United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

May 18, 2022

Lyle W. Cayce
Clerk

No. 20-11218

Capio Funding, L.L.C.,

Plaintiff—Appellant,

versus

Rural/Metro Operating Company, L.L.C.; American Medical Response, Incorporated,

Defendants—Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:17-CV-2713

Before Higginbotham, Willett, and Duncan, *Circuit Judges*.

Don R. Willett, *Circuit Judge*:

This case involves the business of turning debt into dollars. Capio buys and collects on delinquent healthcare accounts. Rural/Metro–AMR sells such accounts. Business between the two soured, and Capio sued for breach of contract and tortious interference. The district court dismissed Capio's claims because it believed the disputed portion of the contract was indefinite and unenforceable. As explained below, we disagree and thus REVERSE and REMAND.

I

First some background. The sale of delinquent accounts typically occurs in a single batch or accrues in multiple batches over a set timeline. To industry veterans, the latter is known as a "Forward Flow" deal. This arrangement is intended to benefit both parties: the purchaser obtains arguably collectable debt for pennies on the dollar, and the seller turns yet-collected debt into cash. Win-win, as they say.

The parties here subscribed to this symbiotic arrangement. Rural/Metro would send Capio a file of delinquent accounts for which initial collection failed—a sub-set of its full portfolio. Capio would then algorithmically identify accounts that met the agreed-upon criteria, calculate a price and wire funds based on the set formula, and take title.

Business was smooth sailing until Capio contracted to purchase more than five-hundred million dollars of Rural/Metro's delinquent accounts. The contract stated the purchase price was $3,300,000.[1] The contract also addressed the expected quality of the delinquent accounts. Finally, a contemporaneous amendment—the "Forward Flow Amendment," signed the same day the contract was executed—created a recurring purchasing agreement.

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[1] Capio alleges the original purchase price was $3,000,000 and that Rural/Metro sought an increase as closing drew near. Hoping to close, Capio acceded; the parties agreed to expand the single-transaction contract by adding the Forward Flow Amendment for an extra $300,000. And before the district court, Capio produced deposition transcripts referencing an email from Rural/Metro stating, "[w]e very much appreciate your offer, including the add-on/increase visit and our current relationship."

Rural/Metro–AMR, on the other hand, represents that Capio paid nothing in exchange for the Forward Flow Amendment.

Here are the relevant terms of the Forward Flow Amendment:

- *Timing:* Rural/Metro agreed to "deliver and offer to sell additional Accounts" within twenty days of each calendar quarter for twelve quarters.
- *Price:* Capio agreed to pay for "additional Accounts" using a set formula.[2] Capio also agreed "the limitation on the amount owed . . . for Ineligible Accounts . . . shall not apply to the Forward Flow Accounts."
- *Quality:* Rural/Metro agreed the "Forward Flow Accounts will (i) be, in the sole determination of the Purchaser, [Capio,] of the same quality as the Inventory Accounts, as determined by reference to those attributes and characteristics of Accounts that impact their collectability and liquidity; and (ii) have been subject to the same number of prior placements and same collection efforts prior to the Closing Date." Rural/Metro also agreed it would not produce accounts "by any adverse or intentional selection or scoring methodologies" and that "Obligors of the Forward Flow Accounts will have demographics that are the same as . . . the Inventory Accounts."
- *Memorialization:* The parties agreed to mutually create a "Schedule of Accounts and a Bill of Sale . . . for each such Forward Flow Sale."
- *Termination:* Rural/Metro agreed to provide Capio "the right to terminate its obligation to purchase any additional Accounts . . . for any reason or for no reason by providing ninety (90) days' prior written notice."

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[2] The formula is explicitly addressed in the agreement and doesn't merit reproduction here. Suffice it to say, there was no question about how to price additional accounts.

Though Capio paid the full contract price, less "purchase price adjustments,"[3] the time came and went for Rural/Metro to transmit the first portfolio of quarterly accounts under the Forward Flow Agreement. Capio received nothing. According to Capio, Rural/Metro asked for more time to tender the accounts because a merger with AMR, another medical company, was delaying compliance.

Post-merger, Rural/Metro–AMR provided 173,000 accounts to Capio for pricing under the Forward Flow Amendment. Capio priced accounts, but the parties failed to close.

Later, Rural/Metro–AMR again tendered a batch of delinquent accounts. This batch included both Rural/Metro accounts (addressed by the Forward Flow Amendment) and AMR accounts (unaddressed by the Forward Flow Amendment) for pricing under the agreed-upon terms. But, as before, the parties failed to close. Rural/Metro–AMR conceded this was "a dollar-and-cents issue."

Capio sued and then appealed the district court's dismissal of its claims.

