UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-5570
Summary Calendar

COUNTRY HOLLOW JOINT VENTURE,

Plaintiff-Counter-Defendant-Appellee,

MICHAEL GRIBBLE AND RICHARD WADE,

Defendants-Counter Claimants-Appellees,

VERSUS

ENTERPRISE CAPITAL CO., N.V.
and BOB STANTON,

Counter-Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(SA 88 CA 0428)

(November 23, 1992)

Before JOLLY, DUHÉ and BARKSDALE, Circuit Judges.

DUHÉ, Circuit Judge:[1]

We visit this case for the second time. In its prior appearance, we affirmed some points of the district court's summary judgment order, while vacating and remanding certain counterclaims and affirmative defenses raised by Enterprise Capital, Co. and Bob Stanton. (Collectively "Enterprise"). On

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

remand, the district court entered detailed findings, drawing from them the legal conclusion to again enter summary judgment against Enterprise, and in favor of Country Hollow Joint Venture, Michael Gribble and Richard Wade. (Collectively "CHJV"). After a review of the record before us, we find no error in the district court's findings and conclusions, and affirm its decision.

I. BACKGROUND AND PROCEDURAL HISTORY

A. Facts

Plaintiff and counter-defendant CHJV is a Texas partnership conducting business in Bexar County, Texas. Counter-defendants Michael Gribble and Richard Wade are the partners in CHJV. CHJV owned the Crown Meadows Shopping Center in San Antonio, Texas, and leased space therein to Malamapi, Inc. ("Malamapi") in which Malamapi operated a nightclub. In 1985, Malamapi sold the assets of its nightclub operation to Enterprise, via a transaction negotiated with Bob Stanton, the Director of Enterprise. As part of this transaction, Malamapi assigned its Crown Meadows lease to Enterprise. This assignment required the written consent of CHJV. CHJV made its written consent contingent upon Enterprise exercising a three-year renewal option contained in the lease. This option extended the lease through 1990. Enterprise, through Stanton, agreed to these conditions and assumed operational control of the nightclub in April of 1985.

In October 1987, Enterprise vacated the Crown Meadows

property. CHJV contends this was a breach of the lease, as modified by the 1985 assignment, and filed suit in Texas state court. Enterprise removed the case to the district court, raised affirmative defenses and asserted counterclaims against CHJV. The gist of Enterprise's defenses and counterclaims is that CHJV initially gave its unconditional oral assent to the lease assignment between Malamapi and Enterprise. Relying on this unconditional assent, Enterprise completed the transaction and purchased the nightclub's assets from Malamapi. Later, Enterprise maintains, CHJV insisted that certain conditions be met (i.e., the three-year lease extension), prior to CHJV giving its written approval to the lease assignment. These conditions were set out in an April 3, 1985 letter agreement signed by representatives from Malamapi, CHJV and Enterprise. Enterprise seeks to repudiate this agreement, alleging that it was forced into either accepting CHJV's conditions or losing the earnest money it had already paid to Malamapi.

The district court entered summary judgment in CHJV's favor on its breach of contract claim against Enterprise. Summary judgment in CHJV's favor was also entered on Enterprise's counterclaims. Enterprise appealed, and this Court affirmed in part, reversed in part and remanded certain issues to the district court for further explication. The district court has made detailed findings on the remanded issues, and again has entered summary judgment against Enterprise.

B. Remanded Issues

The case was remanded and the district court was asked to enter more detailed findings on Enterprise's affirmative defenses of fraud and estoppel. Because the affirmative defenses to CHJV's breach of contract claim were remanded, the summary judgment against Enterprise was vacated with respect to the breach of contract claim. Also remanded were Enterprise's counterclaims of fraud, negligent misrepresentation, breach of contract, and DTPA claims.[2]

II. STANDARD OF REVIEW

Summary judgment is appropriate if the record discloses "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In reviewing the summary judgment, we apply the same standard of review as did the district court. Waltman v. International Paper Co., 875 F.2d 468, 474 (5th Cir. 1989); Moore v. Mississippi Valley State Univ., 871 F.2d 545, 548 (5th Cir. 1989). The pleadings, depositions, admissions, and answers to interrogatories, together with affidavits, must demonstrate that no genuine issue of material fact remains. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). To that end we must "review the facts drawing all inferences most favorable to the party opposing the motion."

