UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10693
Summary Calendar

EARL SLOAN,

Plaintiff-Appellant,

versus

UPJOHN COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(3:92 CV 1540 P)

March 23, 1995

Before DAVIS, JONES and BENAVIDES, Circuit Judges.

EDITH H. JONES, Circuit Judge:[*]

Nothrus, an acronym for "Not Over the Hill Retired Upjohn Salesmen," is a corporation formed by retired Upjohn sales representatives to provide supplemental sales and promotional efforts to pharmaceutical companies. At the end of 1990, Upjohn contracted with Nothrus to engage its consultants to perform these

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

services. Both Nothrus and Upjohn interpret the agreement to allow Upjohn to reject the services of any particular consultant.

Upjohn exercised this ability in April 1992 when it informed Nothrus that it no longer approved of Earl Sloan, a former employee of Upjohn, serving as a sales representative for its products. The founder and CEO of Nothrus responded by terminating its own contract with Mr. Sloan effective upon the expiration of the contractually required 30 days' notice. Mr. Sloan filed suit against Upjohn alleging that Upjohn has tortiously interfered with his contract with Nothrus. The district court granted the defendant's motion for summary judgment because Upjohn's conduct was legally justified or excused as a matter of law. Reviewing that judgment de novo, we affirm.

I.

Texas recognizes legal justification or excuse as an affirmative defense that prevents a plaintiff from recovering on a claim of tortious interference with contract. Victoria Bank & Trust Co. v. Brady, 811 S.W.2d 931, 939 (Tex. 1991). Consequently, a defendant's interference with a contract is privileged if the defendant has an equal or superior right in the subject matter of the contract or the defendant's interference was done in a bona fide exercise of his own rights. Id. (citation omitted) Simply, "[a]ccording to Texas law, a plaintiff cannot recover for tortious interference with contract . . . if the allegedly interfering third party acted to protect his own legitimate

interest." Deauville Corp. v. Federated Dep't Stores, Inc., 756 F.2d 1183, 1196 (5th Cir. 1985).

Both in district court and now on appeal, Mr. Sloan failed to identify a genuine issue of material fact on the first pathway to privilege for Upjohn. In other words, Sloan has not offered affidavits or other evidence contesting the defendant's account of what transpired or the purpose of its arrangement with Nothrus. Indeed, Sloan's most colorable assertion is limited to the second means of defeating a tortious interference claim. Specifically, he at least challenges in more than conclusory terms the assertion that Upjohn exercised its contractual rights in good faith. Nevertheless, we need not resolve whether the strained inference Sloan seeks to draw from his improving performance can negate good faith for the purpose of summary judgment because it is easy to affirm the district court on the other legal basis for privilege.

Precedent joins common sense in finding that Upjohn had an equal or superior right in the subject matter of the contract at issue. Upjohn has an obvious interest in the quality of the performance of the sales consultants who promote its products. Upjohn directly profits from these activities as it retains the benefits from all sales, and Nothrus merely received a flat fee for each of its consultants efforts. Thus Upjohn has a concrete monetary interest in the aptitude of each sales consultant whereas

Nothrus at most has an indirect financial stake.[1] As evidence of the need to protect this serious interest, Upjohn received an unconditional right to approve or reject anybody selected by Nothrus as a representative of Upjohn.[2]

Harris v. Top Brass Janitorial, Carpet & Office Cleaning Corp., 1993 WL 307405 (Tex. App.--Dallas 1993, no writ), clearly embraces this principle. In that case, Farm & Home Savings and Loan Association contracted with Top Brass to provide janitorial services for its offices. Top Brass itself contracted with individual independent contractors who provided these services to its clients. Mr. Harris, a Top Brass independent contractor, was assigned the janitorial accounts for two Farm & Home locations. After Farm & Home requested that Harris be removed from its accounts because he had been involved in a "breach of security" at one of the buildings, he sued Farm & Home for tortious interference with contract.

The court of appeals held as a matter of law that Farm & Home had an equal or superior right in the subject matter of Harris's contract with Top Brass. Id. at *11 ("The subject matter of the contract concerned the servicing of certain janitorial accounts . . . . Farm & Home clearly had an interest equal or superior to [Top Brass] in the security of the buildings and the

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[1] If, for example, all of Nothrus' consultants were incompetent presumably Upjohn might not renew its contract with the company.

[2] The deposition of the Founder and CEO of Nothrus acknowledging this power (and noting that Upjohn had previously exercised it) was uncontradicted. As he explained, "Upjohn['s] local management does not have to have a reason for terminating Upjohn's relationship with an individual [Nothrus consultant.]"

manner in which [Harris] conducted himself while inside the buildings."). This court discerns no basis for distinguishing the "servicing" of Home & Farm's accounts from the servicing by Nothrus of Upjohn's accounts.

Finally, we reject Sloan's attempt to augment the "superior or equal interest" prong of privilege by importing a "nexus" requirement between Upjohn and Nothrus. Although some of the justification and excuse cases involve situations where formal "corporate relationships" exist,[3] no Texas court has ever identified more than an equal interest to be a prerequisite to privilege. See Victoria Bank, 811 S.W.2d at 939.[4] Moreover, Sterner v. Marathon Oil Co.,767 S.W.2d 686 (Tex. 1989), does not suggest otherwise.

Sterner was a union construction worker who was fired from a construction company assigned to build a hot oil treatment plant at Marathon's refinery. Id. at 688. A Marathon safety officer ordered his termination after a brief encounter at the site. The Texas Supreme Court rejected the defense of excuse or justification because Marathon did not possess an equal or superior interest in the subject matter of the contract between Mr. Sterner and the construction company Id. at 688.

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[3] This is not surprising because a party cannot interfere with its own contract. Schoellkopf v. Pledger, 778 S.W.2d 897, 902 (Tex. App. -- Dallas 1989, writ denied).

[4] The lack of such a relationship between Farm & Home and Top Brass, for example, did not defeat the affirmative defense of excuse or justification.

Provisions of contract between Marathon and the construction company compelled this assessment of the relative interests: the contractor was assigned the "sole right to supervise, manage, control and direct the performance of the details" and Marathon agreed by the terms of the contract to be "interested only in the results obtained." Id. at 691. Neither of these limiting factors is present here. Furthermore, Marathon's management directly ordered Sterner's dismissal and did not merely refuse to allow him to work on their premises. Id. Because the quality of Sterner's work off of Marathon's property could have little impact on Marathon, it was even more unlikely that the interest of Marathon in the Sterner contract was equal or superior to that of the construction company. In concert, Marathon circumscribed its interest by the express terms of its contract with the construction company and then acted outside of any of its interest by demanding Sterner's complete termination. Here the undisputed evidence reveals that Upjohn did not demand Sloan's dismissal and demarked the broad scope of its interest in the contract with Nothrus.

For the foregoing reasons, the judgment of the district court is **AFFIRMED**.