II

"We review a grant of summary judgment *de novo*, applying the same standard as the district court" and viewing the facts in the light most

[3] The "Purchase Price Adjustment" provision states that Capio would retain $300,000 as a fund from which Capio could deduct costs attributable to purchased accounts that were (a) later found ineligible under the contract, or (b) successfully collected by Rural/Metro up to a month before the contract date.

favorable to the nonmovant.[4] Similarly, the interpretation of this contract is a legal question—also reviewed *de novo*—subject to the laws of Texas.[5]

A

The crucial question is whether the term "additional Accounts" rendered the Forward Flow Amendment unenforceable. Rural/Metro–AMR urges a Shakespearean take—claiming it was but an indefinite promise to the ear, broken only to Capio's hope.[6] Capio counters that "additional Accounts" governed all accounts that met the agreed-upon standards.

Capio carries the day for two reasons. First, read in context, the term "additional Accounts" has enforceable meaning. Taken together, the plain meaning of the word "additional," the contract's clear architecture, and various settled principles of interpretation reveal that "additional Accounts" refers to *all qualifying accounts* that accrue quarterly. Second, none of Rural/Metro–AMR's counterarguments is persuasive.

1

It has long been the case in Texas that "[i]f the written instrument is so worded that it can be given a certain or definite legal meaning or interpretation, then . . . the court will construe the contract as a matter of law."[7] This, of course, rests on the equally well-established principle that

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[4] *Certain Underwriters at Lloyd's, London v. Axon Pressure Prods. Inc.*, 951 F.3d 248, 255 (5th Cir. 2020) (citations omitted); *see also* Fed. R. Civ. P. 56(a).

[5] *See Pioneer Expl., L.L.C. v. Steadfast Ins. Co.*, 767 F.3d 503, 511–12 (5th Cir. 2014) (reviewing contract interpretation *de novo*); *see also McBeth v. Carpenter*, 565 F.3d 171, 176 (5th Cir. 2009) ("A federal court sitting in diversity applies state substantive law.").

[6] *See* William Shakespeare, The Tragedy of Macbeth act V, sc. VIII, ll. 47–48.

[7] *See, e.g.*, *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983) (citation omitted).

"courts should examine and consider *the entire writing* in an effort to harmonize and give effect to *all the provisions* . . . so that none will be rendered meaningless."[8]

Against this backdrop, the term "additional Accounts" commands a single construction. Though "additional" is sometimes defined as "more than is usual or expected,"[9] the district court divorced that definition from the contract's architecture. The term "additional" qualifies "Accounts," which is defined in the base contract (albeit with more words) as "the accounts receivable listed in . . . Schedule [I]." The basic definition of "Accounts" therefore contemplates only itemized "accounts receivable" already in existence. It comes as no surprise, then, that the scope of the Forward Flow Amendment (by which Rural/Metro–AMR agreed to offer and sell *future* accounts receivable) contemplates "more [accounts] than . . .

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[8] *Id.* (citation omitted); *accord Shell Oil Co. v. Khan*, 138 S.W.3d 288, 292 (Tex. 2004).

[9] The district court relied exclusively on the Merriam-Webster online definition. *Capio Funding, L.L.C. v. Rural/Metro Operating Co., L.L.C.*, No. 3:17-CV-02713-X, 2020 WL 6709966, at *3 (N.D. Tex. Nov. 13, 2020) (citation omitted). But Merriam-Webster's Collegiate—considered among lexicographers as one of "the most useful and authoritative for the [modern] English language generally and for law," Antonin Scalia & Brian Garner, Reading Law: The Interpretation of Legal Texts 419–23 (2012)—provides a less-speculative definition: the term is informational, meaning "existing by way of addition." Merriam-Webster's Collegiate Dictionary 14 (11th ed. 2003). Viewed in this light, the term "additional Accounts" forecasts the subsequently explained criteria (not an atypical, later-negotiated figure) through which addition would occur.

This is not to say that it is per se error to rely on a single dictionary alone. But we undertake a comparative approach and emphasize Merriam-Webster's Collegiate definition, in particular, because we believe the Supreme Court of Texas would do the same. *See, e.g.*, *Jaster v. Comet II Constr., Inc.*, 438 S.W.3d 556, 563 (Tex. 2014) (looking to Merriam-Webster's Collegiate Dictionary, among others). *See generally* Scalia & Garner, *supra*, at 416–17 (emphasizing comparative approach, noting definitional drift of "poultry" between sources and the resulting effect on accurate interpretation).

expected" under Schedule I. But how many? *Ut res magis valeat quam pereat*,[10] however many (*i.e.*, all) that meet the agreed-upon quality requirements.

This reading is further confirmed by longstanding principles of Texas contract interpretation.[11] Understanding "additional Accounts" as little more than qualifying accounts accruing after the delinquencies in Schedule I aligns with (1) the universal disfavor of forfeiture, (2) trade usage,[12] and (3) Rural/Metro–AMR's partial performance[13] under the now-disputed Forward Flow Amendment.

