in physical possession of the property claiming that Stephen's had assigned it interests and he had not foreclosed.

The trial court granted a directed verdict in favor of Stephens on Great Northern's breach of contract claim and granted both Stephens and Circle Ridge directed verdicts on Great Northern's breach of the duty of good faith and fair dealing claims. The trial court also granted a directed verdict in favor of Circle Ridge on its own breach of contract claim against Great Northern.

The jury found against Great Northern on its wrongful foreclosure claim. Accordingly, the trial court entered judgment quieting title to the oil and gas interests in Circle Ridge and awarding it damages for breach of contract against Great Northern, together with attorneys' fees and court costs. Great Northern filed this appeal.

Court of Appeals Ruling

Reviewing Chapter 3 of the Texas Business and Commerce Code and thereby distinguishing promissory notes from negotiable instruments, the Texarkana Court of Appeals determined that because the promissory note contained statements such as the ones specified under comment 1 to section 3.106 (i.e. subject to a contract of sale, loan and security agreement, etc.), the promissory note at issue was not a negotiable instrument under section 3.104.15. Accordingly, Chapter 3 of the Business and Commerce Code, including section 3.110, did not apply to this case. Instead, contract law governed this dispute. Under the note, foreclosure was contemplated as a remedy.

The court then distinguished an assignment (transfer of an existing right) from a promise (an expression of intent to render some performance in the future). The evidence introduced at trial only manifested an intention to make a future transfer, i.e. a promise. Thus, there was no evidence that Stephens had assigned his interests in the note to Great Northern.

Circle Ridge's attorneys did not segregate their fee request despite Circle Ridge having asserted tort causes of action, including negligence in forging documents, negligence in attempting to assign interests to third parties, and civil conspiracy for forgery and also defending tort claims asserted by Great Northern. Legal research and other work completed with respect to these tort claims would not have advanced Circle Ridge's breach of contract or trespass to try title claims. Thus, Circle Ridge's attorneys' fees award violated the Texas Supreme Court's mandate in *Tony Gullo Motors I, L.P. v. Chapa* requiring segregation "if any attorney's fees relate solely to a claim for which such fees are unrecoverable, a claimant must segregate recoverable from unrecoverable fees" and that "[i]ntertwined facts do not make tort fees recoverable; it is only when discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated." While the need to segregate fees is a question of law, "the fees necessary to prove particular claims often turn on . . . facts." Accordingly, the Texarkana Court of Appeals remanded the case so that the trial court can make a factual determination on the amount of fees that were reasonable and necessary to litigate the claims for which attorneys' fees are recoverable, in accordance with the guidelines set forth in *Chapa*.

Current Status

On March 23, 2017, Circle Ridge filed a Motion for Voluntary Remittitur offering to forego attorneys' fees and court costs. After obtaining an extension of time, Great Northern filed its Motion for rehearing on April 26, 2017, which was overruled on May 2, 2017. On May 3, 2017, the Texarkana Court of Appeals issued a Supplemental Opinion accepting the voluntary remittitur, which thereby cured the only reversible error in the case. Petition for Review was filed.

Practice Pointers

One of Great Northern's complaints about Circle Ridge's attorneys' fees was that the bills submitted by two law firms were "so insufficient that it was impossible to determine what duplication occurred." While the Texarkana Court of Appeals's decision did not rest on this basis (out of a list of four complaints, it stated "We agree that attorney's fees were not properly segregated," which was the first complaint), it noted in footnote 36 that "the billing records contained notations such as '[f]act [r]esearch,' 'telephone conference,' '[l]egal [r]esearch regarding potential suit,' 'editing,' '[i]nteroffice conference,' and other general references." Without the entire entry, we cannot assess the propriety of the entry or exactly what the deficiency might be. If these were examples of the entire entry, then that is likely the problem. However, as a precaution, we recommend that the entries be more detailed and, if you are pursuing or defending recoverable and unrecoverable claims, start early and make your contemporaneous time entries explain how they are recoverable. Consider going so far as to denote "recoverable" and "unrecoverable" as a parenthetical in the entry.

