COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00136-CV

1ST RESOURCE GROUP, INC. AND GARY FEWELL — APPELLANTS

V.

OLUFELA OLUKOGA — APPELLEE

FROM THE 67TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 067-273391-14

MEMORANDUM OPINION[1]

In two issues, Appellants 1st Resource Group, Inc. and Gary Fewell appeal from the trial court's judgment awarding Appellee Olufela Olukoga (Fela) $107,900.32 in damages, plus prejudgment interest and attorney's fees, on Fela's breach of contract claim against them. We affirm.

[1]*See* Tex. R. App. P. 47.4.

Background

In 2008, Fela began working for DFW Genesis Energy Group, Inc. (DFW) as a petroleum engineer. 1st Resource acquired DFW's assets in June 2010. At that time, Fewell was a shareholder, officer, and director of both DFW and 1st Resource.

As part of the sale, DFW entered into a settlement agreement with various contractors and employees, including Fela. DFW agreed to pay Fela all unpaid wages that DFW had been unable to pay him during 2008, 2009, and 2010, to assign him 100 shares of DFW stock, and to reimburse him for "certain legal fees totaling $4,500." These obligations were assumed by 1st Resource. Fela worked for 1st Resource after the sale but resigned after several months because 1st Resource could not pay him.

Fela sued 1st Resource and Fewell for breach of contract, quantum meruit, and breach of a settlement agreement.[2] After filing suit, Fela signed a "Compromise and Settlement Agreement" with 1st Resource and Fewell. Under this agreement, Fela agreed to release his claims against 1st Resource and Fewell. The agreement contained the following paragraphs:

> 1. This Agreement is intended to bind all parties from the date of execution under Rule 11 of the T.R.C.P. and Rule 41(a) of the Fed. R.C.P. (as is applicable) and under general contract law. The parties contemplate the preparation of further documents in

[2]Fela also sued DFW and two other individuals, but the trial court rendered no-answer default judgment against them. The case was restyled to omit those defendants, and Fela filed an amended petition omitting them.

carrying out the performance of this Agreement. The terms, conditions, and representations herein shall control the terms, conditions, and representations of further documents. This Agreement shall not be construed as "unenforceable" because the parties may seek to prepare[] further documents. This Agreement is intended to be fully enforceable on its own terms. If the parties are not able to agree on the construction, terms, or conditions in future documents, then this Agreement is the Agreement between the parties.

2. 1st Resource, Inc. and Gary Fewell ("Defendants") shall cause sufficient marketable security shares in Victura Construction, Inc.[3] ("VICT") to be transferred to Fela to compensate him for at least the amount of $107,900.32. In the event the foregoing transferred stock does not generate at least $107,900.32 when sold, Defendants shall issue or transfer additional shares to Fela to make up the difference.

Under the terms of the agreement, the closing of the transaction was to occur by June 3, 2015. When the closing did not occur, Fela asserted claims for breach of contract, quantum meruit, and breach of the settlement agreement against 1st Resource and Fewell.

Fela then moved for partial summary judgment on his claim for breach of the settlement agreement. As evidence, he attached his affidavit and a copy of the settlement agreement, which was signed by Fewell individually and as chief operating officer of 1st Resource, as well as by the attorney for Fewell and 1st Resource, by Fela, and by Fela's attorney.

1st Resource and Fewell filed an amended answer in which they repudiated the settlement agreement. They filed a summary judgment response

[3]In their summary judgment response, 1st Resource and Fewell asserted that Fewell was an affiliate of Victura.

asserting that in their answer, they had withdrawn their consent to the settlement agreement. They further asserted that while some material terms had been agreed to, "the implementation of those terms by subsequent documents were not discussed at mediation nor agreed to." As such, "a fact issue[] exists as to whether the parties intended the formal documentation to be a condition precedent to a final settlement agreement or merely a memorial of an already enforceable settlement agreement." 1st Resource and Fewell included in their response objections to three of Fela's affidavit statements as hearsay, conclusory, and calling for a legal conclusion, among other objections.

