

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7475
Summary Calendar

T. K. STANLEY, INC.

Plaintiff-Appellant,

versus

SCOTT PAPER COMPANY, A
Pennsylvania Corporation,

Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Mississippi
(CA E90 0043 (L)(C))

September 13, 1993

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.*

GARWOOD, Circuit Judge:

Plaintiff-appellant, T.K. Stanley, Inc. (Stanley), appeals the district court's order granting defendant-appellant's, Scott Paper Company's (Scott), motion for summary judgment on the grounds that Stanley's fraudulent inducement claim is barred by the statute of frauds. We affirm on other grounds.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Facts

Stanley and Scott are both in the business of procuring timber and operating saw mills in Mississippi.¹ This dispute involves an alleged fraudulent promise by Scott to sell Stanley the timber rights to a 1,120 acre tract of land, known as the Hall Place. Stanley claims that Scott's promise to convey the timber rights on the tract to Scott induced Stanley to buy from a third party the Hall Place land underneath the timber, the timber having previously been conveyed by the third party to Scott.

I. The Dabney Tract

Although they are competitors, Scott and Stanley have done business with each other on at least one occasion prior to the instant transaction in dispute. This prior transaction involved the "Dabney tract." Stanley put the 1390 acre Dabney tract on the market in 1988, but because of family concerns Stanley did not really want to sell the property.² At the same time that Stanley had the Dabney tract on the market, Scott and the John Hancock Company (Hancock) were negotiating to swap several parcels of land, including the Dabney tract, which neither of them then owned. Although it is not clear just why, Scott may have needed the Dabney tract to complete its deal with Hancock. Keith Boyles, a timber

¹ Stanley is a family owned and operated business while Scott is a large publicly held concern.

² Apparently Stanley was experiencing a cash flow problem that motivated it to market the tract. However, Mr. T.K. Stanley, the company's founder, wanted the company to keep the tract so he could use it for recreation and hunting. Stanley may have even temporarily taken the Dabney tract off the market at the time Scott expressed interest in it.

buyer for Scott involved in the Hancock deal, promised Steve Farrar (Farrar), a Stanley employee, that Scott would return the Dabney tract to Stanley in a land swap if Stanley would sell it to Hancock.

Scott and Stanley assertedly contemplated a three-way transaction respecting the Dabney tract. First, Stanley would sell the Dabney tract to Hancock. Second, Hancock would trade the Dabney tract to Scott. Third, Stanley would acquire parcels of land, which in sum would have the same amount of timber as the Dabney tract, and trade these newly acquired parcels to Scott for the Dabney tract, placing Stanley in basically the same position as it was in before the transaction occurred.

Farrar claims that this exchange was agreed to between Scott and Stanley before Stanley sold the tract to Hancock. Boyles claims that the exchange was not agreed upon until after Stanley sold the tract and T.K. Stanley told Farrar he wanted the tract back. This agreement was not memorialized until after Stanley sold the land to Hancock for cash. The written exchange agreement between Scott and Stanley, though sketchy, provided "that the land sold [by Stanley] to John Hancock for Scott Paper shall be returned to T. K. Stanley, Inc., in exchange for land valued at a minimum of \$764,500. This transaction shall be a land for land exchange . . . and shall occur [within one year from the date of the Hancock sale]." Farrar and Boyles signed the agreement.

Stanley and Scott completed the transaction as they had agreed upon to both parties' satisfaction as Stanley purchased six small tracts of land and traded them in return for the Dabney tract,

which Scott had by then acquired from Hancock. Several of the six tracts purchased by Stanley for the trade were purchased because Scott said that it wanted those parcels. In fact, Farrar wired money to Boyles to close these transactions without having seen the properties because of his faith in Boyles. The total purchase price for these six tracts was several thousand dollars less than what Stanley had received from Hancock in the sale to it of the Dabney tract. Scott makes no complaint about the Dabney tract transactions.

II. The Hall Place

Many of the facts relating to the instant Hall transaction are disputed. In April of 1989, Stanley bought a 2200 acre tract of land adjoining the Hall Place. This purchase motivated Stanley to attempt to acquire the Hall Place, so it could use the Hall Place for hunting and recreation in combination with the adjacent tract and not harvest the timber on either tract. In a separate transaction in January of 1989, Stanley also purchased the Enterprise tract containing 563 acres of land, but only 200 acres of plantation pine timber.

