COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00011-CV

NORHILL ENERGY LLC — APPELLANT

V.

GEORGE MCDANIEL — APPELLEE

FROM THE 90TH DISTRICT COURT OF YOUNG COUNTY
TRIAL COURT NO. 32005

DISSENTING AND CONCURRING OPINION

I agree with the majority that the evidence was sufficient to support the trial court's denial of appellant Norhill Energy LLC's motion for JNOV on its breach-of-contract claim. But I respectfully disagree with the majority that Norhill's claim for money had and received is a viable claim under the facts presented here, entitling Norhill to a rendered judgment for $50,000.

As the majority ably explains, Norhill and appellee George McDaniel entered into two contracts: (1) the September 20, 2010 oil and gas lease, which had a two-year primary term that could be extended "so long as operations are continued in good faith and with reasonable diligence" and (2) an October 19, 2012 agreement, consisting of two integrated and merged documents, under which Norhill agreed to assign its lease back to McDaniel in exchange for McDaniel's payment of $50,000 to Norhill. The October 2012 agreement would not go into effect if McDaniel failed to pay Norhill by November 18, 2012. McDaniel admittedly did not pay Norhill. Meanwhile, McDaniel re-leased his property to a third party and received $60,000.

Norhill filed suit against McDaniel, asserting that McDaniel breached the October 2012 agreement, not the 2010 lease, and seeking damages under a breach-of-contract theory. Norhill also raised a claim for money had and received (MHAR) in the alternative to its breach-of-contract claim because McDaniel "holds $50,000 that in equity and good conscience belongs to Norhill." A jury found that McDaniel had breached the October 2012 agreement but had incurred no damages "that resulted from [McDaniel's] failure to comply."[1] The jury also found in favor of Norhill on its MHAR claim and found that $50,000

[1]The jury charge specifically provided that "Contract" in the breach-of-contract section of the charge "means the agreement dated October 19, 2012, . . . under which Norhill Energy agreed to assign the lease back to George McDaniel and George McDaniel agreed to pay Norhill Energy $50,000 within 30 days." The jury found that Norhill and McDaniel agreed to the terms of this contract.

would "fairly and reasonably compensate [Norhill] in this regard to [MHAR]." Norhill's motion for JNOV focused on the lack of a damage finding on its breach-of-contract claim and requested that the trial court "disregard the jury's answer to the question on damages for breach of contract and award [Norhill] $50,000 in actual damages." McDaniel countered in his own motion for JNOV that the damages for MHAR "must be disregarded" because a valid, express contract foreclosed any recovery for MHAR. The trial court disagreed with Norhill and agreed with McDaniel, entering a take-nothing judgment on Norhill's claims. Norhill sought a new trial on each of its claims, but argued only the insufficiency of the evidence to support the jury's finding of no damages for breach of contract. The trial court denied this motion as well. I believe the trial court hit the nail on the head here.

The majority explains in clear language that the jury's finding of no damages arising from McDaniel's breach of the October 2012 agreement can withstand Norhill's legal-sufficiency attack. Indeed, McDaniel's failure to pay under the October 2012 agreement was the operative breach, not conclusive evidence of the damage to Norhill arising from that breach. *See generally Lafarge Corp. v. Wolff, Inc.*, 977 S.W.2d 181, 187 (Tex. App.—Austin 1998, pet. denied) ("A party's expectation interest is measured by his anticipated receipts and losses caused by the breach *less any costs or other loss he has avoided by not having to perform*."). Thus, the jury's finding was supportable, and the trial

court correctly denied Norhill's motion for JNOV and motion for new trial attacking this finding.

I further agree with the trial court that Norhill was not entitled to recover under its claim for MHAR. The jury found that the October 2012 agreement was an enforceable contract, that McDaniel failed to comply with it, and that McDaniel's noncompliance was not excused. MHAR is a quasi-contractual, equitable remedy used to prevent unjust enrichment that, as pointed out by the majority, required Norhill to prove (1) that McDaniel held money (2) that in equity and good conscience belonged to Norhill. *See Plains Expl. & Prod. Co. v. Torch Energy Advisors Inc.*, 473 S.W.3d 296, 302 n.4 (Tex. 2015). But these two elements are implicated only if a claimant is entitled to seek such relief. Indeed, Norhill implicitly recognized this by raising MHAR only in the alternative to its breach-of-contract claim.

As the majority discusses, the general rule is that there can be no recovery under any quasi-contractual theory if a valid, express contract covers the claims raised in the suit. *See Fortune Prod. Co. v. Conoco, Inc.*, 52 S.W.3d 671, 684 (Tex. 2000). However, the majority continues by noting that the supreme court in *Fortune Production* stated in dictum that there are "certain exceptions" to this general rule, which were "not relevant" in that appeal.[2] *Id.* These

[2]The case the supreme court cites to illustrate these exceptions was a case allowing a restitution or unjust-enrichment claim to recover overpayments under a contract. *Fortune Prod.*, 52 S.W.3d at 684 (citing *Sw. Elec. Power Co. v. Burlington N. R.R. Co.*, 966 S.W.2d 467, 469–70 (Tex. 1998)); *see also Becker v.*

exceptions, the majority concludes, are present here. In short, because Norhill failed to recover damages on its breach-of-contract claim, the equities demand that McDaniel be made to pay the monies owed to Norhill in their October 2012 agreement under the theory of MHAR.

This holding takes a claim for MHAR outside the boundaries of a quasi-contractual cause of action. Several courts have concluded that if there is an express contract that covers the parties' dispute, as undisputedly is the case here, a quasi-contractual—equitable—claim such as unjust enrichment or MHAR cannot lie. *See, e.g.*, *Becker*, 2002 WL 31255021, at *4 & n.32; *Compton v. Citibank (S.D.), N.A.*, 364 S.W.3d 415, 418–19 (Tex. App.—Dallas 2012, no pet.); *Tex Star Motors, Inc. v. Regal Fin. Co.*, 401 S.W.3d 190, 202 (Tex. App.—Houston [14th Dist.] 2012, no pet.); *Christus Health v. Quality Infusion Care, Inc.*, 359 S.W.3d 719, 723–25 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (op. on reh'g); *City of The Colony v. N. Tex. Mun. Water Dist.*, 272 S.W.3d 699, 731 (Tex. App.—Fort Worth 2008, pet. dism'd). And the supreme court in *Fortune Production* underscored this proposition by stating that "parties should be bound by their express agreements" and then by foreclosing Conoco's unjust-enrichment claims because they were covered by the terms of its contract with Fortune Production. *Fortune Prod.*, 52 S.W.3d at 684–85. That Norhill failed to recover damages on its breach-of-contract claim is not dispositive; the existence

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Nat'l Educ. Training Grp., Inc., No. 3:01-CV-1187-M, 2002 WL 31255021, at *4 n.32 (N.D. Tex. Oct. 7, 2002).

of an enforceable contract between the parties as found by the jury, covering the dispute at issue, is the impediment to Norhill's claim for MHAR.

I believe, as does the majority, that the trial court correctly concluded that the jury's finding of no damages for Norhill's breach-of-contract claim was supported by the evidence. To this portion of the majority opinion, I concur. But I further believe that the trial court rightly concluded that Norhill could not alternatively recover for MHAR based on the unchallenged finding that the parties had a valid and enforceable contract, which covered the dispute at issue. Accordingly, I would affirm the trial court's judgment. Because the majority does not, I respectfully dissent.

/s/ Lee Gabriel
LEE GABRIEL
JUSTICE

DELIVERED: April 13, 2017