Geophysical Micro Computer Applications LTD. v. Paradigm Geophysical LTD.

2001 | Cited 0 times | Court of Appeals of Texas | July 30, 2001

REVERSED AND REMANDED and Opinion filed July 30, 2001

OPINION

Justice Rosenberg

Paradigm Geophysical Ltd. (Paradigm) sought a declaration that two letters between it and Geophysical Micro Computer Applications (International) Ltd. (GMA) constituted an agreement to negotiate, not a binding agreement. GMA counterclaimed for breach of contract. In four issues, GMA appeals the summary judgment granted in favor of Paradigm. Because we conclude fact issues exist that preclude summary judgment on Paradigm's declaratory judgment and GMA's counterclaim for breach of contract, we reverse the trial court's judgment and remand this cause for further proceedings.

PROCEDURAL AND FACTUAL BACKGROUND

In July 1997, Paradigm began negotiating with GMA regarding GMA's purchase of SeisX, a computer software program used in the oil and gas industry to interpret seismic data. At that time Paradigm was acquiring SeisX from its owner, CogniSeis. On August 8, 1997, GMA sent Paradigm a letter offering to purchase SeisX. The letter proposed certain terms including a detailed description of the property to be purchased and a purchase price. GMA was to conduct a due diligence review to determine whether Paradigm could convey title to the assets and there were no impediments to the transaction. To assist in the due diligence review, Paradigm was to place SeisX in escrow and give GMA a list of the items it procured and access to SeisX for inspection. The letter also states, in part:

This transaction will be subject to all necessary corporate approvals, on each side of the transaction, such other [government] approvals . . ., satisfactory completion of due diligence and normal representations, warranties and other commercial terms as may be necessary or required in connection with a purchase and sale transaction of this type. Subject to our mutual agreement otherwise, the final documentation of this transaction will be based upon the agreement set out herein.

Our within offer is premised upon your advice that you are not in negotiations with, . . ., any other party to . . . transfer [the described assets] and that you will not do so for so long as we are proceeding in good faith towards the consummation of the transaction contemplated herein.

Should a final, definitive agreement not be entered into between Paradigm and GMA (with both parties negotiating in good faith towards such end) within 31 days of the closing of the asset purchase transaction between Paradigm and Cogni[S]eis, the obligations of Paradigm and GMA hereunder shall terminate. On August 12, 1997, Paradigm sent a letter to GMA agreeing to the proposal subject to modifications set forth in the letter. GMA agreed to the modifications, and both Ronald E. Newman, chairman and chief executive officer of GMA, and Eldad Weiss, CEO of Paradigm, signed the letters. Paradigm refers to these letters together as the "letter of intent."

On September 10, 1997, GMA issued a press release announcing a "Letter of Intent" with Paradigm and stating, in part:

The transaction will be subject to all necessary corporate and regulatory approvals, satisfactory completion of due diligence, normal representations, warranties and other commercial terms as may be necessary or required and negotiation of a definitive purchase and sale agreement.

[T]here can be no assurance that GMA's acquisition of SeisX will close under the terms of the Letter of Intent or at all. (Emphasis added.) On October 14, 1997, Paradigm purchased CogniSeis, thereby acquiring SeisX. GMA immediately requested lists of the property acquired by Paradigm but did not receive a list until November 10, 1997; the list did not state which assets Paradigm did not acquire. SeisX was never placed in escrow.

Because no definitive agreement was reached thirty-one days after Paradigm acquired CogniSeis, Paradigm extended the expiration date of the letters to December 1, 1997. On November 28, 1997, GMA sent Paradigm a draft "asset purchase agreement." On December 2, 1997, Paradigm advised GMA that it considered the letter of intent terminated. On July 9, 1998, Paradigm's Board of Directors disapproved and rejected the "contemplated" transaction.

Paradigm sued GMA seeking a declaratory judgment that the letters did not constitute a binding agreement. GMA answered with a general denial and counterclaimed for breach of contract and declaratory judgment.[2] Paradigm filed a motion for summary judgment and two supplemental motions, asserting that, as a matter of law, the letter of intent (1) constituted an unenforceable agreement to negotiate; (2) did not constitute a binding "agreement to agree" because all essential terms were left open for future negotiation; (3) was indefinite and not binding because it lacked any basis for enforcement; (4) was not enforceable because it lacked mutuality of obligation, i.e., the contemplated transaction was subject to the parties' corporate approvals; (5) was not enforceable because, as authorized by explicit terms, the Paradigm Board of Directors disapproved and rejected the contemplated transaction; and (6) expired by its own terms before the parties reached any final, definitive agreement, even if binding. GMA responded to the motions. The trial court granted Paradigm's motions, specifically listing each of the grounds requested as the reason for granting the motion, and then denied GMA's motion for a new trial. This appeal followed.

STANDARD OF REVIEW

The standard of review for summary judgment is well established: (1) the movant for summary judgment has the burden of showing there is no genuine issue of material fact and he is entitled summary judgment as a matter of law; (2) in deciding whether there is a disputed fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true; and (3) every inference must be indulged in favor of the non-movant and any doubts resolved in his favor. Tex. R. Civ. P. 166a(c); Nixon v. Mr. Prop. Mgmt. Co., 690 S.W.2d 546, 548-49 (Tex. 1985). We affirm a summary judgment only if the summary judgment record establishes the movant's right to summary judgment as a matter of law. Gibbs v. Gen. Motors Corp., 450 S.W.2d 827, 828 (Tex. 1970).

