United States Court of Appeals for the Fifth Circuit

No. 23-50646

GARY BRADLEY,

Plaintiff—Appellant,

versus

GATEHOUSE MEDIA TEXAS HOLDINGS, II, *also known as* AUSTIN AMERICAN-STATESMAN,

Defendant—Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:22-CV-304

Before SOUTHWICK, HAYNES, and GRAVES, *Circuit Judges*.

PER CURIAM:[*]

This case involves a summary judgment granted despite genuine disputes of material fact. Accordingly, we REVERSE in part and VACATE in part, which leads us to AFFIRM the dismissal of the IIED claim because the other claims are moving forward.

[*] This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

I. Background

Plaintiff Gary Bradley was involved with a church for many decades but began to have issues when the church hired a new pastor. Separate from those issues, over the years, Bradley had been a well-known person in Austin who, he says, was the subject of a number of negative articles by the Austin American-Statesman ("Statesman"). Given his view that the Statesman was the main local newspaper, around February 2020, Bradley wanted to put an advertisement in that newspaper to address a matter that he thought might help change the pastor at his church. Accordingly, he placed an anonymous advertisement in the newspaper urging his fellow parishioners to attend an upcoming church meeting, at which they could vote against the new pastor's budget with the hope of securing new church leadership. It was very important to Bradley, however, that the advertisement be anonymous so that the church members would not know he placed it. To that end, Bradley met with an employee of the Statesman who, according to Bradley, agreed that the advertisement would be anonymous. Bradley paid in full for the advertisement, which ran on February 21 and 22, 2020. The advertisement did not identify Bradley by name.

Approximately one month later, despite the fact that the advertisement was paid in full and supposed to be anonymous from the church, the Statesman sent an invoice for the advertisement with Bradley's name on it directly to the church.[1] Bradley contends that this caused problems, and he sued the Statesman in Texas state court for breach of

[1] The Statesman says that, before it sent the invoice, Bradley received an email with a receipt for the advertisement that listed Bradley's church and the church's address. Bradley testified that he never read that email. The email was sent to Bradley and does not suggest that the Statesman was going to be sending or mailing anything to the church. Indeed, it suggests that receipts, etc., are going to be sent by email to Bradley. Thus, it does not change our analysis that the summary judgment must be reversed.

contract, breach of warranty under the Texas Deceptive Trade Practices Act ("DTPA"), mental anguish damages under the DTPA, and intentional infliction of emotional distress ("IIED"). The Statesman removed the case to federal court and moved for judgment on the pleadings. The district court adopted in part the magistrate judge's Report and Recommendation, dismissing the mental anguish damages and the IIED claim and allowing only Bradley's breach of contract claim and DTPA breach of warranty claim to proceed. The district court ultimately granted summary judgment to the Statesman on Bradley's remaining claims. Bradley timely appealed both orders.

II. Jurisdiction & Standard of Review

GateHouse Media Texas Holdings II, Inc. d/b/a Austin American-Statesman is a Delaware corporation with its principal place of business in Virginia. Bradley is a resident and citizen of Texas, and his complaint, when filed, sought damages of more than $1,000,000. Because the parties are citizens of different states and the amount in controversy exceeded $75,000, the district court had jurisdiction over Bradley's claims under 28 U.S.C. § 1332. The district court retained jurisdiction even though the amount in controversy subsequently dropped to $3,400 after the court dismissed the claim for mental anguish damages. *See Gebbia v. Wal-Mart Stores, Inc.*, 233 F.3d 880, 883 (5th Cir. 2000) ("[O]nce the district court's jurisdiction is established, subsequent events that reduce the amount in controversy to less than $75,000 generally do not divest the court of diversity jurisdiction."). We have jurisdiction pursuant to 28 U.S.C. § 1291.

We review de novo a grant of a motion for judgment on the pleadings under Rule 12(c) as well as a grant of summary judgment. *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008); *Salazar-Limon v. City of Houston*, 826 F.3d 272, 276 (5th Cir. 2016), *as revised* (June 16, 2016). When we review a

judgment on the pleadings, we apply the same standard as applied to a motion to dismiss under Rule 12(b)(6), "accept[ing] the factual allegations in the pleadings as true" and asking "whether, in the light most favorable to the plaintiff, the complaint states a valid claim for relief." *Doe*, 528 F.3d at 418 (internal quotation marks and citation omitted). When conducting our review of summary judgment, we "view the facts in the light most favorable to the non-moving party and draw all reasonable inferences in its favor." *Salazar-Limon*, 826 F.3d at 276 (quotation omitted). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a).

Bradley primarily raises two issues on appeal: (1) whether he raised a genuine dispute of material fact on his breach of contract and DTPA breach of warranty claims; and (2) whether he sufficiently pled factual allegations to state a claim for mental anguish damages.[2] We address each issue in turn.

III. Breach of Contract

Under Texas law, "[t]he elements of a breach of contract claim are (1) the existence of a valid contract between plaintiff and defendant, (2) the plaintiff's performance or tender of performance, (3) the defendant's breach of the contract, and (4) the plaintiff's damage as a result of the breach." *Prime Prods., Inc. v. S.S.I. Plastics, Inc.*, 97 S.W.3d 631, 636 (Tex. App.—Houston [1st Dist.] 2002, pet. denied). The issue in the district court was whether the contract was too indefinite to support a cause of action. On that point, the essential question is whether the evidence, portrayed in the light

[2] Bradley also appealed the dismissal of his IIED claim. However, he admits that if we reverse the dismissal of his breach of contract or breach of warranty claims and send them back to the district court, his IIED claim does not remain. We agree and therefore affirm that part and do not address his IIED claim further.

