Affirmed and Memorandum Opinion filed November 9, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00268-CV

1993 GF PARTNERSHIP; CAMPBELL CAPITAL, LTD.; CHEVY CHASE PARTNERS, L.P.; PHILIP H. CORBOY, JR.; DORSAR PARTNERS, L.P.; STEPHEN L. FEINBERG; HURON INVESTORS PARTNERSHIP; LIBERATION INVESTMENTS JOINT VENTURE; JAMES M. MALLICK, AS TRUSTEE FOR THE J.M. MALLICK REVOCABLE TRUST DATED 8/26/87; JULIAN MICKELSON; PDM INVESTMENT CO., L.P.; JOHN SCHWEITZER; PHILIP W. SHALTZ; TST HOLDINGS, LLC; RONALD E. WARNER; ALL DERIVATIVELY ON BEHALF OF ST. JAMES MERCHANT BANKERS, L.P.; ANTAR & CO.; AND ST. JAMES CAPITAL PARTNERS, L.P.; Appellants

V.

SIMMONS & CO. INTERNATIONAL AND WARRIOR ENERGY SERVICES CORPORATION, Appellees

---

On Appeal from the 129th District Court
Harris County, Texas
Trial Court Cause No. 2004-70333B

MEMORANDUM OPINION

Appellants, 1993 GF Partnership; Campbell Capital, Ltd.; Chevy Chase Partners, L.P.; Stephen L. Feinberg; Huron Investors Partnership; Liberation Investments Joint

Venture; James M. Mallick, as Trustee for the J.M. Mallick Revocable Trust Dated 8/26/87; Julian Mickelson; PDM Investment Co., L.P.; John Schweitzer; Philip W. Shaltz; TST Holdings, LLC; Ronald E. Warner; all derivatively on behalf of St. James Merchant Bankers, L.P. ("SJMB"); Antar & Co.; and St. James Capital Partners, L.P. ("SJCP") appeal from a final judgment entered following the trial court granting motions for partial summary judgment filed by appellees, Simmons & Co. International ("Simmons") and Warrior Energy Services Corporation ("Warrior"). Finding no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Both SJMB and SJCP invested in Warrior, an oilfield services company, through a series of bridge loans until they ultimately owned a majority interest in Warrior. Charles Underbrink was the majority owner of the general partner of both limited partnerships throughout most of the relevant time period. The relationship between Warrior and Underbrink was rocky as Underbrink, seeking to maximize the value of the limited partnerships' investment in Warrior, prevented several potential "merger" deals from going through.[1] Eventually, the relationship reached the point where the limited partnerships desired to liquidate their investments in Warrior and Warrior management wanted to get rid of the limited partnerships' controlling interest in Warrior. This resulted in the parties (the two limited partnerships, Underbrink, who also was a significant investor in Warrior, and Warrior) negotiating and entering into three recapitalization agreements ("the Recap Agreements"). Under the terms of the Recap Agreements, Warrior agreed to enter into a "Secondary Public Offering" ("SPO")[2] where Warrior would issue and sell stock and would then use the proceeds of that stock sale to purchase all of the limited

[1] It was as a result of Warrior's efforts to merge with another entity that Simmons entered the scene. Simmons is an investment banking company with its base in Houston that specializes in the area of petroleum businesses. Warrior retained Simmons to assist in the merger process.

[2] There was some dispute as to whether this term is an accurate description of what Warrior agreed to do in the Recap Agreements, however, since the parties all used this term we do so as well.

partnerships' interests in Warrior.[3] Warrior agreed that, for each share of stock sold in the public offering, Warrior would buy one share of stock from the limited partnerships. The limited partnerships agreed to sell all of their interest in Warrior as long as the price per share was at least $7.50.[4]

The provisions of the Recap Agreements relevant to this appeal include paragraph F of the "Background," which provides:

> F. The Holder[5] desires to convert the Holder Notes into Conversion Shares and transfer and assign to the Company the Holder Warrants, SJMB Shares and Conversion Shares on the terms set forth herein.

Then, in the "Agreement" section:

> 2.1 *Commercially Reasonable Efforts of the Company.* The Company[6] agrees that it shall promptly after the expiration of the Exchange Period use its commercially reasonable efforts to complete an Underwritten Offering. Such commercially reasonable efforts shall include, among other things, contacting and soliciting prospective investment bankers to act as underwriters or agents of the Company in effecting such transaction, providing to the prospective investment bankers such financial and other information concerning the Company as may be reasonably requested, providing reasonable access to the management of the Company, its advisors and the Company's facilities as is requested by the prospective investment bankers, fulfilling the Company's obligations set forth in this Article II and otherwise enabling such investment bankers to have the opportunity to engage in "due diligence" activities with respect to the Company and its management and completing the Underwritten Offering on such terms as will yield Net Proceeds, after deducting such amount of Net Proceeds as are to be retained by the Company for its corporate purposes, sufficient to enable

[3] Warrior also agreed to purchase all of Underbrink's interest, however, Underbrink is not a party to this appeal, in fact, he was a defendant in the underlying lawsuit.

