IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-20905

JAMES E. KELLY,

Plaintiff-Appellant,

ANTHONY F. MONTGOMERY,

Movant-Appellant,

VERSUS

THOMAS R. HUZELLA, et al.,

Defendants,

A.J. FAIGIN, JERRY ARGOVITZ, ALVIN LUBETKIN, JAY ROULIER, BERNARD J. LERNER, and FRED GERSON,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(CA H 89 1931)

November 16, 1995

Before KING, SMITH, and STEWART, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

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 Pursuant to that rule, the court has determined that this opinion should not be published.

Plaintiff James Kelly appeals (1) a take-nothing judgment on his contract and tort claims against defendants Jerry Argovitz, Alvin Lubetkin, Jay Roulier, Bernard Lerner, and Fred Gerson and (2) sanctions against Kelly and his attorney, Anthony Montgomery, based upon a claim Kelly brought against defendant A.J. Faigin. We reverse in part as to Kelly's contract claims, affirm as to his tort claims, and dismiss the appeal of sanctions for want of jurisdiction.

I.

Kelly, a well-known professional football player, contracted with a joint venture comprised of Argovitz, Lubetkin, Lerner, and Gerson to play for the Houston Gamblers of the United States Football League ("USFL"). Kelly and the joint venture signed the following documents, all at the same time: five one-year, standard-form player contracts covering the 1984-1988 seasons; five identical addenda, each of which modified one of the player contracts; and one signing bonus "rider." The rider provided that Kelly would receive $200,000 upon passing a physical examination and $160,000 in each of the years 1984-1988. The parties also agreed in the addenda that Kelly would borrow $500,000 from a bank, and the joint venture would repay the loan in five annual installments, making each repayment out of the signing bonus installment owed to Kelly in that year. They later executed a loan agreement with the Texas American Bank/Galleria ("Texas American") to that effect.

The joint venture was later incorporated as the Houston Gamblers, Inc. ("Gamblers"), and assigned its assets and liabilities to that corporation. Kelly played for the Gamblers in 1984 and 1985, but the USFL ceased operations before the 1986 season. The Gamblers assigned Kelly's 1986 player contract to the New Jersey Generals shortly before the league folded, and the Generals paid Kelly's 1986 signing bonus installment. No one ever paid Kelly the 1987 and 1988 installments, however, and he made the corresponding loan repayments——$119,250.70 in 1987 and $113,013.98 in 1988——out of his own pocket.

II.

Kelly filed suit, asserting a variety of claims against the owners of the Gamblers, his former agents and attorneys, and two financial institutions. Kelly brought contract and tort claims against Argovitz, Lubetkin, Lerner, Gerson, and Roulier[1] (collectively "the joint venture"), seeking recovery of the final two signing bonus installments. The district court granted summary judgment in favor of those defendants.

Kelly further alleged that his former agents and attorneys, including Faigin, violated their fiduciary duties by mishandling his finances, but he voluntarily dismissed those claims. The district court then awarded sanctions to Faigin, sanctioning Kelly $11,000 for pursuing frivolous claims and Montgomery $2,000 for

[1] Lerner resigned from the Gamblers in 1984, and Roulier assumed his liabilities "as related to Houston Gamblers' obligations and contracts."

making egregious misrepresentations.

III.

A.

Kelly contends that the joint venture is liable for the unpaid installments of his signing bonus. The district court did not write an opinion, but the parties agree that the dispositive issue is whether Kelly's contracts allow the joint venture to release itself from liability by assigning its assets and liabilities to a successor corporation.

Each of Kelly's one-year contracts consists of a standard-form USFL player contract and an addendum that expressly "modifies and amends the Contract . . . to which this Addendum is attached." The addenda permit the joint venture to assign its rights and obligations under "this Contract" to a successor corporation, and provide that after such an assignment, the joint venture "shall have no liability under this Contract." As the joint venture assigned its rights and liabilities to the Gamblers, the question presented is the meaning of "this Contract."

Kelly interprets "this Contract" to refer to the one-year player contracts and addenda but not the signing bonus rider. The assignment clause is labeled ¶ 10.3 and modifies ¶¶ 10.1 and 10.2, which permit assignment of the contract if Kelly is traded or acquired on waivers. Kelly argues that ¶ 10.3 therefore speaks only to his annual salary payments, which he would earn only by playing during the year in question, and not to the signing bonus,

which he earned by signing the contracts. Additionally, the phrase "this Contract" is in the singular, and ¶ 3 of each player contract states that "this Contract" has a one-year duration. Kelly therefore concludes that “this Contract” cannot encompass the signing bonus, as the rider has a five-year, not a one-year, duration. Finally, Kelly contends, apparently in the alternative, that the defendants' interpretation of "this Contract" renders the term ambiguous and creates a fact question for a jury.

The joint venture responds that documents executed together must be construed together. The signing bonus rider states that it is “additional consideration for the execution of the USFL Player Contracts for [1984-1988]." The addenda also cross-reference the signing bonus installments: Kelly would forfeit them if he were terminated for cause and the club were to make his loan repayments out of them.

