UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1067

QUEST MEDICAL, INC.,

Plaintiff-Appellee
Cross-Appellant,

versus

EARL J. APPRILL,

Defendant-Appellant
Cross-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
CA3 89 2849 G

July 16, 1993

Before JOHNSON, GARWOOD, and JONES, Circuit Judges

EDITH H. JONES, Circuit Judge:[*]

From a judgment on the jury verdict in this breach of contract and fraud case, both parties have appealed. We affirm in part and reverse and remand on the measure of damages owed to Quest and on Apprill's fraud claims.

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[*] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

I.

In the fall of 1988, appellee Quest Medical, Inc. began negotiating with appellant Earl Apprill concerning the purchase of all of Apprill's HemoTec stock.[1] Quest was planning to launch a tender offer for HemoTec stock and needed to acquire certain large blocs of the stock before the tender offer could be successful. The negotiations broke down, but were revived during the first week of January 1989. During these negotiations, Quest allegedly represented to Apprill that the price he received for his HemoTec stock ($4.625/share) would be the same as Quest would pay for stock owned by other large shareholders and that the purchase price was greater than the price which would be paid during the tender offer. On January 5, Quest presented Apprill with a proposed Stock Purchase Agreement. Apprill refused to sign the Agreement, because the closings clause contained a new provision regarding Rule 10b-13, which purported to grant Quest discretion to delay the subsequent closings contemplated by the Agreement during the pendency of a tender offer.[2] Apprill alleges that Quest represented that the Rule 10b-13 provision did not give Quest the ability to delay any subsequent closing beyond April 1, 1989.

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[1] Until August 1988, Apprill was the Chief Financial Officer of HemoTec. The HemoTec shares at issue in this case were owned partly by Apprill and partly by his wife and other relatives. In addition, some of the shares were to come from stock options that Apprill had received while CFO of HemoTec.

[2] Rule 10b-13, 17 CFR § 240.10b-13, prohibited Quest from closing on Apprill's remaining shares during the pendency of a tender offer.

Based on these three alleged representations, Apprill signed the Agreement on January 6, 1989.

On January 11, 1989, most of Apprill's shares were sold to Quest at the first closing. On January 19, Quest launched its tender offer for HemoTec stock at $5.00 per share. Because its tender offer was still outstanding, Quest refused to close on the remaining shares on or prior to April 1. Shortly before and after April 1, Apprill twice made futile requests that Quest purchase the remaining shares.

The tender offer terminated on August 28, and the next day Quest demanded that Apprill sell it his remaining shares of HemoTec stock. Apprill refused and, at some point during this period, sold the shares to another purchaser for a higher price. This lawsuit followed.

Quest sued Apprill for breach of contract, and Apprill counterclaimed with several causes of action rooted in fraud. The jury found that Apprill had breached the contract, causing Quest damages of $304,583. The jury rejected Apprill's Rule 10b-5 fraud claim because Apprill did not reasonably rely on Quest's misrepresentation. The jury also found that Quest had not violated the fraud provisions of the Texas Business and Commerce Code and the Texas Securities Act. Nevertheless, the jury did find that Apprill had established common-law fraud and awarded $16,740 in compensatory damages and $317,655 in punitive damages. The jury rejected Quest's asserted defenses of ratification, waiver, and estoppel.

Each party moved Judge Fish to disregard the damage award for the other party and to enter judgment on its own award. Judge Fish declined to do so and entered judgment on both awards, declaring that the breach of contract award in Quest's favor would offset the fraud damages awarded to Apprill. A final judgment was entered in Apprill's favor for $29,812, the difference between the two jury awards.

II.

Both parties prevailed below, and both have appealed to this court, seeking to strike down the adverse judgment and salvage its own. Quest asserts that its award for contractual damages should be upheld because the contract was unambiguous, disallowing extrinsic evidence of the parties' intentions, and because Apprill voluntarily and intentionally ratified the contract with full knowledge of Quest's fraud, if any. Quest also asserts, for the same reasons, that Apprill's fraud counterclaims should never have gone to the jury. Apprill understandably disputes Quest's assertions. Moreover, argues Apprill, Quest could not prevail on its breach of contract action because its fraud made the contract, or part of it, voidable and entitled Apprill to a remedy in the nature of a partial rescission. We address these chicken-and-egg arguments under Texas law.