[4] The actual process would be as follows: the limited partnerships would convert their investment in Warrior into shares of stock, which Warrior would then purchase for at least $7.50 and would then retire. None of the shares of stock owned by the limited partnerships were sold in the SPO.

[5] "Holder" refers to the specific limited partnership entering into the Recap Agreement with Warrior, in the quoted language SJMB, however, the pertinent language in each Recap Agreement is the same.

[6] "Company" refers to Warrior.

the Company to purchase all the Conversion Shares, SJMB Shares and such number of Exchange Share equivalents as are to be purchased by the Company, subject to paragraph 2.2 hereof, at the Closing Time of the Underwritten Offering.

2.2 *Terms of Underwritten Offering.* If the managing underwriter[7] of the Underwritten Offering concludes in its reasonable judgment that the number of shares to be registered for selling shareholders would materially adversely affect such offering and that the number of Conversion Shares and Exchange Shares to be registered in such offering shall be reduced, the Holder, St. James Capital Partners, L.P., and each of the Underbrink Family Entities, under the terms of this Agreement and the other Recapitalization Agreements such persons have into with the Company, severally and not jointly agree that the number of Conversion Shares, SJMB Shares and Exchange Share Equivalents to be purchased from them by the Company at the Closing Time shall be reduced in accordance with Addendum C hereto to the extent necessary in order that the number of Conversion Shares and Exchange Shares to be registered for sale in the Underwritten Offering by the Other Derivatives Holders will no longer, in the reasonable judgment of the managing underwriter, materially adversely affect the Underwritten Offering.

2.3 *Underwritten Offering Defined.* An "Underwritten Offering" means a sale of such number of Shares of Common Stock of the Company conducted on such terms and conditions, in compliance with the provisions of the Securities Act, and at such price per share of Common Stock and on other terms and conditions as the Company may in its sole and exclusive discretion determine to complete and as will result in sufficient Net Proceeds, subject to paragraph 2.2. hereof, to enable the Company to purchase not less than all of the Conversion Shares, SJMB Shares and Exchange Share Equivalents to be sold by the Underbrink Family Entities and the St. James Partnerships and purchased by the Company, provided, however, that the Underbrink Family Entities and the St. James Partnerships shall only be obligated to sell their Conversion Shares, SJMB Shares and Exchange Share Equivalents to the Company if the purchase price paid per Conversion Share, SJMB Share and Exchange Share Equivalent is not less than [$7.50] per share (before reflecting stock split, divisions, reverse stock splits or share combinations)….

[7] Raymond James.

3.1 *Sale of Conversion Shares at the Closing Time of the Underwritten Offering.* Provided that the Net Price Per Share to be paid to the Holder by the Company at the Closing Time of the Underwritten Offering is not less than [$7.50] per share (before reflecting stock splits, divisions, reverse stock splits or share combinations), the Holder agrees to sell to the Company the Holder's Conversion Shares and the Company agrees to purchase at the Closing Time all the Holder's Conversion Shares out of the Net Proceeds of the Underwritten Offering and in accordance with Article I hereof. The Holder agrees to accept the Net Price Per Share determined as provided in paragraph 2.5 hereof for Holder's Conversion Shares, provided that the Net Price Per Share is not less than [$7.50] per share (before reflecting stock splits, divisions, reverse stock splits or share combinations). …

3.3 *Sale of Warrants and SJMB Shares at Closing Time of Underwritten Offering.* Provided that the Net Price Per Share to be paid to the Holder by the Company at the Closing Time of the Underwritten Offering is not less than [$7.50] for each Warrant Unit and SJMB Share sold (before reflecting stock splits, divisions, reverse stock splits or share combinations) and subject to paragraph 2.2 hereof, the Holder hereby agrees to sell to the Company the Holder's Warrants and SJMB Shares and the Company agrees to purchase at the Closing Time all the Holder's Warrants and SJMB Shares out of the Net Proceeds of the Underwritten Offering. At the Closing Time, Holder agrees to execute and deliver to the Company, at the location set as the place for the closing the Underwritten Offering, the warrant assignment attached hereto as Addendum D (the "Warrant Assignment") with respect to the Warrants sold to the Company and a Stock Assignment with respect to the SJMB Shares sold to the Company. The Holder agrees to accept the Net Price Per Share as the purchase price for each Warrant Unit and SJMB Share sold determined as provided in paragraph 2.5 hereof for its Warrants and SJMB Shares, provided that the Net Price Per Share is not less than [$7.50] for each Warrant Unit and SJMB Share (before reflecting stock splits, divisions, reverse stock splits or share combinations). …

