Opinion issued March 29, 2016

In The

Court of Appeals

For The

First District of Texas

NO. 01-14-00574-CV

UNION CARBIDE CORPORATION, Appellant

V.

PERRY JONES; ROSEMARY ALEGRIA, NATHAN REYES, NATALIE OJEDA, AND NICHOLASA TORRES, INDIVIDUALLY, AND AS HEIRS OF NICHOLAS REYES, Appellees

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On Appeal from the 165th District Court
Harris County, Texas
Trial Court Case No. 2013-36767A

MEMORANDUM OPINION

In this appeal from the trial court's ruling on cross-motions for summary judgment, we consider whether the trial court erred in concluding, as a matter of

law, that a contract had been formed between the offeror and offeree, despite at least a nine-year delay by the offeree in notifying the offeror that he had accepted the terms of the contract. Because there is a fact question as to the reasonableness and timeliness of the offeree's notice of acceptance, we reverse the judgment and remand for further proceedings.

BACKGROUND

On May 10, 2002, Union Carbide Corporation ["Union Carbide"] and the law firm of Robins, Cloud, Greenwood & Lubel, L.L.P. ["Robins Cloud"] entered into an Agreement entitled "Agreement Between Union Carbide Corporation and the 'Robins, Cloud' Law Firm Providing The Mechanism for Settlement of Robins, Cloud Asbestos Litigation" ["the Settlement Mechanism Agreement"]. Robins Cloud had several hundred clients with asbestos-related claims against Union Carbide, and the Settlement Mechanism Agreement was an attempt to provide a framework through which Robins Cloud's clients could submit documentation to Union Carbide in support of their claims, and Union Carbide, in return, would pay a pre-determined settlement amount according to the classification of the claimant's injury. Specifically, the Settlement Mechanism Agreement provided as follows:

> The parties [Union Carbide and Robins Cloud] have agreed to be bound by this Agreement and the Settlement Mechanism for the resolution of Product Claims. However, **the parties understand that Robins, Cloud's agreement to the terms of this Agreement, while**

> **binding as to that firm, is not binding as to any specific plaintiff whom that firm represents and whom Robins, Cloud intends to be subject to this Agreement** ("the Intended Claimants"). Nevertheless, one way an Intended Claimant will be bound is when that claimant individually agrees to the proposed settlement applicable to that Intended Claimant's disease and the Release (Exhibit D), discussed below, which shall serve as a binding agreement between each signing claimant and Union Carbide. ***Alternatively*, an Intended Claimant may agree to and sign the contract for future claim resolution (see Exhibit F), discussed below in Paragraph 11, in order to have a binding agreement with Union Carbide.** If an Intended Claimant does not sign either (1) Exhibit D or (2) Exhibit F for whatever reason, or if a claim is submitted but then rejected by Union Carbide . . . then that claim shall not be affected by this Agreement and will continue as live litigation, but subject to the one-year tolling or standstill arrangement of Paragraph 15 below. (emphasis added).

The Settlement Mechanism Agreement was between Union Carbide and Robins Cloud only. It did not create obligations between Union Carbide and the Intended Claimants, but was an offer for Robins Cloud's clients, the Intended Claimants, to enter into a settlement agreement by agreeing to the proposed settlement and either signing a release or a contract for future claim resolution.

Two of Robins Cloud's clients, Perry Jones and Nicholas Reyes, did not have cancer at the time of the Settlement Mechanism Agreement in 2002, so their claims were defined as "Other Claims" and their mechanism for accepting the settlement offer was found of section 11(a) of the Settlement Mechanism Agreement, which provided:

> ***It is the parties' intention, design and purpose by this Agreement (1) that these Other Claims . . . shall be dismissed without prejudice subject to the tolling agreement attached as Exhibit E and (2) that***

