Opinion issued August 25, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00171-CV

BEXAR-MAR INTERNATIONAL, LLC AND ERIC E. SCHMID, Appellants

V.

COMBI LIFT GMBH, Appellee

On Appeal from the 270th District Court
Harris County, Texas
Trial Court Case No. 2017-08863

MEMORANDUM OPINION

Appellants, Bexar-Mar International, LLC and Eric E. Schmid, appeal from the trial court's order granting summary judgment in favor of appellee, Combi Lift GmbH, on Bexar-Mar and Schmid's claims for breach of contract, fraud, fraudulent inducement, and negligent misrepresentation. In four issues, Bexar-Mar and Schmid

contend that the trial court erred in granting Combi Lift's no-evidence motion because they introduced sufficient evidence to support each essential element of their claims. In a cross-point, Combi Lift contends that the trial court erred in overruling its objections to portions of Schmid's summary judgment affidavit. We affirm.

Background

A. Factual Background

Combi Lift is a German company that provides marine transport logistics to customers throughout the world. In 2016, Combi Lift sought to expand its operations and establish a presence in the United States.

On April 29, 2016, Bastian Lenge, a Chartering Manager for Combi Lift, met Eric Schmid, Bexar-Mar's owner, to discuss specialized maritime transportation, various potential projects, and current market conditions. On May 2, 2016, Lenge sent an email to Schmid informing him that he had spoken to Heiko Felderhoff, Combi Lift's Managing Director, and recommending that Felderhoff meet with Schmid "for a general exchange of ideas and to get to know each other."

At Lenge's invitation, Schmid traveled to Combi Lift's headquarters in Bremen, Germany, and met with Felderhoff on May 31 and June 1, 2016. Felderhoff gave a presentation detailing Combi Lift's operations and capabilities, and Felderhoff and Schmid discussed Schmid opening a Combi Lift office in Houston.

On June 1, 2016, Schmid prepared and forwarded to Felderhoff "a working draft proposal regarding the start-up of the Combi Lift USA office to be located in Houston, Texas," setting forth the terms he and Felderhoff had discussed. Schmid requested Felderhoff's input, stating "You will notice that I only left out the salary, which we can discuss after you have had a chance to review the proposal." On June 2, 2016, Felderhoff advised Schmid that he would review the proposal and get back to him. Schmid later spoke with Peter Harren, the founder of Harren & Partner, which owns Combi Lift, and they reached an agreement regarding Schmid's salary.

At Felderhoff's request, Schmid emailed Philipp Zoelch on June 22, 2016, soliciting input on (1) the acquisition of office space, (2) retaining counsel to set up a domestic entity through which to conduct business, (3) using Bexar-Mar's bank account until a company bank account could be opened, (4) contracting for a general liability insurance policy, and (5) retaining the services of an accounting firm to handle filing requirements under state and federal law. On June 29, 2016, Zoelch responded to the above items and advised Schmid that Combi Lift was "a little bit uncertain about setting up a corporation in the US at this stage" and "the alternative is to run [Combi Lift] Americas as a rep office with [Schmid] as a consultant/rep." Zoelch noted that if the Houston office was not to be run as a separate corporation, a consultancy agreement between Combi Lift and Schmid would be required.

On June 30, 2016, Schmid emailed Zoelch, stating "this . . . is a bit contrary to what we have initially agreed . . . We discussed whether Combi should be its own company here or if I should just represent Combi as a commercial agent and it seemed we had agreed that it would be best that Combi be its own company" and that "it was key in my decision to move forward." Schmid advised Zoelch that he was still interested in moving forward with Bexar-Mar as Combi Lift's commercial agent and that "[w]e must commit to this office being the sole rep for Combi," noting that "as of this moment, there are 2 others in Houston pushing the [Combi] ships and to add another is confusing, especially if you choose not to set up a company."

On July 5, 2016, Zoelch emailed Schmid "summarizing the main points/actions to be done in order to get started." Zoelch stated, "[o]ur idea is to setup Combi-Lift (Americas) as a rep/branch for Combi Lift GmbH for the time being. This will be the sole rep. No others. If we decide that a company in the US will be more beneficial, we can easily take this step further . . . Combi Lift GmbH will engage you as a consultant and you will be indemnified."