A. <u>The Breach of Contract Claim</u>

Quest's breach of contract action is premised on Apprill's refusal to tender his remaining shares of HemoTec stock on August 29, 1989. Apprill justified his refusal to tender his

remaining shares by relying on the Agreement's provision that the parties would close on the shares "no later than April 1, 1989." Quest responds that the April 1 deadline was subject to its expressly reserved right to delay the subsequent closing to comply with Rule 10b-13. The jury was asked whether this provision allowed Quest to delay the closing beyond April 1 and answered that it did. On appeal, Apprill concedes that interpretation is correct.

Instead, Apprill urges that he should not be held to the contract because he was fraudulently induced to enter into the Agreement. Specifically, Apprill alleges that Ken Hawari, Quest's attorney, represented to him that the Rule 10b-13 clause would not extend the subsequent closing deadline beyond April 1. According to Apprill, he would not sign the Agreement without this assurance. He argues that Quest's representation was false, that it was made with the intent that Apprill rely on it, and that he reasonably relied on the misrepresentation to his detriment. Therefore, because he was fraudulently induced to sign the Agreement based on Quest's misrepresentation, he should not be bound by the contract and should be granted a remedy in the nature of a partial rescission, absolving him of any duty to carry through with the subsequent closing.

Quest vigorously denies that its actions were fraudulent, but further maintains that any remedy Apprill might have had for Quest's alleged fraudulent conduct was obviated by Apprill's ratification of the Agreement. To succeed on this point Quest must

overturn an adverse jury finding, demonstrating that no reasonable jury could have found, as this one did, that Apprill failed to ratify the contract. Boeing, Inc. v. Shipman, 411 F.2d 365 (5th Cir. 1969) (en banc). Moreover, Quest insists that Texas does not recognize partial rescission and that, even if it does, such a remedy is extraordinary and must be reserved for particularly egregious circumstances. Quest also contends that Apprill's fraud claims are really disagreements about the contract, and evidence of the parties' intentions should have been excluded as parol evidence.

Ratification occurs when one induced by fraud to enter an agreement continues to accept benefits under the agreement after he becomes aware of the fraud or breach, or if he conducts himself so as to recognize the agreement as binding. LSR Joint Venture No. 2 v. Callewart, 837 S.W.2d 693, 699 (Tex. App.--Dallas 1992, writ denied); Spangler v. Jones, 797 S.W.2d 125, 131 (Tex. App.--Dallas 1990, writ denied); Johnson v. Smith, 697 S.W.2d 625, 630 (Tex. App.--Houston [14th Dist.] 1985, no writ); Sawyer v. Pierce, 580 S.W.2d 117, 122 (Tex. Civ. App.--Corpus Christi 1979, writ ref'd n.r.e.). One may lose the right to rescind a contract after learning of the facts which are grounds for rescission, by action and conduct which demonstrates affirmation or ratification of the contract. Spellman v. American Universal Investment Co., 687 S.W.2d 27, 29 (Tex. App.--Corpus Christi 1984, writ ref'd n.r.e.) (en banc) (per curiam). The party seeking to establish ratification must prove (1) knowledge of the fraud, and (2) a

voluntary intentional choice exercised in the light of such knowledge. LSR Joint Venture, 837 S.W.2d at 699; Spangler, 797 S.W.2d at 131; Bennett v. Mason, 572 S.W.2d 756, 759 (Tex. Civ. App.--Waco 1978, writ ref'd n.r.e.). Thus, Quest had the burden to prove that Apprill had full knowledge of the fraud and that he made a voluntary, intentional choice to ratify the contract in spite of the alleged fraud.

The parties agree that Apprill had knowledge of the alleged misrepresentations. The live issue is whether Apprill made a voluntary, intentional choice to accept benefits under the contract or conduct himself in such a manner as to recognize the contract as binding. We think the evidence amply demonstrates that he did.

After learning of Quest's alleged fraudulent representations, Apprill repeatedly pressed Quest to carry through with the deal. On February 21, 1989, and again on April 6, 1989, Apprill wrote to Quest demanding that it purchase the remainder of his shares for $4.625 per share under the contract. Apprill himself admitted at trial that he sought to finish the deal under the contract after learning of Quest's alleged fraud. When asked why he demanded that Quest purchase the rest of his shares after learning of the tender offer, Apprill testified: "Well, number one, I wanted to sell my shares, and number two, lawsuits are very expensive . . . ." Later in his testimony, Apprill admitted that his February 21 communication to Quest showed that even though he had been "screwed," he still wanted to finish the deal under the

contract. Concerning the April 6 communication, Apprill testified that even though he felt he was free to walk away from the contract he wanted Quest to purchase the remainder of his shares under the terms of the Agreement.

