United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
October 30, 2026
Thomas B. Plunkett, III
Clerk

No. 26-10079

82 Glenwood Avenue, L.L.C., A New York L.L.C.,

Plaintiff—Appellant,

versus

David Kane, *an individual*; Evan Lipp, *an individual*; Kane Title, L.L.C., A Texas L.L.C.,

Defendants—Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:23-CV-2231

Before Richman, Haynes, and Douglas, *Circuit Judges*.

Per Curiam:[*]

This dispute arises from an alleged escrow agreement. The Appellant, 82 Glenwood Avenue LLC, brought claims for breach of contract, breach of fiduciary duty, negligence, fraud, and promissory estoppel against David Kane, Evan Lipp, Kane Title, LLC, and other entities. It settled with some

[*] This opinion is not designated for publication. *See* 5th Cir. R. 47.5.

defendants, and the district court dismissed the claims against the remaining defendants. We affirm.

I

We accept as true the following facts provided in 82 Glenwood's Third Amended Complaint.[1] BHL Capital LLC, owned by Nolan Schutze, entered into an agreement with WC 6th & Rio Grande LP to purchase property in Austin, Texas (the Purchase Agreement). The Purchase Agreement required a $3 million earnest money deposit. BHL Capital did not have sufficient funds to complete the purchase, so it partnered with Jake and Austin Deraaff to complete the transaction. The Deraaff brothers' company, in turn, partnered with the Mermelstein brothers' company to form 82 Glenwood Avenue LLC. 82 Glenwood and BHL Capital then formed another entity, 601 Rio LLC, with 82 Glenwood and BHL Capital as its sole members. BHL Capital assigned its rights as purchaser of the subject property in Austin to 601 Rio LLC.

Pursuant to the Purchase Agreement, 82 Glenwood, on behalf of 601 Rio LLC, wired $3 million in earnest money to Evan Lipp, an escrow agent employed by Kane Title LLC. Kane Title is "owned, operated, and/or managed" by Lipp and David Kane. Before 82 Glenwood wired the money, Schutze and Lipp, copying Austin Deraaff, Jake Deraaff, and Evan Mizrahi (an agent of 82 Glenwood), corresponded by email about the transaction in relevant part:

> Schutze: I wanted to send an introduction email to you regarding the Austin deal at 6th and Rio. Please meet Jake & Austin Deraaff and

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[1] *See Sonnier v. State Farm Mut. Auto. Ins. Co.*, 509 F.3d 673, 675 (5th Cir. 2007).

> Evan Mizrahi, my partners on the deal. . . . I will be sending company documents shortly along with contracts.
>
> Lipp: Thanks for the introduction to your partners. We look forward to working with you on another transaction.
>
> Schutze: Can you review this contract for the back side of this deal before I send out for execution? I need to confirm the Section 12: Special Provisions. "Upon Close of the Feasibility Period, the escrow agent shall use the first $3,000,000 of Buyer's donwpayment [sic] to replace the Seller's donwpayment [sic] under its contract with the current owner of the Property." Want to make sure that once the feasibility period (45 days) is over that their money would go hard and can replace our money in the front side contract.
>
> Lipp: After reviewing your attached draft contract, I would interpret Section 12 as you do. On day 46, the feasibility period would be over and, per the instructions in the special provisions, $3,000,000 would be credited as the sellers [sic] funds.

Mizrahi then emailed Lipp, copying Schutze, Austin Deraaff, and Jake Deraaff:

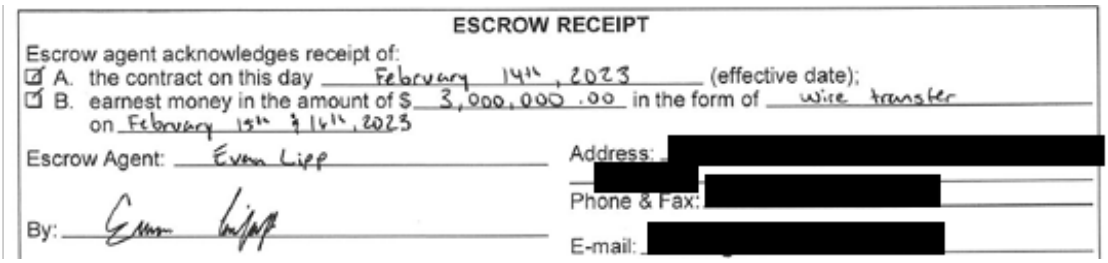
> I just wanted to be sure- we are looking to get a refund of our $3,000,000 on day 46 once the buyers [sic] donwpayment [sic] goes hard and is used to replace our down payment with the current owner. Can you confirm that we would receive a wire of $3,000,000 back on day 46 (of course assuming the buyer does not cancel)?