On July 29, 2016, Schmid forwarded a "Contract for Services" to Zoelch. The document included a severance provision which stated, "[c]onsultant shall recover from Company three (3) months compensation as severance." Zoelch requested that Schmid send a Word version of the document so that Zoelch could "give some comments/highlight points for clarification," and he advised Schmid that Combi

Lift's legal counsel still needed to review and approve it. Schmid forwarded the requested version, stating, "if there are any major changes to the consulting agreement which you are thinking about (ie if we are still negotiating at this point), please let me know the key points."

On August 3, 2016, Matthias Muller, Combi Lift's legal counsel, emailed Schmid and attached a redlined copy of the draft contract with numerous edits and comments. In particular, the redlined document changed the severance provision to provide for one month's severance pay. Schmid objected to the redlined draft and refused to sign it.

The parties, however, continued to work together. During that time, Combi Lift paid every invoice Bexar-Mar submitted for its services.

On August 10, 2016, Combi Lift sent lists of its U.S. clients to Schmid. On August 22, 2016, Lenge advised Schmid that he could begin selling jobs for two ships owned by Panocean "under the agreement 'Combi Lift as agents to Panocean.'"

On August 25, 2016, Lenge sent an email to representatives of Assurance Integrity Management Services, LLC ("AIMS"), and copied Schmid, stating, "Schmid of Combi Lift America is in charge of the sales for Combi Lift and its Heavy Lift/Pan Ocean's Deck Carrier as well as for transportation concepts from door to door/turn key for the US markets" while AIMS "is in charge to develop for

Combi Lift offshore projects e.g. such field works as decommissioning, sub sea installation scopes and maintenance jobs for platforms on a commission basis." On November 1, 2016, Lenge forwarded a letter to AIMS representatives and Schmid in which he again clarified that AIMS was responsible for the development of jobs for the offshore industry (decommissioning, offshore supplies, and field work) and rig movements, and that Schmid was responsible for the heavy lift/project cargo market.

That same day, Schmid advised Combi Lift that "this entire arrangement is not working for me" and "I do not think I wish to continue further under this structure." Muller responded by email notifying Schmid that "we accept your decision and therefore regard our relationship as severed with immediate effect."

On November 18, 2016, Schmid sent Combi Lift an invoice for $32,499.96 for "3 months termination severance as per Contract No.: BM-CL 0816." On December 6, 2016, Zoelch emailed Schmid advising him that Combi Lift had accepted his "wish for resignation" and rejected the invoice.

B. Procedural Background

On February 8, 2017, Schmid and Bexar-Mar filed suit against Combi Lift. In their second amended petition—the live pleading—Schmid and Bexar-Mar alleged claims for breach of contract, fraudulent inducement, common law fraud,

negligent misrepresentation, and quantum meruit. Combi Lift filed an answer on December 14, 2017.

On November 14, 2018, Combi Lift filed a no-evidence motion for summary judgment on all of Bexar-Mar and Schmid's claims. With regard to the breach of contract claim, Combi Lift argued that Bexar-Mar and Schmid presented no evidence establishing that:

- a valid, enforceable contract existed;
- Bexar-Mar and Schmid performed or tendered performance;
- Combi Lift committed a breach; and
- Bexar-Mar suffered damages as the result of Combi Lift's alleged breach.

Combi Lift asserted that Bexar-Mar and Schmid based their fraud claim on two alleged representations: (1) Bexar-Mar and Schmid would be the sole representatives of Combi Lift in Houston and (2) upon termination of his services, Schmid would receive a severance in the amount of three months' compensation. Combi Lift argued that Bexar-Mar and Schmid had no evidence establishing that:

- Combi Lift made the alleged representations;
- even if they did, such representations were false;
- Combi Lift made them with knowledge that they were false, or recklessly, as a positive assertion, and without knowledge of the truth;
- Combi Lift made the alleged representation with the intent that Bexar-Mar and Schmid rely on them;

- Bexar-Mar and Schmid relied on the representations; and
- the representation caused injury to Bexar-Mar and Schmid.

As to the fraudulent inducement claim, Combi Lift made the same arguments as it did in response to Bexar-Mar and Schmid's fraud claim, and it further asserted that Bexar-Mar and Schmid had no evidence that the parties entered into a binding contract or agreement, as required to prevail on a fraudulent inducement claim.