[2] Enterprise points out that in our prior order remanding this matter, we indicated there might be an opportunity for argument on remand. The district court, however, entered an order with detailed findings without soliciting arguments from either party. After a plenary review of the record, we cannot say this decision was in error.

Reid v. State Farm Mut. Auto. Ins. Co., 784 F.2d 577, 578 (5th Cir. 1986). If the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); see Boeing Co. v. Shipman, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc).

III. DISCUSSION

A. Enterprise's Fraud Defense and Counterclaim

At trial, Enterprise would bear the burden of proving fraud both as a counterclaim and as an affirmative defense. Enterprise thus has the burden of proof as to its counterclaim and affirmative defense of fraud in the summary judgment context as well. See Celotex Corp., 477 U.S. at 322.

The district court applied the correct Texas law of fraud. To establish a prima facie case of fraud, a party must show: (1) a material representation; (2) which was false; (3) when the representation was made the speaker knew it was false, or the representation was made with a reckless disregard for its truth and as a positive assertion; (4) the statement was made by one who intended that it would be relied upon by the other party; (5) the other party acted in reliance upon the representation; and, (6) the other party suffered injury. See R. 1, at 11 (citing Stone v. Lawyer's Title Ins. Corp., 554 S.W.2d 183, 185 (Tex. 1977)).

Viewing the evidence in the light most favorable to Enterprise, we assume that during the March 27, 1985 meeting between Wade (CHJV's representative), Stanton (Enterprise's

representative), and Anthony (Malamapi's representative), Wade did give CHJV's oral consent to the assignment of the lease. For the present review, we characterize this oral consent as a contract. Cf. Apperson v. Shofner, 351 S.W.2d 367, 369 (Tex. Civil App. -- Waco 1961, no writ) (consent to the assignment of a lease is not a contract for the lease of real estate contemplated by the Texas statute of frauds, and therefore not required to be in writing).

The April 3, 1985 letter agreement signed by Stanton is a contract covering the identical subject matter of the prior oral agreement. By its terms, which were contrary to the prior oral agreement, the April 3, 1985 agreement put CHJV in breach of its unconditional oral assent to the lease assignment. Stanton must have been aware of the additional requirements outlined in the April 3, 1985 document; the numerous changes made in the April 3, 1985 letter agreement clearly indicate that close attention was paid to its contents. See R. 4, at 677-79.

On remand, the district court found that Enterprise failed to carry its burden of proving fraud because two of the necessary elements could not be shown: (1) the false material representation; and, (2) the injury element. See R. 1, at 18.

Both the Malamapi-Enterprise lease assignment and the purchase agreement between the parties expressly provided that prior written consent of CHJV was necessary, as required in the original CHJV-Malamapi lease. See R. 1, at 12. The district court held that any claim by Enterprise that it relied on the oral consent of CHJV "is therefore untenable and repudiated by these undisputed facts." Id.

at 13. We agree. The record shows that this transaction was conducted at arms length between knowledgeable businessmen. If Enterprise ignored the express provisions calling for written consent to the lease assignment, and instead relied on oral permission, it did so at its peril.

Regarding the injury element, the district court found that the parties contemplated that CHJV may not agree to the lease assignment. In anticipation of this event, the parties built in a safety valve -- Enterprise had the right to request the return of its $75,000 in earnest money. Enterprise did not use this safety valve when CHJV proposed the conditions to the lease assignment, and instead proceeded to negotiate and sign the April 3, 1985 agreement. The district court found that Enterprise's failure to request a refund of its earnest money negated the injury element necessary to prevail on a fraud claim or defense.

