

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

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Lyle W. Cayce
Clerk

No. 23-20506

ROKiT DRINKS, L.L.C.; ROK IMPORTS, INCORPORATED; ROK
STARS, LIMITED,

Plaintiffs—Appellants,

versus

LANDRY’S INCORPORATED; FERTITTA ENTERTAINMENT,
INCORPORATED,

Defendants—Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:22-CV-1551

Before DENNIS, SOUTHWICK, and ENGELHARDT, *Circuit Judges*.

PER CURIAM:*

A beverage supplier sued a restaurant group, claiming they had formed an enforceable agreement to showcase products that was later breached. The supplier brought contract, promissory estoppel, and related

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

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tort claims, but the district court dismissed them under Federal Rule of Civil Procedure 12(b)(6). For the reasons that follow, we AFFIRM.

I

Plaintiff-Appellant ROKiT Drinks, LLC produces and supplies a wide range of products, including energy drinks, spirits, and beer.¹ Defendant-Appellee Landry's Inc. is in the dining and hospitality business and owns over 600 restaurants nationwide. In August 2018, the Houston Rockets were looking for a new jersey sponsor and contacted ROKiT Marketing about a potential partnership. During negotiations for this "Sponsorship Agreement," the parties also discussed the possibility of an additional agreement between ROKiT and Landry's to promote ROKiT's beverage products at Landry's restaurants (the "Beverage Agreement").

As a part of these discussions, Jason Miller, a representative of the Rockets, sent an email to Clinton Ehrlich, the Chief Marketing Officer of ROKiT Marketing, with a "proposal for 'a 5 year partnership'" between the parties that "include[d] a business portfolio wide relationship with the franchise, their home venue (the Toyota Center) and Landry's Inc." The email also stated that Patrick Fertitta, son of Tilman Fertitta, had "made it clear that we could push your products at all 600 Landry's owned and operated locations around the world." These discussions also included a

¹ This case involves a network of interrelated business entities. Plaintiff-Appellant ROK Imports Inc. is a California corporation and a wholly owned subsidiary of ROKiT Beverage Group Limited, which itself is a wholly owned subsidiary of Plaintiff-Appellant ROK Stars Limited (together, Plaintiff-Appellants are referred to as "ROKiT"). On the other side of the litigation, Landry's President, Chairman, and CEO is Tilman Fertitta, who also owns Defendant-Appellee Fertitta Entertainment Inc. Fertitta Entertainment is a holding company that owns a professional basketball team, the Houston Rockets, and several of Landry's-related companies as subsidiaries (together, Defendant-Appellees are referred to as "Landry's").

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partnership proposal from ROKiT discussing potential alcohol marketing partnerships between the brands, such as ROKiT-branded venues within the Rockets arena and a “global brand showcase” for ROKiT products at Landry’s restaurants. However, nothing related to this proposal was included in the Sponsorship Agreement executed in October 2018. To the contrary, that document included an express term stating, “[t]his Agreement is for advertising and promotional benefits only and is in no way conditioned on or subject to the sale of Sponsor’s alcohol sales by Team [i.e., the Rockets].”

After the parties executed the Sponsorship Agreement, ROKiT and Landry’s continued to negotiate the alleged Beverage Agreement. As part of these negotiations, ROKiT entered distribution contracts with some of Landry’s preferred distributors. ROKiT does not allege that a final, executed Beverage Agreement exists, but instead that the emails, proposals, and distribution agreements, considered together, constitute an enforceable contract.

As alleged, the Beverage Agreement required Landry’s to “showcase” particular ROKiT drink products—including its new line of Bogart Spirits—at hundreds of Landry’s locations nationwide. In exchange, ROKiT “would ensure that [its products] be available for distribution to each of [Landry’s] locations and that the respective distributors be provided with sufficient quantities . . . to fulfill Landry’s orders.” Despite lacking a final writing, ROKiT alleges that the distribution agreements—though Landry’s was not party to them—supply the Beverage Agreement’s expressed price term. However, ROKiT’s complaint states that “the quantity of ROKiT Drinks that [Landry’s is] required to purchase under the Beverage Agreement is not a term that is supplied by the distribution agreements,” and that Landry’s is “not necessarily required to purchase any ROKiT Drinks Products under the Beverage Agreement.”