Cox Media Group, LLC v. Joselevitz,

No. 14-16-00333, 2017 Tex. App. LEXIS 2365 (Tex. App.—Houston [14th Dist.] 2017, no pet.)

Synopsis

Defamation claim against newspaper regarding healthcare professionals providing medical services was a matter of public

concern subject to the protections of the Texas Citizens Participation Act.

Factual Background and Trial Court

In an August 2014 agreed order, the Texas Medical Board curtailed Dr. Joel Joselevitz's ability to prescribe medication and permanently prohibited him from treating patients for chronic pain. The agreed order was part of a settlement between the Board and Joselevitz following the death of several of Joselevitz's patients due to prescription overdose and the filing of pubic complaints with the Board. Subsequently, the Austin American Statesman, a newspaper owned by Cox Media Group, LLC, published a lengthy article titled, "Texas doctors rarely charged in prescription drug epidemic" which featured Joselevitz prominently, recounting the Board complaints and settlement. Joselevitz sued Cox Media following publication of the article, alleging defamation. Cox Media moved to dismiss the defamation claim pursuant to the anti-SLAPP Texas Citizens Participation Act ("TCPA") which provides a mechanism for dismissal of a "legal action" that is "based on, relates to, or is in response to a party's exercise of the rights of free speech, right to petition, or right of association." Cox Media's motion was denied by operation of law after the trial court failed to rule.

Court of Appeals

On appeal, Cox Media argued that the TCPA applied to Joselevitz's claim because he sued over publication of a newspaper article that addressed a matter of public concern and Joselevitz could not meet his resulting prima facie burden to offer evidence of falsity. Joselevitz argued that Cox Media failed to offer any evidence that the TCPA applied.

The Fourteenth Court of Appeals first considered whether the TCPA applied to the defamation claim. Application of the TCPA turned on whether the legal action was based on, related to, or was in response to a party's exercise of the rights of free speech. "Free speech" was defined under the TCPA as "a communication made in connection with a matter of public concern." The court ultimately held that the subject of the article at issue, healthcare professionals providing medical services, was a matter of public concern. Accordingly, the court applied the TCPA to Joselevitz's defamation suit.

In light of the TCPA's application, the court next considered whether Joselevitz met his resulting prima facie burden to prove falsity as required given the matter at issue was of public concern. Walking through the various assertions throughout the article and noting their relation to events that unfolded in the Board proceedings, the court ultimately found the article to be substantially true, reversing and remanding the trial court's judgment.

Ifiesimama v. Haile,

No. 01-15-00829, 2017 Tex. App. LEXIS 2748 (Tex. App.—Houston [1st Dist.] 2017, no pet.)

Synopsis

When the trial court finds a breach of contract and awards specific performance as the remedy, the trial court may properly award attorneys' fees to the prevailing party if the contract so provides.

Factual Background and Trial Court Ruling/Verdict

Daniel Haile and Wongelawit Alemu unsuccessfully attempted to purchase a home from Mr. and Mrs. Ifiesimama ("Mr. I" and

"Mrs. I") and then brought this suit for specific performance and breach of contract. In a bench trial, all the evidence reflected that Mr. I held the home exclusively in his name and that Mrs. I never held any interest in the home as she executed a community property waiver in the deed of trust when they originally purchased the property in 2005. Only Mr. I executed the contract of sale with the plaintiffs. Additionally, certain of the title documents for the present transaction were in Mr. and Mrs. I's names. Only Mr. I appeared at the closing. He claimed he had a power of attorney from his wife to sign and would bring that POA by the title company later that day. When he failed to produce the POA, the title company refused to go through with the sale.

