Reversed and Remanded and Memorandum Opinion filed November 15, 2012.

In The

Fourteenth Court of Appeals

NO. 14-11-01006-CV

INEOS USA LLC, Appellant

V.

BNSF RAILWAY COMPANY, Appellee

On Appeal from the 281st District Court
Harris County, Texas
Trial Court Cause No. 2010-07142

MEMORANDUM OPINION

In a single issue, INEOS USA LLC ("INEOS") argues that the trial court erred by granting BNSF Railway Company's ("BNSF") motion for summary judgment and denying INEOS's cross-motion for summary judgment. We reverse and remand.

I. BACKGROUND

INEOS produces plastic commodities and ships them from locations in Texas and Oklahoma. During 2006, INEOS contracted with railway carrier BNSF to transport

INEOS's plastics. INEOS and BNSF entered into a five-year transportation master contract ("Master Contract"), effective May 1, 2006 through April 31, 2011. Pursuant to provisions in the Master Contract, INEOS and BNSF intended to enter into a transportation service agreement ("TSA") which would be part of the parties' agreement and govern routes, destinations, commodities, and rates. The Master Contract did not refer to or identify specific routes, destinations, commodities, or rates. Neither party contends the Master Contract was breached.

INEOS and BNSF entered into two TSAs, both of which were amended numerous times. Our record contains the following versions of the TSAs: (1) TSA 0001 Amendment 45, effective from May 28, 2009 to April 30, 2011 ("TSA 1"); and (2) TSA 0002 Amendment 47, effective from March 13, 2009 to April 30, 2009 ("TSA 2"). TSA 1 and TSA 2 contained the following identical provision: "[INEOS] agrees to ship 95% of all its rail movements of the Commodities listed herein moving between the Origins and Destinations listed herein, via routes listed herein during each year this contract and/or amendments are in effect."

Under TSA 1, the destinations and rates for shipment of INEOS's plastics were divided into two sections: (1) "BNSF Rate Matrix," providing rates to final destinations accessible by BNSF (apparently meaning use of another railway carrier was unnecessary); and (2) "BNSF Rule 11 Matrix," providing rates to destinations at which another, unspecified railway carrier would assume shipment of the commodities and transport them to unspecified final destinations. East St. Louis and New Orleans were destinations under the BNSF Rule 11 Matrix.

INEOS, BNSF, *and* Norfolk Southern Railway Corp. ("Norfolk Southern") entered into TSA 2. TSA 2 contained a "Rate Matrix" listing rates for various destinations east of BNSF's rail lines. Under this matrix, BNSF would carry the plastics to, among other locations, East St. Louis or New Orleans, where Norfolk Southern would assume the shipment and carry it to the final destination.

As the April 30, 2009 expiration date of TSA 2 approached, INEOS requested bids from railway carriers to ship plastics to the eastern destinations listed in TSA 2. On April 1, 2009, INEOS entered into a TSA with Union Pacific Railroad Company and Norfolk Southern[1] (the "Union Pacific TSA"). In the Union Pacific TSA, INEOS agreed to ship plastics via Union Pacific to East St. Louis and New Orleans, where Norfolk Southern would assume the freight and transport it to eastern destinations.

BNSF accused INEOS of breaching TSA 1 because INEOS was obligated under TSA 1 to use BNSF when shipping plastics to East St. Louis and New Orleans enroute to other destinations. INEOS filed suit for declaratory relief against BNSF; BNSF counterclaimed for breach of contract. The parties filed competing motions for summary judgment relative to the breach issue. The trial court granted BNSF's motion and denied INEOS's motion, concluding that INEOS breached TSA 1. The parties stipulated to the amount of BNSF's damages and attorney's fees, and the trial court signed a final judgment.

II. SUMMARY JUDGMENT

In a single issue, INEOS contends the trial court erred by granting BNSF's motion for summary judgment and denying INEOS's motion.

A. Standard of review

A party moving for traditional summary judgment must establish there is no genuine issue of material fact and it is entitled to judgment as a matter of law. *See* Tex. R. Civ. P. 166a(c); *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215–16 (Tex. 2003). If the movant establishes a right to summary judgment, the burden shifts to the non-movant to present evidence raising a material fact issue. *See M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000); *Centeq Realty, Inc. v.*

[1] "Norfolk Southern Railway Company" is the Norfolk Southern entity which entered into the TSA with Union Pacific. Neither party mentions whether this entity is different than "Norfolk Southern Railway Corp.," which entered into TSA 2. For purposes of this opinion, we will assume these names refer to the same entity.

Siegler, 899 S.W.2d 195, 197 (Tex. 1995).

We review a summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). In reviewing the trial court's rulings on cross-motions for summary judgment, we must consider all summary-judgment evidence, determine all issues presented, and render the judgment the trial court should have rendered. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000). We may consider evidence presented by both parties in determining whether to grant either motion. *Expro Americas, LLC v. Sanguine Gas Exploration, LLC*, 351 S.W.3d 915, 919 (Tex. App.—Houston [14th Dist.] 2011, pet. filed).

B. Analysis

The crux of the parties' cross-motions for summary judgment is whether INEOS breached the parties' agreement by entering into the Union Pacific TSA on April 1, 2009. As noted above, the record contains copies of TSA 1, effective May 28, 2009 through April 30, 2011, and TSA 2, effective March 13, 2009 through April 30, 2009. However, the parties agree, and there is evidence supporting the contention, that a prior version of TSA 1 was in effect on April 1, 2009. We have not found this version of TSA 1 in the appellate record. Accordingly, without reviewing or at least considering the contents of the version of TSA 1 in effect when INEOS entered into the TSA with Union Pacific, we cannot conclusively determine whether TSA 1 was breached. *See Barzoukas v. Foundation Design, Ltd.*, 363 S.W.3d 829, 833–34, 837–38 (Tex. App.—Houston [14th Dist.] 2012, pet. filed) (concluding summary judgment was inappropriate for either party because the relevant contracts were not included in the record, leaving the court to guess the contents of the contracts). Consequently, we cannot hold as a matter of law that INEOS breached or did not breach its agreement with BNSF by entering into the Union Pacific TSA. Therefore, the trial court did not err by denying INEOS's motion for summary judgment but erred by granting BNSF's motion. *See FM Props. Operating Co.*, 22 S.W.3d at 872 (explaining that, when reviewing trial court's rulings on cross-motions for summary

judgment, we consider all summary-judgment evidence and render judgment the trial court should have rendered). We sustain in part and overrule in part INEOS's sole issue.

We reverse the trial court's judgment and remand for further proceedings consistent with this opinion.

/s/ Charles W. Seymore
Justice

Panel consists of Chief Justice Hedges and Justices Seymore and Brown.