B.

We review a grant of summary judgment de novo. Hanks v. Transcontinental Gas Pipe Line Corp., 953 F.2d 996, 997 (5th Cir. 1992). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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). The party seeking summary judgment carries the burden of demonstrating that there is an absence of evidence to support the non-moving

party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). After a proper motion for summary judgment is made, the non-movant must set forth specific facts showing that there is a genuine issue for trial. Hanks, 953 F.2d at 997.

The interpretation of an unambiguous contract is a question of law. Technical Consultant Servs. v. Lakewood Pipe, Inc., 861 F.2d 1357, 1362 (5th Cir. 1988). A contract is unambiguous if, in light of established rules of construction, it is reasonably susceptible to only one interpretation. Id. In construing a contract, our goal is to ascertain the parties' intent, as expressed in their writing. Forbau v. Aetna Life Ins. Co., 876 S.W.2d 132, 133 (Tex. 1994). We read all provisions of a contract together, considering it as a whole and giving effect to each of its parts. Id. As a general rule of construction, documents executed together are construed together. Jones v. Kelley, 614 S.W.2d 95, 98 (Tex. 1981).

C.

The signing bonus rider is subtitled "RIDER TO USFL SIGNING CONTRACT BETWEEN HOUSTON USFL FOOTBALL JOINT VENTURE AND JIM KELLY." Kelly's counsel conceded at oral argument that a "rider" is by definition a writing attached to another document and considered to be incorporated into it. Accord BLACK'S LAW DICTIONARY 1323 (6th ed. 1990). The rider therefore purports on its face to be a part of Kelly's player contracts.

Although Kelly contends that the rider is not in fact a rider,

we find no reason to overlook the accepted meaning of that term. The rider and addenda contain multiple cross-references to one another; in fact, the signing bonus was to be paid in equal installments over the five-year period of the player contracts, and Kelly would not receive the bonus payments if he breached those contracts. The player contracts, addenda, and rider all define the parties' five year contractual relationship, and together they constitute a single agreement. Thus, the assignment clause in the addenda encompasses the rider, relieving the joint venture of liability for Kelly's signing bonus. While the parties could have drafted these documents more plainly, their intent is still ascertainable.

Kelly cites cases holding that (1) a signing bonus is a separate element of compensation given solely in exchange for the act of signing[2] and (2) multiple one-year agreements executed at the same time are separate contracts.[3] The first set of cases is irrelevant, because we are concerned not with whether Kelly earned the bonus but with who must pay it; the second is inapposite, because it addresses the interrelationship of multiple one-year contracts, not the relationship of those contracts to a rider.

D.

Kelly also contends that he is entitled to indemnification

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[2] See, e.g., Alabama Football v. Wright, 452 F. Supp. 182, 184 (N.D. Tex. 1977), aff'd, 607 F.2d 1004 (5th Cir. 1979).

[3] See Smith v. Pro-Football, 528 F. Supp. 1266, 1271-72 (D.D.C. 1981); Sample v. Gotham Football Club, 59 F.R.D. 160, 165 (S.D.N.Y. 1973).

against the final two loan repayments. Paragraph 28 of the player contracts states:

> In the event Club is not playing the regular League schedule . . . and Club fails to pay Player any installment of his signing bonus when due in 1984, 1985, 1986 or 1987 . . . the partners in Houston USFL Football Joint Venture or its successors or assigns . . . shall indemnify and hold harmless Player with respect to the loan.

Id. (emphasis added). Kelly argues that this provision grants him the choice of suing either the joint venture or its assign for indemnification.

The joint venture argues that ¶ 28 imposes liability on only its assign, the Gamblers. In support of this contention, the joint venture observes that Kelly reads "or" as meaning "and," giving him the right to sue both the joint venture and its assign. As a general matter, "or" is disjunctive and alternative, Reynolds v. Park, 521 S.W.2d 300, 309 (Tex. Civ. App.——Amarillo 1975, writ ref'd n.r.e.), and does not mean "and," Shell Petroleum Corp. v. Royal Petroleum Corp., 137 S.W.2d 753, 758 (Tex. 1940).[4]

We must read contracts as a whole so as to give meaning to all of their terms. Forbau v. Aetna Life Ins. Co., 876 S.W.2d 132, 133 (Tex. 1994). If we accepted the joint venture's interpretation, however, ¶ 28 would become a nullity.

The contracts state that if the joint venture reorganizes as

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[4] The joint venture also argues that Kelly cannot recover on the indemnity provision because he did not specifically plead it as a basis for relief. "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." FED. R. CIV. P. 15(b). The parties squarely litigated the meaning of ¶ 28 in their cross-motions for summary judgment, constructively amending Kelly's complaint to include that claim. See United States ex rel. Canion v. Randall & Blake, 817 F.2d 1188, 1193 (5th Cir. 1987).

a different entity, the term "Club" will refer to that entity. See ¶ 10.3. The joint venture therefore reads ¶ 28 to provide that if the club folds and fails to make payment, the judgment-proof club (as the joint venture's successor or assign) will indemnify Kelly against its own breach.