6.5 *Holder's Acknowledgement.* The Holder acknowledges that the Company now possesses and may hereafter possess certain non-public information concerning the Company and its prospects and proposed transactions beyond the transactions contemplated in this Agreement that may or may not be independently known to the Holder or other Derivatives Holders (the "Company Non-Public Information") which information may constitute material information. The Holder agrees to the terms and conditions of this Agreement notwithstanding that it is aware that Company Non-Public Information may exist and that the Company has not disclosed

any Company Non-Public Information to Holder or, if such information has been disclosed, it has been disclosed under the terms of a confidentiality agreement. The Holder acknowledges that it is a sophisticated investor and is acting independently with respect to the transactions set forth in this Agreement and that the Company has no obligations to the Holder to disclose such Company Non-Public Information and it has no fiduciary obligations to the Holder. Additionally, the Holder acknowledges that it has adequate information concerning the transactions contemplated in this Agreement, and the business and financial condition of the Company and its prospects, to make an informed decision regarding entering into this Agreement, and it has done so independently and without reliance upon the Company and based on such information as the Holder has deemed appropriate, made its own analysis and decision to enter into this Agreement with the Company. Holder understands and acknowledges that the market value of the Company's shares of Common Stock after the Closing Time of the Underwritten Offering may exceed the price realized by the Holder out of the Net Proceeds of the Underwritten Offering. …

7.1 *Governing Law*. This Agreement shall be governed in all respects by the laws of the State of Delaware. …

7.8 *Enforcement of Agreement.* Holder acknowledges and agrees that the Company could be damaged irreparably if any of the provisions of this Agreement are not performed in accordance with their specific terms. Accordingly, the Holder agrees that (i) it will waive, in any action for specific performance, the defense of adequacy of a remedy at law, and (ii) in addition to any other right or remedy to which the Company may be entitled, at law or in equity, the Company will be entitled to enforce any provision of this Agreement by a decree of specific performance and to temporary, preliminary and permanent injunctive relief to prevent breaches or threatened breaches of any of the provisions of this Agreement, without posting any bond or other undertaking.

To carry out the SPO, Warrior retained several underwriters, including Simmons. The chief underwriter was Raymond James. According to the appellate record, the underwriters would purchase the new shares of stock from Warrior and then sell those shares on the open market. The difference between the amount the underwriter initially paid for the stock and the amount it, in turn, sold the stock for on the open market, the so called aftermarket, would constitute the underwriters' payment for serving as an

underwriter. The chief underwriter, in this instance Raymond James, maintained the book of orders and had the responsibility for setting the initial price per share that would be paid to Warrior for the new shares of stock.

The parties signed the Recap Agreements in October of 2005. In early April of 2006, Raymond James set the share price range for the proposed SPO of Warrior stock at $20.00 to $23.00. This range was publicly disclosed in the S-1 registration statement filed with the Securities and Exchange Commission on April 3, 2006. The so-called "Road Show" then took place and a great deal of interest in the SPO was revealed. On April 18, 2006, during the "Pricing Call," Raymond James employee Bonnie Bishop set the price per share at $23.50.[8] Appellants contend that appellees committed fraud and violated the Texas Securities Act ("TSA")[9] during the Pricing Call when, in response to questions from Underbrink about the possibility of getting a higher price per share, they allegedly represented that $23.50 was the "best deal" they could get.[10] At this price, Warrior would be able to buy out the entire interest of the limited partnerships and Underbrink. Once Bishop set the price, Warrior had the option to either accept or reject this price. Warrior accepted the price.

The SPO was, by all accounts, a success because, according to the summary judgment evidence, the timing was nearly perfect as Warrior ultimately paid the limited partnerships $142 million for their interests in Warrior. Following the SPO, the price of Warrior stock quickly rose to a high of $31.50 per share before dropping to a price of less than $15.00 per share by the summer. Despite the apparent success of the SPO, appellants were dissatisfied with the amount of return they had received on their investment.

---

[8] The $23.50 price was the maximum price the stock could be sold for while still achieving the goal of buying out all of the limited partnerships' interest in Warrior. Raymond James determined this price.

[9] Tex. Rev. Civ. Stat. Ann. art. 581-1 *et seq* (West Supp. 2009).

[10] Appellants use the term "best deal" and "best price" interchangeably.