With regard to the negligent misrepresentation claim, Combi Lift asserted that Bexar-Mar and Schmid relied on the same two alleged misrepresentations underlying their fraud claims. Combi Lift argued that Bexar-Mar and Schmid had no evidence showing that:

- Combi Lift supplied false information for their guidance;
- even if they did, the alleged false information did not constitute misstatements of existing facts but, rather, statements regarding future conduct;
- Combi Lift failed to exercise reasonable care or competence in obtaining or communicating the information;
- Bexar-Mar and Schmid justifiably relied on the alleged misrepresentations; and
- any negligent misrepresentation by Combi Lift proximately caused injury to them.

With regard to the quantum meruit claim, Combi Lift argued that Bexar-Mar and Schmid had no evidence establishing that:

- they provided valuable services to Combi Lift;

- Combi Lift accepted any services for which it did not compensate Bexar-Mar and Schmid; and

- Combi Lift had reasonable notice that Bexar-Mar and Schmid expected to be compensated for services that were provided but for which Combi Lift did not compensate them.

On December 6, 2018, Bexar-Mar and Schmid filed their response to Combi Lift's summary judgment motion. As to their breach of contract claim, they argued that:

- a valid contract exists between the parties because Combi Lift extended an offer on May 31, 2016 when Felderhoff discussed the terms under which they would open a Combi Lift office in Houston, the only change occurred when Schmid agreed to operate as Combi Lift's commercial agent, and the substantive terms of the offer were included in Zoelch's July 5, 2016 email and the consulting agreement that Schmid forwarded to Zoelch on July 29, 2018; Schmid accepted the offer in his June 30, 2016 email and agreed to open a Combi Lift office in Houston and perform services for Combi Lift; Combi Lift paid Schmid for his efforts, business expenses, and lease expenses;

- Schmid and Bexar-Mar performed the services required under the contract with Combi Lift as evidenced by Combi Lift's payment of Bexar-Mar's invoices and Schmid's uncontroverted affidavit testimony;

- Combi Lift breached the terms of the contract by continuing to allow AIMS to represent Combi Lift and to solicit business on Combi Lift's behalf and failing to pay the agreed-upon severance amount when Combi Lift terminated Schmid; and

- Bexar-Mar and Schmid were damaged by Combi Lift's breach because they lost the business of those customers for whom they had previously done work, including Argosy.

As to their fraud and fraudulent inducement claims, Bexar-Mar and Schmid argued that:

- Schmid testified in his affidavit that Felderhoff represented to him that Schmid and Bexar-Mar would be Combi Lift's sole presence in North America, Zoelch's made the same representation in his July 5, 2016 email, and their representations were material to Schmid's decision to work exclusively for Combi Lift;

- Zolech's representation that Bexar-Mar would be "the sole rep" was false at the time he made it because AIMS continued to sell services to customers on behalf of Combi Lift, and Felderhoff's representation to Schmid that there was no contractual relationship between AIMS and Combi Lift was false at the time he made it because Schmid was holding a copy of the agency agreement between AIMS and Combi Lift when the statement was made;

- Combi Lift was aware of AIMS representation in North America while Combi Lift was enticing Schmid to open a Houston office, as evidenced by Lenge's August 25, 2016 email which referenced AIMS's representation of Combi Lift in North America and, therefore, Combi Lift knew the representations were false;

- Felderhoff's and Zoelch's representations that Bexar-Mar and Schmid would be Combi Lift's sole representative in North America, and Schmid's testimony that absent such an assurance he would not have agreed to work for Combi Lift, establish that Combi Lift intended that Bexar-Mar and Schmid rely on the representations;

- Schmid's affidavit testimony, actions, and cessation of business with other customers show that he relied on the representations by Felderhoff and Zoelch; and

- Schmid's testimony that he and Bexar-Mar lost customers based on their reliance on the representations, as well as the loss of a promised severance payment, shows that Bexar-Mar and Schmid suffered injury as a result of their reliance on Combi Lift's misrepresentations.

