

Opinion issued October 13, 2011.



In The  
**Court of Appeals**  
For The  
**First District of Texas**

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NO. 01-09-00138-CV

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**ADVANCED MICROMAGNETICS, INC., Appellant**

**V.**

**TORCH ENERGY ADVISORS, INC., TORCH E&P COMPANY,  
ROCKPORT RESOURCES CAPITAL CORPORATION, AND NM BACK  
NINE EXPLORATION PARTNERS, LLC, Appellees**

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**On Appeal from the 113th District Court  
Harris County, Texas  
Trial Court Case No. 2007-34064**

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**MEMORANDUM OPINION**

Advanced Micromagnetics, Inc. (“AMI”), appeals from a summary judgment in favor of Torch Energy Advisors, Inc., Torch E&P Co., Rockport

Resources Capital Corp., and NM Back Nine Exploration Partners, LLC (collectively, “Torch” or the “Torch Defendants”). We reverse and remand for further proceedings consistent with this opinion.

## **BACKGROUND**

AMI is a consulting company that uses proprietary geophysical technology to analyze and interpret high frequency elements of high resolution, low altitude micromagnetic data for its oil and gas exploration clients. According to AMI, its technology reduces exploration costs and allows clients to focus upon prospects with increased success rates and reduced exploration costs. The Torch Defendants are affiliated companies that lease, drill for, complete, produce and sell oil and natural gas in the southwestern region of the United States, including New Mexico.

In early 2005, Torch’s representative, John James Lendrum III,<sup>1</sup> contacted AMI President David Greenlee regarding potential oil and gas reserves in New Mexico. At the time, Greenlee was both owner and officer of AMI, along with James Wolleben and Carl McCutcheon.

Greenlee met Lendrum, in early March 2005, to discuss the New Mexico prospect and thereafter sent multiple communications on AMI’s letterhead to Lendrum discussing and analyzing data from an aeromagnetic survey of the New Mexico prospect provided by Lendrum. Specifically, Greenlee sent a letter noting

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<sup>1</sup> At the time, Lendrum was the President and Chief Operating Officer of Torch Energy Advisors, Inc. and the President of Torch E&P Co.

that AMI “should be able to significantly add to this exploration play by facilitating the ability to prioritize the magnetic structural anomalies defined by [the other] study” and thanked Lendrum for “remembering AMI.”

The record reflects that, the following month, Greenlee submitted a proposal to Lendrum, on his personal letterhead, to process and analyze the aeromagnetic data. Torch contends that when it asked about the change, Greenlee responded that he had the right to provide the requested analysis in his personal capacity. The record reflects that Torch apparently agreed to hire Greenlee to provide his data analysis services and Greenlee and Torch began to negotiate the terms of an independent vendor/contractor’s agreement. Although early drafts of the agreement named Greenlee as the vendor/contractor, at Greenlee’s request, this was later changed to Telsus Exploration, Inc. The final agreement executed on May 26, 2005, between Torch and Telsus is referred to as the “Torch Energy Contract,”<sup>2</sup> pursuant to which, upon completion of the contract, Telsus received \$50,000, plus an overriding royalty of 0.5% on any prospect defined and located by Telsus pursuant to the contract. AMI claims that Torch’s use of AMI’s proprietary information and intellectual property caused Torch to identify thirty-three defined micromagnetic prospects, from which Torch had profited already and would profit in the future.

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<sup>2</sup> Greenlee signed the document on behalf of Telsus.

On September 13, 2006, AMI, Wolleben, Greenlee, and McCutcheon executed a Mutual Settlement Agreement and Release Agreement (“Settlement Agreement”), effective December 31, 2005, which, *inter alia*, provided for the transfer of Greenlee’s and Wolleben’s AMI stock to McCutcheon and a mutual release of claims. It also included a number of representations by Greenlee and Wolleben regarding AMI’s assets and liabilities, as well as revenue and compensation that they received after May 2002 related to their AMI employment. The Settlement Agreement also transferred equity interest in various contracts to the individual shareholders, and included a consulting agreement for Greenlee and Wolleben to work for AMI on future projects. Before the transfer, Greenlee and Wolleben owned slightly more than 50% of AMI.