Union Carbide and each Other Claims plaintiff . . . who has accepted the proposed resolution of his/her claim per this Agreement will execute a separate contract, Exhibit F attached hereto. Exhibit F provides generally that, in the event one or more of these Other Claims plaintiffs develop one of the cancers listed in paragraph 10 in the next ten (10) years following the execution of Exhibit F, Union Carbide and Robins, Cloud agree that these specified plaintiffs will be offered and paid the settlement amounts set forth in Paragraph 10, provided Plaintiffs meet all other qualifying criteria under the Agreement. Further, Exhibit F provides that during this ten-year period, each signing plaintiff will agree that he/she will not sue Union Carbide concerning any alleged injury due to asbestos exposure. Instead, during that ten-year period, these plaintiffs will be limited to submitting the specified claims . . . for the specified amounts . . . and in the specified manner, as set forth in this Agreement. . . . Thus, these possible future claims shall be submitted and paid (if they qualify) in accordance with Paragraph 12, for a ten-year-period, per the terms of Exhibit F. ***The parties agree that Union Carbide's payment requirement to these Other Claims plaintiffs arises only in the event these claimants sign Exhibit F and meet the criteria set forth therein and in this Agreement.*** The parties agree that no claimed injury, other than those listed in Paragraph No. 10, will trigger Union Carbide's payment requirement under Exhibit F during its term. This payment requirement per Exhibit F shall end at the expiration of the contractual ten-year period. Thus, in summary, it is the intention of these parties that these Other Claims plaintiffs . . . shall each dismiss their claims without prejudice, subject to Exhibits E & F, and that these potential future claims shall be handled in accordance with and subject to all requirements under this agreement. . . . ***If any claimant in this category rejects the offered settlement by not signing Exhibit F, then that claim will be considered live litigation though subject to the standstill agreement of Paragraph No. 15.*** Notwithstanding the foregoing, nothing in this Paragraph prohibits a plaintiff who signs Exhibit F from proceeding through the tort system after the term of Exhibit F expired, unless plaintiff has previously settled and released his/her claims against Union Carbide under the Agreement or otherwise.

In July 2003, Jones and Reyes each signed an Exhibit F ["the Contract"] referenced in the Settlement Mechanism Agreement, which provided that, if within the 10 years after the Contracts were signed the claimant developed an asbestos-related cancer, he could submit a claim in accordance with the Settlement Mechanism Agreement and that "during the term of this Contract [the claimant] shall file no lawsuit, nor pursue any legal process of any nature or type, nor make any allegation or claim whatsoever to or against Union Carbide based on any Possible Asbestos Claims," and that "during the ten-year term of this Contract [the claimant] shall never prosecute and shall never be entitled to prosecute any action, lawsuit, or other legal proceeding against Union Carbide for any such Malignant Claim, except through the Settlement Mechanism specified herein and in The Union Carbide/Robins, Cloud Agreement." The Contract also provided that "[t]o be considered a valid claim . . . the claim must be made in the form, must follow the process, and meet all the criteria of the terms and conditions of [the Settlement Mechanism Agreement], which is fully incorporated herein by reference."

Although Jones and Reyes signed and had these Contracts notarized on July 14, 2003 and July 22, 2003, respectively, the Contracts were never forwarded to Union Carbide, and Union Carbide never signed them.

Sometime during the 10-year periods after signing the Contracts, Jones and Reyes developed lung cancer. Ian Cloud, an attorney from Robins Cloud,

forwarded Jones's and Reyes's Contracts to Union Carbide on October 11, 2011 and December 21, 2012, respectively. After Union Carbide denied their claims, Jones and Reyes filed suit against Union Carbide alleging that it had "entered in a contract with Plaintiffs wherein it agreed to pay Plaintiffs for their asbestos-related diseases in exchange for a release of their claims against Union Carbide Corporation." Jones and Reyes further alleged that Union Carbide had "breached the contract by not paying Plaintiffs the amount owed."

