IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-2396

TRAVELERS EXPLORATION COMPANY,

Plaintiff-Appellee,
Cross-Appellant,

VERSUS

NOMECO OIL & GAS CO., ET AL.,

Defendants,

NOMECO OIL & GAS CO.,

Defendant-Appellant,
Cross-Appellee.

Appeals from the United States District Court
for the Southern District of Texas
(CA H 91-2857)

(July 11, 1994)

Before KING and SMITH, Circuit Judges, and KAZEN,[*] District Judge.

JERRY E. SMITH, Circuit Judge:[**]

Travelers Exploration Company recovered against Nomeco Oil & Gas Company in an action for fraud. Concluding that the magistrate judge erroneously denied Nomeco's motions for judgment as a matter

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[*] District Judge of the Southern District of Texas, sitting by designation.

[**] Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

of law, we reverse.

I.

Mario Garcia is the president of Travelers, a Houston company that derives its income from acting as a broker for oil and gas property and also from owning such property itself. In 1990, the Zilkha Energy Company contacted Garcia about selling Zilkha's 21% interest in a piece of land called the Utica field. Garcia arranged a meeting on February 26, 1990, between Zilkha and Nomeco, a prospective buyer of the Utica field.

Representing Nomeco at the meeting was Willie Lyon, a district operations manager for Nomeco. Most of the meeting consisted of a technical evaluation of the Utica field by Lee Jorden, a petroleum engineer who had been retained by Travelers to help find a buyer for the property. At the meeting, Garcia told Lyon that Travelers wanted a brokerage commission in the form of a 3-2-1 commission and an option to purchase part of the property on the same terms as Nomeco. A 3-2-1 brokerage commission is an agreement whereby the broker receives 3% of the first million of the purchase price, 2% of the second million, and 1% of the amount greater than two million.

According to Garcia, Lyon told him that he not have any problems with the 3-2-1 commission. And with respect to the option, Lyon allegedly said:

> Don't see a problem with it. But . . ., I can't make that decision . . . . I have to check with Mr. [Gordon] Wright [Vice-President of Nomeco] . . . and get back with you.

For our purposes, we will accept Garcia's characterization of the events as true. At trial, Lyon testified that he thought that Garcia's request was for an option on future purchases. He denied making any promise to check with Wright and get back to Garcia. For the next week or so, Garcia, Zilkha, and Nomeco continued to discuss the Utica field deal. Garcia arranged a meeting between Nomeco and Zilkha executives. Through Garcia, Nomeco got Zilkha to agree not to sell its interest in the Utica field to anyone other than Nomeco so long as Nomeco remained interested in and was evaluating the property in an effort to negotiate its purchase.

On March 5, 1992, Garcia sent to Nomeco a proposed commission agreement providing that Nomeco would pay a 3-2-1 commission to Travelers. The commission agreement contained no reference to an option on the Utica field. The cover letter accompanying the commission agreement contained what appeared to be a request for options on future acquisitions, not on the Utica field option. The letter read:

> As we discussed at our meeting of February 26, 1991, Travelers Exploration Company would like to reserve the option to acquire an interest in any properties we identify for Nomeco to acquire. This interest would never exceed more than 25% of the interest[] acquired by Nomeco and its partners and in most cases would be significantly less or none at all due to our limited funds. Travelers Exploration Company would reserve the right to acquire this interest within thirty days of closing on the same basis as Nomeco and its partners acquired this interest. We would expect to be notified once a Letter of Agreement to acquire such interests was signed.

Nomeco made an initial offer to Zilkha for the Utica field. On March 19, Garcia called Lyon to ask why Nomeco had not responded

to his letter. Lyon allegedly told Garcia not to worry and that Wright had received Garcia's letter.

Zilkha rejected Nomeco's initial offer of $3,090,000. Zilkha proposed a counter-offer of $3,850,000. Nomeco made a verbal counter-offer of $3,200,000. On March 25, Zilkha informed Jorden that it would accept Nomeco's offer, provided that the transaction could be documented and closed on or before April 5. The same day, Wright signed and dated the commission agreement and mailed it to Travelers.

On March 27, Garcia called Wright to inquire about his alleged request for an option on Utica field. Wright denied knowing about an option but agreed to check and see whether Nomeco had agreed to grant an option.

Some evidence at trial indicated that Wright had personal knowledge of a request for an option for Utica field or for future options. Wright took handwritten notes on March 13, 1991 that read: "Mario Garcia)) Travelers' Explor)) retain to buy up to 25%." Also, Wright admitted at trial that he told Lyon before March 25 that he would not grant an option to purchase the Utica field and that he had no intention of granting such an option "from the very beginning."

