

UNITED STATES COURT OF APPEALS  
For the Fifth Circuit

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No. 92-2164  
Summary Calendar

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PACE CONCERTS, INC.,

Plaintiff-Appellee  
Cross-Appellant,

VERSUS

JAMES TODD SMITH a/k/a LL COOL J,

Defendant-Appellant,  
Cross-Appellee.

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Appeals from the United States District Court  
For the Southern District of Texas

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CA H 91 2218

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(March 25, 1993)

Before HIGGINBOTHAM and SMITH and DeMOSS, Circuit Judges.

DeMOSS, Circuit Judge:\*

I. BACKGROUND

In 1989, James Todd Smith ("Smith"), a nationally known musician who performs under the stage name of "LL Cool J," entered into negotiations with G-Street Express, Inc. ("G-Street"), a concert promoter, for the staging and promotion of Smith's 1989

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

"Nitro Tour." Rush Productions, Inc., Smith's management company, represented Smith in the negotiations. On April 12, 1989 Smith and G-Street executed an agreement for a seven week tour.

Pursuant to the agreement, G-Street advanced sums to Smith to cover initial tour expenses incurred before the first ticket revenues were realized. G-Street advanced a total of \$337,000 to Smith and his representatives, all of which was funded by Pace Concerts, Inc. ("Pace"). G-Street was to recoup, over the life of the concert tour, the total amount advanced; and additionally, was to receive a certain percentage of tour receipts and a commission on expenses it incurred. Smith was to receive certain guaranteed payments and a percentage of tour receipts.

On August 28, 1989 representatives of Pace, Smith and G-Street attended a meeting in Houston, Texas. The "Nitro Tour" was not the financial success that the parties had envisioned. As only two weeks remained on the tour and a large amount of the advance had not been recovered, G-Street sought to discuss both a method for settling the deposit deficit and plans for the possible postponement of the tour. The settlement agreement reached during the August 28 meeting was memorialized in a contract dated September 3, 1989 (the "Contract"). That document, signed on September 19, 1989, forms the basis for this action. G-Street assigned all of its rights under the Contract to Pace on May 25, 1990.<sup>1</sup>

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<sup>1</sup> We refer to G-Street and Pace separately for purposes of clarity; however, Pace, as successor to G-Street, possesses all of the rights that G-Street had under the Contract.

Under the terms of the Contract the parties agreed to extend the tour beyond the final concert date of September 3, 1989. Smith was to work additional performance dates to be mutually agreed upon by the parties, and G-Street was to forestall immediate collection of the deposit balance in an effort to recoup the deposit balance through future tour receipts. At the time of the meeting, G-Street had recovered \$103,444.58 of the advance; consequently, the parties fixed the amount Smith owed at \$233,555.42. The parties agreed that if Smith failed or refused to perform or engaged other promoters, the \$233,555.42 would be payable immediately. Unfortunately, after September 3, 1989, Smith did not have any more performances. Pace, alleging that Smith failed to perform when requested and that Smith engaged another tour promoter, demanded the return of the advance money. When Smith failed to respond to Pace's requests, Pace initiated this action for the return of the advance.

After Smith filed his Answer to Pace's First Amended Original Complaint, Pace filed a motion for summary judgment. The district court granted Pace's motion, awarding to Pace the principal deposit balance of \$233,555.42, prejudgment interest, postjudgment interest and attorneys fees.

Smith appeals from the granting of Pace's motion for summary judgment and the denial of his own cross motion for summary judgment. Smith presses his appeal on three fronts: (1) He asserts that the Contract is ambiguous, (2) he argues that his affirmative defenses of duress and lack of consideration preclude the entry of

summary judgment, and (3) he contends that he has not breached the Contract. Smith also appeals from the district court's denial of his cross-motion for summary judgment.

Pace appeals from the district court's calculation of prejudgment interest, asserting that the proper rate of interest is 10% and not the 6% figure used by the district court.