Haile's and Alemu's attorney presented testimony that he charged $250 per hour and worked 65 hours on the case ($16,250). He did not submit billing records. On cross-examination, he admitted that the plaintiffs could not recover attorneys' fees against Mrs. I as they had only pled specific performance, an equitable remedy. He also acknowledged that he had to defend against a sanctions motion for allegedly filing a frivolous lawsuit and against Mr. and Mrs. I's counterclaims. However, he estimated that 75% of his time was prosecuting claims. He agreed that he was not seeking fees for the other 25% of his time that was devoted to defending the claims.

The trial court ruled in favor of Haile and Alemu finding that Mr. I breached the contract, and ordered that they recover costs, their earnest money deposit, and attorneys' fees ($16,250) from both Mr. and Mrs. I. The court ordered specific performance, requiring conveyance of the subject property to Haile and Alemu.

Court of Appeals Ruling

Haile and Alemu asserted that the sales contract had been modified and that they tendered performance in conformity with the modification. Therefore, they had the burden of proving the modification as well as all of the traditional requirements of a contract, including meeting of the minds and consideration. Specific performance is an equitable remedy that may be awarded upon a showing of breach of contract. Specific performance is not a separate cause of action but is instead an equitable remedy that is used as a substitute for monetary damages when such damages would not be adequate. Haile and Alemu presented evidence that they appeared at the closing and signed the closing documents. Additionally, they presented documentary proof that they had financing arranged with which to purchase the house. Thus, they had presented factually sufficient evidence to show that they had performed or tendered performance, that Mr. I breached, and that they were entitled to specific performance.

The sales contract contained an attorneys' fees provision allowing the prevailing party to recover its fees. When the trial court finds a breach of contract and awards specific performance as the remedy, the trial court may properly award attorneys' fees to the prevailing party if the contract so provides Thus, despite Haile's and Alemu's counsel's concession to the contrary, they were entitled to recover their attorneys' fees. Further, as they essentially brought one claim for breach of contract and sought alternative remedies, this is not a situation in which they brought a claim for which attorneys' fees were recoverable and a claim for which attorneys' fees were not recoverable, which would have required them to segregate their attorney's fees. However, this does not address the time spent on defending against the cross-claim

and motion for sanctions, but Mr. and Mrs. I did not challenge the specific amount awarded to Haile and Alemu as unreasonable.

However, the sales contract made specific performance and reimbursement of earnest money alternative remedies. Accordingly, the court of appeals reversed the trial court's award of $1,000 in earnest money. Additionally, as Mrs. I had not signed the contract, the court of appeals found that the trial court erred in entering a judgment against her and making her jointly and severally liable for Haile's and Alemu's court costs, earnest money, and attorneys' fees.

Current Status

Mr. and Mrs. I filed an amended motion for reconsideration and en banc reconsideration on April 18, 2017, and, as of this writing, the First Court of Appeals has not ruled on the motion.

Mission Grove, L.P. v. Hall,

503 S.W.3d 546 (Tex. App.—Houston [14th Dist.] 2016, no pet.)

Synopsis

This is an appeal from a trial court's order granting summary judgment on claims for breach of contract, fraud, and promissory estoppel. The court of appeals affirmed in part and reversed and remanded in part.

Factual Background and Trial Court Ruling

Mission Grove, L.P. entered into a contract with Texas Classic Homes, L.P. for Texas Classic to be the approved builder for a subdivision. Darren Hall, as President, signed the contract on behalf of Texas Classic. Texas Classic filed for bankruptcy and failed to perform under the agreement. Mission Grove filed a lawsuit for breach of contract against Hall, personally, and for failure to pay or perform as agreed. Hall filed a motion for summary judgment asserting that he was not a party to the contract because he did not sign the contract in his individual capacity. More than four years later, Mission Grove filed an amended petition asserting claims against Hall for promissory estoppel, fraud, and negligent misrepresentation. Hall filed a second motion for summary judgment on the newly asserted claims allegeing that the four year statute of limitations had expired. Mission Grove responded and contended that the claims were timely under the relation back doctrine. The trial court granted both motions for summary judgment and Mission Grove appealed.