Lipp responded:

> The draft contract Nolan [Schutze] previously sent was on the standard TAR – Commercial Contract form. The job or purpose of an escrow agent is to act as a neutral third party and not to interpret the contract, but rather to follow the

> instructions of the contract. In my opinion, I would agree with you and Nolan [Schutze] in that the $3,000,000 would be released once the feasibility period ends or if the contract were to cancel.

On February 14, 2023, 82 Glenwood wired $3,000,000 to Lipp in his capacity as escrow agent of Kane Title. Lipp acknowledged receipt of the funds, but the receipt did not identify the sender of the payment. The receipt is reproduced, redacted in part, below:



ESCROW RECEIPT

Escrow agent acknowledges receipt of:
☑ A. the contract on this day February 14th, 2023 (effective date);
☑ B. earnest money in the amount of $ 3,000,000.00 in the form of wire transfer on February 13th & 14th, 2023

Escrow Agent: Evan Lipp
By: Evan Lipp

Address: [redacted]
Phone & Fax: [redacted]
E-mail: [redacted]

Approximately 45 days later, 82 Glenwood emailed Lipp requesting the return of the $3,000,000. A few days thereafter, Lipp responded as follows:

> As you know, I received several calls and emails from multiple parties on Friday claiming to be part of the deal for 601 Rio Grande St. I don't have an operating agreement for the entity that is purchasing the property. I don't know who can sign for the company or even who the members are. I am not releasing any funds to anyone until I have a clear understanding of who can sign for the company and who the members are. I'm really not comfortable discussing the details of the deal until I know who I'm talking to. Please relay this message to any and all parties that are involved so we can prevent what happened on Friday with the frantic back to back phone calls and emails.

82 Glenwood later discovered that within thirty minutes of Lipp receiving the funds, Schutze had emailed Lipp, with no one else copied, and requested the funds be refunded directly to him. Despite Lipp's email

implying that he had not already released the funds to anyone, Kane Title had "immediately" wired Schutze the funds after deducting its 2.5% fee ($75,000) from the $3,000,000.

82 Glenwood filed this lawsuit against BHL Capital, Schutze, Lipp, Kane, and Kane Title. It settled its breach of contract and fraud claims against BHL Capital and Schutze. Lipp, Kane, and Kane Title filed motions to dismiss 82 Glenwood's claims against them for breach of contract, breach of fiduciary duty, negligence, and promissory estoppel under Federal Rule of Civil Procedure 12(b)(6). The district court granted the motions, resulting in the dismissal of the case, and 82 Glenwood appealed.

II

We "review[] *de novo* the district court's order on a Rule 12(b)(6) motion to dismiss."[2] As a preliminary matter, the complaint makes no factual allegations against Kane. We agree with the reasons stated by the district court that the claims against Kane should be dismissed. That leaves only the claims against Lipp and Kane Title. "Because this is a diversity case, Texas substantive law applies."[3]

A

Under Texas law, "[t]he elements of a contract, express or implied, are identical."[4] These elements include:

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[2] *Id.* at 675 (citing *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007)).

[3] *Primrose Operating Co. v. Nat'l Am. Ins. Co.*, 382 F.3d 546, 552 n.4 (5th Cir. 2004).

[4] *Plotkin v. Joekel*, 304 S.W.3d 455, 476 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (quoting *Univ. Nat'l Bank v. Ernst & Whinney,* 773 S.W.2d 707, 710 (Tex. App.—San Antonio 1989, no writ)).