Apprill disputes the voluntariness of the April 6 communication, asserting that Quest had threatened him with litigation and that he was only attempting to avoid that litigation when he requested Quest to purchase his shares on April 6. Apprill's assertion of involuntariness is unfounded; threats of litigation like those in this case cannot make Apprill's choice involuntary.[3] On the facts of this case, Apprill ratified the Stock Purchase Agreement as a matter of law and was barred from asserting his mistake and fraud defenses to the contract.

Apprill's ratification of the Agreement obviates the need to discuss Apprill's partial rescission argument in depth. We note only that although some authority exists to support Apprill's contention that Texas allows a remedy in the nature of partial rescission, see, e.g., O'Con v. Hightower, 268 S.W.2d 321, 322 (Tex. Civ. App.--San Antonio 1954, writ ref'd), such a remedy may

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[3] Under Texas law, Apprill's assertion of involuntariness is analyzed as a claim of duress. See Matthews v. Matthews, 725 S.W.2d 275, 278 (Tex. App.--Houston [1st Dist.] 1986, writ ref'd n.r.e.). What constitutes duress is a question of law, but whether duress exists in a particular situation is a question of fact dependent on all these circumstances. Id.; Lewkowicz v. El Paso Apparel Corp., 614 S.W.2d 198, 200 (Tex. Civ. App.--El Paso), rev'd on other grounds, 625 S.W.2d 301 (Tex. 1981); Sanders v. Republic National Bank, 389 S.W.2d 551, 554 (Tex. Civ. App.--Tyler 1965, no writ). "There can be no duress unless there is a threat to do some act which the party threatening has no legal right to do. Such threat must be of such character as to destroy the free agency of the party to whom it is directed." Matthews, 725 S.W.2d at 278 (quoting Dale v. Simon, 267 S.W. 467, 470 (Tex. Comm'n App. 1924, judgment adopted)). It is not duress to threaten to do that which one has a legal right to do. Ulmer v. Ulmer, 162 S.W.2d 944, 947 (Tex. 1942).

be granted only in circumstances which are "extreme." Id. No such circumstances exist here. Moreover, given the overwhelming support for the general rule that a rescission must be in toto, the few cases which suggest the existence of a remedy in the nature of partial rescission are of questionable precedential value.

Apprill wants to affirm the contract with respect to the first closing and recover damages for misrepresentations regarding the price received for the stock sold at the initial closing, and, at the same time, he wants to be able to rescind his agreement to sell the remainder of the shares. But having insisted on enforcing his contract rights after learning of Quest's alleged fraud, Apprill cannot now insist on rescinding all or even part of the Agreement. Quest's breach of contract award must be sustained.[4]

B. The Fraud Claims

We now turn to the question whether Apprill's award on his fraud counterclaims may be upheld. Under Texas law, a defrauded party to a contract may seek any of three general remedies:

1. A right to damages for being led into the transaction;

2. Rescission of the fraudulent transaction; or

[4] Apprill's suggestion that he was misled by the district court into withdrawing his affirmative defense to the contract based on the Texas Securities Act is false and merits no discussion. That claim was voluntarily withdrawn, and whatever error there might have been was not preserved.

> 3. Enforcement against the perpetrator of the fraud of the kind of bargain which he represented that he was making.[5]

Gage v. Langford, 615 S.W.2d 934, 939-40 (Tex. Civ. App.--Eastland 1981, writ ref'd n.r.e.) (quoting Williston On Contracts § 1523); see Fredonia Broadcasting Corp. v. RCA Corp., 481 F.2d 781, 790 (5th Cir. 1973).

A defrauded party may seek by claim or defense to have the contract rescinded and to obtain damages resulting from the fraud, even though these remedies are inconsistent. See Fed. R. Civ. P. 8(e). But the party may not obtain judgment on both remedies and must choose between them before a judgment is entered. Fredonia Broadcasting, 481 F.2d at 790.

At the same time, however, a judgment for fraud and breach of contract is not inconsistent and may stand. One who has been fraudulently induced into a contract may elect to stand on the contract and sue for fraud damages. When this happens and the defrauded party fails to perform under the contract, he commits a separate wrong, and a distinct cause of action for breach of contract arises in favor of the defrauding party. See Gage, 616 S.W.2d at 937-40 (citing Mason v. Peterson, 250 S.W. 142 (Tex. Comm'n App. 1923, holding approved)).