Court of Appeals Ruling

On appeal, Mission Grove argued that the unambiguous language of the contract made it clear that Hall was personally liable for the obligations of Texas Classic. The court of appeals held that the contract expressly identifies Mission Grove and Texas Classic as the parties and that Hall's name does not appear as a party to the contract, only as "President." The court of appeals noted the general rule that "a suit for breach of contract may not be maintained against a person who is not a party to the contract, particularly a non-party who is assigned duties by the terms of the contract."

Mission Grove contended that paragraph 11 signaled the intent of the parties that Hall would become a party to the contract. Paragraph 11 stated "the obligations under this agreement are also the personal obligations of the builder representative signing below." The court stated that this sentence reflected no agreement between Mission Grove and Hall but would apply to whoever signed the agreement on behalf of

Texas Classic, not just Hall. As such, the court of appeals concluded that the agreement unambiguously expressed the parties' intent that Mission Grove and Texas Classic are the parties to the contract and that Hall executed the agreement in his representative capacity. Alternatively, Mission Grove argued that Hall personally guaranteed his company's performance and that, without this personal guarantee from Hall, Mission Grove would not have entered into the contract. The court of appeals held that to show that Hall personally guaranteed the performance of Texas Classic, the agreement must clearly evidence Hall's intent to become personally liable for the obligations of Texas Classic. The court held that the contract at issue contained no such explicit guarantee. Having concluded that Hall was neither primarily liable for Texas Classic's contract nor secondary liable on the contract as a guarantor, the court held that the trial court did not err in granting Hall's motion for summary judgment on the breach of contract claim.

Mission Grove's second issue on appeal was that the trial court erred in granting summary judgment on Mission Grove's fraud and promissory estoppel claims based on the relation-back doctrine. The court of appeals held that because Hall did not allege that Mission Grove's breach of contract claim was time-barred or that Mission Grove's new claims are wholly based on a new, distinct or different transaction or occurrence, the relation-back doctrine applies. Therefore, the Court of Appeals reversed the trial court's order granting summary judgment on Mission Grove's fraud and promissory estoppel claims and remanded those claims to the trial court.

Kartsotis v. Bloch,

503 S.W.3d 506 (Tex. App.—Dallas 2016, pet. denied)

Note: This case was reported in our Fall 2016 Commercial law Newsletter. That opinion was withdraw and this one substituted. The Petition for Review has since been denied.

Synopsis

Interpreting contracts that incorporate other documents by reference requires construing all the documents in their entirety. Recitals are not strictly part of the contract and certainly do not control over operative provisions. Where in conflict, specific provisions control over general provisions. Failure to mitigate must be performed with reasonable efforts (at a trifling expense or reasonable exertion) and requires proof of lack of diligence and proof of the increased damages due to the failure to mitigate. Repudiation must be definite, absolute, and unconditional. Chapters 37 and 38 provide for recovery of attorneys' fees, but not expenses.

Factual Background and Trial Court Ruling/Verdict

This case involves who owes the secondary obligations (indemnities and contribution) for real estate development loans and liabilities after the primary debtors failed to pay. The parties entered a series of contracts, including a Contribution and Indemnity Agreement ("CIA") and a Guaranty Bank Agreement ("GBA"). Kartsosis sued Bloch for Bloch's failure to pay his share of the Guaranty Bank Loan as required by the GBA and Bloch counterclaimed seeking reimbursement of payments made under the CIA as well as for declaratory relief concerning the parities rights and obligations under the CIA and for attorneys' fees.

The parties filed countervailing summary judgments. The trial court signed a judgment that awarded judgment for Kartsotis against Bloch on Kartsotis's GBA claims and for Bloch against Kartsotis on Bloch's contribution and reimbursement CIA claims. The trial court, among other relief, also awarded both parties attorneys' fees, netted the total sums due each party, and gave Bloch a net judgment against Kartsotis for $200,982.93 plus contingent appellate attorneys' fees and interest. Both parties appealed.

