IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Nos. 92-2677
93-2432
Summary Calendar

ENERMARK, INC.,

Plaintiff-Appellee,

versus

SANDPOINT PETROLEUM, INC., ET AL.,

Defendants,

SANDPOINT PETROLEUM, INC.,

Defendant-Appellant.

Appeals from the United States District Court for the
Southern District of Texas
(CA-H-88-0023)

(December 2, 1993)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

This appeal concerns a contract dispute between appellant Sandpoint Petroleum ("Sandpoint") and appellee EnerMark, Inc. ("EnerMark"). After a bench trial, the district court held that

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

there was a valid, enforceable contract, and that Sandpoint breached that contract. The court awarded EnerMark contract damages, prejudgment interest, and attorney's fees. Sandpoint appeals. We affirm.

I

Sandpoint, a New Mexico corporation, organized by its president and sole shareholder Sam Dazzo, was an investor and broker in the oil and gas business. Dazzo was the principal source of funding for the Sandpoint's projects, while Pete Temple, Sandpoint's vice president, supplied the technical skills for evaluating the projects. During the early part of 1987, Sandpoint reviewed depressed values of oil and gas properties in the gulf coast area and decided that it should explore the possibilities of acquiring production and other properties on favorable terms. To that end, Sandpoint formed a joint venture with Xplor Corporation ("Xplor"). Sandpoint was to locate mineral properties and Xplor was to supply the financing to buy the properties. In May of 1987, Sandpoint sent Ted W. Elison, a landsman whose primary job was to locate projects for investment, to Houston, Texas, to begin looking for bargain properties.

While in Houston, Elison was introduced to Jack Hutchison, the president and sole employee of EnerMark. EnerMark's primary business was processing and marketing natural gas, but it also made a business of locating oil and gas reserves. In this connection, EnerMark had entered into a brokerage agreement with a firm called

Hall-Houston Oil Company ("Hall-Houston"). Under the agreement, EnerMark received a commission whenever it located a buyer or assignee for one of Hall-Houston's properties, provided that Hall-Houston did in fact take advantage of the opportunity.

On May 13, 1987, Temple, Hutchison, and Elison met in Houston. Hutchison disclosed EnerMark's relationship with Hall-Houston, and Temple likewise disclosed Sandpoint's relationship with Xplor. Among topics discussed at the meeting was Hall-Houston's several offshore wells in an area called High Island that needed a gas gathering system and a pipeline to make the gas marketable. The meeting adjourned without conclusive results, but the following day, Sandpoint hired a consulting firm to prepare a confidential report on the High Island gas reserve.

On May 18, 1987, Hutchison sent Elison a letter in which he summarized the holdings of Hall-Houston, and added that

> [EnerMark] represents Hall-Houston regarding matters of reserves acquisitions and gas marketing. However, any proposal regarding participation interest in a gas gathering system owned or planned by Hall-Houston shall require an executed letter of interest from Sandpoint Petroleum, Inc. that provides for compensation to EnerMark, Inc. for the project development, contract negotiations, and related activities.

Hutchison wrote Elison again on May 22, to inform Elison of other prospects that were not connected with Hall-Houston. On May 29, Temple and Elison met with Hutchison and two officers of Hall-Houston to discuss the High Island project. One of the Hall-Houston officers brought up a new prospect called the Main Pass

Drilling Project. Temple informed them that Sandpoint was interested in both the High Island and Main Pass projects.

On or about June 1, after some negotiation, Elison and Hutchison signed a "confidentiality agreement." In part, EnerMark agreed to supply Sandpoint confidential information concerning oil and gas properties. Sandpoint in turn agreed not to disclose the information to any third parties or to contact any producer regarding the properties in question without EnerMark's knowledge or consent. After Elison signed this agreement, EnerMark supplied Sandpoint with confidential data relating to the High Island and Main Pass prospects. Later, on July 24, Elison also signed a fee agreement drawn up by Hutchison in which Sandpoint agreed to compensate EnerMark for its services. Eventually, Sandpoint purchased from Hall-Houston a 12.5 percent working interest in the Main Pass property. Sandpoint, however, refused to compensate EnerMark.

II

After Sandpoint refused to pay the finder's fee, EnerMark sued Sandpoint for breach of contract in Texas State Court. Sandpoint removed the action to federal court based upon diversity jurisdiction. After a lengthy bench trial, the district court held that Elison had apparent authority to sign the fee agreement on Sandpoint's behalf. The court further held that Sandpoint owed EnerMark $151,295.00 under the contract plus prejudgment interest,

and attorney's fees of $173,550.00. Sandpoint then appealed to this court.