Quest responds by asserting that Apprill's ratification of the contract waived his right to seek damages for Quest's

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[5] This option appears to describe the relief that Apprill seeks on appeal. Nevertheless, this is not the option that Apprill chose to plead and prove at trial. Had Apprill not ratified the Agreement, he might have been more successful at trial arguing a remedy under this theory.

alleged fraud. Although a few Texas cases have stated that ratification waives not only the right to rescission but also the right to seek damages,[6] that proposition is inconsistent with the general rule that a defrauded party may stand on the contract and sue for damages. Moreover, neither of the cases Quest cites directly addresses this issue.[7]

Quest also maintains that its motion for directed verdict should have been granted because Apprill's fraud counterclaim allegations are really disagreements about the proper interpretation of the Agreement and that Apprill's extrinsic evidence was inadmissible under the parol evidence rule and the doctrine of merger. In the absence of fraud, accident, or mistake, extrinsic evidence will not be received if its effect is to vary, add to, or contradict the terms of a written contract that is complete in itself and unambiguous. C&C Partners v. Sun Exploration and Production Co., 783 S.W.2d 707, 714 (Tex. App.--Dallas 1989, writ denied). Thus, the parol evidence rule is not a bar to the introduction of evidence to prove fraud. Dallas Farm Machinery Co. v. Reaves, 307 S.W.2d 233 (Tex. 1957); Tidelands Life Ins. Co. v. Harris, 675 S.W.2d 224, 226 (Tex. App.--Corpus Christi 1984, writ ref'd n.r.e.).

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[6] See Spellman v. American Universal Investment Co., 687 S.W.2d 27, 29-30 (Tex. App.--Corpus Christi 1984, writ ref'd n.r.e.); Wise v. Pena, 552 S.W.2d 196, 200 (Tex. Civ. App.--Corpus Christi 1977, writ dism'd).

[7] While ratification in the form of a modified agreement may waive one's right to seek fraud damages, see Wise, 552 S.W.2d at 200, affirmance only of the validity of the contract itself, as was done here, will not waive the defrauded party's right to seek damages for fraudulent conduct.

Acknowledging the fraud exception to the parol evidence rule, Quest protests that Apprill's allegations are insufficient to escape the reach of the parol evidence rule. In Weinacht v. Phillips Coal Co., 673 S.W.2d 677 (Tex. App.--Dallas 1984, no writ), the court affirmed a summary judgment against the plaintiff partly because his petition did not state a cause of action for fraud, only an alleged breach of an oral agreement whose enforcement was barred by the statute of frauds and the parol evidence rule. See Weinacht, 673 S.W.2d at 679-81. The coal lease at issue in Weinacht provided for a 5% royalty, but the plaintiff alleged that the lessee had orally agreed to increase its royalty if it paid a higher royalty to any other land owner in the county. Id. at 678. Unlike Weinacht, however, Apprill has not alleged an oral modification of the contract. Rather, he alleges he sought and obtained assurances regarding the circumstances surrounding the formation of the contract, which he reasonably relied on, and which were false when given. These allegations adequately state a cause of action for fraud and, therefore, fall outside the reach of the parol evidence rule.

Finally, Quest argues that the court should not have entered judgment on Apprill's fraud claims because the jury's answers concerning those claims are hopelessly inconsistent and cannot be harmonized. This argument stems from the fact that the jury was asked to make specific fact findings with respect to each of the four fraud theories advanced by Apprill. The jury found in Quest's favor on three of those theories and in Apprill's favor on

one, common-law fraud. The district court, relying on Holt Oil & Gas Corp. v. Harvey, 801 F.2d 773, 781 (5th Cir. 1986), cert. denied, 481 U.S. 1015, 107 S.Ct. 1892, 95 L.Ed.2d 499 (1987), found that the jury's findings were not hopelessly inconsistent, because the jury might well have concluded that Apprill would unjustifiably receive a multiple recovery if damages were awarded under more than one theory of recovery. See Holt, 801 F.2d at 781. We think Holt is distinguishable. In Holt, the court addressed claims involving breach of contract and quantum meruit causes of action with distinct and disparate elements. The jury in this case, however, was asked identical questions regarding four separate, but largely indistinguishable, fraud claims and gave inconsistent answers. These answers are irreconcilable and require remanding this case for a new trial on Apprill's fraud claims.