Court of Appeals Ruling

The court of appeals first considered the trial court's summary judgment in Bloch's favor on the CIA. In began by interpreting that document in conjunction with its Exhibit A "Existing Obligation" and the GBA, which excluded the GBA debt from the CIA's obligations. The court of appeals sought the parties' objective intent as expressed in the entire agreement harmonizing where necessary to give effect to all provisions of the contract and allowing no single provision to be controlling. The court of appeals also recognized that the construction the parties placed on the contract as evidenced by their conduct. Likewise, separate writings may be construed together if the connection appears on the face of the documents by express reference or by internal evidence of their unity. Documents, like Exhibit A, incorporated into a contract by reference become part of that contract and, when a document is incorporated into another by reference, both instruments must be read and construed together.

Here, the court of appeals found that the CIA provision set up a four step process for contribution and indemnity with the first step being a calculation that triggers when a Guarantor must make a payment to another Guarantor for payments that the latter made "upon or in respect of the Obligations." The court found that Bloch had not established that he had met the trigger as he had not shown that he had paid more than his share of the primary debtors' obligation. In doing so, the court of appeals rejected Bloch's reliance on recitals, noting that (1) a contract's recitals are not strictly part of the contract, and they will not control the operative phrases of the contract unless the phrases are ambiguous, and (2) the recital was general, while Section 2 was specific and, if a conflict existed between the two, the specific would control over the general. Having so found, the court of appeals reversed the trial court's summary judgment in Bloch's favor on the CIA breach of contract claims.

The court next addressed Bloch's claim for reimbursement of incidental expenses (attorneys fees and other expenses) paid to avoid the guarantors' liability under the CIA. Bloch argued that these were payments made "in respect of" an obligation. The court of appeals disagreed and stated that there is no basis in the CIA for including Bloch's miscellaneous expense payments when calculating contribution liability under the CIA and holding that a court may not add language to a contract under the guise of interpretation.

With respect to attorneys' fees and expenses, the court of appeals began by rejecting Bloch's claims for expenses noting that the attorney's fees were awarded under Chapters 37 and 38, neither of which provide for the recovery of expenses. Additionally, as the court of appeals reversed Bloch's summary judgment on the CIA, he no longer had a right to recover attorneys' fees under Chapter 38. And, while awarding attorneys' fees to a non-prevailing party under Chapter 37 is not in itself and abuse of discretion, after a declaratory judgment is reversed on appeal, an attorneys' fee award may no longer be

equitable and just. Therefore, the court of appeals remanded the attorneys' fee issue to the trial court for further consideration.

On Bloch's cross point as to Kartsosis's failure to mitigate, the court of appeals concluded that there is legally no evidence that would support (i) a duty by Kartsotis to agree to a third extension and (ii) a finding that Bloch would have performed had Kartsotis agreed to Bloch's request. The court noted that the mitigation-of-damages rule prevents a party from recovering damages that result from a breach of contract that the non-breaching party could avoid by reasonable efforts, which are those that a party can avoid at a trifling expense or with reasonable exertions. The party raising the failure to mitigate defense must prove lack of diligence as well as the amount by which the damages were increased as a result of the failure to mitigate. At the time that Bloch would have had Kartsois obtain a third extension, the loan was already in default and there was no evidence that the bank would have granted the extension. The mere evidence that the bank had twice extended the loan is no evidence it would have done so a third time. Further, the GBA had no provision requiring Kartsosis to obtain an extension.

Bloch also contended that Kartsosis repudiated the CIA, and since the GBA incorporated the CIA by reference, Kartsotis repudiated the GBA. The court of appeals rejected that argument citing case law for the proposition that a party repudiates a contract if the party manifests, by words or actions, a definite and unconditional intention not to perform the contract according to its terms and that refusal to perform must be absolute and unconditional. The court determined that, even if Kartsosis had repudiated the CIA, repudiation of the CIA does not by implication establish repudiation of the GBA, as the whole point of the GBA's incorporation of the CIA was to make clear that the bank loan was excluded from the CIA's terms.