When the April 3, 1985 letter agreement was signed, Enterprise was then fully aware of the alleged misrepresentation previously made by CHJV. This new contract, covering the identical subject matter of the earlier oral agreement, superseded the previous agreement. See Roquemore v. Ford Motor Co., 290 F.Supp. 130, 137 (N.D. Tex. 1967), aff'd, 400 F.2d 255 (5th Cir. 1968); Stufflebeme v. Jack, 253 S.W.2d 459, 461 (Tex. Civil App. -- Austin 1952). Instead of seeking to enforce the earlier oral agreement, however, Stanton signed off on the new terms. In so doing, Enterprise and Stanton erected a bar to a claim or defense of fraud stemming from CHJV's violation of the earlier oral contract. See Mitsubishi

Aircraft Int'l, Inc. v. Brady, 780 F.2d 1199, 1201-02 (5th Cir. 1986) (citing Dallas Farm Machinery Co. v. Minneapolis-Moline Co., 324 S.W.2d 578, 581 (Tex. Civil App. -- Dallas 1959, no writ)).[3]

In light of the actions taken by Enterprise after the alleged material misrepresentation was made, the conclusion that no claim for fraud exists is inescapable.

> If a party claims fraud in the inducement of a contract, but then with knowledge of the fraud, enters into contract on the same transaction, his claim of fraud in the inducement of the original contract appears frivolous. He has now done what he claimed the fraud tricked him into doing originally.

Mitsubishi Aircraft Int'l, Inc., 780 F.2d at 1201 (citing Andrews v. Powell, 242 S.W.2d 656, 660 (Tex. Civil App. -- Texarkana 1951, writ ref'd n.r.e.)).

We agree with the district court that Enterprise cannot establish the elements necessary to pursue its fraud claim or defense, and that summary judgment on this issue was proper.[4] See Fontenot, 780 F.2d at 1194-95; see also Taylor v. GWR Operating Co., 820 S.W.2d 908, 910 (Tex. Civil App. -- Houston 1991, writ denied) ("When a plaintiff moves for summary judgment against a

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[3] This analysis is similar to the ratification and waiver issues discussed in part III. B, infra.

[4] Enterprise argues, and CHJV concedes, that the district court did not expressly address Enterprise's affirmative defense of estoppel. This is not a fatal omission. Enterprise's estoppel defense can be analyzed within the same framework as its fraud defense. Because the district court found Enterprise's actions amounted to a bar to its fraud arguments, an estoppel defense likewise fails. See, e.g., Spangler v. Jones, 797 S.W.2d 125, 130 (Tex. Civil App. -- Dallas 1990, writ denied) (ratification of a contract operates as an estoppel to party seeking to disaffirm transaction). By their actions, Enterprise has effectively estopped itself from asserting an estoppel defense.

defendant's counterclaim, the plaintiff must negate one or more of the essential elements of the defendant's counterclaim.").

B. Enterprise's Claim for Breach of Contract

The basis for Enterprise's breach-of-contract claim is identical to its claim for fraud, i.e. that the unconditional oral assent to the Crown Meadows lease assignment was a contract, and this contract was broken by CHJV's insistence on inserting conditions into the April 3, 1985 letter agreement. We have discussed at length the reasons why the fraud claim must fail in light of Enterprise's actions subsequent to the alleged misrepresentation and breach. The foundation for the breach-of-contract claim is eroded by the same reasons, see discussion supra, part III. A, and we will briefly discuss the district court's treatment of this issue.

Again, the evidence on this issue is viewed in the light most favorable to the nonmovant, Enterprise. We assume that CHJV did give its unconditional oral assent to the Malamapi-Enterprise lease assignment. The district court, applying Texas law, held that Enterprise ratified the later written lease agreement and waived any claim for damages.

