Affirmed and Majority and Concurring and Dissenting Opinions filed September 23, 2010

In The

Fourteenth Court of Appeals

NO. 14-08-00536-CV

H. FRANK FAUCETTE AND J. LAWRENCE SCHADLER, Appellants/Cross-Appellees

V.

GRACE C. CHANTOS AND A.J. CHANTOS & ASSOCIATES, INC. D/B/A SARCO OF TEXAS, Appellees/Cross-Appellants

On Appeal from the 151st District Court
Harris County, Texas
Trial Court Cause No. 2004-25975

CONCURRING AND DISSENTING OPINION

To the extent this court affirms the trial court's judgment notwithstanding the verdict as to the tortious-interference-with-contract claims, I concur in the judgment. To the extent this court affirms the trial court's judgment awarding recovery on the breach-of-contract claims and declines to render a take-nothing judgment on these claims, I respectfully dissent.

Under the unambiguous language of the agreement in question, to exercise their option to acquire the remaining shares of the corporation, the option holders had to make the purchase by means of a lump-sum payment within a specified time from the execution date of the contract, and if this purchase did not occur within that time frame, the agreement and the option in it would terminate. It is undisputed that the option holders never purchased the remaining shares, and the plaintiffs judicially admitted that the contract upon which they base their breach-of-contract claims terminated at the expiration of the time period specified in the contract. Because the option holders did not exercise their option in the manner required by the contract and because the contract terminated by its own terms, the trial court erred in granting summary judgment in the plaintiffs' favor as to liability on the breach-of-contract claims and in denying the defendants' motion for summary judgment as to these claims. Accordingly, the trial court's judgment should be reversed, and this court should render a take-nothing judgment.

Relevant Background

Plaintiffs/appellees/cross-appellants Grace C. Chantos and A. J. Chantos & Associates, Inc., d/b/a Sarco of Texas (hereinafter collectively, the "Chantos Parties")[1] sued defendants/appellants/cross-appellees H. Frank Faucette and J. Lawrence Schadler (hereinafter collectively, the "Option Holders") for breach of a written contract entitled "Sale and Purchase Agreement" (hereinafter, the "Contract"). Grace Chantos, Grace's husband Andrew J. Chantos, Faucette, and Faucette's wife executed the Contract on May 25, 2001. Schadler and his wife executed the Contract on July 24, 2001.

In a section of the Contract entitled "Sale and Purchase," the parties detailed the contemplated sale of the shares of A. J. Chantos & Associates, Inc., d/b/a Sarco of Texas

[1] Though Sarco was a plaintiff in the trial court, it was not a party to the Contract, and the trial court rendered judgment only in favor of Grace. References in this opinion to the "parties" pertain to the contracting parties, not to the parties to the litigation, and do not include Sarco.

(hereinafter, "Sarco") by Grace and her husband to the Option Holders and Andrew J. Chantos (collectively hereinafter, the "Buyers"). The parties agreed that during the first thirty months of the Contract or until the Buyers acquired forty-nine percent of the Sarco shares, whichever occurred first, the Option Holders were required to purchase at least four Sarco shares per month. Under the terms of the Contract, if the Buyers acquired at least forty-nine percent of the outstanding Sarco shares, then the Buyers had "the option to purchase the remaining shares, but only in a lump sum wherein Buyers purchase all remaining shares." The parties agreed that "[t]his Agreement *shall terminate unless* the Sale and Purchase contemplated is completed *in its entirety* within thirty-two (32) months from the date of execution of the Agreement" (hereinafter, the "Termination Provision"). (emphasis added). The parties did not specify a date of execution in the Contract. But in light of the two dates on which parties executed the Contract, this thirty-two month period ended no later than on March 24, 2004 (hereinafter, the "End Date").

It is undisputed that, by July 22, 2003, the Buyers had acquired forty-nine percent of the Sarco shares and that they had the option to purchase the remaining Sarco shares provided in the Contract (hereinafter, the "Option"). The Chantos Parties moved for partial summary judgment as to the Option Holders' liability on the breach-of-contract claims. In their sole ground for summary judgment, the Chantos Parties asserted that the summary-judgment evidence conclusively proves that (1) the Option Holders exercised the Option by giving oral notice to Grace at the July 22, 2003 meeting of their acceptance and intent to exercise the Option; and (2) the Option Holders breached the Contract by failing and refusing to purchase the remaining Sarco shares from Grace. The Chantos Parties agreed that acceptance of an option must be unqualified, unambiguous, and strictly in accordance with the terms of the agreement; but they asserted that the Contract did not contain any terms regarding the manner for exercising the Option. Therefore, the Chantos Parties argued, the Option Holders could accept and exercise the Option by giving oral notice to Grace at the July 22, 2003 meeting of their acceptance and intent to exercise the Option.