AMI subsequently filed suit against Torch alleging various causes of action, including trade secret misappropriation, conversion, quantum meruit, unjust enrichment, breach of fiduciary duty and usurping corporate opportunities, conspiracy, and aiding and abetting, arising from Torch’s alleged misappropriation and conversion of AMI’s proprietary information and intellectual property in concert with Greenlee, Wolleben, and Telsus. Notably, AMI did not assert a claim of ownership with respect to the Torch Energy Contract. Torch answered with a general denial and raised affirmative defenses of settlement, estoppel, third party

beneficiary, release, waiver, ratification, sanctions, ambiguity, responsible third party, and agency.

Torch subsequently filed a traditional motion for summary judgment arguing that AMI had no claim as a matter of law because it knowingly relinquished any rights or claims that it may have had with respect to the Torch Energy Contract when it executed the Settlement Agreement.<sup>3</sup> According to Torch, the purpose of the Settlement Agreement was to preserve AMI's ownership of and use of its technology with respect to future business and all existing business, excepting those prospects specifically allocated to Greenlee and Wolleben in the Settlement Agreement, such as the Torch Energy Contract. Citing to section 2(C) of the Settlement Agreement which expressly excluded the Torch Energy Contract from the definition of "AMI Prospects," Torch argues that by doing so, AMI agreed that the rights to the Torch Energy Contract as well as the propriety information of AMI provided pursuant to the contract did not belong to AMI, but instead were allocated to Greenlee and Wolleben.

According to Torch, that the parties agreed to exclude the Torch Energy Contract from AMI's assets is further supported by Wolleben's and Greenlee's

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<sup>3</sup> Torch's motion for summary judgment also argues that Rockport had no interest in the Torch Energy Contract and that AMI had improperly joined Rockport as a defendant. According to Torch, Rockport was simply a corporation that Lendrum conducted business through prior to becoming President and Chief Operating Officer of Torch Energy Advisors, Inc. AMI nonsuited Rockport when it filed its response to Torch's motion for summary judgment.

representations and warranties as set forth in sections 5.5 and 5.12 of the Settlement Agreement. Section 5.5 states that “[e]ach of Greenlee and Wolleben represent and warrant that the assets listed in Exhibit ‘3,’ . . . lists all assets of AMI.” The Torch Energy Contract is not included in Exhibit 3. The assets do include, however, AMI’s confidential and propriety information. In section 5.12, Greenlee and Wolleben state that they have identified the revenue and compensation received since May 1, 2002, or are entitled to receive in the future “to the extent such revenues and compensation arose from, or are related in any way to the employment of AMI Micromagnetic Technology, AMI Geophysical Data, or AMI Prospects” in an attached exhibit, and they further represent and warrant that:

there are (1) no undisclosed micromagnetic and/or aeromagnetic prospects or projects that existed prior to May 1, 2002 that were sold by AMI and/or transferred by AMI and which AMI is entitled in the future to any compensation or value therefrom, and (2) there are no undisclosed micromagnetic and/or aeromagnetic prospects or projects that were identified by Greenlee and Wolleben and/or AMI between May 1, 2002 and the execution date and (3) none of the AMI Prospects identified before or after May 1, 2002 and/or consulting projects identified after May 1, 2002 using AMI Micromagnetic Technology have been sold by either Greenlee or Wolleben or their affiliates since May 1, 2002. **The foregoing representation and warranty specifically excludes revenue and compensation received relating to the one Torch Energy contract covering 1,800,000 acres in Chaves and Roosevelt Counties, New Mexico, dated June 20, 2005.**

Torch argues that these clauses evidence that the Torch Energy Contract was not one of AMI's assets and that AMI both knowingly and willingly relinquished any rights or claims it may have had with respect to the Contract and therefore, AMI has no claims arising therefrom as a matter of law.