In mid-summer of 1989, Stanley employee Farrar learned that the Hall Place was for sale and began investigating ways to purchase it. Scott was also interested in acquiring the timber, but not the land, on the Hall Place. Because Stanley did not have the money available to purchase the Hall tract at the time it was for sale, Farrar called Boyles to see if they could work a deal similar to the Dabney exchange in which Scott would purchase the Hall Place and Stanley would later acquire property to trade to

Scott in return for the Hall Place.

Boyles' deposition states that in this conversation Boyles and Farrar discussed the possibility of Boyles' acquiring the timber rights on the Hall Place and Farrar the dirt or raw land beneath it. Conversely, Farrar suggests that these discussions involved Scott's acquiring the land and timber on the Hall Place and trading it to Stanley for land and timber to be acquired in the future.

Farrar was contemplating trading the Enterprise tract and some cash to Scott in return for the Hall Place, but he knew that Scott did not want the Enterprise tract. Farrar also contemplated purchasing other parcels to make the Hall Place trade work.

Boyles then called Farrar and told him that a man named Willie Robinson was going to buy the Hall Place imminently if they did not act. Farrar told Boyles that he did not have the financing in place and that he would just have to pass at that time, but that if Scott bought it, he would be interested in trading for it later.

After this second conversation with Farrar, Boyles called W.A. Mills (Mills), a large Mississippi landholder, and proposed that Mills buy the land and timber on the Hall Place and immediately convey the timber to Scott. This transaction was executed, as Mills bought the Hall Place on August 8, 1989, and conveyed the timber by timber deed to Scott on the same day.

On learning of the transaction in late August and obtaining some cash from other business transactions, Farrar called Boyles and spoke to Boyles about getting Boyles' help in acquiring the land from Mills and in acquiring the timber from Scott. Farrar stated that he was willing to offer Boyles money, land, or land and

timber in return for the timber on the Hall Place. Boyles responded that he could help Farrar get the land from Mills, but that he was unwilling to give up the timber rights.

Negotiations between Boyles, Farrar, and Mills continued, with Farrar clinging to the idea that he could acquire the timber on the Hall Place from Scott. Boyles, acting as middleman, arranged the sale of the raw land on the Hall Place to Stanley for \$290,000, and one season's worth of agricultural and hunting rights.³

On September 14, 1989, Boyles drafted a deed for Mills that expressly stated that the conveyance to Stanley was subject to the timber rights held by Scott. Boyles took the deed to Stanley's office to pick up the check for Mills and to have Farrar also sign the deed. At this meeting, Farrar reiterated his interest in the timber. Farrar said he wanted the timber, "No matter what it cost." Farrar says he then closed the deal only because Boyles made the following promise: *"Well, I don't know how I'll get you the timber. If I have to, I'll just give you a timber deed."* Boyles denied making the promise and added that he could never make that promise because he lacked the authority to give up timber once acquired by Scott and because Scott never gave up timber rights once it acquired them.⁴

Farrar claims that this promise meant that either Boyles would

³ The lease was defective. Instead of giving these rights to the lessee, Mills, it reserved the rights to the lessor. Stanley claims that this was a typographical error and that Mills was free to use the land as agreed.

⁴ Boyles stated that while Scott may occasionally trade land and timber for land and timber, it absolutely never trades away only timber rights.

swap the Hall Place timber for land and timber, timber, or money at some point in the future. Farrar admits that no price or value of the Hall Place timber was discussed, that no writing was made reflecting this agreement, and that Stanley did not then own any property that it could trade for the Hall Place.

After the September 14, 1989, closing, Farrar continued to call Boyles about obtaining the timber from the Hall Place, but Boyles refused to give it up. Farrar called Boyles' boss and asked him about the timber. When Boyles' boss declined to trade it, Farrar hung up on him.

Scott almost immediately began logging on the Hall Place and clear cut the property by the end of 1989.

Stanley filed suit against Scott alleging that it was fraudulently induced into purchasing the ground on the Hall Place by Boyles' promise that Stanley could also obtain the timber thereon. Stanley sought damages from its reliance (namely, purchasing the Hall Place subject to Scott's timber rights) on Boyles' promise.

The district court, based on the depositions of Boyle and Farrar, held that the alleged oral promise by Boyles was subject to the U.C.C. because the sale of timber involves the sale of "goods," and that the promise was unenforceable because it was barred by Mississippi's version of the U.C.C. statute of frauds. Stanley appeals.

Discussion

Stanley contends that the district court erred in ruling as a matter of law that its claim was barred by the statute of frauds.