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Beginning in 2019, ROKiT began to express dissatisfaction with Landry's failure to hold up to its end of the alleged contract. In January 2019, Jonathon Kendrick, the co-founder of ROKiT, sent an email reading in part, "I know we could not put this in the contract but it was clearly agreed that you wold [sic] help us get our drinks into your outlets and that was the main reason I got the sponsorship through with the Rockets." ROKiT alleges that by January 2020, "ROKiT Drinks had only made approximately \$440,000 in sales to a small portion of the Landry's locations, in violation of the Beverage Deal and the expectations set by Landry's/Fertitta Entertainment." ROKiT further alleges that in early 2021 the Defendants-Appellees ordered all their locations to stop carrying ROKiT products.

Ultimately, ROKiT determined that Landry's actions amounted to a breach of the alleged Beverage Agreement and filed this suit in May 2022. At an initial status conference, the district court dismissed ROKiT's breach of contract, promissory estoppel, and torts claims without prejudice, allowing ROKiT to amend the complaint. The district court specifically admonished ROKiT that any revised pleading must contain "the material terms of the contract and the nature of the applicable consideration," and warned that "all amended claims, whether brought in contract or in tort, must be viable with respect to the dictates of Section 102.16(a)(1) of the Texas Alcoholic Beverage Code."

ROKiT filed a Second Amended Complaint, at issue here, in October 2022, alleging five Texas state law claims: a claim for breach of contract, a promissory estoppel claim, and three related tort claims, all based on the promises underlying the alleged Beverage Agreement. The tort claims include fraud by misrepresentation, fraud by non-disclosure, and tortious interference with a contract.

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The district court granted Landry’s motion to dismiss, finding that ROKiT had failed to plead the necessary price and quantity terms for an enforceable contract, that the complaint did not allege that there was a signed, written agreement as required by the statute of frauds, and that the remaining claims failed because the alleged contract formed the underlying promise at the heart of all the claims. While acknowledging the issue, the district court declined to decide whether the alleged contract and related claims also failed for violating Section 102.16(a)(1) of the Texas Alcoholic Beverage Code (“TABC”). The district court dismissed all claims with prejudice and entered final judgment in favor of Landry’s. ROKiT timely appealed.

II

We review a district court’s dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) de novo, applying the same legal standards as the district court. *Raj v. La. State Univ.*, 714 F.3d 322, 329–30 (5th Cir. 2013) (citation omitted). We affirm a district court’s dismissal only if the plaintiff fails to allege a facially plausible claim for relief. *Bass v. Stryker Corp.*, 669 F.3d 501, 506 (5th Cir. 2012) (citation omitted).

Although “[t]he failure-to-state-a-claim inquiry typically focuses on whether the plaintiff plausibly alleges the elements of a claim,” a “Rule 12(b)(6) dismissal may also ‘be appropriate based on a successful affirmative defense’ provided that the affirmative defense ‘appear[s] on the face of the complaint.’” *Bell v. Eagle Mountain Saginaw Indep. Sch. Dist.*, 27 F.4th 313, 320 (5th Cir. 2022) (quoting *Basic Cap. Mgmt. v. Dynex Cap., Inc.*, 976 F.3d 585, 588 (5th Cir. 2020)).

III

The district court’s dismissal of ROKiT’s claims was proper. Although the court did not address the issue, the alleged Beverage

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Agreement is illegal and unenforceable under Texas law. That argument was properly presented to the district court: the court instructed the parties to brief the issue, and Landry's raised it in its motion to dismiss. We may affirm on any ground supported by the record, so long as it was raised below. *Ballex v. Cont'l Airlines, Inc.*, 668 F.3d 777, 781 (5th Cir. 2012). Because Texas courts will not enforce an illegal contract or any rights flowing from it, we affirm.

A

Illegality is an affirmative defense to a breach of contract claim. TEX. R. CIV. P. 94; *Phillips v. Phillips*, 820 S.W.2d 785, 789 (Tex. 1991). "Under Texas law, a contract is illegal, and thus void, if the contract obligates the parties to perform an action that is forbidden by the law of the place where the action is to occur." *Am. Precision Ammunition, L.L.C. v. City of Mineral Wells*, 90 F.4th 820, 824–25 (5th Cir. 2024) (quoting *In re OCA, Inc.*, 552 F.3d 413, 422 (5th Cir. 2008)); see also *Phila. Indem. Ins. Co. v. White*, 490 S.W.3d 468, 483 (Tex. 2016).