Torch further contends that AMI has no claims against it for either "aiding and abetting," or usurpation of corporate opportunities because AMI relinquished any interest it had in the Torch Energy Contract after services were provided under the contract by Greenlee and Wolleben, and therefore, AMI ratified Greenlee's and Wolleben's conduct. Torch also claims that AMI's secondary claims of conspiracy and aiding and abetting require the existence of some wrongful conduct, and since AMI authorized and ratified Greenlee's and Wolleben's conduct, there was no wrongful conduct, and therefore, no basis for a conspiracy or aiding and abetting claim. Torch also argues that it was entitled to summary judgment because the Settlement Agreement establishes its affirmative defenses of waiver and quasi-estoppel as a matter of law.<sup>4</sup>

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<sup>4</sup> Specifically, Torch contends that waiver was established as a matter of law when AMI acknowledged the Torch Energy Contract and gave up any interest in it via the Settlement Agreement. Torch also claims that AMI is estopped as a matter of law from claiming that the Torch Energy Contract did not go to Greenlee and Wolleben in the Settlement Agreement because AMI knowingly chose to exclude the Torch Energy Contract from AMI's assets under the terms of the Settlement Agreement and AMI benefited from the Settlement Agreement.

In its response to Torch's motion for summary judgment, AMI argues that the Settlement Agreement did not transfer, convey, or assign AMI's rights to sue Torch or AMI's rights to be compensated by Torch for the use of its proprietary information to Greenlee, Wolleben, or Telsus. According to AMI, the two parties never reached an agreement as to which owned the Torch prospect, the Torch Energy Contract, or any claims related thereto.

AMI contends that Torch has misinterpreted sections 2(C), 5.5, and 5.12 of the Settlement Agreement. According to AMI, sections 2(C), 5.5, and 5.12 did not convey or transfer its rights to Greenlee or Wolleben because there is nothing in the Settlement Agreement that expressly does so and interpreting otherwise is against standard contract interpretation. AMI points out that section 5.5 and section 5.12 are representations of what Greenlee and Wolleben thought to be the assets of AMI; the Settlement Agreement does not contain any such representations by AMI. AMI also contends that because the Settlement Agreement is silent as to which party owns the rights to the Torch Energy Contract, the rights still belonged to AMI. AMI also cites to other provisions in the contract which, it argues, support its view that AMI retains all rights and claims associated with the Torch Energy Contract.<sup>5</sup>

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<sup>5</sup> Specifically, AMI cites to section 5.10 of the Settlement Agreement which states that in the event Greenlee, Wolleben, and/or their spouses "have directly or indirectly retained any asset of AMI or the benefit of any AMI Prospects or



Second, AMI argues that it did not ratify the wrongful conduct of Greenlee, Wolleben, and Torch. AMI points out that the sole basis for the argument of ratification by Torch was based on Torch's interpretation of the Settlement Agreement, an interpretation that AMI disagrees with, and therefore, AMI maintains that there is no evidence for the ratification defense. AMI further claims that nothing in the Settlement Agreement ratified the conduct of Greenlee, Wolleben, and Torch and if AMI wanted to do so, it would have expressly stated its ratification in the agreement. Lastly, AMI asserts that the ratification defense is a genuine issue of fact for the jury, precluding summary judgment.

In their final argument, AMI claims that Torch's waiver and quasi-estoppel defenses are not supported by summary judgment evidence. AMI asserts that these two defenses are usually issues of fact for the jury to decide. AMI urges that there was no waiver in this case because the Settlement Agreement does not express any

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consulting projects sold to third party clients of AMI which is not disclosed in Exhibit '3' such asset and all of the financial benefits related thereto shall be the sole property of AMI." AMI also cites to section 25 which provides in relevant part: "The Parties acknowledge and agree that no statements, promises, or representations have been made by any Party to the other or are to be relied upon by any third person or entity. No third party beneficiary or other rights are created by or arise from this Agreement. This Agreement shall not affect any contractual rights the parties to this Agreement may have with third parties. . . ." AMI argues that section 25 makes two things clear: (1) there is no language in the Settlement Agreement that confers the rights of the Torch Energy Contract to Greenlee or Wolleben, and (2) the Settlement Agreement does not confer third party beneficiary rights to Torch, evidenced by the clear and unambiguous language in this section.

intent of a waiver. AMI also contests Torch's quasi-estoppel defense on the grounds that it did not accept any benefit from the Torch Energy Contract as necessary to invoke the defense.