To their response, 1st Resource and Fewell attached Fewell's affidavit. Fewell stated that he had "Rule 144 Restricted and Affiliate Stock in companies that [he] was willing to attempt to put into an Escrow account in [his] name and [sell], not transfer to [Fela], in an attempt to generate funds to settle this matter." Fewell asserted that he thus did not intend for the settlement agreement to constitute a final and binding settlement agreement. He asserted that "all parties who signed knew there would be more documents with additional details that would need to be negotiated and prepared in order to finalize and implement the settlement and transfer the shares into Escrow." He attached as an exhibit an escrow agreement, which he alleged the parties had attempted to negotiate.

The trial court granted Fela's motion without ruling on Fewell and 1st Resource's evidentiary objections. Fela then nonsuited his remaining claims, and the trial court signed a final judgment awarding Fela $107,900.32 in

damages, jointly and severally, as well as prejudgment interest, attorney's fees of $8,625.00, and conditional appellate attorney's fees.

Discussion

1st Resource and Fewell argue in their first issue that the trial court erred by granting the motion for partial summary judgment because the evidence established a genuine issue of fact as to the intent of the parties and whether the parties had entered into an enforceable settlement agreement.

"Written settlement agreements may be enforced as contracts even if one party withdraws consent before judgment is entered on the agreement." *Ford Motor Co. v. Castillo*, 279 S.W.3d 656, 663 (Tex. 2009). When consent is withdrawn, however, the party seeking enforcement of the settlement agreement must pursue a claim for breach of contract. *Id.*

"A claim for breach of settlement agreement is subject to the established procedures of pleading and proof, just like any other breach of contract claim." *Bell v. Victor Myers Const.*, *LLC*, No. 02-14-00024-CV, 2014 WL 5089231, at *3 (Tex. App.—Fort Worth Oct. 9, 2014, no pet.) (mem. op.). Among other elements, a plaintiff in a breach of contract claim must establish the existence of a valid contract. *Id.* A valid contract requires a meeting of the minds and execution of the contract with the intent that it be binding. *Lucas v. Coomer*, No. 02-09-00152-CV, 2010 WL 5118023, at *4 (Tex. App.—Fort Worth Dec. 16, 2010, no pet.) (mem. op.).

1st Resource and Fewell's issue challenges the evidence supporting the parties' intent to be bound. They cite to factors relied on by the Supreme Court of Texas in *Foreca, S.A. v. GRD Dev. Co., Inc.*, 758 S.W.2d 744, 746 n.2 (Tex. 1988), to argue that while some material terms had been agreed to by the parties, "the implementation of those terms by subsequent documents were not discussed at mediation nor agreed to," and, accordingly, "a fact issues exists as to whether the parties intended the formal documentation to be a condition precedent to a final settlement agreement." They argue that the parties signing the settlement agreement "knew there would be more documents with additional details that would need to be negotiated and prepared in order to finalize and implement the settlement and transfer the shares."

In *Foreca*, the supreme court cited the Restatement (Second) of Contracts as setting out circumstances that may be helpful in determining whether parties to a document intend that document to be an enforceable contract or merely an agreement to enter into negotiations for a contract. *Id.* The circumstances are:

> the extent to which express agreement has been reached on all the terms to be included; whether the contract is of a type usually put in writing; whether it needs a formal writing for its full expression; whether it has few or many details; whether the amount involved is large or small; whether it is a common or unusual contract; whether a standard form of contract is widely used in similar transactions; and whether either party takes any action in preparation for performance during the negotiations.

Id. 1st Resource and Fewell cite to these circumstances and argue that after mediation, the parties had left to be drafted "additional documents containing

complicated agreements and language," that the settlement was for a fairly large amount, that some of the additional documents were unusual, "e.g.[,] Escrow Agreement and Rule 144 Plan," and that "the final judgment and settlement agreement needed a formal writing for their full expression."