Jones and Reyes filed motions for summary judgment, alleging that they had proved a breach of contract as a matter of law. Union Carbide filed a cross-motion for summary judgment, alleging that it had proved that no contract existed as a matter of law. Specifically, Union Carbide argued that Jones and Reyes never validly accepted its settlement offer because they never communicated their acceptance until at least 9 years after the contracts were signed, and that, as a matter of law, acceptance after that amount of time was unreasonable. The trial court granted Jones's and Reyes's motions for summary judgment, denied Union Carbide's, and rendered judgment in favor of Jones and Reyes for $100,000 each, plus pre- and post-judgments interest. The trial court then severed Jones's and Reyes's claims from other plaintiffs in the suit, thus making their judgment final and appealable. Union Carbide then filed this appeal.

PROPRIETY OF SUMMARY JUDGMENT RULINGS

Union Carbide brings the following issues challenging the trial court's rulings on the summary judgments and subsequent final judgment:

> Whether the trial court erred by denying Union Carbide's cross-motions for summary judgment when the undisputed evidence established as a matter of law that no valid contract existed between Jones and Union Carbide or between Reyes and Union Carbide, thereby disproving one essential element of Appellee's claims.
>
> Whether the trial court erred by granting Appellees' motions for summary judgment on their breach of contract claims because Appellees did not meet their burden to prove as a matter of law that a valid contract existed between Jones and Union Carbide or between Reyes and Union Carbide.

Standard of Review and Applicable Law

We review a trial court's decision to grant or to deny a motion for summary judgment de novo. *See Tex. Mun. Power Agency v. Pub. Util. Comm'n*, 253 S.W.3d 184, 192 (Tex. 2008). "When both sides move for summary judgment, as they did here, and the trial court grants one motion and denies the other, reviewing courts consider both sides' summary-judgment evidence, determine all questions presented, and render the judgment the trial court should have rendered." *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 124 (Tex. 2010) (citing *Embrey v. Royal Ins. Co. of Am.*, 22 S.W.3d 414, 415–16 (Tex. 2000)). Each party must carry its own burden to establish entitlement to summary judgment by conclusively proving all the elements of the claim or defense as a

matter of law. *See* TEX. R. CIV. P. 166a(c); *see James v. Hitchcock Indep. Sch. Dist.*, 742 S.W.2d 701, 703 (Tex. App.—Houston [1st Dist.] 1987, writ denied).

To prevail on a traditional summary-judgment motion, a movant has the burden of proving that it is entitled to judgment as a matter of law and there is no genuine issue of material fact. TEX. R. CIV. P. 166a(c); *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995). When a plaintiff moves for summary judgment on its claim, it must establish its right to summary judgment by conclusively proving all the elements of its cause of action as a matter of law. *Rhône Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999); *Anglo–Dutch Petroleum Int'l, Inc. v. Haskell*, 193 S.W.3d 87, 95 (Tex. App.—Houston [1st Dist.] 2006, pet. denied). When deciding whether there is a disputed, material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985). Every reasonable inference must be indulged in favor of the non-movant and any doubts must be resolved in its favor. *Id.* at 549.

To prevail on a breach of contract claim, a plaintiff is required to prove: (1) a valid contract existed between plaintiff and defendant; (2) plaintiff tendered performance or was excused from doing so; (3) defendant breached the terms of the contract, and (4) plaintiff sustained damages as a result of defendant's breach. *See Dorsett v. Cross*, 106 S.W.3d 213, 217 (Tex. App.—Houston [1st Dist.] 2003,

pet. denied). The elements of a valid contract are (1) an offer, (2) an acceptance, (3) a meeting of the minds, (4) each party's consent to the terms, and (5) execution and delivery of the contract with the intent that it be mutual and binding. *Prime Prods., Inc. v. S.S.I Plastics, Inc.*, 97 S.W.3d 631, 636 (Tex. App.—Houston [1st Dist.] 2002, pet. denied); *Angelou v. African Overseas Union*, 33 S.W.3d 269, 278 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

Waiver

Jones and Reyes contend that the summary judgment in their favor should be affirmed because Union Carbide's appellate brief did not address all grounds upon which their summary judgment might have been granted. Specifically, Jones and Reyes argue that they raised the issue of their status as third-party beneficiaries of the Settlement Mechanism Agreement, and that Union Carbide did not attack that ground in its appellate briefing.