most favorable to Bradley, could lead a reasonable juror to conclude that the oral contract executed between the Statesman and Bradley had a sufficiently definite term regarding confidentiality.[3]

Here, accepting Bradley's evidence as true, there was an agreement to keep Bradley's identity anonymous so that the church would not know that he placed the advertisement. There are different views between Bradley and the Statesman employee, which is exactly why summary judgment is not appropriate. Bradley testified that the Statesman employee "said she understood the situation and that . . . she and the paper would do everything they could to keep [him] anonymous." The Statesman questions Bradley's interpretation of his conversation with the employee, but that is a fact dispute not resolvable at summary judgment. In addition, the Statesman responds by arguing that the alleged anonymity term is insufficiently definite as a matter of law, relying on three non-binding cases from the journalism context. But the cases it cites are not applicable in the context of a contract for advertising services, like the one at issue here. *See, e.g.*, *Pierce v. The Clarion Ledger*, 452 F. Supp. 2d 661, 664 (S.D. Miss. 2006) (addressing reporter's promise to source).

The bottom line is that, while the jury could believe the Statesman employee, that is not up to the district court at the summary judgment stage. Here, the factual disputes support a jury trial, not a summary judgment. The evidence that the Statesman sent an invoice to the church, which exposed Bradley's involvement, raises a fact question regarding breach. We need not address the damages in full here (and we make no holding on the possible

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[3] The Statesman employee and Bradley admittedly did not discuss an invoice, although it is understandable that a person paying in full for an advertisement would not anticipate receiving an invoice one month later by mail sent elsewhere, particularly since a receipt was sent by email to that person.

injuries and amount of damages) because, at the very least, Bradley alleges that he would not have bought the advertisement if he knew it would not be anonymous; thus, there are at least some damages. Given Bradley's evidence, we conclude that summary judgment was improperly granted, and we REVERSE on that claim.

IV. DTPA Breach of Warranty

Bradley also brought a breach of warranty claim under the DTPA. The DTPA grants consumers a cause of action for breach of an express or implied warranty causing economic or mental anguish damages. *See* TEX. BUS. & COM. CODE § 17.50(a)(2). "To recover for breach of warranty under the DTPA, the plaintiff must show (1) consumer status, (2) existence of the warranty, (3) breach of warranty, and (4) the breach was a producing cause of damages." *Four Bros. Boat Works, Inc. v. Tesoro Petroleum Cos.*, 217 S.W.3d 653, 666 (Tex. App.—Houston [14th Dist.] 2006, pet. denied).[4]

Bradley alleges that the Statesman made an express warranty related to his anonymity, which it breached when it mailed the invoice to the church. *See Sw. Bell Tel. Co. v. FDP Corp.*, 811 S.W.2d 572, 573–76 (Tex. 1991) (addressing "whether a seller's partial failure to perform under a sales agreement [for an advertisement] may serve as the basis for a breach of warranty claim under the [DTPA]"). Even the district court seemed to

[4] Additionally, Texas requires pre-suit notice in certain cases. *See* TEX. BUS. & COM. CODE § 2.607(c)(1). There is no dispute that Bradley did not send a pre-suit notice, so the question is whether it was required. This statute applies to sales of goods, *see id.* § 2.102, which is not what the sale of an advertisement is according to the Texas Supreme Court, *see Sw. Bell Tel. Co. v. FDP Corp.*, 811 S.W.2d 572, 574 (Tex. 1991). There is some dispute within the Texas courts of appeal about § 2.607(c)(1), but we conclude that the statutory text and the Texas Supreme Court's decision support Bradley's position that pre-suit notice was not required. Thus, we conclude that his lack of pre-suit notice does not support affirming the district court on this claim.

conclude that the evidence—viewed in the light most favorable to Bradley—could lead a reasonable juror to at least conclude that the Statesman employee promised "anonymity from anyone" and that Bradley would be "treated as a confidential source," meaning "confidentiality was an express warranty of the advertising service."

The next question is the breach of the warranty. Similar to the plaintiff in *Southwestern Bell Telephone Co.*, Bradley alleges that the Statesman "delivered most of the services it agreed to provide" by publishing the advertisement to his specifications, but it ultimately "delivered an incomplete package" by mailing the invoice to the church and thus exposing Bradley's identity. *See id.* at 576. If the jury believed that, it would be a breach. *See id.*

The last question is whether that breach caused an injury. There is some disagreement regarding what the church already knew about Bradley's grievances with the current pastor, but, again, that is not an appropriate dispute to resolve on summary judgment. The invoice notified the church that Bradley placed the advertisement, which is sufficient to raise a fact dispute regarding causation. We also conclude that Bradley has sufficiently raised a fact dispute regarding damages, for the reasons articulated in the previous section. Accordingly, we REVERSE the grant of summary judgment on Bradley's breach of warranty claim.

V. Mental Anguish Damages

Finally, we turn to the issue of Bradley's claim of mental anguish damages, which was dismissed under Rule 12(c). An award of mental anguish damages under the DTPA requires "evidence of a high degree of mental pain and distress that is more than mere worry, anxiety, vexation, embarrassment, or anger" and that the defendant's actions were "a producing cause of the mental anguish." *Jabri v. Alsayyed*, 145 S.W.3d 660, 669 (Tex. App.—

Houston [14th Dist.] 2004, no pet.). Bradley claimed significant anguish. While it is arguable that he was not sufficiently clear on his emotional harm, because we are remanding as discussed above, it is appropriate to vacate and remand on this point, so he can provide more detailed information on his claim of mental anguish.

VI. Conclusion

Accordingly, we REVERSE and REMAND on the breach of contract and breach of warranty claims, VACATE and REMAND on the mental anguish damages, and AFFIRM the dismissal of the IIED claim.