With regard to their negligent misrepresentation claim, Bexar-Mar and Schmid argued that:

- Felderhoff's and Zoelch's representations to Schmid and Bexar-Mar that they would be Combi Lift's sole presence in North America, in the course of discussing Combi Lift's expansion into the North American market and which Schmid testified were material to Schmid's decision to work for Combi Lift exclusively, established that Combi Lift made a representation to them in the course of a transaction in which it had an interest;

- Felderhoff's and Zoelch's representations that Bexar-Mar and Schmid would be Combi Lift's sole representative in North America, made in the course of negotiations with Schmid while Combi Lift sought to retain Schmid to open a Houston office, and Schmid's testimony that absent such an assurance he would not have agreed to work for Combi Lift, establishes that the representations were false and provided for the guidance of Schmid and Bexar-Mar;

- Felderhoff's and Zoelch's representations that Bexar-Mar and Schmid would be Combi Lift's sole presence in North America, made while AIMS was actively selling Combi Lift services to customers, shows that Combi Lift did not exercise reasonable care in communicating the information;

- Bexar-Mar and Schmid justifiably relied on Combi Lift's representation as evidenced by Schmid's testimony and Combi Lift's significant expenditures in furtherance of its goals (e.g., Combi Lift paid for two trips to Bremen for meetings with Schmid, leased office space in Houston and set up an office, and committed to paying Schmid for his efforts); and

- Schmid and Bexar-Mar suffered pecuniary injury in the form of lost business and the loss of severance pay, and the damages were foreseeable as evidenced by the provision in the contract prohibiting Schmid and Bexar-Mar from performing services for any competitor of Combi Lift.

Bexar-Mar and Schmid did not argue that there was evidence to support their quantum meruit claim.

On December 6, 2018, Combi Lift filed objections to portions of Schmid's affidavit testimony on the grounds that it was incompetent and inadmissible.

On December 12, 2018, the trial court granted Combi Lift's no-evidence motion for summary judgment on all of Bexar-Mar and Schmid's claims. On January 10, 2019, Bexar-Mar and Schmid filed a motion for new trial which was overruled by operation of law. This appeal followed.

Standard of Review

We review a trial court's grant of summary judgment de novo. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). When reviewing a summary judgment motion, we must (1) take as true all evidence favorable to the nonmovant and (2) indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005) (citing *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003)). If a trial court grants summary judgment without specifying the grounds for granting the motion, we must uphold the trial court's judgment if any one of the grounds is meritorious. *Beverick v. Koch Power, Inc.*, 186 S.W.3d 145, 148 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

"A no-evidence summary judgment is essentially a pretrial directed verdict, and we apply the same legal sufficiency standard in reviewing a no-evidence summary judgment as we apply in reviewing a directed verdict." *King Ranch, Inc.*

v. Chapman, 118 S.W.3d 742, 750–51 (Tex. 2003). In a no-evidence summary judgment motion, the movant asserts that there is no evidence to support an essential element of the nonmovant's claim on which the nonmovant would have the burden of proof at trial. *See* TEX. R. CIV. P. 166a(i); *Hahn v. Love*, 321 S.W.3d 517, 523–24 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). The burden then shifts to the nonmovant to present evidence raising a genuine issue of material fact as to each of the elements specified in the motion. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006); *Hahn*, 321 S.W.3d at 524. If the nonmovant fails to produce evidence that raises a genuine issue of material fact, the trial court must grant the motion in favor of the movant. *King Ranch*, 118 S.W.3d at 750–51. A no-evidence summary judgment will be sustained on appeal "when (a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered by the nonmovant to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a mere scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact." *Id.* at 751 (quoting *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)).

Breach of Contract

Bexar-Mar and Schmid contend that the trial court erred in granting summary judgment on their cause of action for breach of contract because they introduced evidence sufficient to support each element of their claim.

A. Applicable Law

The essential elements of a breach of contract claim are (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages sustained as a result of the breach. *B & W Supply, Inc. v. Beckman*, 305 S.W.3d 10, 16 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). To form a valid contract, there must be (1) an offer; (2) acceptance in strict compliance with the terms of the offer; (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. *See DeClaire v. G&B McIntosh Family Ltd. P'ship*, 260 S.W.3d 34, 44 (Tex. App.—Houston [1st Dist.] 2008, no pet.).

