UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-30694
Summary Calendar

In the Matter of: BILLY RAY EUBANKS
a/k/a B.R. EUBANKS, Debtor.

BILLY RAY EUBANKS,

Appellee,

versus

TEXAS MERIDIAN RESOURCES, INC.,

Appellant.

Appeal from the United States District Court
For the Eastern District of Louisiana
(CA-93-1579-C c/w 93-4082-C)

(August 7, 1995)

Before POLITZ, Chief Judge, JOLLY and BENAVIDES, Circuit Judges.

POLITZ, Chief Judge:*

Texas Meridian Resources, Inc. ("TMR") appeals an adverse judgment of the bankruptcy court, affirmed by the district court, in its claim against Billy Ray Eubanks. We affirm.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Background

On June 20, 1986 Eubanks entered into a letter agreement to sell certain oil and gas properties to TMR. On August 7, 1986 Eubanks filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. Four days later TMR was given notice that the agreement was being rejected, a rejection which subsequently was approved by the bankruptcy court.

TMR filed a claim for damages for breach of contract which Eubanks opposed. In due course the bankruptcy court found the letter agreement to be nothing more than an option to purchase by TMR. After a hearing on the issues relative to its binding force, if any, the bankruptcy court found that there was no consideration given for the option, that it was gratuitous and had been revoked by Eubanks before acceptance by TMR. The bankruptcy court dismissed TMR's claim; TMR appealed unsuccessfully to the district court and has now timely appealed to this court.

Analysis

TMR reiterates its challenges to the adverse rulings of the bankruptcy court. We review findings of fact under the clearly erroneous standard and legal conclusions *de novo*.[1]

Bankruptcy Rule 3001(f) establishes that a party who correctly files a proof of claim is deemed to have made a *prima facie* showing of the claim's validity. Under 11 U.S.C. § 502(a), however, a

[1]**Matter of Killebrew**, 888 F.2d 1516 (5th Cir. 1989).

party in interest may object to the allowance of the claim by offering rebutting evidence.[2] When that occurs, the claimant must establish the validity of the claim by a preponderance of the evidence.[3]

TMR contends that it has met this burden and that the courts *a` quo* erred in rejecting its demands. It maintains that the letter agreement was bilateral and reciprocally enforceable. Alternatively, it contends that if the agreement were only an option in its favor, it was revoked improperly before expiration of its term.

Texas substantive law controls the resolution of this dispute. Texas distinguishes between a bilateral contract of sale where "one party is obligated to sell and the other to purchase,"[4] from an option contract which merely confers upon the buyer "a right to purchase if there is an election to do so."[5] Further, "an option is a mere offer which binds the optionee to nothing,"[6] and its sole purpose "is to give the optionee the right to purchase at his election within an agreed period at a named price."[7] An agreement

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[2]**In re Fidelity Holding Co., Ltd.**, 837 F.2d 696 (5th Cir. 1988).

[3]**Id.** at 698.

[4]**Carroll v. Wied**, 572 S.W.2d 93, 96 (Tex.Ct.App. - Corpus Christi 1978, writ ref'd n.r.e.).

[5]**White v. Miller**, 518 S.W.2d 383, 385 (Tex.Ct.App. - Tyler 1974).

[6]**Western Federal Sav. and Loan Ass'n v. Atkinson Financial Corp.**, 747 S.W.2d 456, 460 (Tex.Ct.App. - Fort Worth 1988).

[7]**White**, 518 S.W.2d at 385.

to sell is usually construed as an option when it gives the buyer "total discretion to avoid the sale,"[8] with the seller being afforded no remedy against the buyer declining to purchase.[9]

TMR maintains that it did not have the discretion to avoid the sale, positing that the agreement obligated it both to investigate the properties and, assuming that the investigation produced satisfactory results, to purchase the properties. We are not persuaded.

The question whether a contract is ambiguous is a question of law subject to *de novo* review, as is the interpretation of an unambiguous contract.[10] A contract is ambiguous if it is reasonably susceptible to more than one meaning.[11] In making this determination, each provision is to be given its reasonable, natural, and probable meaning when considered in relation to the whole.[12]

By its terms, the agreement did not compel purchase until TMR was satisfied that, after its examination of records relating to the properties, Eubanks had good title and that various warranties

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[8]**Culbertson v. Brodsky**, 788 S.W.2d 156, 157 (Tex.Ct.App. - Fort Worth 1990).

[9]See **Baldwin v. New**, 736 S.W.2d 148 (Tex.Ct.App. - Dallas 1987, writ denied).

[10]**Haber Oil Co., Inc. v. Swinehart**, 12 F.3d 426 (5th Cir. 1994).

[11]**Richland Plantation Co. v. Justiss-Mears Oil Co., Inc.**, 671 F.2d 154 (5th Cir. 1982).