Nor does Rural/Metro–AMR's invocation of *Gordon v. Emerson Shoe Company* change our analysis. Beyond its questionable weight,[14] the case

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[10] Scalia & Garner, *supra* note 9, at 66 (explaining the presumption of validity canon).

[11] *See generally Fischer v. CTMI, L.L.C.*, 479 S.W.3d 231, 239–40 (Tex. 2016) (detailing general principles).

[12] *Cf., e.g.*, *Chase Bank USA, N.A. v. Unifund Portfolio A LLC*, No. 09 CIV. 9795, 2010 WL 3565169, at *2 (S.D.N.Y. Sept. 13, 2010) (involving forward flow arrangement where "contracts were customarily twelve months in duration, at a set price, with eligible charged-off accounts presented by [the seller] to [the purchaser] on a monthly basis"). *See generally* Fed. Trade Comm'n, The Structure and Practices of the Debt Buying Industry, app. C § 2 (2013) (discussing common characteristics of forward flow agreements).

[13] The standard of review compels an inference in favor of partial performance. Even more, Rural/Metro–AMR provides us with no explanation for why it transmitted receivables for pricing after the sale of Schedule I delinquencies, nor does Rural/Metro–AMR deny that this constituted all qualifying accounts post-dating Schedule I. Rural/Metro–AMR instead offers a dilettantish rejoinder—noting that Capio cannot prove this to be true (despite no such obligation) and asserting the failure to close was "the opposite of partial performance." We disagree.

[14] Rural/Metro–AMR incorrectly attributes this precedent to the Supreme Court of Texas. But the case was decided by the progenitor of the Ninth Court of Appeals. *See generally Gordon v. Emerson Shoe Co.*, 242 S.W. 795 (Tex. Civ. App 1922). Far more than

stands for the unremarkable: a $4,000 shoe contract—without evidence of the agreed number of shoes, sizes, styles, quality, or individual prices—was "too indefinite" to sustain.[15] We are not presented with a similar scenario. The Forward Flow Amendment spelled out the material terms on timing, selection criteria, and price. The only term omitted was a specific quantity, which was not only irrelevant given the nature of the agreement but, as the district court recognized, such granularity "would have been impossible" to forecast.[16] Rural/Metro–AMR's reliance on *Gordon* is therefore misplaced.

2

We are likewise unpersuaded by Rural/Metro–AMR's alternative arguments. Rural/Metro–AMR first claims that Capio provided no consideration for the Forward Flow Amendment. Setting aside the fact that the record suggests otherwise,[17] we cannot ignore that this argument was not presented to the district court. We will not speculate on why no one from Rural/Metro–AMR reached for this low-hanging factual fruit. But the time to do so has come and gone.[18]

Rural/Metro–AMR also claims damages cannot be calculated because, in its view, there is no way to determine the number of accounts they

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just a citation misstep, though, Rural/Metro–AMR names the Supreme Court of Texas at least three times in making its point.

[15] *Id.* at 795–96.

[16] *Capio Funding*, 2020 WL 6709966, at *3.

[17] Viewing the record in the light most favorable to the non-movant, we are hard-pressed to overlook a series of emails referencing "the add-on/increase" and, more explicitly, "the additional [$]300,000 we [*i.e.*, Capio] paid . . . to secure the forward flow piece."

[18] *See, e.g.*, *Fed. Deposit Ins. Corp. v. Laguarta*, 939 F.2d 1231, 1240 (5th Cir. 1991) ("This Court has clearly held, however, that it will generally not consider a new ground on appeal raised by an appellant in opposition to summary judgment.").

had to offer and Capio was obligated to purchase. But *Fischer* again counsels otherwise. As noted previously,[19] Rural/Metro–AMR partially performed in a manner consistent with its putative obligation under the Forward Flow Amendment. Such performance "may make a contractual remedy appropriate even though uncertainty is not removed."[20] This supports Capio's contention that damages demonstrably flow from the accounts tendered (but never closed upon) by Rural/Metro–AMR.

III

The term "additional Accounts" has enforceable meaning. And because the Forward Flow Amendment was binding, Capio's claims should not have been dismissed. We therefore REVERSE and REMAND.

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[19] *See supra* note 13.

[20] *Fischer*, 479 S.W.3d at 241–42 (quoting Restatement (Second) of Conts. § 34(3) (Am. L. Inst. 1981)). Of note, the party that unsuccessfully sought to avoid its obligation in *Fischer* had "never performed any obligation under the [allegedly indefinite] clause." *Id.* at 242. Yet the court still found the disputed language binding, pointing in part to the fact that Fischer had "already rendered some substantial performance or . . . taken other material action in reliance upon [his] existing expressions of agreement." *Id.* (quoting *Scott v. Ingle Bros. Pac. Inc.*, 489 S.W.2d 554, 556 (Tex. 1972)). The facts here arguably favor Capio more than they did Fisher, who ultimately prevailed.