The first three elements of contract formation are related. There must be a clear and definite offer followed by a clear and definite acceptance in accordance with the offer's terms. *See Levin Law Grp., P.C. v. Sigmon*, No. 14-08-01165-CV, 2010 WL 183525, at *3 (Tex. App.—Houston [14th Dist.] Jan. 21, 2010, pet. denied) (mem. op.); *Angelou v. African Overseas Union*, 33 S.W.3d 269, 278 (Tex. App.—Houston [14th Dist.] 2000, no pet.). A purported acceptance that changes or qualifies an offer's material terms constitutes a rejection and counteroffer rather than an acceptance. *See Knowles v. Wright*, 288 S.W.3d 136, 143 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (recognizing material terms of contract must be agreed

upon before contract may be enforced). "Meeting of the minds" describes the mutual understanding and assent to the agreement regarding the subject matter and the essential terms of the contract. *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex. 1992); *Potcinske v. McDonald Prop. Inv., Ltd*., 245 S.W.3d 526, 530 (Tex. App.—Houston [1st Dist.] 2007, pet. denied). The determination of a meeting of the minds, and thus offer and acceptance, is based on the objective standard of what the parties said and did and not on their subjective state of mind. *Baroid Equip., Inc. v. Odeco Drilling, Inc.*, 184 S.W.3d 1, 17 (Tex. App.—Houston [1st Dist.] 2005, pet. denied); *Angelou*, 33 S.W.3d at 278. In order to make this objective determination, we must necessarily review "the communications between the parties and . . . the acts and circumstances surrounding those communications." *Copeland v. Alsobrook*, 3 S.W.3d 598, 605 (Tex. App.—San Antonio 1999, pet. denied).

The question of what terms are essential to a contract is determined on a contract-by-contract basis, depending on the subject matter of the contract at issue. *T.O. Stanley Boot Co*., 847 S.W.2d at 221. Courts, including this one, have held that a term is material, or essential, if the contracting parties would reasonably regard it as a vitally important element of their bargain. *See Potcinske*, 245 S.W.3d at 531; *see also Gen. Metal Fabricating Corp. v. Stergiou*, 438 S.W.3d 737, 744 n.4, 5 (Tex. App.—Houston [1st Dist.] 2014, no pet.) ("Under Texas law, essential or material

terms are those that parties would reasonably regard as vitally important elements of their bargain.").

B. Analysis

Bexar-Mar and Schmid contend that the summary judgment evidence demonstrates that a valid contract was formed by the parties. They argue that Felderhoff communicated an incomplete offer to Schmid, and that the offer became complete when Harren set Schmid's compensation. They assert that Zoelch later changed the terms of the offer by advising that Combi Lift would operate the Houston office as a representative office, rather than a separate corporation, and that Schmid accepted the changes, prepared a consultant agreement commemorating the terms of the offer, and forwarded it to Zoelch. When Combi Lift again attempted to change the terms, Schmid objected. They contend that the consultant agreement, as prepared by Schmid, "constitutes Combi Lift's offer in its final form," and that "Schmid accepted this offer."

In response, Combi Lift contends that Bexar-Mar and Schmid have presented no evidence that a valid contract was formed. It argues that there is no evidence that it agreed to numerous terms in the consulting agreement, including an exclusivity agreement or a severance provision. Combi Lift assert that the parties were actively negotiating but they never agreed to the terms of, or entered into, a formal contract for services.

Throughout their brief, Bexar-Mar and Schmid assert that one of the material terms of the parties' agreement was the understanding that they would serve as Combi Lift's exclusive North American representatives. There is no evidence in the summary judgment record reflecting that the parties had a meeting of the minds regarding this term. The written proposal that Schmid forwarded to Felderhoff immediately following their meetings on May 31 and June 1, 2016—which Schmid testified included the terms the parties had discussed, except for salary—did not include an exclusivity agreement. The first reference to an exclusivity provision appears in Schmid's June 30, 2016 email to Zoelch. In that email, Schmid advised Zoelch that Combi Lift's decision to operate the Houston office as a representative office was not what he had agreed to but that he was still interested in moving forward as a commercial agent for Combi Lift. He further stated, "we must commit to this office being the sole rep for Combi, as of this moment there are 2 others in Houston pushing ships and to add another is confusing." Schmid's email shows that he was aware that Combi Lift was working with other companies in the U.S. at that time. On July 5, 2015, Zoelch responded with a summary of "the main points/actions to be done *in order to get started*," and stating "*[o]ur idea* is to setup Combi-Lift (Americas) as a rep/branch of Combi Lift GmbH for the time being. This *will be* the sole rep. No others." There is no evidence that the parties either agreed to an exclusivity agreement before July 5 or ever discussed the issue again after July 5.