In Torch's reply to AMI's response, it makes three more arguments. First, Torch argues that AMI ignores section 2(C)'s exclusion of the Torch Energy Contract as an AMI prospect, which it contends means that the parties agreed that rights to that contract did not belong to AMI, but to Greenlee and Wolleben. Second, Torch argues that AMI interpreted section 5.10 incorrectly because that section only applies to AMI assets and prospects, which the Torch Energy Contract is not. Lastly, Torch argues that its ratification, waiver, and estoppel defenses are based on the Settlement Agreement. According to Torch, AMI's knowledge about the contract before the Settlement Agreement and its agreement that the Torch Energy Contract was not an asset or a prospect of AMI in the agreement, amounted to ratification and waiver and AMI is therefore estopped from making any claims otherwise.

The trial court granted Torch's motion for summary judgment, but did not specify the ground or grounds upon which judgment was rendered. This appeal followed.

In four issues on appeal, AMI contends that the trial court erred in granting Torch's motion for summary judgment because (1) the Settlement Agreement did

not transfer or convey AMI's interest in its proprietary information and intellectual property or extinguish its right to be compensated for the use of these valuable assets, (2) AMI did not ratify Greenlee's or Wolleben's conduct with respect to AMI's proprietary information and intellectual property, (3) Torch failed to conclusively prove its affirmative defenses of waiver and quasi-estoppel, and (4) questions of material fact exist with respect to Torch's misappropriation of AMI's proprietary information and intellectual property.

## **DISCUSSION**

### **a. Standard of review**

We review a trial court's grant or denial of a motion for summary judgment *de novo*. See *Tex. Mun. Power Agency v. Pub. Util. Com'n of Tex.*, 253 S.W.3d 184, 192, 199 (Tex. 2007). If the trial court's order does not specify the grounds upon which judgment was rendered, we must affirm the summary judgment if any ground in the summary judgment motion is meritorious. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000).

Under the traditional summary judgment standard, the movant has the burden to show that no genuine issues of material fact exist and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Nixon v. Mr. Prop. Mgmt. Co., Inc.*, 690 S.W.2d 546, 548 (Tex. 1985). In deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to

the non-movant will be taken as true, and every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor. *Nixon*, 690 S.W.2d at 548–49. A defendant moving for a traditional summary judgment must conclusively negate at least one essential element of each of the plaintiff’s causes of action or conclusively establish each element of an affirmative defense. *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997).

When a contract contains an ambiguity, its interpretation becomes a fact issue. *Coker v. Coker*, 650 S.W.2d 391, 394 (Tex. 1983); *Hackberry Creek Country Club, Inc. v. Hackberry Creek Home Owners Ass’n*, 205 S.W.3d 46, 56 (Tex. App.—Dallas 2006, pet. denied). When construing a written contract, the primary concern of the court is to ascertain the parties’ intent as expressed in the contract’s terms. *Chrysler Ins. Co. v. Greenspoint Dodge of Houston, Inc.*, 297 S.W.3d 248, 252 (Tex. 2009); *Coker*, 650 S.W.2d at 393.

Contract language that can be given a certain or definite meaning is not ambiguous and is construed as a matter of law. *Chrysler*, 297 S.W.3d at 252; *Coker*, 650 S.W.2d at 393. A contract is ambiguous when its meaning is uncertain and doubtful or it is reasonably susceptible to more than one meaning. *Coker*, 650 S.W.2d at 393; *United Protective Servs., Inc. v. W. Vill. Ltd. P’ship*, 180 S.W.3d 430, 432 (Tex. App.—Dallas 2005, no pet.). A court may conclude that a contract is ambiguous even in the absence of such a pleading by either party. *Sage St.*

*Associates v. Northdale Constr. Co.*, 863 S.W.2d 438, 445 (Tex. 1993); *see Coker*, 650 S.W.2d at 392–94 (although both parties asserted property settlement agreement was unambiguous and moved for summary judgment, supreme court concluded ambiguity existed).

**b. Analysis**

All of Torch’s summary judgment arguments are based upon its interpretation of the Settlement Agreement. Thus, in order to determine whether summary judgment was appropriate, we must first determine whether the Settlement Agreement was ambiguous. *See Coker*, 650 S.W.2d at 394.

