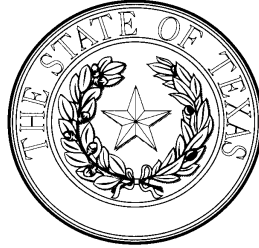


Opinion issued February 23, 2017



In The
Court of Appeals
For The
First District of Texas

NO. 01-16-00277-CV

MIKE WALZ, WALZ FAMILY BUILDERS, AND WHMW, LLC,
Appellants

V.

WESLEY HAYES AND ADVANTAGE HOUSING CORPORATION,
Appellees

On Appeal from the 212th District Court
Galveston County, Texas
Trial Court Case No. 15-CV-0084

MEMORANDUM OPINION

Mike Walz, Walz Family Builders, and WHMW, LLC appeal a judgment entered on a jury's verdict, asserting that the trial court erred in admitting parol evidence related to an oral agreement between the parties. We affirm.

Background

In 2002, appellee Wesley Hayes hired Walz to sell mobile homes and manufactured housing for Hayes's company Advantage Housing Corporation ("AHC"). Years later, Hayes created a separate mobile home company, WHMW, which conducted its business under the d/b/a Advantage Housing. WHMW used the name Advantage Housing on its promotional material, and its website was texasadvantagehousing.com.

In 2010, Hayes gave Walz a 50% interest in WHMW. In June 2011, Hayes sold his remaining 50% membership interest in WHMW to Walz for \$10 pursuant to a bill of sale. The bill of sale states: "The membership interests are sold as is and where is with no guarantee. The LLC membership interests are free of any encumbrances." The parties agree that a contemporaneous oral agreement was made at the time of the sale, but they dispute the terms of the oral agreement.

Following the sale to Walz, Walz continued to operate under the name Advantage Housing. For reasons that are not clear from any contemporaneous document, Walz paid AHC approximately \$1,500 per month from June 2011 to April 2012. Then, in May 2012, Walz emailed Hayes stating that he could no longer afford to pay.

Approximately two years after Walz stopped paying, in March 2014, Hayes sent Walz a letter demanding payment for the use of the d/b/a Advantage Housing:

Dear Mike,

As per our agreement when you purchased WHMW, LLC. [sic] On 6/1/2011, in order to use the name Advantage Housing as a dba and the use of other assets of Advantage Housing Corp., a monthly fee of \$1500.00 would be paid to Advantage Housing Corp.

On May 2012, you informed me you would no longer pay the fee, but continued, without payment, to use the Advantage Housing name on signage, advertising, mailers, checks and web site domain name and continue to do as of this date.

Therefore, I am demanding payment for the past 23 months, May 2012 thru March 2014 for total of \$34,500.00 and cease and desist from using Advantage Housing.

Advantage Housing Corp. will accept as final payment of \$22,500 for the past name use and will sign over certain assets retained by WHMW and Walz Family i.e. Home furniture, storage building located 9105 Ruth Rd., wells cargo trailer, lawn tractor (mower), generator, copy machines, pressure washer, decks and stairs and 5% not paid on purchase below cost of three homes serial #12405209 ABC, 12404994 AB located on Ruth Rd. and modular home located 1195 Mabry.

Mike, I feel I have been more than fair with you and your family over the past years and the \$22,500 is an equitable settlement. This balance can also be made in payments if needed.

Please advice [sic] within 10 days

Wesley Hayes
President

The parties continued to correspond, disputing the terms of the agreement. Finally, Hayes and AHC sued Walz, Walz Family Builders,¹ and WHMW for breach of contract, quantum meruit, and theft of service.

At trial, Walz testified first. He admitted that the parties made an oral agreement when Walz bought Hayes's remaining 50% interest in WHMW for \$10. According to Walz, he agreed to pay Hayes \$1,500 per month for the use of office space and Hayes's agreement to perform administrative work such as bookkeeping. Walz testified that he paid AHC \$1,500 per month every month from June 2011 to April 2012, with the exception of October 2011 when he paid slightly more. According to Walz, he stopped paying because he could no longer afford it and because Hayes stopped performing the agreed-upon administrative work.