That dissatisfaction found an outlet in litigation that started as a derivative suit filed by the limited partners of SJMB against the auditor of that limited partnership. From that start, the litigation grew to involve the dispute at issue in this appeal as well as parties and issues not relevant to this appeal. Eventually, a second limited partnership, SJCP, intervened in the suit against appellees. Appellants were upset with the result of the sale of their investment in Warrior and brought suit against appellees alleging (1) violations of the TSA, (2) breach of contract against Warrior, (3) statutory and common-law fraud, and (4) tortious interference with contract against Simmons.[11] Eventually, both Simmons and Warrior moved for summary judgment on each cause of action asserted against them. The trial court granted appellees' motions but only on specified grounds. The trial court then severed those causes of action and entered a final judgment paving the way for this appeal.[12]

DISCUSSION

In four issues on appeal, appellants challenge the trial court's granting of Warrior and Simmons' motions for summary judgment on each of the causes of action appellants asserted against appellees.

I. The Standard of Review.

This case involves summary judgment motions asserting both no-evidence and traditional grounds. In a traditional motion for summary judgment, the movant has the burden to show there is no genuine issue of material fact and it is entitled to judgment as a matter of law. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985). In determining whether there is a genuine fact issue precluding summary judgment, evidence favorable to the non-movant is taken as true and the reviewing court makes all reasonable

[11] Appellants do not appeal the trial court's summary judgment on their tortious interference with contract claims and therefore they are not at issue in this appeal.

[12] The causes of action against the remaining defendants ultimately went to trial and the jury found against the plaintiffs and a take-nothing judgment was entered.

inferences and resolves all doubts in the non-movant's favor. *Id.* at 548–49. If there is no genuine issue of material fact, summary judgment should issue as a matter of law. *Haase v. Glazner*, 62 S.W.3d 795, 797 (Tex. 2001). A defendant who conclusively negates at least one of the essential elements of a plaintiff's cause of action is entitled to a summary judgment on that claim. *IHS Cedars Treatment Ctr. of DeSoto, Tex., Inc. v. Mason*, 143 S.W.3d 794, 798 (Tex. 2004). A defendant is entitled to summary judgment on an affirmative defense if the defendant conclusively proves all the elements of the affirmative defense. *Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999). Once a defendant establishes its right to summary judgment, the burden then shifts to the plaintiff to come forward with competent controverting summary judgment evidence raising a genuine issue of material fact. *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995).

In a no-evidence motion for summary judgment, the movant must specifically state the elements as to which there is no evidence. *Walker v. Thomasson Lumber Co.*, 203 S.W.3d 470, 473–74 (Tex. App.—Houston [14th Dist.] 2006, no pet.). The trial court must grant the motion unless the non-movant produces summary judgment evidence raising a genuine issue of material fact on each of the challenged elements. Tex. R. Civ. P. 166a(i). However, the non-movant is not required to marshal its proof; its response need only point out evidence that raises a fact issue on the challenged elements. *Hamilton v. Wilson*, 249 S.W.3d 425, 426 (Tex. 2008).

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. *Mathis v. Restoration Builders, Inc.*, 231 S.W.3d 47, 50 (Tex. App.—Houston [14th Dist.] 2007, no pet.). We review the entire record in the light most favorable to the non-movant, indulging every reasonable inference and resolving any doubts against the motion. *City of Keller v. Wilson*, 168 S.W.3d 802, 824 (Tex. 2005). We sustain a no-evidence summary judgment if (1) there is a complete

absence of proof of a vital fact; (2) the rules of law or evidence bar the court from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a scintilla; or (4) the evidence conclusively establishes the opposite of a vital fact. *Walker*, 203 S.W.3d at 474. Less than a scintilla of evidence exists when the evidence offered to prove a vital fact is so weak it does no more than create the mere surmise or suspicion of its existence and, in legal effect, is no evidence. *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004). More than a scintilla of evidence exists when the evidence rises to a level that would enable reasonable and fair-minded people to differ in their conclusions as to the existence of the vital fact. *Id.*

We review a trial court's summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). In an appeal from a summary judgment, the issues an appellate court may review are those the movant actually presented to the trial court. *Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 625 (Tex. 1996). An appellate court is not precluded from affirming the judgment on other grounds the parties properly raised before the trial court, if the trial court grants summary judgment specifically on fewer than all grounds asserted. *Id.* To preserve a ground for appellate review, a party need only raise the ground in the trial court and then present it in a cross-issue on appeal. *Kelly v. Brown*, 260 S.W.3d 212, 216 (Tex. App.—Dallas 2008, pet. denied). Finally, if an appellant fails to challenge each independent ground on which a summary judgment is based, the summary judgment should be affirmed. *Adams v. First Nat'l Bank of Bells/Savoy*, 154 S.W.3d 859, 875 (Tex. App.—Dallas 2005, no pet.).