Having reviewed the contract and the parties’ arguments, we conclude that the Settlement Agreement is ambiguous. Although the parties agreed to exclude the Torch Energy Contract from the definition of AMI Prospects, the parties also agreed in section 9.1 that “AMI shall solely and exclusively own any and all AMI Micromagnetic Technology and all related intellectual property. . . .” Greenlee and Wolleben further represented and warranted that none of their family members had any rights or claims with respect to “AMI Micromagnetic Technology, AMI Prospects, or AMI Geophysical Data” and that, to the extent Greenlee and Wolleben had such a claim, they assigned it to AMI.

While one might reasonably interpret the Settlement Agreement to transfer, convey, or assign all of AMI’s rights and claims associated with the Torch Energy

Contract, including its right to sue Torch or its rights to be compensated by Torch for the use of its proprietary information, to Greenlee or Wolleben, the agreement does not expressly say that, and it would be just as reasonable to interpret the Settlement Agreement to reserve the Torch Energy Contract and all rights and claims associated with it to AMI. In addition to the absence of any language of conveyance with respect to the Torch Energy Contract, the Settlement Agreement contains other provisions that convey and assign equity interests in certain contracts to Greenlee and Wolleben. The parties chose not to use this conveyance language for the Torch Energy Contract. Additionally, the Settlement Agreement does not release or relinquish any claims that AMI might have against third parties who were provided with AMI's confidential information by Greenlee or Wolleben.<sup>6</sup> It does not release Torch, nor does it convey any claims that AMI might have against Torch to Greenlee and Wolleben. We agree with Greenlee and Wolleben that the summary judgment record demonstrates that the Torch Energy Contract was disclosed to AMI, that AMI knew its contents and purposes, and that it precludes any claims by AMI against Greenlee and Wolleben. We do not, however, agree that it bars such claims against Torch.

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<sup>6</sup> In fact, section 25 of the Settlement Agreement expressly states that “[t]his Agreement shall not affect any contractual rights the parties to this Agreement may have with third parties. . . .”

Moreover, section 2(C) addresses AMI's prospects; it does not address the use of proprietary and confidential information. The phrase "AMI Prospects" concerns listings of companies and leads. It is distinct from "AMI Micromagnetic Technology" and "AMI Geophysical Data," both of which concern AMI's confidential and propriety intellectual property. This language could reasonably be read to suggest that the companies and contacts are defined as "prospects," but the intellectual property related to such work is not covered by that definition. Additionally, section 5.5 does not contain an agreement by AMI that the assets listed on exhibit 3 constitute all of AMI's assets. On the contrary, section 5.10 makes it clear that AMI does not agree that its assets are limited to items listed on exhibit 3 and AMI reserves its rights for assets not listed in that paragraph. Section 5.12 likewise is a representation by Greenlee and Wolleben; it does not reflect an agreement of the parties with respect to this issue. Sections 9.1 and 9.2 expressly state that AMI owns all of the technology in question and all related intellectual property. Finally, section 25 is contrary to the assertion that the Settlement Agreement constitutes a conveyance to Greenlee and Wolleben of all rights under the Torch Energy Contract.

Having reviewed the entire agreement, we are uncertain about the parties' intentions when they entered into the Settlement Agreement. We, therefore, conclude that, at a minimum, a contract ambiguity exists regarding whether AMI

transferred or conveyed any rights it had with respect to the Torch Energy Contract to Greenlee and Wolleben under the terms of the Settlement Agreement and whether that transfer also extinguished AMI's right to be compensated for the use of any AMI Micromagnetic Technology and all related intellectual property.

Because all of Torch's summary arguments were premised upon their interpretation of an agreement that we have determined to be ambiguous, the trial court erred in rendering summary judgment on any ground argued by Torch. *See Coker*, 650 S.W.2d at 394 ("When a contract contains an ambiguity, the granting of a motion for summary judgment is improper because the interpretation of the instrument becomes a fact issue."). Therefore, we reverse the summary judgment and remand this matter to the trial court for further proceedings consistent with this opinion.

### **CONCLUSION**

We reverse the judgment of the trial court and remand for further proceedings.

Jim Sharp  
Justice

Panel consists of Chief Justice Radack and Justices Sharp and Brown.