On March 29, Wright told Garcia that Nomeco had never agreed to grant an option on Utica field. On April 1, Garcia received his commission agreement. Four days later, Nomeco and Zilkha signed the purchase agreement for the Utica field. Nomeco paid Travelers $62,000, representing the 3-2-1 commission on the $3.2 million

purchase price. Travelers then paid one-half of the commission to Jorden and Jorden's company for the services they had provided.

II.

Travelers brought suit against Nomeco and Nomeco's joint-venturer in the deal, Patrick Petroleum Corporation of Michigan. The suit, originally an action for breach of contract, was removed to federal district court. The district court granted summary judgment for the defendants on the breach of contract claims but denied summary judgment on two extracontractual claims of fraud and quantum meruit, which had been added to the complaint. By consent of the parties, the case was tried before a magistrate judge.

After the first trial, the jury found Nomeco and Patrick liable for fraud. Nomeco moved for a new trial, and the magistrate judge granted the motion, holding that the jury's findings were against the great weight and preponderance of evidence. Patrick then settled for $100,000.

The case was tried a second time, with Nomeco as the sole defendant. The jury found that Nomeco had committed fraud. The magistrate judge overruled Nomeco's motions for judgment as matter of law both at the close of Travelers's case and at the close of all the evidence. Nomeco renewed its motion for judgment as a matter of law and moved alternatively for remittitur and new trial, motions that the magistrate judge denied.

Damages were established by jury questions 4, 5, and 6. Jury question 4 asked the jury to calculate "direct damages," defined as

the "difference, if any between the value of services provided by Travelers to Nomeco and the amount paid by Nomeco for those services." The jury awarded $810,000 in response to question 4. Question 5 asked the jury to calculate the "lost future net revenues" that were "proximately caused by Nomeco's conduct." The jury awarded $105,000 in response to question 5. The magistrate judge allowed Travelers to choose the greater of the two damages figures. Travelers chose question 4. The jury also awarded $1,500,000 in response to question 6 on exemplary damages. Travelers moved to increase the award in question 5 from $105,000 to $810,000, submitting an affidavit from the jury foreman that the jury had accidentally switched the answers to questions 4 and 5. The magistrate judge denied Travelers's motion and, instead, reduced the question 4 award from $810,000 to $151,474.

III.

We review de novo the denial of a motion for judgment as a matter of law, applying the same legal standard used by the district court. Conkling v. Turner, 18 F.3d 1285, 1300 (5th Cir. 1994). In evaluating such a motion, formerly referred to as a motion for directed verdict, the court is to view the entire trial record in the light most favorable to the non-movant, drawing all factual inferences in favor of the non-moving party and leaving credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts to the jury. Id. Like a directed verdict, judgment as a matter of law "is not a

matter of discretion, but a conclusion of law based upon a finding that there is insufficient evidence to create a fact question for the jury." Id. at 1300-01.

Under Texas law, which governs this case, fraud has six elements. The plaintiff must prove

> (1) that a material representation was made; (2) that it was false; (3) that the speaker knew it was false when made or that the speaker made it recklessly without any knowledge of the truth and as a positive assertion; (4) that he made it with the intention that it be acted upon by the other party; (5) that the party acted in reliance upon it; and (6) damage.

T.O. Stanley Boot Co. v. Bank of El Paso, 847 S.W.2d 218, 222 (Tex. 1992) (citation omitted).

A promise to do an act in the future is actionable fraud when made with the intention, design, and purpose of deceiving and with no intention of performing the act. Spoljaric v. Percival Tours, Inc., 708 S.W.2d 432, 434 (Tex. 1986). "Slight circumstantial evidence" is sufficient to establish a finding of fraudulent intent. Id. at 435. A party's denial of the promise is a factor showing no intent to perform at the time the promise was made. Id. The failure to perform, standing alone, is not evidence of the promisor's intent not to perform when the promise is made but is a circumstance to be considered with other facts to establish intent. Id.

The jury was not asked to specify what promise constituted actionable fraud. Jury question 1 read: "Did Nomeco . . . commit fraud against Travelers . . . ?" The magistrate judge instructed the jury that fraud occurs when

> (a) a party makes a promise to take future action, (b) the promise is material and is made with the intent to deceive the other party, (c) at the time the promise is made, the party has no intent to perform, and (d) the other party acts in justifiable reliance upon the promise and as a result suffers injury.