Practice Pointers

No. 1 If you want to recover for incidental expenses related to the contract, such as those related to servicing or avoiding the debt or the contract (including attorneys' fees, accounting fees, maintenance of the property, etc.) as opposed to incidental expenses related to the subject litigation, you should make provision for them in the contract. Likewise, if you want to recover your expenses related to the subject litigation (including expert fees, copy costs, etc.), you need to expressly provide for those in the contract as neither Chapter 37 nor Chapter 38 provide for them.

No. 2 The space constraints of appellate briefing make including every detail difficult. However, if you are complaining about certain damages, in this case expenses, you must specifically identify those damages. An appendix identifying the specific items that added up to the $44,565.50 in unrecoverable litigation expenses with record citations may have been all Kartsosis needed to eliminate these damages on a reverse and render.

Deuell v. Tex. Right to Life Comm., Inc.,

508 S.W.3d 679 (Tex. App.—Houston [1st Dist.] 2016, pet. denied)

Synopsis

The purpose of judicial privilege is to foreclose claims for reputational damages, regardless of the label the claims are given. Therefore, cease and desist letters sent by attorneys were not subject to judicial privilege as against tortious interference

claims since damages sought were not defamation or reputational damages.

Factual Background and Trial Court

The Texas Right to Life Committee, Inc. ("TRLC") filed suit against State Senator Bob Deuell for tortious interference with contract after Deuell's lawyers sent cease-and-desist letters to two radio stations airing TRLC's political advertisements concerning Deuell's differing position on end of life care policy and the stations stopped airing the adds. At the trial court, Deuell urged that the lawsuit should be dismissed under the anti-SLAPP Texas Citizens Participation Act ("TCPA") which provides a mechanism for dismissal of a "legal action" that is "based on, relates to, or is in response to a party's exercise of the rights of free speech, right to petition, or right of association." The trial court denied Deuell's motion to dismiss.

Court of Appeals

Among other issues on appeal, the First Court of Appeals considered whether Deuell established the affirmative defense of judicial privilege. Deuell contended that even if TRLC met its burden to prove a prima facie case as required by the TCPA, the trial court erred by failing to grant his motion to dismiss because his lawyers' cease and desist letters were subject to the absolute judicial privilege as communication made in contemplation of a judicial proceedings. Deuell's argument rested on categorically applying judicial privilege to tortious interference claims that are based upon letters sent by a lawyer threatening litigation.

The First Court of Appeals rejected Deuell's assertions of judicial privilege, holding that judicial privilege may apply to various claims, regardless of the label they are given, but only if the damages sought are essentially defamation or reputational damages. Here, Deuell failed to plead or produce evidence of defamation or reputation damages, instead seeking only direct and consequential contract damages. As such, his assertion of privilege was unfounded, failing to align with the purpose of the privilege to foreclose claims for reputational damages, regardless of the label the claim is given.

Kingsley Props., LP v. San Jacinto Title Servs. of Corpus Christi, LLC,

501 S.W.3d 344 (Tex. App.—Corpus Christi 2016, no pet.)

Synopsis

Contracting parties may determine the standard that will govern the attorneys' fee award for a "prevailing party," rather than relying on the definition of that term in the case law, in which case, the contract language controls over statutory and case law definitions.

Factual Background and Trial Court Ruling/Verdict

Kingsley Properties, LP owned a failing country club and golf course in Corpus Christi, which it had purchased in 2005. San Jacinto Title Services of Corpus Christi, LLC, of which Mark Scott was a Vice-president, was the escrow agent and performed some title work on the 2005 transfer, which required that San Jacinto join in certain of the contracts surrounding the transaction. Kingsley sent a letter to the surrounding community advising that, if membership did not increase, he might re-purpose the property or sell it to someone who might repurpose it, which he claimed was in his sole discretion. Scott, now on city counsel, responded with a letter to the

community advising that re-purposing required council approval and he would not support it.