[12]**Hennigan v. Chargers Football Co.**, 431 F.2d 308 (5th Cir. 1970).

made about the properties were, in its opinion, accurate. In the event of TMR's discovery of any perceived discrepancy in title or warranty that remained uncorrected to its satisfaction, TMR was given the "sole discretion" either to dissolve the matter or to allow additional time to Eubanks to correct the defect.

The agreement also gave TMR the right to demand specific performance if Eubanks either (1) refused to supply information and records concerning the properties, (2) failed to correct any perceived defects in title or warranty, or (3) refused to transfer title upon TMR's notification of its decision to purchase. Eubanks, on the other hand, was not afforded any reciprocal right to demand specific performance. The agreement provided:

> Because Buyer will bear all costs and expenses of examining title to the Properties, reviewing books, records, and data furnished by the Sellers relating to the properties and inspecting the Properties, Sellers agree that in the event of Buyer's failure or refusal to comply with this agreement, Sellers' sole remedy shall be to terminate this agreement by written notice to Buyer [emphasis added].

This section makes abundantly clear that Eubanks had no recourse against TMR for its failure to comply with any of the terms of the agreement, including the terms relating to purchase of the properties. The agreement, therefore, contains the essence of an option -- limited or no recourse against the optionee declining to purchase.[13]

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[13]See **Gala Homes, Inc. v. Fritz**, 393 S.W.2d 409, 411 (Tex.Ct.App. - Waco 1965, writ ref'd n.r.e.) ("[C]ontract is a mere option if there is an express or implied agreement on the part of the vendor to accept liquidated damages in lieu of purchaser's performance.").

TMR next posits that, even if the instant agreement was only an option to purchase the properties, it supplied consideration, i.e., the performance of its agreement to investigate title, sufficient to hold the option open for the duration of its term.[14] Because Eubanks revoked the option before passage of this term TMR contends that the revocation was invalid.

Texas law requires that an option, in order to be binding for the duration of its term, must be accompanied by consideration. Options given without adequate consideration are revocable until accepted.[15] Adequacy of consideration is a question of fact, and the conclusions of the bankruptcy court on this issue are not to be disturbed absent clear error.[16]

TMR's contention that its promise to investigate the properties was sufficient consideration to make the option irrevocable is not persuasive. The agreement is the only predicate for TMR's "obligations" to investigate the property. The provision denying recourse against TMR for noncompliance with any of the terms of the agreement vitiates any "requirement" that TMR conduct an investigation of the properties. Thus, it is clear that TMR made no binding promise to investigate the properties that may be

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[14]The agreement provided that the option expired on the latest of either of the following dates: July 15, 1986; 10 days after approval of Eubanks' title; 10 days after correction of all objections made by TMR to title or warranty; or on the last day of any extension given by TMR to Eubanks to correct any defects.

[15]**Hott v. Pearcy/Christon, Inc.**, 663 S.W.2d 851 (Tex.Ct.App. - Dallas 1983, writ ref'd n.r.e.).

[16]**United States v. Sherman**, 462 F.2d 577 (5th Cir. 1972).

viewed as adequate consideration.

TMR's outlay of funds in efforts to investigate the title and warranties on the properties does not render the option irrevocable. When a purchaser's payment of fees in the investigation of title and warranty neither benefits the seller nor serves as a detriment to the purchaser, there is no consideration under Texas law.[17] We find no clear error in the bankruptcy court's finding that the proffered consideration was insufficient to make the option irrevocable for the duration of its term.

Finally, TMR urges that even if the option was gratuitous and could be revoked before acceptance, its investigation of the properties constituted valid prerevocation acceptance. This argument is without merit. An option must be accepted without reservation[18] according to its terms, and "[s]ubstantial compliance with the terms of an option is not sufficient to constitute an acceptance."[19] According to the agreement "[u]pon receipt of written notice that [TMR was] ready[,] willing[,] and able to purchase the Properties," the option would be considered

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[17]**Texas Co. v. Dunn**, 219 S.W. 300 (Tex.Ct.App. - El Paso 1920, writ dismissed w.o.j.). TMR invites our attention to **Colligan v. Smith**, 366 S.W.2d 816 (Tex.Ct.App. - Fort Worth 1963, writ ref'd n.r.e.), where an optionee's expenditure of funds relating to the property before transfer of title was determined to be consideration sufficient to create a binding option. We find **Colligan** to be inapposite for the monies spent removed a restriction on the property and inured to the direct benefit of the seller. In the case at bar the funds were spent by TMR solely to allay its doubts about the qualities and title of the properties.

[18]**White**, 518 S.W.2d at 385.

[19]**Id.**

"consummate[d]," i.e., accepted. As TMR did not provide written notice of its unqualified intent to purchase prior to Eubanks' revocation, no valid and timely acceptance occurred.

The remaining claims are without merit. The judgment appealed is AFFIRMED.