

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2091

Summary Calendar

PED, INC.,

Plaintiff-Appellant,

v.

EBASCO CONSTRUCTORS, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
CA H 87 3080

(September 2, 1993)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:*

Plaintiff-Appellant PED, Inc., appeals from the district court's decision granting summary judgment on its breach of contract claim. PED argues specifically that the district court erred in holding as a matter of law that its contract with Ebasco Constructors, Inc. was terminable at will. We disagree and affirm the district court's judgment.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I.

On August 29, 1986, Ebasco Constructors, Inc. entered into a contract (the "Prime Contract") with the United States Department of Energy ("DOE"). This contract called for Ebasco to construct facilities, which were to be used to leach nine oil storage facilities at the Big Hill Strategic Petroleum Reserve near Winnie, Texas. In connection with the construction of these facilities, the Prime Contract required that certain surveying services be performed by Ebasco or Ebasco's subcontractors.

Ebasco in turn subcontracted PED, Inc. to perform the surveying services. This subcontract, which was executed on October 2, 1986, defined the scope of the work to be performed by PED as follows:

All Work as required by the Specifications and Drawings, except as set forth in Article 4 below, to furnish tools, material, transportation, personnel, supervision and crew to perform surveying services and related work as requested by the Contractor for construction of facilities required to leach nine oil storage facilities for DOE's Big Hill Strategic Petroleum Reserve Crude Oil Storage Facility.

(emphasis added). It further stated that PED was to begin working "immediately" and was to complete the work "as directed." Finally, the subcontract provided that PED personnel would be paid an hourly rate.

PED began performing the surveying services required by the subcontract and continued its performance until December 19, 1986, when Ebasco first refused PED's performance. According PED, it repeatedly attempted to continue performance as required by the subcontract, but was prevented from doing so by Ebasco.

On January 7, 1987, Ebasco gave notice to PED that it was terminating the subcontract.

PED filed this breach of contract suit in Texas state court on September 1, 1987. Ebasco thereafter removed the suit to federal court on diversity of citizenship grounds and filed a motion for summary judgment. Ebasco asserted that PED's breach of contract claim must fail because the subcontract was unambiguous and had no specified duration, thereby making it terminable at will under Texas law. Although the district court first denied Ebasco's motion for summary judgment, upon reconsideration it agreed that the subcontract was terminable at will under Texas law. This appeal followed.

II.

On appeal, PED argues that the district court's grant of summary judgment must be reversed. PED first asserts that, because the subcontract is ambiguous as to its duration, there is a genuine issue of material fact which precludes summary judgment. In the alternative, PED contends that the subcontract "unambiguously specifies an ascertainable event by which the term of the duration of the contract can be determined." The ascertainable event establishing the duration of the subcontract, according to PED, is contained in the Prime Contract between Ebasco and DOE, the terms of which were incorporated in the subcontract between Ebasco and PED.

All parties concede that, under Texas law, whether a contract is ambiguous is a question of law to be decided by the court. See Coker v. Coker, 650 S.W.2d 391, 393 (Tex. 1983). The parties also concede that, if a contract is found to be unambiguous, the interpretation of that contract is also a question of law for the court. See id. ("If the written instrument is so worded that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous and the court will construe the contract as a matter of law."). We therefore must decide whether the district court in this case correctly determined that (a) the subcontract was not ambiguous with respect to its duration, and (b) that the duration of the contract was indefinite, thereby making it terminable at the will of either party.

We conclude that the district court correctly resolved both issues. The subcontract between Ebasco and PED unambiguously provides for an indefinite duration. Paragraph 5 of their agreement, which sets forth the schedule for the surveying services, requires PED to begin its work "immediately" and to complete the work "as directed" by Ebasco. Moreover, paragraph 2 of the subcontract makes clear that PED was to provide "surveying services and related work as requested by" Ebasco. These two provisions, in our view, demonstrate that this was a contract which could be terminated at any time by either party. See Aztec Servs., Inc. v. Quintana-Howell Joint Venture, 632 S.W.2d 160, 162 (Tex. App.--Corpus Christi 1982, writ ref'd n.r.e.) (holding

that "contracts which contemplate continuing performance (or successive performances) and which are indefinite in duration can be terminated at the will of either party") (quoting Clear Lake City Water Auth. v. Clear Lake Util. Co., 549 S.W.2d 385, 390 (Tex. 1977)).

That PED can hypothesize some duration by referring to the Prime Contract between Ebasco and DOE does not make the subcontract ambiguous. The terms in the Prime Contract to which PED points--including the milestone schedule which was included primarily as a liquidated damages provision--cannot reasonably be interpreted to make the subcontract between Ebasco and PED one for a definite duration. In short, PED's interpretation of the subcontract is too strained to create a genuine issue of material fact for trial.

III.

The subcontract between Ebasco and PED, which contemplated continuing services by PED, is not for a definite duration. Therefore, under Texas law, it could be terminated at the will of either party. For these reasons, the district court's decision to grant summary judgment in favor Ebasco is AFFIRMED.