Although the district court did not reach the issue, Stanley also contends that it has offered sufficient summary judgment evidence supporting its fraudulent inducement claim to survive summary judgment. Scott contends that the district court correctly ruled on the statute of frauds issue, but that in any event Stanley did not sufficiently make out a fraudulent inducement claim to survive Scott's motion for summary judgment.

We need not decide whether the district court's decision to apply the U.C.C. to bar Stanley's action was correct,⁵ because we

⁵ The district court's ruling that, as a matter of law, Stanley's claim is barred by the Mississippi version of the U.C.C. statute of frauds is troubling. For the U.C.C. statute of frauds to apply in this case, the timber on the Hall Place that is the subject of the instant dispute must qualify as "goods" under section 75-2-107 of the Mississippi Code Annotated. This section provides that "[a] contract for the sale apart from the land of . . . timber to be cut is a contract for the sale of goods within this chapter whether the subject matter is to be severed by the buyer or by the seller even though it forms part of the realty at the time of contractng [sic], and the parties can by identification effect a present sale before severance."

Under this provision all sales of timber are not subject to the U.C.C., only sales of timber "cut or to be cut" fall within the definition of goods under section 75-2-107. *Bay Springs Forest Products, Inc. v. Wade*, 435 So.2d 690, 694 (Miss. 1983); *Futch v. James River-Norwalk, Inc.*, 722 F.Supp. 1395 (S.D. Miss. 1989), *aff'd without published op.*, 887 F.2d 1085 (5th Cir. 1989) (oral contract for sale of timber to supply paper mill involved sale of "goods"); *Bohle v. Thompson*, 554 A.2d 818, 826 (Md. Ct. Special Appeals 1989) (timber contract involved sale of goods where it specified what type and size of trees were sold and expressly gave buyer two years to remove the timber); *Newton v. Allen*, 141 S.E.2d 417 (Ga. 1965) (lease of trees themselves not lease of goods because timber leased for turpentine purposes, not to be cut by lessee).

Although Stanley is in the business of timber harvesting, there is sufficient evidence to survive summary judgment that Stanley may not have been seeking the Hall Place timber to cut it. Farrar testified in his deposition that he did not intend to cut the timber, but that he intended to keep it since he intended to use the property for recreational activities such as hunting. Since Stanley owned the fee or land beneath the timber, it cannot automatically be presumed that Stanley intended to cut the

can affirm the judgment in Scott's favor on other grounds. *Davis v. Liberty Mut. Ins. Co.*, 525 F.2d 1204, 1207 (5th Cir. 1976) ("In reviewing a district court's grant of summary judgment, an appellate court may affirm even though the district court relied on the wrong reason in reaching its result."); *Rodrigue v. Western and Southern Life Ins. Co.*, 948 F.2d 969, 971 (5th Cir. 1991).

We grant *de novo* review of issues of fact and law in summary judgment cases. *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 82 (1992). A party moving for summary judgment is entitled to a judgment where no genuine issues of material fact are in dispute and where they are entitled to a judgment as a matter of law. FED. R. CIV. P. 56. Under *Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2553 (1986), when the party opposing a motion for summary judgment bears the burden of proof at trial on an essential element of the case and does not, after discovery, make a sufficient showing of the existence of that

timber. It is plausible that a landowner would attempt to purchase the timber rights to remove the burden on the underlying estate and obtain full ownership of the land. Stanley's argument is supported by the fact that it owned (and owns) the land and the timber on the tract next to the Hall Place and, apparently, had (and has) not cut the timber on that tract. The fact that Stanley wanted the timber on this particular piece of property so badly, as opposed to equally good timber on another tract, suggests that Stanley may not have wanted the timber to cut it. Also, there is no evidence of the general form of instrument contemplated for the allegedly agreed transfer from Scott to Stanley, and there was no evidence that Stanley's alleged agreement with Scott included any provisions respecting cutting timber or the like. Thus, the district court may well have erred in concluding as a matter of law that for purposes of this dispute the timber on the Hall Place constituted "goods" under the U.C.C. and that Stanley's action was barred by the U.C.C. statute of frauds.

Scott does not claim, and the district court did not find, that the general statute of frauds applied (see note 6, *infra*).

element with summary judgment evidence, summary judgment may be entered against that party.