## II. STANDARD OF REVIEW

This court reviews the grant of a summary judgment de novo, using the same criteria as the district court. Walker v. Sears, Roebuck & Co., 853 F.2d 355, 358 (5th Cir. 1988). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Southmark Properties v. Charles House Corp., 742 F.2d 862, 873 (5th Cir. 1984). When a proper motion for summary judgment is made, a nonmoving party who wishes to avoid judgment by establishing a factual dispute must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

## III. ANALYSIS

### A. *Contract Ambiguity*

Smith initially argues that the district court's grant of summary judgment was improper because the Contract did not obligate

Smith personally to repay the deposit, or alternatively, that the Contract was ambiguous with respect to any such obligation.<sup>2</sup>

The interpretation of contracts is a question of law which this court reviews de novo. United States for the Use and Benefit of Straus Systems, Inc. v. Assoc. Indemn. Co., 969 F.2d 83, 85 (5th Cir. 1992). The district court held that the Contract was not ambiguous. The principles guiding our determination of contract ambiguity are well settled. A contract is not ambiguous merely because the parties disagree upon the correct interpretation or upon whether it is reasonably open to just one interpretation. D.E.W., Inc. v. Local 93, Laborers Int'l Union, 957 F.2d 196, 199 (5th Cir. 1992); Childers v. Pumping Sys., Inc., 968 F.2d 565, 569 (5th Cir. 1992). Mere disagreements of the parties as to the meaning of contract terms do not transform the issue of law into an issue of fact. D.E.W., Inc., 957 F.2d at 199.

If a written instrument is worded so that a court may properly give it a definite legal meaning or interpretation, the instrument is not ambiguous. Childers, 968 F.2d at 569; R & P Enter., Inc. v. LaGuarta, Gavrel & Kirk, Inc., 596 S.W.2d 517, 519 (Tex. 1980). A contract is ambiguous only when the applicable rules of contract interpretation leave a genuine uncertainty as to which of two meanings is the proper meaning. Universal C.I.T. Credit Corp. v. Daniel, 243 S.W.2d 154 (Tex. 1951).

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<sup>2</sup> The Contract states the following: In the event that, (i) the Artist [Smith] fails or refuses to perform; or (ii) the Artist engages another Tour promoter, the unrecouped balance of the deposit (as determined on September 3, 1989) will be payable to Promoter [G-Street]." Tr. at 186.

Texas law provides that when a court construes a contract it must look to the intent of the parties as expressed in the contract. United States for the Use and Benefit of Straus Systems, Inc., 969 F.2d at 85; Phillips v. Inexco Oil Co., Inc., 540 S.W.2d 546, 548 (Tex. Civ. App.--Tyler 1976, writ ref'd n.r.e.). In a determination of the parties' intent, it is the objective intent, and not the subjective intent, which controls. When the court finds that a contract is unambiguous the instrument alone is taken to express the intent of the parties. Swaminathan v. Swiss Air Transport Co., Ltd., 962 F.2d 387, 389 (5th Cir. 1992); Shelton v. Exxon Corp., 921 F.2d 595, 603 (5th Cir. 1991); Fuller v. Phillips Petroleum Co., 872 F.2d 655 (5th Cir. 1989).

With these principles in mind, we agree with the district court that the Contract is unambiguous. The Contract is reasonably susceptible to only one interpretation. The parties clearly contemplated that Smith would return the remaining deposit balance. Moreover, Smith admitted in his Answer that he "was to refund the monies advanced." Parties are bound by admissions in their pleadings, and facts admitted in pleadings are no longer at issue. Davis v. A.G. Edwards, 823 F.2d 105, 108 (5th Cir. 1987).

G-Street was to recoup the balance through concert receipts if any concert dates materialized after September 3, 1989. Whether Smith agreed to and performed at future concert performances affected only the manner in which Pace was to recover its money, not whether Smith in fact owed Pace a sum of money. If Smith failed or refused to perform, or if Smith engaged other tour

promoters, then he was to repay the balance immediately. The Contract language clearly sets out these conditions for repayment; contrary to Smith's assertions, neither the terms nor the obligation to repay are ambiguous.