On July 29, 2016, Schmid sent Combi Lift the "Contract for Services" that he had prepared, and which Bexar-Mar and Schmid contend constituted Combi Lift's offer in its final form. The agreement did not include an exclusivity agreement.

Similarly, there is no evidence that Combi Lift agreed to the severance provision included in the "Contract for Services." In his affidavit, Schmid testified that the June 1, 2016 written proposal he sent to Felderhoff "included most of the terms [the parties] had discussed, omitting only the salary I would receive as a Combi Lift employee." The written proposal makes no mention of a severance provision. The communications between Schmid and Combi Lift between June 1 and July 29, 2016 also make no reference to a severance provision. On July 29, 2016, Schmid forwarded the "Contract for Services," which included a severance provision, to Combi Lift. The same day, Schmid emailed Zoelch, asking "if there are any major changes to the consulting agreement which you are thinking about (ie if we are *still negotiating* at this point), please let me know the key points." Zoelch responded that he was making comments on the Word version, and that Combi Lift's legal counsel still needed to review and approve it. On August 3, 2016, Muller sent Schmid a redlined version of the document which reflected numerous changes, including changes to the severance provision. Schmid objected to the changes and ultimately refused to sign the revised version.

Rather than establishing a mutual understanding and assent between the parties regarding the material terms of an agreement, the summary judgment evidence shows that the parties were still in the process of negotiating a formal contract to govern their anticipated long-term business relationship, but that they were unable to agree on the terms. While the evidence shows that Bexar-Mar and Schmid provided some services to Combi Lift, and that Combi Lift paid them for those services, there is no evidence that Combi Lift agreed to either a severance provision or an exclusivity agreement. *See Clarent Energy Servs., Inc. v. Leasing Ventures, LLC*, No. 01-18-00821-CV, 2020 WL 1173706, at *9 (Tex. App.—Houston [1st Dist.] Mar. 12, 2020, no pet.) (mem. op.) ("By stating that the parties had a deal in principle and using other equivocal language, such as recognizing that there remained details to work out that 'should' be simple to address, counsel's statement does not demonstrate a meeting of the minds on the material terms as a matter of law, but could be interpreted as recognizing the continued negotiations of the parties."); *see also Baroid Equip., Inc.*, 184 S.W.3d at 17 (noting parties must have meeting of minds and must communicate consent to essential terms of alleged agreement); *Angelou*, 33 S.W.3d at 279 ("The parties must agree to the same thing, in the same sense, at the same time.").

We conclude that Bexar-Mar and Schmid failed to establish a meeting of the minds between the parties as a matter of law. *Leonard v. Knight*, 551 S.W.3d 905,

909 (Tex. App.—Houston [14th Dist.] 2018, no pet.). The trial court properly granted summary judgment in favor of Combi Lift on Bexar-Mar and Schmid's breach of contract claim. We overrule Bexar-Mar and Schmid's first issue.

Fraud and Fraudulent Inducement

In their second and third issues, Bexar-Mar and Schmid contend that the trial court erred in granting summary judgment in favor of Combi Lift on their fraud and fraudulent inducement claims because they presented more than a scintilla of evidence on each element of their claims.

A. Applicable Law

To establish a cause of action for fraud, the plaintiff must demonstrate each of the following elements: (1) the defendant made a material representation; (2) the representation was false; (3) when the representation was made, the defendant knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) the defendant made the representation with the intent that the plaintiff should act upon it; (5) the plaintiff acted in reliance on the representation; and (6) the plaintiff thereby suffered an injury. *See Zorrilla v. Aypco Constr. II, LLC*, 469 S.W.3d 143, 153 (Tex. 2015). A representation is material if "a reasonable person would attach importance to [it] and would be induced to act on the information in determining his choice of actions in the transaction in question." *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 337 (Tex. 2011).