"[A] contract's language is to be given its plain grammatical meaning unless doing so would defeat the parties' intent." *D.R. Horton-Tex., Ltd. v. Savannah Props. Assocs., L.P.*, 416 S.W.3d 217, 226 (Tex. App.—Fort Worth 2013, no pet.). "In determining intent, we must look to the contract, not what the parties allegedly meant." *Id.* A party may not introduce parol evidence to alter the intent of the parties as expressed in a contract. *Id.*

The evidence that 1st Resource and Fewell asked the trial court to consider—Fewell's testimony of the intention of the parties—contradicts the plain terms of the settlement agreement. The settlement agreement states that it "is intended to bind all parties from the date of execution," that "[t]he parties contemplate the preparation of further documents in carrying out the performance" of the agreement, and that the fact that the parties may seek to prepare further documents does not make the agreement unenforceable. Rather, the agreement "*is intended to be fully enforceable on its own terms*," and "[i]f the parties are not able to agree on the construction, terms, or conditions in future documents, then this Agreement is the Agreement between the parties."

The settlement agreement is clear about the parties' intent, and Fewell's affidavit was not admissible to alter that expression of intent. We overrule 1st Resource and Fewell's first issue.

In their second issue, 1st Resource and Fewell assert that the trial court erred by not sustaining their objections to three statements contained in Fela's affidavit. They argue that Fela's affidavit testimony was inadmissible as to any statements about the intent of 1st Resource and Fewell to be bound by the settlement agreement.

The first two statements they objected to in Fela's affidavit concerned the parties' agreement that 1st Resource and Fewell would transfer shares to Fela to compensate him for at least $107,900.32 and that if the transferred shares did not generate that sum, they would transfer additional shares to Fela. Both of these statements also appeared in the settlement agreement. Fela's affidavit was therefore unnecessary to establish the parties' intent on that point. *See id*. Accordingly, even if the trial court should have sustained their objections to these statements, 1st Resource and Fewell were not harmed by its failure to do so. *See* Tex. R. App. P. 44.1(a).

The third statement in the affidavit complained of by 1st Resource and Fewell was Fela's assertion that 1st Resource and Fewell were "wholly in default and are liable to [Fela] in the amount of $107,900.32." Again, even if the trial court should have sustained the objections to this statement, 1st Resource and Fewell have shown no harm.

The trial court had before it as summary judgment evidence the parties' settlement agreement, as well as the undisputed evidence that the share transfer had not occurred by the date called for under the agreement. The trial court could determine on its own what the parties had agreed to and whether, by failing to transfer the shares to Fela, 1st Resource and Fewell had breached the settlement agreement. *See Grace Interest, LLC v. Wallis State Bank*, 431 S.W.3d 110, 125 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (holding that the appellant had not shown harm even if the objected-to affidavit contained conclusory statements because the trial court had before it the relevant document on which the suit was based and the court could determine the legal effect of the document). 1st Resource and Fewell therefore have not demonstrated that the trial court's consideration of the objected-to statement resulted in an improper judgment. *See* Tex. R. App. P. 44.1(a).

Because 1st Resource and Fewell have not shown that, even if the objected-to statements were inadmissible, the trial court's failure to sustain their objections was reversible error, we overrule their second issue.

Conclusion

We conclude that the record before us does not demonstrate that the trial court erred by granting partial summary judgment for Fela or that 1st Resource and Fewell were harmed by the trial court's failure to rule on their objections to Fela's summary judgment evidence. Accordingly, we affirm the trial court's judgment.

/s/ Charles Bleil
CHARLES BLEIL
JUSTICE

PANEL: LIVINGSTON, C.J.; WALKER, J.; and CHARLES BLEIL (Senior Justice, Retired, Sitting by Assignment).

DELIVERED: January 19, 2017