Hayes testified next. He also acknowledged that the parties made an oral agreement when Walz bought his remaining 50% interest in WHMW. According to Hayes, Walz agreed to pay \$1,500 per month for use of the name Advantage Housing and its associated goodwill. Hayes testified that after Walz stopped paying him in May 2012, Hayes orally told Walz to stop using the Advantage Housing name before sending him a letter to that effect.

¹ Walz testified that he started his own company, Walz Family Builders, and began operating under that name after Hayes sent him the letter demanding payment for use of the Advantage Housing name.

The jury returned a verdict in favor of Hayes and AHC, finding that (1) Walz and Hayes orally agreed that Walz would pay Hayes \$1,500 per month for Walz's continued use of the Advantage Housing name and goodwill; (2) Walz failed to comply with the agreement; and (3) Hayes was entitled to \$34,500 in damages.

Discussion

In their sole issue, appellants contend that the trial court misapplied the parol evidence rule and erred in admitting evidence of the parties' oral agreement.

A. Standard of Review and Applicable Law

“A written contract must be construed to give effect to the parties' intent expressed in the text as understood in light of the facts and circumstances surrounding the contract's execution, subject to the limitations of the parol-evidence rule.” *Americo Life, Inc. v. Myer*, 440 S.W.3d 18, 22 (Tex. 2014) (citing *Houston Exploration Co. v. Wellington Underwriting Agencies, Ltd.*, 352 S.W.3d 462, 469 (Tex. 2011)). The general rule for an unambiguous contract is that evidence of prior or contemporaneous agreements is inadmissible as parol evidence. *ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867, 875 (Tex. 2010); *David J. Sacks, P.C. v. Haden*, 266 S.W.3d 447, 450–51 (Tex. 2008).

However, an exception exists for consistent collateral agreements. *ERI Consulting*, 318 S.W.3d at 875. The parol evidence rule “does not preclude enforcement of prior or contemporaneous agreements which are collateral to an

integrated agreement and which are not inconsistent with and do not vary or contradict the express or implied terms or obligations thereof.” *Id.* at 875 (quoting *Hubacek v. Ennis State Bank*, 317 S.W.2d 30, 32 (Tex. 1958)); *see also* *David J. Sacks*, 266 S.W.3d at 451; *Dupree v. Boniuk Interests, Ltd.*, 472 S.W.3d 355, 366 (Tex. App.—Houston [1st Dist.] 2015, no pet.). A collateral agreement between parties concerning the relationship of several distinct obligations between them falls within this exception. *ERI Consulting*, 318 S.W.3d at 875.

The parol evidence rule is not a rule of evidence, but rather a rule of substantive contract law. *See DeClaire v. G & B Mcintosh Family Ltd. Partnership*, 260 S.W.3d 34, 45 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (citing *Hubacek*, 317 S.W.2d at 31). Its applicability is a question of law we review de novo. *Id.* (citing *City of Pasadena v. Gennedy*, 125 S.W.3d 687, 691 (Tex. App.—Houston [1st Dist.] 2003, pet. denied)).

B. Analysis

Appellants contend that the bill of sale constituted the entire agreement between the parties and that the trial court erred in admitting evidence of a contradictory oral agreement that Walz would pay Hayes \$1,500 per month to use the d/b/a Advantage Housing. Appellees respond that the bill of sale was not a fully

integrated agreement and parol evidence regarding the parties' oral agreement did not contradict the bill of sale and was thus properly admitted.²

The parol evidence rule does not preclude evidence of prior or contemporaneous agreements that are not inconsistent with, and do not vary or contradict, express or implied terms or obligations of a separate written agreement. *Transit Enters., Inc. v. Addicks Tire & Auto Supply, Inc.*, 725 S.W.2d 459, 461 (Tex. App.—Houston [1st Dist.] 1987, no pet.) (citing *Sherrod v. Bailey*, 580 S.W. 2d 24, 29 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.)). Nor does the rule prohibit proof of collateral undertakings. *Id.* (citing *Cont'l Ins. Co. v. Stewart & Stevenson Servs., Inc.*, 306 S.W.2d 415, 420 (Tex. Civ. App.—Houston 1957, writ ref'd n.r.e.)).