"Ratification is the adoption or confirmation by a person with knowledge of all material facts of a prior act which did not then legally bind him and which he had the right to repudiate." Wise v. Pena, 552 S.W.2d 196, 199 (Tex. Civil App. -- Corpus Christi 1977, writ dism'd); see also Olney Sav. & Loan Ass'n v. Trinity Banc Sav. Ass'n, 885 F.2d 266, 270 (5th Cir. 1989) (applying Texas law). A

party ratifies a contract by acting pursuant to its terms, performing under it, or affirmatively acknowledging it. Zieben v. Platt, 786 S.W.2d 797, 802 (Tex. Civil App. -- Houston 1990). Once ratification occurs, the defrauded party waives his defense, and is bound by the terms of the contract. See Bennett v. Mason, 572 S.W.2d 756,759 (Tex. Civil App. -- Waco 1978, writ ref'd n.r.e.); Mitsubishi Aircraft Int'l, Inc. v. Brady, 780 F.2d 1199, 1201-02 (5th Cir. 1986) (citing Dallas Farm Machinery Co. v. Minneapolis-Moline Co., 324 S.W.2d 578, 581 (Tex. Civil App. -- Dallas 1959, no writ)).

Enterprise had full knowledge of the material facts surrounding the execution of the April 3, 1985 letter agreement, including the fact that it had the right to refuse to sign the agreement and request a full refund of its earnest money. Having ratified the letter agreement, Enterprise waived any right to rescission or damages. See Sawyer v. Pierce, 580 S.W.2d 117, 122 (Tex. Civil App. -- Corpus Christi 1979); Wise v. Pena, 552 S.W.2d at 200.

When the facts are uncontroverted, or uncontrovertible, the issues of ratification and waiver can be decided as matters of law. See id.; Foster v. L.M.S. Dev. Co., 346 S.W.2d 387, 395 (Tex Civil App. -- Dallas 1961, writ ref'd n.r.e). The district court found that the facts, even taken in a light most favorable to Enterprise, would not support Enterprise's claim for breach of contract. We agree that the record, taken as a whole, indicates that summary judgment on this issue is proper. See Matsushita Elec. Indus. Co.

v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); see Boeing Co. v. Shipman, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc).

C. Enterprise's Claim for Negligent Misrepresentation

The district court held that Enterprise's claim for negligent misrepresentation was time-barred. A cause of action for negligent misrepresentation must be brought within two years of the time that the misrepresentation is made. See Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a); Texas Am. Corp. v. Woodbridge Joint Venture, 809 S.W.2d 299, 303 (Tex. Civil App. -- Fort Worth 1991, writ denied). When brought as a counterclaim, however, a different time frame controls. Counterclaims arising out of the same transaction that forms the basis of the original complaint "must be filed not later than the 30th day after the date on which the party's answer is required." Tex. Civ. Prac. & Rem. Code Ann. § 16.069(b).

After removal, Enterprise was ordered to file its answer by May 20, 1988. Enterprise did not file its negligent misrepresentation counterclaim until September 30, 1988, well past the thirty-day limit. See Tex. Civ. Prac. & Rem. Code Ann. § 16.069(b). The district court correctly held that this counterclaim was time barred.

D. Enterprise's Claim for DTPA Violations

The district court held that any DTPA claims were likewise time-barred, per the thirty-day limit set out in Tex. Civ. Prac. & Rem. Code Ann. § 16.069(b). See ECC Parkway Joint Venture v. Baldwin, 765 S.W.2d 504, 514 (Tex. Civil App. -- Dallas 1989, writ

denied). This is a correct application of Texas law, and we affirm.

E. CHJV's Claim for Breach of Contract

To establish that Enterprise breached the contract covering the lease of the Crown Meadows property, CHJV had to show: (1) the existence of a binding contract; (2) a breach; and, (3) damages as a result of this breach. Ryan v. Superior Oil Co., 813 S.W.2d 594, 596 (Tex. Civil App. -- Houston 1991, writ denied). The district court had before it the pertinent lease and assignment documents, and held that CHJV suffered damages by Enterprise's termination of the Crown Meadows lease. This finding is amply supported by the record on review, and we affirm on this point.

IV. CONCLUSION

Based on the foregoing reasons we AFFIRM the entry of summary judgment against Enterprise on its counterclaims of fraud, negligent misrepresentation, DTPA, and breach of contract. As Enterprise's affirmative defenses do not survive the summary judgment inquiry, we also AFFIRM the district court's entry of summary judgment on CHJV's breach-of-contract claim stemming from the Crown Meadows lease assignment.

AFFIRMED.