UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-1758
Summary Calendar

ALBAUGH CHEMICAL CORPORATION.,

Plaintiff-Appellant,

VERSUS

OCCIDENTAL ELECTROCHEMICALS CORPORATION, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of Texas

3:87 CV 0953 G

(August 23, 1993)

Before HIGGINBOTHAM, SMITH, and DEMOSS, Circuit Judges.

PER CURIAM:*

I.

This diversity case arises from a contract for the sale of EPA registrations of herbicide chemicals and equipment for their manufacture. Diamond Shamrock Agricultural Corporation (DSAC) contracted to sell to Albaugh Chemical Corporation (ACC) forty

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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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

specified EPA herbicide registrations, referred to by the parties as "labels," and some equipment for the sum of $185,000. DSAC had separately agreed to sell, if available, a seat on the EPA's 2,4-D Task Force (the "task force seat") to ACC. The agreements provided that ACC was to place part of the contract price in an escrow account until they took possession of the equipment. No such account was ever established. Before executing the final agreement, DSAC notified ACC that one of the labels previously discussed had been sold to a third party and that they were unable to guarantee the transfer of the task force seat. Additionally, a number of the labels were, at this time, suspended by the EPA, rendering them unavailable for manufacture. Removal of the suspension required the performance of a series of test on the chemicals to ensure that they would continue to meet EPA standards. ACC was aware of these facts at the time the agreement was drafted. DSAC transferred thirty-nine of the forty contracted-for labels to ACC but withheld the "Lo-Val" label after it learned that the escrow account had not been established. In fact, ACC never paid any part of the contract price and actually resold several labels and some equipment for $490,000. ACC refused to remit payment and filed suit claiming, inter alia, breach of warranty, beach of contract, violation of the Texas Deceptive Trade Practices Act (DTPA) and misrepresentation. DSAC, asserted a counterclaim for breach of the same contract. After extensive discovery, DSAC filed a motion for summary judgment on ACC's claims. The court granted

both this motion and its later motion for summary judgment on DSAC's own counterclaim.

In granting the motion, the district court disregarded an affidavit filed by Albaugh Chemical's president, Dennis Albaugh in opposition to the motion for summary judgment. The affidavit contradicted Albaugh's prior deposition testimony without giving any reasonable explanation for the changes. The district court concluded that the affidavit could not be considered as creating the genuine issue of material fact needed for Albaugh to survive the motion for summary judgment.

On appeal, ACC asserts that: 1. The district court erred in holding that ACC waived its right to rely on the Texas Deceptive Trade Practices Act. 2. The district court abused its discretion in concluding that Mr. Albaugh's affidavit could not be considered as creating a genuine issue of material fact. 3. The district court erred in granting DSAC's motion for summary judgment on its breach of contract claim.

We AFFIRM.

II.

We review a district court's findings of fact under the "clearly erroneous" standard of review. We review a summary judgment de novo, applying the same criteria as the district court. Guthrie v. Tifco Indus., 941 F.2d 374, 376 (5th Cir. 1991), cert. denied, 112 S. Ct. 1267 (1992). If there is "no genuine issue of material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby,

Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986). Once the moving party has identified those portions of the record which entitled it to judgment as a matter of law, the burden shifts to the nonmoving party to come forth with specific facts that show there is no genuine issue for trial. Matsushita Elec. Indus.Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). Summary judgment is appropriate if a party fails to establish the existence of an element essential to its case and on which it has the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d. 265 (1986); see, Davis v. Illinois Central R.R., 921 F.2d 616, 618 (5th Cir. 1991).

III.

CHOICE OF LAW AND THE DECEPTIVE TRADE PRACTICES ACT

Where a contract manifests the intent of the parties to select in advance the jurisdiction whose laws will govern any disputes arising out of the contract, courts will generally uphold the provision so long as there is an adequate nexus between the forum and the contract. M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972). ACC's choice-of-law provision in the contract specifically states that "[i]n the event that [ACC] needs to enforce its rights under this Agreement against [DSAC], [DSAC] agrees that Iowa law shall apply." The parties intent is clear and, because ACC is an Iowa corporation, there is a reasonable connection between the contract and the chosen forum. We agree with the district court that Iowa law clearly applies.

ACC's explicit choice of Iowa law precludes its reliance on Texas' Deceptive Trade Practice Act (DTPA). ACC contends that the district court's application of the choice-of-law provision to bar its action under the DTPA is against public policy. We disagree. ACC bargained for and drafted the choice of law clause; it cannot now demand that Texas law be applied.

ACC relies heavily on the DTPA's §17.42 anti-waiver provision as proof that the district court's decision is against public policy. However, § 17.42 has not prevented other courts from finding contract clauses which preclude a DTPA action. See, Hoffman v. Burroughs, 571 F. Supp. 545 (N.D. Tex. 1982); Wydel Assoc. v. Thermasol, Ltd., 452 F. Supp. 739 (W.D. Tex. 1982). As the district court noted, the DTPA anti-waiver provisions addresses instances when unequal bargaining power is used to circumvent the policy of protecting consumers. See, MBank Fort Worth, N.A. v. Trans Meridian, Inc. 820 F.2d 716, 721 (5th Cir. 1987). ACC offers no evidence to show that DSAC had a greater bargaining strength or that it was coerced into agreeing to a disadvantageous contract. Therefore, ACC cannot rely on the anti-waiver provisions of the DTPA as a means of avoiding the consequences of the choice-of-law language it voluntarily chose. See, Jack B. Anglin Co. v. Tipps, 842 S.W.2d 266, 271 n.9 (Tex. 1992). We hold that ACC waived its right to rely on the Texas DTPA and affirm the district court's ruling in that regard.