Here, Walz and Hayes executed a written bill of sale conveying Hayes's remaining 50% interest in WHMW to Walz. Although the parties dispute the terms of the contemporaneous oral agreement, neither side disputes that one was made and

² At trial, appellants did not object to the admission of evidence regarding an oral agreement. They instead moved for a directed verdict after appellees rested on the basis that evidence of the parties' oral agreement contradicted the written bill of sale. Because the parol evidence rule is a rule of substantive contract law, evidence admitted in violation of the rule is without probative force in the interpretation of a written instrument, even when admitted without objection. See *Mandarino v. Sherwood Lane Inv.*, No. 01-15-00192-CV, 2016 WL 4034568, at *9 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (mem. op.); *Houston Community Bank, N.A. v. Welling*, No. 01-93-01165-CV, 1996 WL 89327, at *2 (Tex. App.—Houston [1st Dist.] 1996, writ denied) (mem. op., not designated for publication) (citations omitted). Thus, appellants did not waive the issue by failing to object at trial at the time it was admitted. *Welling*, 1996 WL 89327, at *2.

that Walz paid AHC \$1,500 per month from June 2011 to April 2012. Walz testified that he agreed to pay Hayes \$1,500 for office space and administrative work, but Hayes testified that the \$1,500 monthly payment was for the use of a name and goodwill. Because these monthly payments are not contemplated by the bill of sale, we conclude that the bill of sale did not constitute the entire agreement between the parties. *See Sun Oil Co. v. Madeley*, 626 S.W.2d 726, 731–32 (Tex. 1981) (holding that surrounding circumstances are considered in determining whether written agreement is complete and exclusive statement of terms); *Royce Homes, L.P. v. Bates*, 315 S.W.3d 77, 88 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (quoting *Morgan Bldg. & Spas, Inc. v. Humane Soc’y*, 249 S.W.3d 480, 486 (Tex. App.—Beaumont 2008, no pet.)) (“Under Texas law, ‘A partially integrated agreement is a final and complete expression of all the terms addressed in that written agreement, but is not a final and complete expression of all the terms the parties have agreed upon.’”).

In light of the circumstances, parol evidence regarding the parties’ oral agreement was properly admitted. Walz and Hayes both testified that they entered into an oral agreement collateral to the bill of sale regarding subsequent monthly payments by Walz, but the bill of sale is silent as to its terms. Thus, Hayes’s testimony that Walz agreed to pay a monthly fee for use of the name Advantage

Housing did not vary, modify, change or contradict the terms of the written bill of sale.

Because the bill of sale was not a fully integrated agreement and the challenged testimony evidences an oral agreement that is collateral to, and not inconsistent with the bill of sale, the testimony is not barred by the parol evidence rule. Accordingly, we conclude the challenged testimony was properly admitted to ascertain the parties' intentions with regard to their oral agreement. *See ERI Consulting Eng'rs*, 318 S.W.3d at 875–76 (holding testimony regarding agreement for additional consideration was admissible as consistent and collateral to original contract); *Dupree*, 472 S.W.3d at 367 (affirming admission of parol evidence establishing principal was received as credit on account because it did not vary or contradict terms of promissory note that was silent regarding manner of payment of principal); *Lopez v. Rivas*, No. 01-14-00592-CV, 2015 WL 1967594, at *3 (Tex. App.—Houston [1st Dist.] April 30, 2015, no pet.) (mem. op.) (holding testimony about oral promise of additional consideration for deed was admissible where oral agreement did not contradict or vary terms of deed).

We overrule appellants' sole issue.

Conclusion

We affirm the trial court's judgment.

Rebeca Huddle
Justice

Panel consists of Justices Massengale, Brown, and Huddle.