The jury instruction is a fair summary of the requirements for proving fraud related to a promise to act in the future. See American Medical Int'l, Inc. v. Giurintano, 821 S.W.2d 331, 338 (Tex. App.))Houston [14th Dist.] 1991, no writ) (where a state jury instruction described fraud as "the making of a promise to do an act in the future with the intention, desire or purpose of deceiving, and with no present intention of performing it, if such promise or statement is material and is reasonably relied upon by the other party to his injury."). Travelers argues that there was sufficient evidence for the jury to find that Nomeco had committed fraud. Lyon's promise to "get back" with Garcia was a promise to act in the future. Furthermore, Travelers contends that Lyon's promise contained the implicit condition that Nomeco would "get back" to Travelers before the sale of the Utica field was consummated, that Lyon's promise was false when made, and that Nomeco justifiably relied upon Lyon's promise to "check and get back."

A review of the record shows that there is insufficient evidence of at least two of the elements of fraud. First, Lyon's promise to get back to Garcia was not false when made.

A promise to act in the future is not false if the promise is actually performed. Wright called Garcia on March 29 and told him that Nomeco would not grant the option, thereby fulfilling Lyon's promise. Travelers argues that Nomeco communicated its final

decision too late. But there is no evidence of any implicit or explicit condition to Lyon's promise. Lyon did not promise to get back to Garcia by a specific date, nor did Lyon promise to get back to Garcia by the time the deal was consummated. Nor, given the circumstances, was there any implication on Lyon's part that Nomeco would respond by the time the Utica field had been bought.

The purchase of the Utica field was not a watershed event for Travelers. The practical ability of Travelers to induce Nomeco to grant an option had evaporated on February 26, by which time Travelers had disclosed to Nomeco the seller's name, the location of its interest, information on production zones, number of wells, production amounts, and reserve estimates.

A broker's primary service is to link a buyer and a seller of a property. If a broker fails to extract a written promise from one or both of the parties by the time it introduces them to each other, the broker has realistically forfeited its bargaining power over the two parties. The buyer and seller are free to negotiate the sale of the property on their own. The broker can extract nothing more from the parties than the value of its services rendered under quantum meruit. Given the economic realities of the situation, we conclude that a deadline cannot be attributed to Lyon's promise to check and get back with Travelers.

Travelers attempts to characterize Lyon's promise to "check and get back" as a promise actually to consider whether to grant an option on the Utica field. Even if Nomeco had such an obligation to consider granting the option, Nomeco fulfilled the obligation.

Wright did not know about the option at the time Lyon made the "check and get back with" promise, and Wright rejected the option later. Therefore, Wright "considered" the option. See Troutman v. S. Ry., 296 F. Supp. 963, 970 (N.D. Ga. 1968), aff'd, 441 F.2d 586 (5th Cir. 1971).

Moreover, it seems unlikely that Travelers actually relied upon Lyon's promise. Even before Lyon could have conceivably gotten back to Travelers, Travelers had hired a petroleum engineer, arranged two informational meetings, and disclosed the identity of the seller and other crucial information to Nomeco. Travelers performed all of these actions without any legally binding agreement on the part of Nomeco to grant the option. A company that had performed these actions in the absence of any promises would not then premise its course of conduct on Nomeco's mere promise to consider granting an option.

The case of Spoljaric v. Percival Tours, Inc., 708 S.W.2d 432 (Tex. 1986), cited by Travelers, is inapposite. In Spoljaric, an employer agreed to implement a bonus compensation plan in order to keep his employees from moving to greener pastures. The employer never implemented a bonus plan, and one of the employees sued in fraud. Whereas Spoljaric concerned a promise to act, our case concerns a mere promise to consider.

As an alternative theory, Travelers argues that it was actionable fraud for Lyon to say that he did not see a "problem" with granting the option. This statement, according to Travelers, was an "expression of opinion as to the happening of a future

event . . . where the speaker purports to have special knowledge of facts that will occur or exist in the future." See Rubinstein v. Collins, 20 F.3d 160, 172 (5th Cir. 1994) (citing Trenholm v. Ratcliff, 646 S.W.2d 927, 930 (Tex. 1983)). We reject Travelers's theory as a matter of law. Lyon did not purport to have any special knowledge that Nomeco would grant the option. Lyon carefully couched his response, stating that he did not have authority to grant the option, that such authority rested with Wright, and that he would have to check with Wright and get back to Garcia.

The judgment is REVERSED and RENDERED.