Since Stanley bears the burden of proof as plaintiff, to survive summary judgment, it must establish facts supporting the elements of its cause of action both in pleadings and in timely filed summary judgment evidence.⁶ A key element in dispute in this case is whether the promisee, Stanley, had a right to rely on Scott's promise that if Stanley purchased the raw land on the Hall Place from Mills, Scott would sell or exchange the timber on the Hall Place with Stanley for a future undetermined price. *Anderson v. Burt*, 507 So.2d 32, 38 (Miss. 1987). In other words, was Stanley's reliance on Scott's promise reasonable?

Stanley contends that it was reasonable to rely on Boyles' promise because its transactions with Scott involving the Dabney tract showed a course of dealing in land exchanges with future undetermined prices. Stanley observes that the Dabney transaction was similar inasmuch as a deal was made with the price left open. This was shown by the fact that Boyles instructed Farrar as to

⁶ Scott admits that an action for fraud may be based on an oral promise that is itself unenforceable under Mississippi's general statute of frauds. Miss. Code Ann. § 15-3-1 (19); *Walker v. U-Haul Co. of Miss.*, 734 F.2d 1068, 1078 (5th Cir.), *modified slightly on reh'g*, 747 F.2d 1011, 1016 (5th Cir. 1984) (oral promise as part of franchise agreement that rent would remain reasonable not barred by statute of frauds); *Commercial Springs Ins. Agency Inc. v. Commercial Union Ins. Co.*, 554 So.2d 884 (Miss. 1989) (adopting this Circuit's interpretation of Mississippi law); *Futch*, 722 F.Supp. at 1400 (noting estoppel is exception to statute of frauds where only tort damages and not specific performance is remedy sought). Thus, Stanley's action in this case for fraudulent inducement, based on an unenforceable oral promise, is not barred by Mississippi's general statute of frauds.

which pieces of property Stanley could purchase to complete the trade to reacquire the Dabney tract.

We agree with Scott, however, that Stanley's dealings with Scott in the Dabney tract exchange do not justify Stanley's reliance on Boyles' promise. From a general prospective, it is unlikely, highly exceptional circumstances aside, that an experienced businessman would rely on an oral promise from an arms-length corporate competitor to trade timber on a 1,120 acre tract of land when such an agreement would have to be written to be enforceable as a contract under Mississippi law.⁷ This general consideration, however, is not alone conclusive. Turning to specifics, we initially note that this transaction was not similar enough in structure to the Dabney trade to suggest that reliance would be reasonable. There was a written agreement memorializing the Dabney trade; there was no such as to the Hall Place. Before entering the Dabney transaction, Stanley received \$764,500 in cash from Hancock. Even if it never got the Dabney tract back, Stanley still had the cash up front. Here, Stanley put \$290,000 down to a third party. Thus, while Stanley undertook no real financial risk in the Dabney trade, it took a significant risk by investing in the Hall Place. And, because cash was paid for the Dabney tract, there was an implicit price for which Stanley could reacquire the Dabney

⁷ See Rittenberg, Comment, *Louisiana's Tenfold Approach to the Duty to Inform*, 66 Tul. L. Rev. 151, 193-94 (1991) (discussing whether it can ever be reasonable to rely on an oral promise when the law requires an agreement to be in a specific written form to be enforceable. A law requiring that a specific type of agreement be written is useless, if an oral agreement to do the same thing can be enforced).

tract from Scott in the future. No such price was mentioned in connection with the Hall Place matter. While it is true that the specific properties that Stanley would trade to Scott in the Dabney trade were unknown at the transaction's inception, the value of the tracts was known. Here, Farrar admitted that there was no mention of the value of the timber on the Hall Place before Stanley purchased the Hall Place land. This is crucial. We find it unreasonable as a matter of law for an experienced business person to rely on the alleged promise made by Boyles when no price (or even range of price), an essential element of an agreement, was stated or agreed upon. Without knowing what it would cost to get the timber, no reasonable businessman would rely on Boyles' alleged oral promise. Whether or not it supported Stanley's actual reliance, the Dabney trade does not make Stanley's reliance on Scott's promise in the Hall Place transaction reasonable.⁸

Conclusion

Accordingly, the judgment of the district court is

AFFIRMED.

⁸ We also note that the actual damages suffered by Stanley, even if its reliance had been reasonable, are not shown. Stanley claims that its losses equal the diminished value of the property caused by the removal of its timber. This argument is flawed. Stanley would have had to pay to acquire the timber. There is no showing that there was any promise that what it would have to pay would be less than the difference in value between the tract with the timber and without it. Moreover, had Scott's alleged promise not been made, Stanley claims it would not have purchased the tract at all, so its "reliance" damages are unrelated to what happened to the timber.