II. Did the trial court err when it granted Warrior's motion for summary judgment on appellants' TSA claims?

In their first issue, appellants contend the trial court erred when it granted Warrior's motion for summary judgment on appellants' TSA causes of action. Appellants contend Warrior violated Article 581-33(B) when it allegedly misrepresented that $23.50 was the

best price that could be obtained for Warrior's stock in the SPO. *See* Tex. Rev. Civ. Stat. Ann. art. 581-33(B) (West Supp. 2009). Article 581-33(B) provides, in pertinent part:

> Liability of Buyers. A person who offers to buy or buys a security (whether or not the security or transaction is exempt under Section 5 or 6 of this Act) by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, is liable to the person selling the security to him, who may sue either at law or in equity for rescission or for damages if the buyer no longer owns the security.

Id.

In addition, the TSA includes a definition of "sale:"

> The terms "sale" or "offer for sale" or "sell" shall include every disposition, or attempt to dispose of a security for value. The term "sale" means and includes contracts and agreements whereby securities are sold, traded, or exchanged for money, property or other things of value, or any transfer or *agreement to transfer*, in trust or otherwise.

See Tex. Rev. Civ. Stat. Ann. art. 581-4(E) (West Supp. 2009) (emphasis added).

In *Pitman v. Lightfoot*, a case involving similar facts, the San Antonio court of appeals examined article 581-33(B). *Pitman v. Lightfoot*, 937 S.W.2d 496 (Tex. App.—San Antonio 1997, writ denied). The *Pitman* court determined that while the TSA does not define "offers to buy or buys," the commentary to article 581-33(B) "states that the provision is to be construed similarly to article 581-33(A), which provides remedies for defrauded buyers of securities." *Id.* at 531. It then concluded that since "sale," "offer to sell," and "sell" are so broadly defined, the terms "offer to buy" or "buy" should "include every acquisition of, or attempt to acquire, a security for value." *Id.* It then noted that article 581-33(A) has been construed to mean that the alleged misrepresentation must relate to the security and induce the purchase of that security. *Id.* The San Antonio court of appeals then held that, under article 581-33(B) of the TSA, the alleged untruth or material omission must have related to the security and "induced the purchase thereof."

Id. Finally, the court concluded that alleged omissions and misrepresentations that occur only after the sale cannot be the "means" by which a person "offers to buy or buys" the security. *Id.* at 532.

The Recap Agreements were signed on October 6, 2005. The alleged misrepresentations underlying appellants' TSA claims against Warrior occurred during the April 18, 2006 "Pricing Call" during which Raymond James determined that the offering price for Warrior's newly issued stock would be $23.50 a share. The evidence is undisputed that a few days after the "Pricing Call," the SPO was a great success and the amount ultimately paid to appellants by Warrior as a result of the SPO far exceeded the $7.50 per share minimum. Based on that timeline of events, Warrior asserted it was entitled to summary judgment because appellants had committed to sell their interests in Warrior on October 6, 2005 and since the alleged misrepresentations occurred after that date, they could not be the means by which a person offers to buy or buys a security. In response, appellants contend that since it was not known until the "Pricing Call" that the offering price would meet the $7.50 per share minimum price, they had not made a commitment to sell and the alleged misrepresentations could still be the means by which a person offers to buy or buys a security.[13]

[13] Section 3.1 of the Recap Agreements states: "Provided that the Net Price Per Share to be paid to the [appellant] by [Warrior] at the Closing Time of the Underwritten Offering is not less than [$7.50] per share …, [appellant] agrees to sell to [Warrior] [appellant's] Conversion Shares… out of the Net Proceeds of the Underwritten Offering." Despite the fact that conditions precedent are disfavored and courts will not construe a contract provision as a condition precedent unless compelled to do so by language that may be construed no other way, we conclude this language constitutes a condition precedent. *See Criswell v. European Crossroads Shopping Ctr.*, 792 S.W.2d 945, 948 (Tex. 1992) (Terms such as "'if,' 'provided that,' 'on condition that,' or some similar phrase of conditional language must normally be included" to create a condition precedent). A condition precedent may be either a condition to the formation of a contract or an obligation to perform an existing agreement. *Hohenberg Brothers Co. v. George E. Gibbons & Co.*, 537 S.W.2d 1, 3 (Tex. 1976). Conditions may, therefore, relate to either the formation of contracts or to the liability under them. *Id.* If a condition is a condition precedent to the formation of a contract, then no binding contract will arise until the specified condition has occurred or been performed. *Fred v. Ledlow*, 309 S.W.2d 490, 491 (Tex. Civ. App.—San Antonio 1958, no writ); *Continental Transfer & Storage Co. v. Swann*, 278 S.W.2d 413, 415 (Tex. Civ. App.—Amarillo 1954, writ ref'd n.r.e.). On the other hand, conditions precedent to an obligation to perform are those acts or events which occur subsequent to the making of a contract and which must occur before there is a right to immediate

Having examined the language of the Recap Agreements, and considering that under article 581-33(B), "offer to buy" or "buy" includes every acquisition of, attempt to acquire, or agreement to transfer, a security for value, we hold that appellants, on October 6, 2005, contractually agreed to sell all of their interest in Warrior at a price to be determined solely and exclusively by Warrior, provided only that the price per share was at least $7.50.[14] *Pitman*, 937 S.W.2d at 531. Therefore, since the alleged misrepresentations occurred after October 6, 2005, they could not be the "means" by which Warrior offered to buy or bought appellants' interests in Warrior. *Pitman*, 937 S.W.2d at 531. We overrule appellants' first issue on appeal and affirm the trial court's summary judgment on appellants' TSA causes of action against Warrior.