> (1) an offer was made; (2) the other party accepted in strict compliance with the terms of the offer; (3) the parties had a meeting of the minds on the essential terms of the contract (mutual assent); (4) each party consented to those terms; and (5) the parties executed and delivered the contract with the intent that it be mutual and binding.[5]

The breach of contract claim fails on the third element, mutual assent. 82 Glenwood argues that "the email exchange demonstrates mutual assent to the same terms," and points to Lipp's response regarding his opinion of the terms of the draft contract attached to the emails. It also argues that the parties' "course of dealing demonstrates that all parties understood they were entering an escrow arrangement," and emphasizes Lipp's signing of the escrow receipt.

We agree with the district court that 82 Glenwood did not sufficiently plead mutual assent between 82 Glenwood and Lipp regarding the terms of the contract—namely, that Lipp would receive funds from 82 Glenwood and then return those funds only to 82 Glenwood. "[B]oth express contracts and those implied in fact require 'a meeting of the minds of the parties as implied from and evidenced by their conduct and course of dealing . . . the essence of which is consent to be bound.'"[6] The emails do not contain express terms

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[5] *USAA Texas Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 501 n.21 (Tex. 2018).

[6] *Oncor Elec. Delivery Co. NTU, LLC v. Wilbarger Cnty. Appraisal Dist.*, 691 S.W.3d 890, 901 n.7 (Tex. 2024) (second alteration in original) (quoting *Haws & Garrett Gen. Contractors, Inc. v. Gorbett Bros. Welding Co.*, 480 S.W.2d 607, 609 (Tex. 1972)); *see Joekel*, 304 S.W.3d at 477; *Hou. Med. Testing Servs., Inc. v. Mintzer*, 417 S.W.3d 691, 698 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

that Lipp would return the down payment only to 82 Glenwood.[7] Nor do the circumstances sufficiently indicate consent to be bound by those terms.[8]

The email correspondence does not suggest in any way that Lipp intended to be bound to an agreement with 82 Glenwood, who is not mentioned or identified anywhere in the emails. At most, the emails contain a discussion about how Schutze, Lipp, and Mizrahi interpreted a draft contract. The emails stated that draft contracts and company documents would be sent to Lipp, but they do not state, and the complaint does not clarify, what company documents were actually sent or whether the draft contracts mentioned 82 Glenwood. Additionally, throughout their correspondence, Schutze and Mizrahi referred to Schutze, Mizrahi, and the Deraaff brothers collectively. For example, when Mizrahi confirmed that Lipp would wire the $3,000,000 back, he asked if "we," as in the "partners on the deal"—Schutze, the Deraaff brothers, and Mizrahi—would be refunded the $3,000,000.

82 Glenwood argues Mizrahi was its agent, but that was never communicated to Lipp. What was communicated to Lipp was that Mizrahi was Schutze's "partner[] on the deal," and Mizrahi's email contained the same domain address as the other "partners," Jake and Austin Deraaff, and was not in any way associated with 82 Glenwood.

Although 82 Glenwood alleges it wired the funds to Lipp, it does not state whether the account from which the funds were wired in any way suggested to Lipp that the funds came from 82 Glenwood. Even if the account did indicate that it belonged to 82 Glenwood, this would not be

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[7] *See Mintzer*, 417 S.W.3d at 698.

[8] *See Joekel*, 304 S.W.3d at 477.

enough under the circumstances to conclude that Lipp agreed with 82 Glenwood that he would return the funds only to 82 Glenwood.[9]

The breach of contract claim against Kane Title is derivative of the claim against Lipp.[10] Because the breach of contract claim fails against Lipp, it fails against Kane Title as well.

This claim was properly dismissed.

B

In Texas, "[c]laims based on ordinary negligence and fiduciary duty both require showing damages were proximately caused by breach of a duty."[11] "Proximate cause has two components: foreseeability and cause in fact."[12] "Harm is foreseeable if a person of ordinary intelligence should have anticipated the danger created by an act or omission."[13] "Foreseeability usually is determined by whether the defendant is aware of prior, similar conduct by third parties."[14] "We consider not only the foreseeability of the

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[9] *See Effel v. McGarry*, 339 S.W.3d 789, 792 (Tex. App.—Dallas 2011, pet. denied) ("The parties must assent to the same thing in the same sense at the same time. Their assent must comprehend the whole proposition, and the agreement must comprise all the terms which they intend to introduce into it." (internal citations omitted) (citing *Finley v. Hundley*, 252 S.W.2d 958, 962 (Tex. App.—Dallas 1952, no writ))).