Fraudulent inducement is a particular species of fraud that arises only in the context of a contract and requires the existence of a contract as part of its proof. *Haase v. Glazner*, 62 S.W.3d 795, 798 (Tex. 2001); *Wilmot v. Bouknight*, 466 S.W.3d 219, 227 (Tex. App.—Houston [1st Dist.] 2015, pet. denied). Thus, with a fraudulent inducement claim, the elements of fraud must be established as they relate to an agreement between the parties. *Haase*, 62 S.W.3d at 798–99.

B. Analysis

On appeal, as they did in the trial court below, Bexar-Mar and Schmid contend that Combi Lift made a material misrepresentation of fact when it represented to Schmid that Bexar-Mar and Schmid would be Combi Lift's sole presence in North America. In his affidavit, Schmid testified that Felderhoff made the representation to him during their meetings on May 31 and June 1, 2016, and that Felderhoff "assured me that were I to set up a Combi Lift presence in Houston, my operation would be Combi Lift's only presence in North America." Schmid further testified that Zoelch made the same representation in writing. In response to Schmid's June 30 email stating "we must commit to this office being the sole rep for Combi," Zoelch sent an email on July 5 setting forth a summary of "the main points/actions to be done in order to get started," and stating "[o]ur idea is to setup Combi-Lift (Americas) as a rep/branch office for Combi Lift GmbH for the time being. This will be the sole rep. No others." Schmid testified that "[h]ad I known that my

Houston operation would not have been Combi Lift's sole presence in North America and that there would be two other Combi Lift sales agents in Houston, I would never have agreed to open the Houston office and abandoned Bexar Mar's customers."

In response, Combi Lift argues that "Felderhoff's alleged assurance that [Bexar-Mar and Schmid] attribute to Felderhoff concerned what could happen in the future, provided the parties came to terms and proceeded with their business relationship." They argue that there is no evidence that Felderhoff's assurance was a representation of material fact or, if it was, that Felderhoff knew it was false at that time.

Viewing the evidence in the light most favorable to Bexar-Mar and Schmid, we conclude that they presented more than a scintilla of evidence that Combi Lift made a material representation of fact that Bexar-Mar and Schmid would be its sole presence in North America. *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (2004). We now consider whether Bexar-Mar and Schmid presented any evidence showing that Combi Lift knew the representation was false when it was made or made it recklessly without any knowledge of the truth and as a positive assertion.

A promise of future performance is actionable in fraud only if, at the time the promise was made, the promisor intended to deceive and had no intention of performing. *See Aquaplex, Inc. v. Rancho La Valencia, Inc*., 297 S.W.3d 768, 774

(Tex. 2009) (per curiam). Showing that a party had no intent to perform "is not easy," as such matters are not usually susceptible to direct proof. *See Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 305 (Tex. 2006). A party must present evidence relevant to intent at the time the representation was made; demonstrating failure to perform a contract is not sufficient to support a claim of fraud. *See Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 48 (Tex. 1998).

Bexar-Mar and Schmid argue that Combi Lift knew that its representation was false at the time it was made because Combi Lift was aware that others represented Combi Lift in the Houston area and it had no intention of ceasing that representation, as promised. In support of their contention, they point to Schmid's June 30 email to Zoelch advising him that there were two other people in Houston selling services on behalf of Combi Lift and Zoelch's response that Bexar-Mar and Schmid "will be the sole rep." They also argue that Combi Lift knew who was brokering its services in North America, as evidenced by the August 2016 email exchange between Lenge and employees of AIMS, on which Schmid was copied, explaining the different roles that AIMS and Bexar-Mar would perform on Combi Lift's behalf, and Lenge's November 1, 2016 letter to AIMS and Schmid reiterating their distinct roles and different market segments.

The evidence does not demonstrate that Combi Lift had a present intent to deceive Bexar-Mar and Schmid when Combi Lift represented that they would be its sole presence in North America. Zoelch's and Felderhoff's representations contemplated a promise to perform in the future. The fact that Combi Lift knew it had other representatives in North America when it made the representation does not demonstrate that Combi Lift knew its representation of future performance was false when it was made. Stated differently, the summary judgment evidence does not establish that Combi Lift intended to deceive Bexar-Mar and Schmid when it made the promise and that it had no intention of performing. *See Aquaplex*, 297 S.W.3d at 774; *Formosa Plastics Corp.*, 960 S.W.2d at 48 (stating party must present evidence relevant to intent at time representation was made). Further, we note that Schmid was aware of Combi Lift's relationship with AIMS as he was either copied on, or was a recipient of, the communications between Combi Lift and AIMS.