III. Did the trial court err when it granted Simmons' motion for summary judgment on appellants' TSA claims?

The TSA establishes both "primary" and "secondary" liability for securities violations. *Sterling Trust Co. v. Adderley*, 168 S.W.3d 835, 839 (Tex. 2005). "Primary" liability arises when a person offers to sell or buy a security "by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to

---

performance and before there is a breach of a contractual duty. *Hohenberg Brothers Co.*, 537 S.W.2d at 3. If the condition is not fulfilled, the contract or obligation attached to the condition cannot be enforced. *CDI Engineering Group, Inc. v. Administrative Exchange, Inc.*, 222 S.W.3d 544, 548 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). In essence, appellants assert that meeting the minimum price of $7.50 per share constitutes a condition precedent to the formation of the Recap Agreements. We disagree with this assertion and instead conclude that the $7.50 minimum price per share is a condition precedent to appellants' existing contractual duty to sell to Warrior all of their interests in Warrior and not a condition precedent to the formation of the contracts. *See Roberts v. Clark*, 188 S.W.3d 204, 210–11 (Tex. App.—Tyler 2002, pet. denied).

[14] Our holding is reinforced by cases construing federal securities laws. *See In re ExxonMobil Corp. Sec. Litig.*, 500 F.3d 189, 200 n.14 (3d Cir. 2007) (exchange of securities occurs not on the date they formally change hands, but on the date the parties become committed to exchange the securities); *Grondahl v. Merritt & Harris, Inc.*, 964 F.2d 1290, 1291–94 (2d Cir. 1992) (the date when the parties committed themselves to complete the sale was the date they entered into two buy-sell agreements, though the stock was not valuated or paid for until six years later); *Helman v. Murry's Steaks, Inc.*, 742 F.Supp. 860, 869–70 (D. Del. 1990) ("[O]nce the parties make the investment decision and enter into a binding commitment to perform the transaction, the purchase and sale is complete.").

make the statements made, in the light of the circumstances under which they are made, not misleading." *Id.* In contrast, secondary liability is derivative liability for another person's securities violation either because they are a "control person" or because they "aided" the seller or buyer of the securities. *Id.*

Appellants alleged that Simmons had both primary liability for its own alleged securities violations as well as secondary liability for Warrior's alleged securities violations. *See* Tex. Rev. Civ. Stat. Ann. art. 581-33(B) & (F). Simmons moved for summary judgment as to both, which the trial court granted on specified grounds.

A. The trial court correctly granted summary judgment on appellants' primary liability claims based on the timing of the alleged misrepresentations.

Like Warrior, Simmons argued it was entitled to summary judgment on appellants' primary liability claims because all of the alleged misrepresentations occurred after appellants had made their investment decision by entering into the Recap Agreements. For the same reasons stated above in regard to appellants' TSA claims against Warrior, we overrule appellants' second issue as it relates to appellants' primary liability claims against Simmons.

B. The trial court correctly granted summary judgment on appellants' secondary liability claims against Simmons.

Appellants also asserted an article 581-33(F) secondary liability claim against Simmons. "Secondary liability is derivative liability for another person's securities violation; it can attach to either a control person, defined as '[a] person who directly or indirectly controls a seller, buyer, or issuer of a security,' or to an aider, defined as one 'who directly or indirectly with intent to deceive or defraud or with reckless disregard for the truth or the law materially aids a seller, buyer, or issuer of a security.'" *Sterling Trust Co.*, 168 S.W.3d at 839 (quoting Tex. Rev. Civ. Stat. Ann. art. 581-33(F)). "Both control persons and aiders are jointly and severally liable with the primary violator 'to the same

extent as if [they] were' the primary violator." *Id.* Because secondary liability is derivative liability for another person's securities violation, before a party, such as Simmons, can be held secondarily liable, there must first be a primary violation. *Id.* As we have already determined there has been no primary violation of the TSA because the alleged misrepresentations underlying appellants' TSA causes of action occurred after appellants had committed to sell their entire interest in Warrior, we hold there can be no secondary liability based on those same alleged misrepresentations. We overrule appellants' second issue as it relates to appellants' secondary liability claims against Simmons.