III

Sandpoint attacks the district court's judgment on four separate grounds. First, Sandpoint argues that the district court's finding that Elison had apparent authority to sign the fee agreement on Sandpoint's behalf is clearly erroneous. Next, Sandpoint contends that the district court erroneously held that the fee agreement signed by Elison was an enforceable contract. Third, Sandpoint asserts that even if the fee agreement were an enforceable contract, the amount of damages awarded to EnerMark had no basis in the agreement and is clearly erroneous. Finally, Sandpoint argues that because EnerMark should not have prevailed on any of the foregoing issues, the court should not have awarded EnerMark attorney's fees. Because Sandpoint's arguments are meritless, we affirm the district court.

A

Sandpoint argues that the district court erred in finding that Elison had apparent authority to sign the fee agreement on Sandpoint's behalf. According to Sandpoint, EnerMark, through its president Hutchison, knew or should have known that Elison did not have authority to sign the fee agreement.

Under Federal Rule of Civil Procedure 52(a), "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given

to the opportunity of the trial court to judge the credibility of the witnesses. Anderson v. Bessemer City, 470 U.S. 564, 573, 105 S.Ct. 1504,1511, 84 L.Ed.2d 518 (1985). A finding is clearly erroneous when although there is evidence to support it, "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Id. (citing United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed.2d 746 (1948)).

After a lengthy bench trial, the district court found that Elison was clothed with apparent authority. Under Texas law, apparent authority arises where the principal "knowingly or by want of care so cloth[es] the agent with indicia of authority as to lead a reasonably prudent person to believe that he actually has such authority." Sorenson v. Shupe Bros. Co., 517 S.W.2d 861, 864 (Tex. Civ. App.--Amarillo 1974, no writ). In its Memorandum Opinion, the district court noted that "Sandpoint sent Elison to Houston on a long term basis, had him arrange for living space and office quarters, and allowed him to behave, to all appearances, like an officer or other dominant figure in the corporation." Moreover, Elison conducted negotiations with Hutchison, and signed the non-disclosure agreement.[1] Hutchison also testified that he overheard a telephone conversation between Elison and Temple in which Temple

[1]Sandpoint concedes that Elison, as its agent, had actual authority to sign the non-disclosure agreement. Elison signed the June 1 agreement "Ted W. Elison, V.P." even though at the time he signed the agreement, he was not in fact an officer of Sandpoint.

authorized Elison to sign the fee agreement on Sandpoint's behalf. Although Sandpoint hotly contests this point, and denies that this conversation ever occurred, the district court was within its bounds to make a credibility determination in EnerMark's favor. Sandpoint also contends that Hutchison failed to exercise the requisite care to determine the nature and extent of Elison's authority. However, assuming, as we must, that Hutchison overheard the conversation between Temple and Elison, a reasonable person would have been led to believe that Elison had Temple's authority to act on Sandpoint's behalf. Based on the evidence present in this record, the district court's finding that Elison was clothed with apparent authority is not clearly erroneous.

B

Next, Sandpoint argues that the fee agreement signed by EnerMark and Sandpoint is nothing more than an agreement to negotiate in the future, and as such, it is unenforceable. We review de novo the district court's construction and interpretation of the agreement between Sandpoint and EnerMark. Stine v. Marathon Oil Co., 976 F.2d 254, 260 (5th Cir. 1992). As noted above, however, the determination of any question of fact is subject to the clearly erroneous standard. Id.; FED. R. CIV. P. 52(a).

To be enforceable under Texas law, a contract must be definite enough to enable the courts to fix the legal obligations of the parties. Richter S.A. v. Bank of America Nat'l Trust & Savings Assn, 939 F.2d 1176, 1196 (5th Cir. 1991); Neeley v. Bankers Trust

Co., 757 F.2d 621, 628 (5th Cir. 1985); Bendalin v. Delgado, 406 S.W.2d 897, 899 (Tex. 1966). Nevertheless, a contract for goods or services may be enforceable even though the exact amount of compensation is uncertain. Bendalin v. Delgado, 406 S.W.2d at 900; Scott v. Ingle Bros. Pac., Inc., 489 S.W.2d 554, 555 (Tex. 1972). In such cases, the law requires the payment of a reasonable amount. Id. Whether an agreement is a binding contract or merely an agreement to contract in the future depends upon whether the parties intended to be bound by the agreement. The Texas Supreme Court has stated that

> [Whether the agreement in question is a binding contract or merely an agreement to agree in the future] depends upon the intention of the parties. An agreement simply to enter into negotiations for a contract later does not create an enforceable contract. But parties may agree upon some of the terms of a contract, and understand them to be an agreement, and yet leave other portions of the agreement to be made later.