IV.

GENUINE ISSUE OF MATERIAL FACT

DSAC supported its first motion for summary judgment, on ACC's claims, with deposition testimony and exhibits. In response to this motion, ACC filed an affidavit by Dennis Albaugh that contradicted much of his prior testimony. DSAC moved to strike that affidavit and the district court granted the motion by indicating that it would not consider the affidavit in ruling on whether there was a genuine issue of material fact. The court's decision to ignore the conflicting testimony in the affidavit was based on the fact that Albaugh had already made changes to his deposition testimony in errata sheet, submitted two months after the deposition. Hence, the court reasoned that any new changes were a sham attempt to create a genuine issue of material fact solely to defeat DSAC's summary judgment motion.

A party may not create a genuine issue of material fact with an affidavit that contradicts prior deposition testimony. Thurman v. Sears, Roebuck & Co., 952 F.2d 128, 136-37 n.23 (5th Cir.), cert. denied, 113 S. Ct. 136 (1992); Albertson v. T.J. Stevenson & Co., 749 F.2d 223, 233 n. 9 (5th Cir. 1984). The court will not consider such an affidavit unless either of two exceptions apply. The affidavit must sufficiently explain the reasons for the contradiction, or else, the deposition itself shows that the affiant was confused while giving his earlier testimony. See, e.g., Kennett-Murray Corp. v. Bone, 622 F.2d 887, 894 (5th Cir. 1980). However, the affidavit must cite specific instances in the deposition transcript showing that the confusion existed as a result of undue pressure, badgering, or counsel's attempts to

mislead the witness. See, e.g., Miller v. A.H. Robins Co., 766 F.2d 1102, 1104-05 (7th Cir. 1985).

We agree with the district court that neither of these exceptions applies to the case at hand. The court below found that Albaugh's affidavit failed to provide the requisite "reasonable explanation" for the changes. The district court also found that there was insufficient evidence to show that any inappropriate behavior by opposing counsel caused Albaugh's "incorrect" misstatements. Albaugh failed to provide a reasonable explanation for why the affidavit so dramatically altered his prior testimony when he had already made material, substantive changes to his deposition through the errata sheet. Generally, this court has upheld trial court grants of summary judgments against parties who attempt to retract sworn statements which are fatal to their claims. See, e.g., Thurman, 952 F.2d at 136-37, n.23 (and cases cited within). Albaugh gives us no reason to treat this case differently.

After reviewing the record and the nature of the changes caused by the affidavit, we agree with the district court's conclusion that Albaugh's affidavit does not fall within the exceptions. Accordingly, we find that the district court did not err in granting DSAC's motion for summary judgment and affirm.

V.

BREACH OF WARRANTY AND BREACH OF CONTRACT

ACC contends that the district court erred in granting summary judgment on its breach of warranty claim. ACC argues that DSAC

breached the warranty provision of the agreement by transferring a number of the suspended labels. The warranty language in the contract stated that: the assets to be transferred "will be free and clear of . . . encumbrances and will not be subject to any . . . regulations of government agencies which will interfere with the removal, transfer or use of said assets."

"It is well settled [that] `doubtful language in a written instrument is construed against the party who selected it.'" Rector v. Alcorn, 241 N.W.2d 196, 202 (Iowa 1976)(citation omitted); Iowa Fuel and Minerals, Inc. v. Iowa State Board of Regents, 471 N.W.2d 859, 862 (Iowa 1991). In this case, ACC drafted the contract and was, therefore, in the best position to ensure that it drafted provision which explicitly covered the labels.

We agree with the district court that ACC's failure to create a warranty explicitly covering the labels means that this warranty provision must apply to the labels. At the time ACC drafted the warranty's language against the transfer of restricted assets, it was aware that some of the labels were in suspension and that DSAC, which was no longer operating, would not be able to conduct the tests necessary to take the labels out of suspension. The district court found that the "omission of any reference to labels in suspension evinces the parties' intent that such labels were to be transferred along with other assets." The court therefore concluded that the prohibition in the warranty against transferring encumbered assets must refer not to suspension of labels but to

claims to title and other liens on the assets. We agree. Accordingly, ACC's claim for breach of warranty must fail.

ACC's alternative claim that DSAC breached the contract must also fail. ACC contended that DSAC's failure to transfer two labels constituted a breach. The district court rejected this argument and found that ACC's knew at the time the agreement was drafted that the butyric label had been sold to a third party. ACC also knew that it would be receiving suspended labels. Given this knowledge, we fail to see how DSAC breached the contract. But even assuming a breach occurred, ACC's failure to establish the escrow account constitutes a material fault that excused DSAC's obligation to transfer the Lo-Val label which it was withholding. See, Rasch v. City of Bloomfield, 153 N.W.2d 718, 724 (Iowa 1967).

ACC finally asserts that defendants made numerous misrepresentations concerning, among others, the number of labels in suspension and the status of the task force seat. The district court found no evidence in the record that ACC relied on any alleged misrepresentations or that they were induced into the contract. Upon review of the record, we cannot conclude that the district court was clearly erroneous in its ruling on either the breach of contract or the breach of warranty claims.

VI.

CONCLUSION

For the foregoing reasons, the district court's decision to grant DSAC summary judgment on ACC's claims of misrepresentation,

DTPA violations, breach of warranty and breach of contract is AFFIRMED; and the district court's grant of summary judgment in favor of DSAC on its cross claim against ACC for breach of contract is also AFFIRMED.