Kingsley claimed this communication killed a sale and sued San Jacinto and Scott claiming, in part, that Scott had violated the sales contract's confidentiality provision as well as for breach of a fiduciary duty and tortious interference with prospective business relations. San Jacinto filed a counterclaim seeking attorneys' fees in the event that it prevailed on Kingsley's breach of contract claim.

Between a directed verdict and jury finding, Kingsley lost on all of its claims and the trial court entered a take-nothing judgment and awarded San Jacinto attorneys' fees for its defense of the breach of contract claim.

Court of Appeals Ruling

Majority opinion

The contract contained a provision providing attorneys' fees for the "prevailing party." Kingsley conceded on appeal that San Jacinto prevailed in the underlying contract dispute; however, Kingsley contended that San Jacinto was not a "party" as defined by the prevailing party clause of the agreement.

Ordinarily, for the purposes of awarding attorneys' fees, case law defines the term "prevailing party" as referring to a party who successfully prosecutes an action or successfully defends against an action on the main issue. However, parties to a contract are "masters of their own choices." Contracting parties may determine the standard that will govern the attorneys' fee award for a "prevailing party," rather than relying on the definition of that term in the case law, in which case, the contract language controls over statute and case law. Here, the contract used the term "prevailing party" in a "technical or different sense" that is distinct from its ordinary legal meaning.

First, section 12.5 expressly stated that the agreement was to bind and benefit only two "parties" the "Seller" and the "Buyer." The escrow agent, San Jacinto, was neither buyer nor seller as defined by the contract. Instead, it signed an acknowledgement appended to the contract, but therein agreed to confidentiality. The San Antonio Court of Appeals addressed a nearly identical situation and held that, where a real estate contract's definition of "party" included only the buyer and seller of land, this controlled the meaning of "prevailing party," barring a realtor who also signed the contract from collecting attorneys' fees.

Second, the language of the prevailing party provision used the term "either party." Citing Webster's Dictionary, the court of appeals noted that the word "either" refers to "the one or the other of two." San Jacinto's three-party interpretation would render the word "either" meaningless, whereas Kingsley's interpretation creates a greater measure of harmony between the agreement's provisions: "either" fits with the definition of the two "parties bound" just a few sentences earlier—the "Seller" and the "Buyer."

Third, San Jacinto's obligations were in a different form and of a lesser magnitude than the obligations of the buyer and seller. San Jacinto's consideration was not specified, and its obligations were undoubtedly more limited. Finally, whereas both buyer and seller signed on the same page that they had "executed" the agreement, San Jacinto signed on a different page and signified that it "agreed and accepted" the agreement. The court of appeals presumed that this differing choice of words had some significance.

Accordingly, the Corpus Christi Court of Appeals found that, pursuant to the explicit terms of the contract, San Jacinto was not a prevailing party and, therefore, was not entitled to recover attorneys' fees.

Dissenting opinion

The dissenting opinion concluded that San Jacinto was a party to the contract. San Jacinto signed the agreement and, traditionally, the presence or absence of signatures on a contract is relevant in determining whether the contract is binding on the parties. Further, the language "AGREED AND ACCEPTED" follows the body of the agreement and is placed before the non-disclosure language, which indicates that San Jacinto is assenting to the terms of the entire agreement. Further, the agreement imposes numerous obligations and responsibilities upon San Jacinto including expressly defining San Jacinto as the "Title Company." The dissenting justice further explained that, in considering the entire agreement, section 12.5's reference to "another party" should be construed as excluding non-signatory third parties from the benefits and obligations of the agreement, not San Jacinto—a signatory with multiple obligations under the agreement. A contrary interpretation—one that binds only buyer and seller—would render meaningless the multiple provisions of the agreement which impose responsibilities upon San Jacinto. The dissenting justice noted that the cases cited by the majority are distinguishable as they all pertain to real estate brokers who were not parties to the contract and, in at least one case, the agreement noted that obligations relating to the broker were contained in a separate agreement. Here, no separate agreement defining San Jacinto's rights and obligations exists.

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