When the trial court's order granting summary judgment for one movant and denying summary judgment for the other does not specify the grounds on which it rests, we may affirm the trial court's judgment if any of the grounds raised in the prevailing movant's motion are meritorious. *Corp. Leasing, Int'l, Inc. v. Groves*, 925 S.W.2d 734, 736 (Tex. App.—Fort Worth 1996, writ denied). We will not affirm a summary judgment on a ground that was not specifically presented in the motion for summary judgment. *Travis v. City of Mesquite*, 830 S.W.2d 94, 99–100

(Tex. 1992); *Bill De La Garza & Assocs., P.C. v. Dean & Ongert*, 851 S.W.2d 371, 373 (Tex. App.—Houston [1st Dist.] 1993, no writ). Nor will we reverse a summary judgment on a ground that was not expressly presented to the trial court by a written motion, answer, or other response to the motion for summary judgment. *Travis*, 830 S.W.2d at 99–100; *Universal Sav. Ass'n v. Killeen Sav. & Loan Ass'n*, 757 S.W.2d 72, 75 (Tex. App.—Houston [1st Dist.] 1988, no writ). When, as here, the trial court does not state the basis for granting summary judgment, an appellant must attack each basis on which the summary judgment could have been granted. *See Progressive Cty. Mut. Ins. Co v. Kelley*, 284 S.W.3d 805, 806 (Tex. 2009).

Union Carbide argues that it was not required to address the third-party beneficiary because it was not raised as a ground for summary judgment in Jones's and Reyes's motions. We agree. Jones's and Reyes's own motions do not mention or rely on an argument that they were third-party beneficiaries to the Settlement Mechanism Agreement. In fact, the only reference to a claim by Jones of third-party beneficiary status is found on page 11 of 13-page document entitled "Plaintiff Perry Jones' Response to Defendant's Cross-Motion for Summary Judgment," and the only reference to a claim by Reyes of third-party beneficiary status is found of page 15 of a 17-page document entitled "Plaintiffs' Response to Defendant's Cross-Motion for Summary Judgment." As such, the third-party

beneficiary issue was raised as a reason for defeating Union Carbide's motion, but, because it was not in the plaintiffs' own motions, it was not a ground upon which summary judgment could have been granted. *See Kaye/Bassman Int'l Corp. v. Help Desk Now, Inc.*, 321 S.W.3d 806, 817–18 (Tex. App.—Dallas 2010, pet. denied) (holding appellate court would not consider whether appellant was entitled to summary judgment on affirmative defense when affirmative defense was not raised in its own motion, but in response to appellee's motion). Union Carbide was not required to address the third-party beneficiary issue in arguing for the reversal of Jones's and Reyes's motions for summary judgment. Thus, we will address Union Carbide's issues on their merits without finding waiver.

Analysis

Union Carbide contends that the trial court erred in denying its motion for summary judgment and in granting Jones's and Reyes's motions for summary judgment. Specifically, Union Carbide argues that Jones and Reyes failed to prove the second element of contract formation, i.e., a valid acceptance. Union Carbide contends that, even if Jones and Reyes accepted the Settlement Contracts when they signed them in 2002, those acceptances were not valid because they gave no notice of their acceptances until 2011 for Jones and 2012 for Reyes. Union Carbide further contends that notice of acceptance given that long after the contracts were signed is unreasonable as a matter of law.

In contrast, Jones and Reyes contend that they accepted the settlement offer in strict compliance with its terms by merely signing the Contracts, and that no further action on their part was necessary to make the Contracts binding. In support they cite *International Filter Co. v. Conroe Gin, Ice & Light, Inc.*, 277 S.W. 631, 632 (Tex. Comm'n App. 1925). In that case, International Filter made an offer to sell water purifying equipment to Conroe Gin. *Id.* at 631. The offer provided, "This proposal is made in duplicate and becomes a contract when accepted by [Conroe Gin] and approved by an executive officer of the International Filter Company, at its office in Chicago." *Id.* Thus, the offer provided that it would become a binding contract when (1) accepted by the offeree, Conroe Gin, and (2) approved by an officer of the offeror, International Filter. The approval by an executive of International Filter was, as such, a condition precedent to the creation of a binding contract. Conroe Gin, the offeree, immediately accepted the offer by noting "accepted" on the proposal, and, three days later forwarded its acceptance to International Filter. *Id.* Upon receipt, an executive from International Filter in Chicago wrote on Conroe Gin's acceptance letter, "OK," and sent a letter back to Conroe Gin thanking it for the order, and asking for Conroe Gin to send water samples so that International Filter could begin manufacturing the ordered equipment. *Id.* at 632. Conroe Gin then sought to countermand its order, arguing (1) that the notation "OK" was not sufficient approval "by an