As this interpretation is senseless, the parties must have intended that if Kelly could not collect part of the signing bonus from the club, the joint venture would indemnify him against any remaining indebtedness.[5] Kelly is entitled to indemnity in the amount of the final two loan repayments, $119,250.70 in 1987 and $113,013.98 in 1988, for a total of $232,264.68.[6] Finally, we note that our interpretation of ¶ 28 lends further support to our interpretation of the assignment clause, as the indemnity provision would be surplusage if the joint venture was liable for the entire bonus.

IV.

Kelly brought alternative fraud and negligent misrepresentation claims against Lubetkin, Argovitz, and Lerner, alleging that they promised to guarantee the loan personally and that he

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[5] On its face, ¶ 28 covers only the 1984-1987 repayments. Kelly argues that he is entitled to indemnification against both the 1987 and 1988 repayments, however, and the joint venture responds only that it assigned its liability to the Gamblers. Although we may affirm on any basis appearing in the record, Russell v. SunAmerica Sec., 962 F.2d 1169, 1172 (5th Cir. 1992), we must reverse the judgment in any event. Accordingly, we decline to raise sua sponte the fact-specific issue of a possible typographical error.

[6] We note that Roulier assumed all of Lerner's liabilities relating to the Gamblers, and Kelly signed a letter consenting to that assumption. Lerner does not contend that Kelly thereby released him from liability, however.

reasonably relied on those representations when applying for the loan. The tort defendants contend that Kelly's fraud and negligent misrepresentation claims sound in contract, not tort. An action sounds in contract alone when the injury is "only the economic loss to the subject of a contract." Jim Walter Homes v. Reed, 711 S.W.2d 617, 618 (Tex. 1986). Where the object of a suit is to enforce a promised exchange, the suit lies in contract. Barbouti v. Munden, 866 S.W.2d 288, 293-94 (Tex. App.——Houston 1993, writ denied). Kelly's tort claims are based upon the breach of alleged oral promises, the subject matter of which (repayment of the loan) is addressed in the parties' written contracts.

Kelly responds only that he has met the requirements of the "economic loss" rule by alleging greater damages in tort than in contract. Kelly seeks recovery in tort not only for the signing bonus, but also for legal fees he incurred after refusing to make the final loan repayment. If such costs are recoverable at all, it is as consequential damages resulting from the alleged breach. Such recovery is on the contract. Cf. Southwestern Bell Tel. Co. v. DeLanney, 809 S.W.2d 493, 495 (Tex. 1991) (holding that lost profits resulting from breach of a duty created by contract are recoverable only in contract).

V.

Kelly and Montgomery appeal sanctions of (1) $11,000 against Kelly for bringing a frivolous suit against Faigin as part of a "shotgun pleading" strategy and (2) $2,000 against Montgomery for

attempting to mislead the court by taking statements out of context. Kelly waited until the district court entered final judgment on his entire omnibus lawsuit before appealing the sanctions order. As a result, he filed a notice of appeal within thirty days of the entry of final judgment, but more than thirty days after the entry of the sanctions order. Faigin contends that this notice was untimely.

Sanctions orders under FED. R. CIV. P. 11 are collateral to the merits of a suit. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 396 (1990). In fact, a district court retains jurisdiction to award sanctions after it loses jurisdiction over the underlying suit. Id. Thus, a final judgment on the merits is one final order, an assessment of sanctions is another final order, and the time to file an appeal on the merits is not tolled pending a final order on sanctions. Bogney v. Jones, 904 F.2d 272, 273 n.1 (5th Cir. 1990). The reverse is equally true. Voluntary dismissal ended Faigin's involvement with the underlying litigation, and his subsequent motion for sanctions was a collateral action, appealable immediately.

Kelly does not deny that sanctions orders are appealable immediately under the reasoning of Cooter & Gell; instead, he argues only that we have found they are not Cohen collateral orders. See Click v. Abilene Nat'l Bank, 822 F.2d 544, 545 (5th Cir. 1987). This contention is irrelevant. Kelly's notice of appeal was untimely.

VI.

We AFFIRM the dismissal of Kelly's tort claims and DISMISS his appeal of sanctions for want of jurisdiction. We REVERSE the dismissal of Kelly's contract claims and REMAND for (1) entry of judgment for Kelly in the amount of $232,264.68 against Argovitz, Lubetkin, Lerner, Gerson, and Roulier, jointly and severally; (2) award of prejudgment and postjudgment interest; and (3) award of attorney's fees that reasonably reflect "the benefits resulting to the client from the attorney's services," and any other relevant factors under Texas law. See Alexander v. Cooper, 843 S.W.2d 644, 647 (Tex. App.——Corpus Christi 1992, no writ).