As we have recognized, "[t]he TABC is a compilation of statutes that regulate the production, distribution, sale, and consumption of all alcoholic beverages within Texas." *Dickerson v. Bailey*, 336 F.3d 388, 397 (5th Cir. 2003). In *Dickerson*, we provided a helpful summary of the goals of the regulatory regime:

[T]he TABC creates a three-tier system that strictly separates ownership and operations between manufacturers, wholesalers, and retailers. The vertical integration of the manufacture, distribution or sale of alcoholic beverages is strictly prohibited. And, with rare exceptions, manufacturers are permitted to sell only to wholesalers; wholesalers only to retailers; and retailers only to consumers.

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One need not engage in extensive analysis to understand the Beverage Agreement's illegal nature. Texas designed the TABC to prevent the exact conduct that the alleged agreement would require. Here, ROKiT (a producer of alcoholic beverages) alleges that the Beverage Agreement required Landry's (a retailer of alcoholic beverages) to "showcase" its alcoholic beverages. While the Appellants use the word "showcase," the meaning of this phrase is clear: ROKiT's brief states that "the Beverage Agreement dictates that [Appellees] 'showcase,' that is sell, ROKiT Drinks' products at its 600+ Landry's locations." But the TABC is designed so that "manufacturers are permitted to sell only to wholesalers" and "wholesalers only to retailers." *Dickerson*, 336 F.3d at 397; *see also Cadena Com. USA Corp. v. Tex. Alcoholic Beverage Comm'n*, 518 S.W.3d 318, 327 (Tex. 2017) (noting that the TABC is designed to create a regime of "strict separation between the manufacturing, wholesaling, and retailing levels of the alcoholic beverage industry in Texas" (quoting TEX. ALCO. BEV. CODE § 6.03(i) (internal quotation marks omitted))).

Further, ROKiT's own characterization of the Beverage Agreement in the complaint is clearly an "unlawful agreement" under TABC § 102.16, foreclosing any breach of contract claim. Section 102.16 makes it an offense for any "alcoholic beverage manufacturer" to "orally or in writing enter[] or offer[] to enter into an agreement . . . by which a person is required or influenced . . . to purchase . . . a certain volume or quota of business, more or less, of one or more types or brands of alcoholic beverages" TEX. ALCO. BEV. CODE § 102.16(a)(1). Distilled to its essence, the Beverage Agreement requires Landry's (a retailer) to "showcase" ROKiT's (an alcoholic beverage manufacturer) "products at all of its 600+ locations nationwide." As discussed, "showcase" means sell, so the Beverage Agreement "obligates the parties to perform an action that is forbidden by" § 102.16. *Am. Precision Ammunition*, 90 F.4th at 824–25. Accordingly, it "is

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illegal, and thus void” under Texas law. *Id.*; see also *Merry Homes, Inc. v. Chi Hung Luu*, 312 S.W.3d 938, 946 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (“Any contract or lease that requires a violation of [the TABC] . . . is void.”).

And even if the Beverage Agreement’s “showcase” term does not *require* sales, § 102.16 also prohibits parties entering an agreement “by which a person is . . . *influenced* . . . to purchase” alcoholic beverages. TEX. ALCO. BEV. CODE § 102.16(a)(1) (emphasis added). The Beverage Agreement clearly does so. As ROKiT itself admits, to comply with the Beverage Agreement, Landry’s “must, at the very least, include the products on their menus at each location.” And “the inclusion of [ROKiT]’s products on the menu” makes it “reasonable to expect that [Landry’s] would regularly purchase *some* amount of” ROKiT’s products. By ROKiT’s own admission, the alleged Beverage Agreement, at minimum, “influence[s]” the purchase of alcoholic beverages in violation of § 102.16. Because there is no legal way for the parties to comply with the Beverage Agreement, we hold that the contract is void for illegality. See *White*, 490 S.W.3d at 483 (“A contract to do a thing which cannot be performed without violation of the law violates public policy and is void.” (internal citations omitted))).

ROKiT argues that the Beverage Agreement cannot be illegal because it lacks a definite quantity term. Not so. The words “more or less” in TABC § 102.16(a)(1) show that the law prohibits agreements guaranteeing any sales of alcohol whatsoever, not just those for a specific quantity. And ROKiT’s complaint makes clear that the alleged agreement did guarantee sales; averring that Landry’s “must, at the very least, include the products on their menus at each location” to avoid breach. This still requires Landry’s to purchase “a certain volume or quota of business,” as prohibited by the statute. See § 102.16(a)(1).