Smith's final argument with respect to the proper interpretation of the parties' agreement is that the Contract does not represent the entire agreement between the parties. He argues that to understand the entire agreement, one must look at the parties' previous April 12 agreement and their course of performance under that agreement. Again, we find Smith's argument meritless. A written contract is presumed to embody the entire agreement between the parties. Previous or inconsistent agreements, whether oral or written, are inadmissible to vary the terms of the written contract. N.K. Parrish, Inc. v. Southwest Beef Indus. Corp., 638 F.2d 1366, 1368-69 (5th Cir.), cert. denied, 454 U.S. 1047 (1981); Hubacek v. Ennis State Bank, 317 S.W.2d 30, 32 (Tex. 1952). Similarly, it is improper for a court to look to course of performance to determine contractual intent if the court has not made a finding of ambiguity. Shelton, 921 F.2d at 603. Because Smith has not brought any evidence forth to show that the parties intended otherwise, and because there is no provision in the Contract that incorporates other documents by reference, we take the Contract as comprising the entirety of the agreement between the parties.

## B. *Affirmative Defenses*

### 1. *Duress*

Smith next contends that even if the Contract unambiguously purports to bind him to certain obligations, any obligations appearing in the Contract were improperly forced upon him. As such, he argues, he is not bound by those contractual obligations. Specifically, Smith asserted in his Answer that, during the parties' August meeting, G-Street threatened to cancel all future tour dates unless Smith agreed to the terms of the Contract.

In order to prevail on a duress claim under Texas law, a party must prove the following: (1) a threat to do some act that the party threatening the act has no legal right to do, (2) some illegal exaction or some fraud or deception, (3) an imminent restraint that destroys the free agency of the threatened party, and (4) the threatened party must have no means of present protection from the threat. Lee v. Wal-Mart Stores, Inc., 943 F.2d 554 (5th Cir. 1991); Simpson v. MBank Dallas, N.A., 724 S.W.2d 102, 109 (Tex. App.--Dallas 1987, writ ref'd n.r.e.). What constitutes duress is a question of law for the courts; however, whether duress exists in a particular case is a question of fact dependent upon the circumstances of the case. Mathews v. Mathews, 725 S.W.2d 275, 278 (Tex. App.--Houston [1st Dist.] 1986, writ ref'd n.r.e.).

In light of the elements of the duress defense and the undisputed facts in this case, we find that Smith failed to present any genuine fact issue. Smith failed to bring forth evidence on the elements of duress; as such, he cannot prevail on this theory.



Smith admitted in the trial court that the Contract was not signed until September 19, 1989, well after the September 3, 1989 conclusion of the tour. Because the Contract was not signed until after all of the tour dates were completed, any threat allegedly made by G-Street to cancel the "remaining" concert dates would have been utterly impotent, and could have had no coercive effect.

Smith neither pleaded nor brought forth any evidence showing how such a threat could have operated as an imminent restraint which overbore his free agency. Smith also failed to show how he lacked the present means to protect himself from this alleged threat. Moreover, Smith's ratification of the agreement after the cessation of any threat or duress precludes his use of duress as a defense to the contract. See United States v. McBride, 571 F. Supp. 596, 613 (S.D. Tex. 1983).

## 2. *Lack of Consideration*

Smith next asserts that the Contract is not binding or enforceable because it is not supported by consideration. Smith argues that he and G-Street entered into a prior concluded contract, and then entered into a subsequent contract on the same subject matter at variance with or contradictory to the prior contract, without new consideration; therefore, the subsequent September 3, 1989 contract is of no legal force or effect. Bates Grain Co. v. Cassidy, 225 S.W.2d 1018, 1019 (Tex. Civ. App.--Dallas 1949, writ ref'd n.r.e.). G-Street, Smith claims, did not pay any additional money, gave no additional consideration, and did not

assume any obligation that it was not already bound to perform under the previous April 12 contract. We do not agree.

The Contract specifically provides that: (1) G-Street would promote additional "Nitro Tour" performances after the September 3rd conclusion of the original tour, (2) G-Street would forego immediate collection of the remaining deposit balance and would carry over the \$233,555.40 as a deposit for the tour extension, and (3) G-Street would seek immediate repayment only if Smith failed or refused to perform, or engaged other tour promoters. Smith agreed to perform additional tour dates in exchange for G-Street's promises. These reciprocal promises are sufficient consideration to support the Contract. Newitt v. Camden Drilling Co., 552 S.W.2d 928, 932 (Tex. Civ. App.--Corpus Christi 1977, no writ).