The danger of receiving inconsistent answers to jury questions may be obviated by avoiding duplication of jury questions. The jury is the finder of fact; it does not sit to rule on causes of action. If two causes of action are based upon the same factual inquiry, it is not necessary, or even prudent, to require more than a single answer from the jury. To do so increases the chances of juror confusion and inconsistent answers.

III.

Both parties also challenge the district court's entry of judgment on damages. Specifically, Apprill asserts that the district court allowed an improper measure of damages on Quest's breach of contract claim, and Quest asserts that Apprill's punitive damages award was excessive.

A. Breach of Contract Damages

Apprill argues that the district court should have granted its motion for new trial because the damages awarded were excessive as a matter of law. The damages claimed and awarded to Quest were calculated as the difference between the contract price and the adjusted share price on June 4, 1991. Normally, contract damages are calculated at or near the time of the breach.[8] However, a plaintiff may be entitled to consequential damages if it can show the amount of the loss by competent evidence with "reasonable certainty." Turner v. P.V. International Corp., 765 S.W.2d 455, 465 (Tex. App.--Dallas 1988, writ denied). The evidence supports Apprill's assertion that Quest intended to sell its HemoTec stock shortly after it purchased the stock. Moreover, Quest gives no indication that it made any attempt to show that it suffered consequential damages other than introducing the equivalent price of the stock as of June 4, 1991. Indeed, in its own brief Quest disavows any showing of consequential damages.

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[8] See Winograd v. Clear Lake City Water Authority, 811 S.W.2d 147, 157 (Tex. App.--Houston [1st Dist.] 1991, writ denied); Marshall v. Telecommunications Specialists, Inc., 806 S.W.2d 904, 907 (Tex. App.--Houston [1st Dist.] 1991, no writ).

> If Apprill had properly performed under the contract, Quest would have had his HemoTec shares in August, 1989. Nothing required Quest to sell those share[s] at that time, and because of Apprill's conduct, one can only speculate when (or if) Quest might have resold the shares.

Given Quest's complete failure to plead or prove consequential damages at trial and Quest's complete disavowal of any consequential damages in its brief, the jury's damage award was improperly sustained. With no proof of consequential damages, Quest's damages should have been calculated as of August 29, 1989. Apprill properly preserved the error through his trial objections and his motion for post-trial relief. Therefore, we must remand for a new determination of Quest's damages.[9]

B. Apprill's Punitive Damage Award

Quest likewise argues that the amount of punitive damages awarded in this case was not reasonably or rationally related to Apprill's actual damages. Because we must remand Apprill's fraud claims for a new trial, we vacate the punitive damage award. On remand, if Apprill's fraud claims are sustained, the jury may again

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[9] Quest correctly argues that it was entitled to recover its reasonable attorneys' fees under Tex. Civ. Prac. & Rem. Code Ann. § 38.001. However, the jury found that Quest's reasonable and necessary fees were zero. On remand, after the court has reestablished damages, the court may revisit the issue of attorneys' fees. We note only that a finding of fraud against Quest does not necessarily preclude it from receiving an award for attorneys' fees. See Southwestern Bell Media, Inc. v. Lyles, 825 S.W.2d 488, 491 (Tex. App.--Houston [1st Dist.] 1992, writ denied) (upholding breach of contract award of attorneys' fees in favor of party found liable on DTPA misrepresentation counterclaim).

determine whether punitive damages should be assessed and set an appropriate amount therefor.[10]

CONCLUSION

For the foregoing reasons, the judgment of the district court is **AFFIRMED** in part and **REVERSED** and **REMANDED** for a new trial or other appropriate proceedings on Apprill's fraud claims and a new determination of Quest's breach of contract damages.

AFFIRMED in part, **REVERSED** and **REMANDED** in part.

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[10] On remand, Apprill will be entitled to prejudgment interest on its actual damages according to the provisions of Tex. Rev. Civ. Stat. Ann. art. 5069-1.05. See Wood v. Armco, Inc., 814 F.2d 211, 213 (5th Cir. 1987) (citing Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 549, 552, 554 (Tex. 1985)). Prejudgment interest is not available for punitive damages. Tex. Civ. Prac. & Rem. Code Ann. § 41.006 (Vernon Supp. 1992).