executive officer of the International Filter Company, at its office in Chicago", and (2) that the letter acknowledging the order by International Filter was not sufficient notice of the executive's approval. *Id.* International Filter sued, alleging breach of contract. *Id.* The court held that *International Filter* complied with the condition precedent—obtaining approval "by an executive officer of the International Filter Company, at its office in Chicago"—when that executive endorsed "O.K." on the acceptance sent by Conroe Gin, and that the proposal became a contract at that time. *Id.* at 632–33. The court further held that International Filter was not required to give notice of its executive's approval because the language of the proposal stated that it "becomes a contract . . . when approved by an executive officer." *Id.*at 633. "There is not anything in the language used to justify a ruling that this declaration must be wrenched from its obvious meaning and given one which would change both the locus and time prescribed for the meeting of the minds." *Id.*

International Filter is different from the present case in one important respect. It involved notification of a condition precedent, i.e., final approval by an executive of the offeror, after the offer had been unconditionally accepted by the offeree. Here, the issue presented is whether the offerees, Jones and Reyes, ever effectively accepted the offer at all in light of the fact that they never told Union Carbide of their acceptance until over 9 years after they purportedly accepted it.

We agree with Union Carbide that to form a binding contract, the party to whom the offer is made must accept such offer and communicate such acceptance to the person making the offer. *See Angelou*, 33 S.W.3d at 279. "Except as stated in § 69 [regarding acceptance by silence] or where the offer manifest a contrary intention, it is essential to an acceptance by promise either that the offeree exercise reasonable diligence to notify the offeror of acceptance or that the offeror receive the acceptance seasonably." RESTATEMENT (SECOND) OF CONTRACTS §56 (Am. Law Inst. 1981). An acceptance is generally not binding until delivered to the offeror. *See Jatoi v. Park Ctr., Inc.*, 616 S.W.2d 399, 400–401 (Tex. Civ. App—Fort Worth 1981, writ ref'd n.r.e.). "An acceptance which resides solely within the exclusive knowledge of the acceptor without being communicated to the offeror is ordinarily no binding acceptance." *Id.* at 401; *see also State v. Triax Oil & Gas, Inc.*, 966 S.W.2d 123, 128 (Tex. App.—Austin 1998, no pet.).

Our agreement that communication of acceptance is required, however, does not resolve the issue presented in this case, i.e., whether the existence of a contract was proved or disproved as a matter of law. We must still decide whether it was shown as a matter of law that (1) Jones and Reyes actually provided Union Carbide notice of their acceptance, and (2) that such notice, if given, was reasonably timely.

Notice of Acceptance by Silence

Jones and Reyes undoubtedly gave notice of their acceptance when they forwarded their Contracts to Union Carbide nine and ten years after they were signed. However, they argue that Union Carbide had actual knowledge of their acceptances much earlier.

There are certain circumstances in which silence may operate as acceptance. RESTATEMENT (SECOND) OF CONTRACTS § 69 (1) (Am. Law Inst. 1981) provides in part:

> (1) When an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only:
>
> . . . .
>
> (b) Where *the offeror has* stated or *given the offeree reason to understand that assent may be manifested by silence* or inaction, and the offeree in remaining silent and inactive intends to accept the offer.
>
> (c) Where because of *previous dealings or otherwise*, it is reasonable that the offeree should notify the offeror if he does not intend to accept. (emphasis added).