#### C. *Breach of Contract*

In his final argument, Smith contends that even if he had an unambiguous personal obligation to repay the deposit balance, such an obligation never attached because he never breached the Contract. Smith argued below that the Contract required him to perform only on mutually agreed dates and no dates were agreed upon; therefore, his failure to agree to or to perform on any dates after September 3, 1989 did not trigger his obligation to repay the deposit. We, along with the district court, do not share this view. The clear terms of the Contract gave Smith an option--pay or play. Smith did neither. He declined to schedule or play further performances, and he steadfastly refused to remit the deposit

balance upon Pace's request; therefore, he was obligated under the Contract to repay the balance of the deposit.

The Contract also provided that if Smith engaged other tour promoters, then the deposit was due immediately. Smith admitted in his Answer that he engaged other tour promoters. Just as Smith was bound by his admission of personal liability on the deposit balance, he is also bound by his admission that he hired other promoters. Smith argues that his hiring of other tour promoters does not constitute a breach because he hired those promoters for another tour that commenced after the end of the "Nitro Tour." Smith's creative argument, however, renders meaningless the Contract language prohibiting Smith from hiring other promoters. Courts construing a contract "examine the entire instrument so that none of the provisions will be rendered meaningless." R & P Enter., Inc., 596 S.W.2d at 519; Southland Royalty Co. v. Pan American Petroleum Corp., 378 S.W.2d 50 (Tex. 1964). This last argument, which ignores the straightforward language in the Contract, is not persuasive.

*D. Pace's Challenge to the Prejudgment Interest Rate*

Pace argues on cross-appeal that the district court incorrectly calculated prejudgment interest at a rate of six percent (6%) and asserts that the proper measure of interest is ten percent (10%). If the sum payable is ascertainable from the contract, claims for prejudgment interest are governed by Tex. Rev. Civ. Stat. Ann. art. 5069-1.03 (Vernon 1987) which provides,

When no specified rate of interest is agreed upon by the parties, interest at the rate of

six percent per annum should be allowed on all accounts and contracts ascertaining the sum payable commencing on the thirtieth (30th) day from and after the time when the sum is due and payable.

Texas law thus permits prejudgment interest on contracts at a rate of six percent when those contracts provide the conditions upon which liability depends and fix a measure by which the sum payable can be ascertained with reasonable certainty. Perry Roofing Co. v. Olcott, 744 S.W.2d 929, 930 (Tex. 1988); La Sara Grain Co. v. First National Bank of Mercedes, 673 S.W.2d 558, 567 (Tex. 1984).

If the sum payable is not ascertainable from the contract, equity may provide prejudgment interest at the rate specified in Tex. Rev. Civ. Stat. Ann. art. 5069-1.05. Perry Roofing Co., 744 S.W.2d at 930; Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 549, 554 (Tex. 1985). The rate specified under Tex. Rev. Civ. Stat. Ann. art. 5069-1.05 is ten percent compounded daily, and it is that rate that Pace argues is proper in this case. Pace bases its contention on the fact that the determination of the precise outstanding balance would require an extrinsic analysis of net tour receipts. Such an analysis, Pace concludes, would take the Contract outside of art. 5069-1.03. We disagree.

Courts that have applied the higher rate have done so when they have found that the contract does not contain facial provisions, language, or terms which give guidance in determining damages. University Sav. Assn. v. Burnap, 786 S.W.2d 423, 427 (Tex. Civ. App.--Dallas 1990, no writ); Rauscher Pierce Refsnes,

Inc. v. Koenig, 794 S.W.2d 514 (Tex. Civ. App.--Corpus Christi 1990, writ denied); Rio Grande Land & Cattle Co. v. Light, 758 S.W.2d 747 (Tex. 1978).

The Contract clearly sets out the conditions upon which liability depends; furthermore, it fixes a measure by which the sum payable can be ascertained with reasonable certainty. The Contract fixes the deposit balance at \$ 233,555.42. Because that figure represents the exact measure of contractual damages awarded in this case, the Contract states with exact precision the sum payable. Even if that were not true, the Contract still would meet the requirements of art. 5069-1.03. The Contract specifically states that the deposit balance is to be reduced, if at all, by sums recouped through tour receipts gained after September 3, 1989. As such, the Contract contains facial provisions which give clear guidance in determining damages. Accordingly, we affirm the district court's calculation of prejudgment interest at six percent per annum.

#### V. CONCLUSION

We find no merit in the remaining contentions of the parties. For the foregoing reasons we AFFIRM the decision of the district court in all respects.