Scott v. Ingle Bros. Pac., Inc., 489 S.W.2d at 555. In another relevant case, the Texas Supreme Court further stated that

> [w]here the parties have done everything else necessary to make a binding agreement for sale of goods or services, their failure to specify the price does not leave the contract so incomplete that it cannot be enforced. In such a case it will be presumed that a reasonable price was intended.

Bendalin v. Delgado, 406 S.W.2d at 900.

In this case, the district court held that the June 1, 1987 confidentiality agreement and the July 24, 1987 fee agreement together represented an enforceable contract between Sandpoint and EnerMark even though the exact amount of compensation was not

defined. Under these two agreements, EnerMark agreed to deliver proprietary information to Sandpoint concerning specific oil and gas properties. In exchange, Sandpoint agreed, inter alia, to keep the information confidential and to obtain EnerMark's consent before acquiring any of the properties at issue. The July 24 fee agreement further spelled out the rights, duties and obligations of each party, and set out the two separate methods of determining the specific amount of compensation.[2] Together these two agreements form a sufficiently strong evidentiary base from which the district court could conclude that the parties intended to be bound by an enforceable contract. As such, the district court's finding that

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[2]The agreement first states that if Sandpoint acquires one of the properties in question, EnerMark will receive a "promoter's commission." The fee agreement states:

> Enermark will participate with Sandpoint principles [sic] in receiving such compensation as may be available from Sandpoint and Sandpoint's joint venture partner(s) in whatever form, e.g., cash, stock, working interest, etc. The division of such compensation between the parties hereto will be decided by mutually agreeable "ballot" contribution to each transaction. Such ballot shall be determined in face to face negotiations by assigning weighting factors to each individual's (or company's) contributions. However, in the event that EnerMark's participation is deemed to be unsatisfactory, in EnerMark's sole opinion, EnerMark shall have the right to negotiate its compensation with Sandpoint concurrently with the tendering of future prospects. . . .

The fee agreement further provides that if a gas gathering property is acquired, EnerMark's compensation would "in no event . . . be less than ten percent (10.0%) carried working interest or a mutually agreeable equivalent, of the acquired participation interest in gas gathering prospects tendered by EnerMark for Sandpoint's consideration."

the parties were bound by the signed agreements is not clearly erroneous.

C

Sandpoint next argues that the amount of damages assessed by the district court is clearly erroneous. In cases where the contract does not expressly specify the amount of compensation for goods or services provided, the court will award an amount that is reasonable. Bendalin v. Delgado, 406 S.W.2d at 900. Here, since Sandpoint did not acquire a gas gathering system, the district court found that the value of EnerMark's first rights to market oil and gas production was too speculative to ascertain. The district court did, however, calculate the value of EnerMark's services in locating the property Sandpoint bought and providing brokers services. In calculating the amount of damages, the district court relied upon testimony provided by a value expert designated by both EnerMark and Sandpoint.[3] This expert testified that the promoter's commission should be split evenly, since both parties performed a broker function. The expert further testified as to the exact dollar amount of the promoter's commission.[4] Although the district

[3]The value expert was hired by EnerMark to render an opinion of the value of its claim against Sandpoint. However, after Sandpoint took the expert's deposition, Sandpoint withdrew its designation of other value experts, and designated EnerMark's expert as its only expert.

[4]The expert stated that the total promoter's commission of $302,590 could be broken down in the following manner: cash fees of $31,090; cash flow from past production of $108,970; and estimated cash flow from future production of $162,530.

court adopted the expert's valuation of the promoter's commission, the court awarded EnerMark twenty-five percent of the total commission, rather than the fifty percent suggested by the expert. Because this amount is well supported by the evidence in the record, this award is not clearly erroneous.

D

Finally, Sandpoint argues that the district court improperly awarded EnerMark attorney's fees because EnerMark should not have prevailed on any of the issues discussed above. However, as we have already determined, the district court properly held that Sandpoint in fact breached a binding enforceable agreement with EnerMark. As such, under Texas law, EnerMark is entitled to recover its attorney's fees. See TEX. CIV. PRAC. & REM. CODE § 38.001.

IV

For the foregoing reasons, the decision of the district court is

A F F I R M E D.