IV. Did the trial court err when it granted Warrior's motion for summary judgment on appellants' breach of contract claims?

According to appellants, Warrior breached the Recap Agreements because it did not provide a commercially reasonable SPO. As part of their breach of contract cause of action, appellants alleged that Warrior intentionally under-priced the stock sold in the SPO in order to accomplish its allegedly unstated and undisclosed motive of buying out all of appellants' interests in Warrior. Warrior moved for summary judgment on these causes of action asserting two main arguments: (1) Warrior's goal of purchasing all of the appellants' interest in Warrior was expressly disclosed in the Recap Agreements; and (2) Warrior had no contractual obligation to obtain, and appellants had no contractual right to demand, a price greater than $7.50 per share. The trial court agreed with Warrior and granted its motion for summary judgment on that basis. As a result, in their third issue, appellants assert the trial court erred when it granted Warrior's motion for summary judgment on appellants' breach of contract causes of action.[15] We disagree.

[15] The Recap Agreements contain a choice of law provision stating they are governed by Delaware law. However, the parties, both in the trial court and here on appeal, all cite both Texas and Delaware case law and indicate there is no conflict between the laws of these two states. If there is no conflict, then there is no need to resolve a choice of law question. In addition, no choice of law issue was presented by either appellants or appellees in this appeal. Therefore, we need not address any choice of law issue. *See Young Refining Corp. v. Pennzoil Co.*, 46 S.W.3d 380, 385 (Tex. App.—Houston [1st Dist.] 2001, pet. denied)

In the Recap Agreements, appellants contractually agreed to convert all of their interest in Warrior into shares of stock and then to sell all of those shares to Warrior, provided that the price per share met the $7.50 minimum price. In return, Warrior agreed to use its commercially reasonable efforts to complete an Underwritten Offering, a defined term in the Recap Agreements, which would generate sufficient Net Proceeds, another term defined in the Recap Agreements, that would then enable Warrior to "purchase not less than all" of appellants' interest in Warrior. In addition, the Recap Agreements granted Warrior the sole and exclusive discretion to complete the Underwritten Offering at the price and upon the terms offered by the underwriters. Warrior's discretion was expressly subject to the $7.50 per share minimum price and was to be exercised to enable Warrior to "purchase not less than all" of appellants' shares of Warrior stock unless the managing underwriter, not Warrior, determined that the number of shares of Warrior stock to be sold in the Underwritten Offering needed to be reduced. Finally, appellants acknowledged in paragraph 6.5 of the Recap Agreements that, among other things, they were sophisticated investors and that the market value of Warrior's stock might rise after the closing of the Underwritten Offering and may exceed the price per share realized by appellants as a result of the Underwritten Offering. In other words, the Recap Agreements envisioned two separate transactions: first, an Underwritten Offering in which Warrior, through various underwriters, would sell newly issued shares of stock. The proceeds from this sale would then permit Warrior to complete the second transaction: the "purchase of not less than all" of appellants' Warrior stock at a price not less than $7.50 per share.

It is also important to note what the Recap Agreements do not contain. First, they do not contain any provision giving appellants the authority to rescind the deal if the price per share achieved in the Underwritten Offering exceeded the $7.50 minimum but for some undisclosed reason was not satisfactory to appellants. The Recap Agreements also do not contain a provision requiring Warrior to surrender their contractual right to "purchase not

---

(finding no necessity to decide which states's law applied absent a conflict of law on the issues presented).

less than all" of appellants' interest in Warrior in order to obtain a higher price per share in the Underwritten Offering. Finally, the Recap Agreements do not have a provision giving Warrior the authority to set the price per share in the Underwritten Offering; instead, the Recap Agreements only authorize Warrior, exercising its sole and exclusive discretion, to accept or reject the price per share determined by the managing underwriter.

We conclude Warrior proved as a matter of law that it complied with its contractual obligations. Warrior hired Raymond James as the managing underwriter, provided Raymond James and the other underwriters with all of the information they requested, and participated in the Road Show to generate interest in the Underwritten Offering. Once Raymond James determined the price per share in the Underwritten Offering would be $23.50, a price significantly higher than the contractual minimum of $7.50, Warrior exercised its sole and exclusive discretion to accept that price. Warrior then completed the SPO and paid appellants the net price per share, which appellants accepted.

We further conclude that appellants did not produce summary judgment evidence raising a genuine issue of material fact. Appellants rely heavily on their argument that Warrior breached the Recap Agreements by influencing Raymond James to set the price per share for the Underwritten Offering at a commercially unreasonable low price to enable Warrior to "accomplish its unstated and undisclosed motive of buying out all of the [appellants] shares." Even if we were to assume Warrior had a contractual duty to obtain a commercially reasonable price per share different from the $7.50 minimum specifically stated in the Recap Agreements, appellants' argument still fails because it flies in the face of the plain language of the Recap Agreements which expressly disclosed Warrior's goal of "purchasing not less than all" of appellants' ownership interests in Warrior.