[10] *See Reid Road Mun. Util. Dist. No. 2 v. Speedy Stop Food Stores, Ltd.*, 337 S.W.3d 846, 853 (2011) ("An organization takes action through its agents."); *360–Irvine, LLC v. Tin Star Dev., LLC*, No. 05-14-00412-CV, 2015 WL 3958509, at *5 (Tex. App.—Dallas June 30, 2015, no pet.) (unpublished) ("[A]n LLC, like a corporation, can only act through its agents and authorized representatives.").

[11] *Bos v. Smith*, 556 S.W.3d 293, 303 (Tex. 2018).

[12] *Id.*

[13] *Id.*

[14] *Id.* (quoting *Taylor v. Louis*, 349 S.W.3d 729, 737 (Tex. App.—Houston [14th Dist.] 2011, no pet.).

general danger but also whether the injury to the particular plaintiff or one similarly situated could be anticipated."[15]

The district court concluded 82 Glenwood's allegations were "insufficient to establish proximate cause" because it did "not plead that Lipp or Kane Title were involved in [Schutze's] deception." It explained that "[t]he logical conclusion is that they, too, were deceived by Schutze's scheme" and that "nothing in the complaint suggests that, when Schutze emailed Lipp and requested a refund of the funds, [Lipp and Kane Title] could reasonably foresee that complying with [his] request would lead to [him] stealing the funds from people he had introduced as his 'partners' just the day before."

We agree with the district court. Lipp and Schutze had worked together before, and the allegations in the complaint do not state that their prior dealings gave any reason for Lipp to be suspicious about Schutze's behavior when working on the transaction at hand. As previously mentioned, the emails indicate that Schutze, the Deraaff brothers, and Mizrahi were working together collectively to purchase the subject property. A reasonable escrow agent would not have anticipated that, because one of the "partners on the deal" supplied the down payment, another one of the "partners" would then steal "and convert[] those funds for his own personal use." Based on the allegations in the complaint, Schutze's actions were not foreseeable as a matter of law. "Foreseeability requires more than someone, viewing the facts in retrospect, theorizing an extraordinary sequence of events whereby the defendant's conduct brings about the injury."[16]

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[15] *Id.*

[16] *Id.* (quoting *Doe v. Boys Clubs of Greater Dall., Inc.*, 907 S.W.2d 472, 478 (Tex. 1995)).

Accordingly, the breach of fiduciary duty and negligence claims were properly dismissed because 82 Glenwood failed to allege the requisite element of proximate cause.

C

In Texas, "[t]he requisites of promissory estoppel are: (1) a promise, (2) foreseeability of reliance thereon by the promisor, and (3) substantial reliance by the promisee to his detriment."[17] In its complaint, 82 Glenwood alleged that Lipp and Kane Title "made promises and assurances that they would hold [82 Glenwood's] funds in escrow and eventually return the funds to [82 Glenwood]." It argues Lipp's statement, "In my opinion, I would agree with you and [Schutze] in that the $3,000,000 would be released once the feasibility period ends or if the contract were to cancel," was his promise that he would "hold [its] money and return it on day 46 or if the buyer cancels."

We disagree. As the district court concluded, this was simply Lipp's opinion of the interpretation of the draft contract. Both Schutze and Mizrahi asked Lipp to confirm their interpretation. In response, Lipp clarified that his job was to "act as a neutral third party and not to interpret the contract, but rather to follow the instructions of the contract," and only then did Lipp provide his "opinion." His opinion of what the draft contract provided for regarding the down payment does not constitute a promise as a matter of law, and therefore, the district court properly dismissed the claim for promissory estoppel.

Even if Lipp's statement constituted a promise, 82 Glenwood does not sufficiently allege foreseeability of reliance on the promise. The emails

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[17] *English v. Fischer*, 660 S.W.2d 521, 524 (Tex. 1983).

demonstrate discussions about a *draft* contract and the parties' interpretation of that *draft*. For all Lipp knew, the contract could be subject to further revisions.

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