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Accordingly, we affirm the district court's dismissal of ROKiT's breach of contract claim because the Beverage Agreement is illegal under Texas law, and do not reach any of the other grounds for dismissal. *See Cuvillier*, 503 F.3d at 401 ("We may affirm a district court's Rule 12(b)(6) dismissal on any grounds raised below and supported by the record.").

B

The Beverage Agreement's illegality also bars enforcement of ROKiT's promissory estoppel and tort claims. Consistent with the general legal principle that Texas courts will not enforce an illegal contract, a party cannot bring a claim that arises from, is founded upon, or is directly related to an illegal contract. *See Texas & P. Coal Co. v. Lawson*, 89 Tex. 394, 402 (1896) ("It results from what has been said that the contract . . . is . . . void [as illegal] and no action or counterclaim can be founded thereon."); *see also Cain v. Franklin*, 476 S.W.2d 952, 953 (Tex. App.—Austin 1972, writ ref'd n.r.e) ("No court will lend its assistance in any way towards carrying out the terms of an illegal contract. This applies to any action in which it is necessary to prove the illegal contract in order to maintain the action. Nor will the courts enforce any alleged rights directly springing from such contract."). Courts applying Texas law have consistently refused to recognize fraud claims based on illegal contracts. *Villanueva v. Gonzalez*, 123 S.W.3d 461, 468 (Tex. App.—San Antonio 2003, no pet.) (recognizing that where a contract "is unenforceable because it is illegal," a "fraud claim to recover the benefit of an unenforceable bargain cannot stand"); *see also Johnson v. McLeaish*, No. 05-94-01673-CV, 1995 WL 500308, at *9 (Tex. App.—Dallas, Aug. 23, 1995, writ denied) ("Allowing a recovery for fraud involving the breach of an unenforceable contract would permit one to do indirectly what could not be done directly."); *Keriotis v. Lombardo Rental Tr.*, 607 S.W.2d 44, 46 (Tex. App.—Beaumont 1980, writ ref'd n.r.e.) ("We fail to see how there could be any recovery for fraud involving the breach of an unenforceable contract."

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(citation omitted)). So too for promissory estoppel claims. *See, e.g., Schmidt v. Matise*, 747 S.W.2d 883, 887 (Tex. App.—Dallas 1988, writ denied) (“An agreement that is void as prohibited by law cannot be rendered valid by invoking the doctrine of estoppel.”); *Duncan Litig. Invs., LLC v. Baker*, No. 4:19-CV-3094, 2022 WL 3566848, at *7 (S.D. Tex. Aug. 17, 2022) (“Generally, claims for . . . promissory estoppel are also barred where a contract is void because of illegality.”).

ROKiT’s fraud by misrepresentation,² tortious interference, and promissory estoppel claims all attempt to enforce an illegal contract through other means. As pleaded in the complaint, each of these depend on the Beverage Agreement to supply one or more elements. *See* ROA.225 (alleging that Appellees committed fraud when they “made material, false representations to Plaintiffs which include Defendants’ ongoing representations . . . pursuant to the Beverage Agreement”) (emphasis added); ROA.227 (alleging that Appellees committed tortious interference when they “made an illegal *promise* under the Texas Alcoholic Beverage Code” causing Appellants to lose their contract with Bogart LLC) (emphasis added); ROA.224 (alleging that Appellants “relied on [the Appellees’] promise to their detriment” for the promissory estoppel claim). Because ROKiT offers no reason to depart from the general principle that “[n]o court will lend its assistance in any way towards carrying out the terms of an illegal contract,” *Cain*, 476 S.W.2d at 953, we hold the district court did not err when it dismissed ROKiT’s remaining claims.

² ROKiT’s fraud by non-disclosure claim fails for a different reason. Appellants allege Appellees failed to disclose that offering ROKiT’s products nationwide would violate TABC. But under Texas law, parties are presumed to know the law, and a failure to disclose a legal prohibition generally cannot support a fraud claim. *See Packard v. OCA, Inc.*, 624 F.3d 726, 734 (5th Cir. 2010).

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IV

For the foregoing reasons, we AFFIRM the district court's judgment.