In addition, appellants failed to introduce summary judgment evidence creating a fact issue regarding whether Warrior played any role in Raymond James' decision to set the price per share at $23.50, or whether Warrior even attempted to get Raymond James to set the price lower than the aftermarket was willing to pay in order to acquire all of

appellants' ownership interest in Warrior. Bonnie Bishop, the Raymond James employee responsible for setting the offering price, testified that she decided there was sufficient demand to set the offering price at $23.50 per share. She further testified that this price accomplished her objective of balancing the interests of Warrior and potential investors with a price that ensured proper aftermarket performance. Bishop also testified unequivocally that she alone determined the price offered to the Warrior pricing committee. Bishop further testified that a price higher than $23.50 was not appropriate as it could adversely affect the "overall performance of the transaction," especially the "after market follow through that we needed to make sure it traded well." Bishop also testified she did not believe that a higher price could have been obtained if the number of shares included in the offering were reduced. Appellants offered no summary judgment evidence controverting Bishop's testimony.

Finally, again assuming Warrior had a contractual duty to obtain a commercially reasonable price in the Underwritten Offering, appellants contend they raised a genuine issue of material fact on their breach of contract causes of action by citing to Charles Underbrink's answers to a line of questions during his deposition. The initial question asked of Underbrink was: "…in your experience would it be commercially reasonable for the company to intentionally offer shares of the … company at a lower price in order to take out a shareholder such as [appellants]?" Underbrink responded: "At a lower price—." This response was followed by the second question: "Than it could normally get in an offering?" Underbrink answered: "That — it doesn't seem like a commercially reasonable thing to do." We conclude Underbrink's testimony is insufficient to raise a genuine issue of material fact on appellants' breach of contract cause of action. This is so for several reasons, including (1) it is based on the assumption that Warrior set the price for the Underwritten Offering, which is not supported by the summary judgment record; (2) it is based on the assumption that there was a higher price acceptable to the underwriters than the price that was set, which is not supported by the summary judgment record; and (3) the

question does not take into account the express purpose of the Recap Agreements: Warrior "purchasing not less than all" of appellants' interest in Warrior.

Because we conclude Warrior proved as a matter of law that it complied with all of its contractual obligations and that appellants did not produce summary judgment evidence raising a genuine issue of material fact, we hold the trial court did not err in granting Warrior's motion for summary judgment on appellants' breach of contract cause of action. Therefore, we overrule appellant's third issue on appeal.

V. Did the trial court err when it granted appellees' motions for summary judgment on appellants' statutory and common law fraud claims?

Appellants also asserted common-law and statutory fraud causes of action against both appellees based on the same alleged misrepresentations discussed above. A fraud cause of action requires a party to establish that (1) a material misrepresentation was made; (2) the representation was false; (3) when the speaker made the representation he knew it was false or made it recklessly without knowledge of the truth and as a positive assertion; (4) the speaker made it with the intention that it should be acted upon by the party; (5) the party acted in reliance upon it; and (6) the party thereby suffered injury. *Lundy v. Masson*, 260 S.W.3d 482, 492 (Tex. App.—Houston [14th Dist.] 2008, pet. denied). The elements of statutory fraud are nearly identical to the elements of common-law fraud, except that statutory fraud under section 27.01 of the Texas Business and Commerce Code does not require proof of knowledge or recklessness as a prerequisite to recovery of actual damages. *See* Tex. Bus. & Com. Code Ann. § 27.01 (West 2009) (providing that a person who makes a false representation commits fraud and is liable for actual damages while a person who does so with actual awareness of the falsity of the representation is liable to the person defrauded for exemplary damages). Therefore, reliance is an element common to both common-law and statutory fraud causes of action.

In their motions, both appellees asserted they were entitled to summary judgment on appellants' fraud claims because they proved as a matter of law that appellants did not rely

on any statement or omission attributable to either appellee. The trial court agreed and granted both motions. In their fourth issue, appellants challenge the trial court's granting of appellees' motions for summary judgment on those claims. For the same reasons stated above in sections II and III of this opinion addressing appellants' TSA causes of action, we conclude appellees established as a matter of law that appellants could not have relied on the alleged misrepresentations as they occurred after appellants had entered into the Recap Agreements. Therefore the trial court correctly granted appellees' summary judgment on appellants' common-law and statutory fraud causes of action. We overrule appellants' fourth issue on appeal.

CONCLUSION

Having overruled each of appellants' issues on appeal, we affirm the trial court's final judgment.

/s/ John S. Anderson

Justice

Panel consists of Justices Anderson, Brown, and Christopher.