Both in response to the Chantos Parties' motion and as a ground for summary judgment in their own motion for final summary judgment, the Option Holders asserted that, under the Contract, the parties specified the manner in which the Option Holders had to exercise the Option—they had to purchase Grace's remaining shares in a lump-sum payment by the End Date. The summary-judgment evidence conclusively proves that the Option Holders did not purchase Grace's remaining shares by the End Date. Therefore, the Option Holders asserted, (1) the Contract terminated by its own terms; and (2) the Option Holders had no obligation to purchase the remaining shares under the Contract and did not breach any of its terms. The Option Holders attached to their motion for summary judgment responses to requests for admissions, in which the Chantos Parties judicially admitted that the Contract terminated within thirty-two months of the Contract's execution date and that the Contract was currently terminated.

The trial court denied the Option Holders' summary-judgment motion and granted the Chantos Parties' motion, ruling that, as a matter of law, the Option Holders breached the Contract and are liable to Grace for the breach.

Principles of Option Law

When one acquires an option to purchase property, the holder of the option purchases the right to compel a sale of the property on the stated terms before expiration of the option. *See Comeaux v. Suderman*, 93 S.W.3d 215, 219–20 (Tex. App.—Houston [14th Dist.] 2002, no pet.). Option contracts have two components: (1) an underlying contract that is not binding until accepted and (2) a covenant to hold open to the option holder the opportunity to accept. *See id*. at 220. Before the option can ripen into an enforceable contract of sale, however, the option holder must manifest his acceptance. *See id*. Acceptance of an option must be unqualified, unambiguous, and strictly in accordance with the terms of the agreement. *See id*. For this reason, a failure to exercise an option according to its terms, including untimely or defective acceptance, is simply ineffectual, and legally amounts to nothing more than a rejection. *See id*. If the contract

is silent regarding the method of exercising the option, the option holder may exercise the option by timely giving notice to the optionor of the option holder's intent to exercise the option, and the option holder also may be required to tender performance within a reasonable time.[2] *See English v. English*, 44 S.W.3d 102, 105 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

Principles of Contract Interpretation

In construing contracts, this court's primary concern is to ascertain and give effect to the intentions of the parties as expressed in the contract. *Kelley-Coppedge, Inc. v. Highlands Ins. Co.*, 980 S.W.2d 462, 464 (Tex. 1998). To ascertain the parties' true intentions, this court must examine the entire agreement in an effort to harmonize and give effect to all provisions of the contract so that none will be rendered meaningless. *MCI Telecomms. Corp. v. Tex. Utils. Elec. Co.*, 995 S.W.2d 647, 652 (Tex. 1999). Whether a contract is ambiguous is a question of law for the court. *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996). A contract is ambiguous when its meaning is uncertain and doubtful or is reasonably susceptible to more than one interpretation. *Id.* But, when a written contract is worded so that it can be given a certain or definite legal meaning or interpretation, it is unambiguous, and the court construes it as a matter of law. *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 157 (Tex. 2003).

[2] Various cases state that, if the contract is silent regarding the method of exercising the option, the option holder may exercise the option by timely giving notice to the optionor of the option holder's intent to exercise the option and by subsequently tendering performance within a reasonable time. *See, e.g., English v. English*, 44 S.W.3d 102, 105 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (stating that "we conclude and hold that where the option instrument is silent regarding the method of exercising the option, giving timely notice to the optionor and subsequently tendering performance within a reasonable time is sufficient to exercise the option"). But, given that the overwhelming majority of option cases involve option holders seeking to enforce the option, it may be that the tender of performance is required in these cases because the option holder seeks to enforce the option rather than as part of the exercise of the option. *See id.* (stating that "if [option holder] gave notice of her intent to exercise the option within the applicable 180 day period, such notice would be sufficient to trigger her rights under the divorce decree"). This court need not address this issue to dispose of this appeal, and it is not addressed in this opinion.

This court cannot rewrite the Contract or add to its language under the guise of interpretation. *See id.* at 162. Rather, this court must enforce the Contract as written. *See Royal Indem. Co. v. Marshall*, 388 S.W.2d 176, 181 (Tex. 1965).