Jones and Reyes argue that that the above two sections apply. Specifically, they allege that, under the circumstances, Union Carbide gave them reason to understand that their acceptance could be manifested by silence because the Settlement Mechanism Agreement provided that the claim of a claimant who "rejects the offered settlement by not signing Exhibit F," will be considered "live

litigation[,]" and because there was no express requirement that Jones and Reyes deliver notification to Union Carbide when they signed the agreement. Because there was no "live litigation" between Union Carbide and Jones and Reyes at any time during the 9-year period before Jones and Reyes forwarded their signed Contracts to Union Carbide, they contend that Union Carbide had notice that they had accepted the settlement offer, especially since there was no requirement in the contract that they deliver the signed contract to Union Carbide within a certain timeframe.

Silence, plus forbearance, may, in some cases, constitute an acceptance. *See* 2 WILLISTON ON CONTRACTS § 6:53 (4th ed.). We believe that in this case there is a question of fact for the jury about whether Jones's and Reyes's silence, coupled with their forbearance from pursuing litigation against Union Carbide, provided sufficient notice to Union Carbide that they had, in fact, accepted the settlement offer found in the Settlement Mechanism Agreement.

Timeliness of Notice of Acceptance

Union Carbide further alleges that a nine-year delay in providing notice of acceptance is unreasonable as a matter of law, citing *Christy v. Andrus*, 722 S.W.2d 822, 824 (Tex. App.—Eastland 1987, writ ref'd n.r.e.) (holding 15 months' time between offer and acceptance was unreasonable as a matter of law); *Smith v. Sabine Royalty Corp.*, 556 S.W.2d 365, 369 (Tex. Civ. App.—Amarillo 1977, no

writ) (holding 63 days between offer and acceptance unreasonable as a matter of law.)

An offeree's power of acceptance is terminated at the time specified in the offer, or if no time is specified, it is terminated at the end of a reasonable time. *See Valencia v. Garza,* 765 S.W.2d 893, 897 (Tex. App.—San Antonio 1989, no writ) ("Reasonable time depends on the circumstances in each case, including the nature and character of the thing to be done and the difficulties surrounding and attending its accomplishment and is generally for the jury [factfinder]."); RESTATEMENT (SECOND) OF CONTRACTS § 41(1) (Am. Law Inst. 1981) ("An offeree's power of acceptance is terminated at the time specified in the offer, or, if no time is specified, at the end of a reasonable time.").

We are unprepared to hold that, as a matter of law, the delay in providing express notice of acceptance was unreasonable as a matter of law under these unusual circumstances. The contract itself is a contract regarding the handling of *future* litigation. In 2002, when the Contracts were signed by Jones and Reyes, neither of them had cancer, thus neither of them had claims that were ripe for settlement. The Contracts themselves contemplated a 10-year period before the possibility of performance would be foreclosed. Perhaps a jury would find it a "reasonable" time for Jones and Reyes to formally notify Union Carbide of their acceptance of the settlement agreement after they had sufficient cause to make a

claim for their asbestos injuries. We believe that what is reasonable time under these circumstances presents a fact question for the jury. *See Valencia*, 765 S.W.2d at 897 ("What is reasonable time is a fact question, depending on all the circumstances existing when the offer and attempted acceptance are made.").

Summary

While we agree with Union Carbide that Jones and Reyes were required to give notice of their acceptance of the settlement offer set forth in the Settlement Mechanism Agreement, we do not agree that the existence or non-existence of a contract was established by either party as a matter of law. Indeed, we believe that there are several fact questions to be answered by a jury, including (1) whether Jones's and Reyes's silence and forbearance from pursuing litigation gave notice to Union Carbide that they had accepted the settlement agreement and when such notice was effective, and (2) whether the notice of their acceptance to Union Carbide was given within a reasonable time.

CONCLUSION

In light of the fact questions remaining, neither party has shown that they were entitled to summary judgment as a matter of law. Accordingly, we reverse the judgment and remand for further proceedings.

Sherry Radack
Chief Justice

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