The trial court properly granted summary judgment on Bexar-Mar and Schmid's fraud claim. *See* TEX. R. CIV. P. 166a(i). Because Bexar-Mar and Schmid did not establish the elements of their fraud claim, much less as they relate to an agreement with Combi Lift, the trial court properly granted summary judgment on their fraudulent inducement claim. See *Haase*, 62 S.W.3d at 798–99 (plaintiff must establish elements of fraud as they relate to agreement between parties to prove

fraudulent inducement). We overrule Bexar-Mar and Schmid's second and third issues.

Negligent Misrepresentation

Bexar-Mar and Schmid argue that the trial court erred in granting summary judgment on their negligent misrepresentation claim because they presented evidence raising a genuine issue of material fact as to each element of their claim.

A. Applicable Law

To prevail on a cause of action for negligent misrepresentation, a plaintiff must show that (1) the defendant made a representation in the course of its business or in a transaction in which it has a pecuniary interest; (2) the defendant supplied "false information" for the guidance of others in their business; (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information; and (4) the plaintiff suffered pecuniary loss by justifiably relying on the representation. *See JPMorgan Chase Bank, N.A. v. Orca Assets G.P., L.L.C.*, 546 S.W.3d 648, 654 (Tex. 2018). The term "false information," as used in the elements of a negligent misrepresentation claim, means a misstatement of existing fact, not a promise of future conduct. *See Fed. Land Bank Ass'n v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1991); *Miller v. Raytheon Aircraft Co.*, 229 S.W.3d 358, 379 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

B. Analysis

Bexar-Mar and Schmid base their negligent misrepresentation claim on Felderhoff's and Zoelch's statements that Schmid and Bexar-Mar would be Combi Lift's sole presence in North America. They assert that the representation was material to Schmid's decision to work for Combi Lift exclusively and was made in the course of discussing Combi Lift's expansion into the North American market. They assert that Combi Lift had an interest in opening a Houston office and in having Bexar-Mar and Schmid act as its representative in North America.

Combi Lift contends that the statements upon which Bexar-Mar and Schmid rely are promises of future conduct rather than statements of existing fact and, therefore, are not actionable. We agree. Bexar-Mar and Schmid dispute this characterization and point out that "as early as June 30, 2016, Combi Lift was already double dealing with other North American competitors in contravention of the exclusive representation agreement and Combi Lift then continued encouraging [them] to perform under the agreement." However, the evidence showing that Combi Lift had other North American representatives at the time the statements were made does not alter the fact that the statements were a promise of future conduct rather than existing fact. *See Miller*, 229 S.W.3d at 380 (holding plaintiff's negligent misrepresentation claim failed as matter of law because statements relied upon—that all pilots would be offered opportunity to continue flying and "all pilot positions

will be retained and all pilots will be assured of their current flying positions and seniority"—were promises of future conduct rather than statement of existing fact); *Dallas Firefighters Ass'n v. Booth Research Grp., Inc*., 156 S.W.3d 188, 195 (Tex. App.—Dallas 2005, pet. denied) (holding statements about movement of ranks consisted of expectation of future conduct, not existing fact, and were not actionable); *Swank v. Sverdlin*, 121 S.W.3d 785, 802–03 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (concluding oral promises not to fire plaintiff, not to take control of company, and not to exercise stock options were promises of future conduct, not existing fact); *Allied Vista, Inc. v. Holt*, 987 S.W.2d 138, 141 (Tex. App.—Houston [14th Dist.] 1999, pet. denied) (holding representations that defendant would provide all equipment necessary to start Louisiana plant and would pay plaintiff $55,000 annually were promises of future conduct and not misrepresentations of existing fact). The trial court properly granted summary judgment on Bexar-Mar and Schmid's negligent misrepresentation claim. Accordingly, we overrule its fourth issue.[1]

[1] In light of our disposition, Combi Lift's cross-point complaining that the trial court erred in overruling its objections to certain portions of Schmid's summary judgment affidavit are moot.

Conclusion

We affirm the trial court's judgment.

Russell Lloyd
Justice

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