Analysis of the Contract

In the Contract, the parties agreed that, if the Buyers acquired at least forty-nine percent of the outstanding Sarco shares, then the Buyers would have the option to purchase the remaining shares, but only through a lump-sum payment by which the Buyers would acquire all remaining shares. The parties also agreed that the entire Contract would terminate unless the contemplated purchase of the Sarco shares was completed in its entirety by the End Date. The parties did not agree that any provisions of the Contract would survive termination of the Contract. If the Option Holders could have exercised the Option simply by giving notice to Grace of their acceptance and intent to exercise the Option and without purchasing the remaining shares from Grace, such an exercise would have imposed a binding obligation on the Option Holders to purchase the remaining shares by a lump-sum payment. But this construction of the Contract would render the Termination Provision meaningless. *See Kruegel v. Berry*, 9 S.W. 863, 863–64 (Tex. 1888) (stating that option holder under lease had to tender purchase price before lease terminated in order to exercise option to buy leased premises for a specified price); *Nguyen v. Woodley*, 273 S.W.3d 891, 898 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (holding that contract for purchase of real property terminated by its own terms upon buyer's giving of a certain notice and that therefore the contract was no longer valid and enforceable); *Cate v. Woods*, 299 S.W.3d 149, 153 (Tex. App.—Texarkana 2009, no pet.) (holding that trial court erred as a matter of law by enforcing contract for purchase of real property that had terminated by its own terms).[3]

[3] The Chantos Parties rely upon the *English* case. *See English*, 44 S.W.3d at 103–5. But, in that case, the divorce decree in question contained language materially different from the language in the Contract. *See id.* The divorce decree did not contain language similar to the Termination Provision, and the decree was

If the Termination Provision is given effect, then the Option Holders could not be bound to purchase the remaining shares because they could wait until the End Date passed and any obligation to purchase the remaining shares would terminate. Harmonizing and giving effect to all provisions of the contract so that none will be rendered meaningless, this court should conclude that, under the unambiguous language of the Contract, the parties specified the manner in which the Option Holders had to exercise the Option—they had to purchase the remaining shares by the End Date. *See MCI Telecomms. Corp.*, 995 S.W.2d at 652. The summary-judgment evidence proves as a matter of law that the Option Holders did not do so, and therefore, they did not exercise the Option. After the End Date passed, the Contract terminated without any exercise of the Option. Indeed, the Chantos Parties have judicially admitted that the Contract upon which the trial court's judgment is based terminated on or before the End Date, which was before the Chantos Parties filed this lawsuit in the trial court.

In their Contract, the parties required the Option Holders to purchase Sarco stock up to the forty-nine-percent threshold. The parties could have required the Option Holders to purchase the remaining stock; however, the parties chose not to do so. Instead, they agreed to contractual language under which the Option Holders had the ability to choose whether they wanted to exercise the Option by purchasing the remaining shares from Grace no later than the End Date. This court cannot rewrite the Contract or add to its language under the guise of interpretation; instead, the court must enforce the Contract as written. *See Schaefer*, 124 S.W.3d at 157; *Marshall*, 388 S.W.2d at 181.

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silent as to the manner in which the option should be exercised. *See id*. Therefore, the *English* case is not on point.

Conclusion

The sole ground asserted in the Chantos Parties' motion for summary judgment lacks merit.[4] In their cross-motion, the Option Holders proved as a matter of law that they did not exercise the Option and that the Contract terminated by its own terms.[5] Though the majority notes the Option Holders' arguments in this regard, the majority does not address these arguments or explain why they lack merit. The court should address these arguments, sustain the Option Holders' first issue, and hold that the trial court erred by failing to grant the Option Holders' motion.[6] Accordingly, this court should reverse the trial court's judgment and render judgment that the Chantos Parties take nothing.

/s/ Kem Thompson Frost
Justice

Panel consists of Justices Frost, Brown, and Senior Justice Hudson.* (Brown, J., majority)

*Senior Justice J. Harvey Hudson, sitting by assignment.

[4] On appeal, the Chantos Parties assert, in the alternative, that this court should affirm the trial court's judgment on the breach-of-contract claims based on an alleged modification of the Contract by the parties at the July 22, 2003 meeting. Significantly, however, the Chantos Parties did not assert any alleged modification of the Contract as a ground in their summary-judgment motion. Therefore, this court cannot affirm the trial court's summary judgment on this unasserted ground. *See Stiles v. Resolution Trust Corp.*, 867 S.W.2d 24, 26 (Tex. 1993)

[5] Presuming for the sake of argument that the Option Holders could have exercised the Option by notice alone and that they did so, the Chantos Parties still could not prevail on a breach-of-contract claim because the Contract terminated on the End Date and the parties did not agree that any contractual obligations would survive termination. *See Nguyen*, 273 S.W.3d at 898; *Cate*, 299 S.W.3d at 153.

[6] This court appropriately holds the trial court did not err in granting the Option Holders' motion for judgment notwithstanding the verdict as to the tortious-interference-with-contract claims.