CONTRACT OR "AGREEMENT TO AGREE"

In its first and fourth issues, GMA contends that the trial court's judgment is in error because the letters had all the necessary elements for a binding contract, including the description of the product to be purchased, warranty of title, the price, calculation of royalties, and the method for calculating the closing date and price adjustments at closing, and the judgment is contrary to Foreca, S.A. v. GRD Development Co., 758 S.W.2d 744 (Tex. 1988), because the letter of intent created a fact issue as to the intent of the parties to enter a binding agreement even though the agreement contemplated additional documentation. GMA maintains that the Texas Supreme Court in Foreca has rejected the argument that such a provision results in an unenforceable "agreement to agree" as a matter of law. Paradigm maintains that the parties had not agreed to any essential terms because all the terms in the letters of intent were proposed and subject to negotiation; thus, the letters created neither a contract nor an obligation of any kind.

Applicable Law

A party interested under a written contract or other writings may have a court determine its rights, status, or legal relations. See Tex. Civ. Prac. & Rem. Code Ann. § 37.004 (Vernon 1997). Parties form a binding contract when the following elements are present: (1) an offer, (2) an 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 Am. Nat'l Ins. Co. v. Warnock, 131 Tex. 457, 463, 114 S.W.2d 1161, 1164 (1938); McCulley Fine Arts Gallery, Inc. v. "X" Partners, 860 S.W.2d 473, 477 (Tex. App._El Paso 1993, no writ). For a contract to be enforceable, it must be sufficiently certain so as to enable the court to determine the respective legal obligations of the parties. T.O. Stanley Boot Co. v. Bank of El Paso, 847 S.W.2d 218, 221 (Tex. 1992). The material terms of the contract must be agreed upon before a court can enforce the contract. Id.; See "X" Partners, 860 S.W.2d at 477. The parties may agree upon certain contractual terms and leave other matters for later negotiations. See Scott v. Ingle Bros. Pac., Inc., 489 S.W.2d 554, 555 (Tex. 1972); Frank B. Hall & Co. v. Buck, 678 S.W.2d 612, 629 (Tex. App._Houston [14th Dist.] 1984, writ ref'd n.r.e.). It is only when an essential term of a contract is left open for future

negotiations that there is no binding contract, only an agreement to agree. "X" Partners, 860 S.W.2d at 477. Moreover, parties to a contract may expressly provide that new matters or terms will be incorporated or interpreted along with the existing contract when those matters or terms are agreed upon. Frank B. Hall & Co., 678 S.W.2d at 629.

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. See Copeland v. Alsobrook, 3 S.W.3d 598, 604 (Tex. App._San Antonio 1999, pet. denied). The offer must be clear and definite, and there must be a clear and definite acceptance of all terms contained in the offer. See Gulf Coast Farmers Co-op. v. Valley Co-op Oil Mill, 572 S.W.2d 726, 737 (Tex. Civ. App._Corpus Christi 1978, no writ). When a meeting of the minds is contested, as it is here, determination of the existence of a contract is often a question of fact. Foreca, S.A., 758 S.W.2d at 746; Buxani v. Nussbaum, 940 S.W.2d 350, 352 (Tex. App._San Antonio 1997, no writ); Hallmark v. Hand, 885 S.W.2d 471, 476 (Tex. App._El Paso 1994, writ denied); Runnells v. Firestone, 746 S.W.2d 845, 849 (Tex. App._Houston [14th Dist.]), writ denied, 760 S.W.2d 240 (Tex. 1988) (per curiam).

Essential Terms and Intent to be Bound

Here, the parties negotiated together before GMA made its proposal. In the August 8 letter, GMA asked Paradigm to accept the terms of the letter as its "expression of intent and our offer relative to the purchase of certain assets which Paradigm will be acquiring." The letter provides that "[t]his transaction will be subject to . . . other commercial terms as may be necessary or required in connection with a purchase and sale transaction of this type." The letter also provides that "[s]ubject to our mutual agreement otherwise, the final documentation of this transaction will be based upon the agreement set out herein." The letter set forth elements of the bargain by identifying SeisX as the asset to be sold, its price and adjustments to the purchase price, royalties, a method to calculate the closing date, and the payment and financing terms. In Paradigm's August 12 response accepting GMA's proposal, Paradigm changed GMA's ability to reassess its position if Paradigm did not acquire all the assets of SeisX. The change provided that if Paradigm did not acquire substantially all the assets of SeisX, GMA could withdraw from the transaction or renegotiate the terms of the sale. The other changes and proposals accepted by GMA concerned the manner of paying the royalties and employment issues. Finally, GMA's letter proposal stated that the obligations of both parties would cease if a "final, definitive agreement" was not entered within thirty-one days of the closing on SeisX, with both parties negotiating in good faith towards such end.

The letter of intent clearly identifies SeisX as the asset to be sold, its price and adjustments to the purchase price, royalties, a method to calculate the closing date, and the payment and financing terms. Because these are essential terms for a sales transaction and they are definite, the letter of intent would meet the minimum requirements of an enforceable agreement. See Univ. Nat'l Bank v. Ernst & Whinney, 773 S.W.2d 707, 710 (Tex. App._San Antonio 1989, no writ). Although the letter of intent provides for "Other Terms" that included Paradigm's obligations to assist GMA in due

diligence, warranties, responsibility for closing documents, and personnel agreements, parties may agree on some terms and leave others for further negotiation; such other matters may be included later but do not prevent the agreement already made from being an enforceable contract. See Frank B. Hall & Co., 678 S.W.2d at 629. Other "necessary commercial terms" are not specifically mentioned but are contemplated. There is no evidence that these other terms were essential for the contract. In fact, Newman, GMA's CEO, testified in his affidavit that these terms were not essential.

Paradigm points to GMA's November draft purchase agreement to support the argument there was no intent for the letter to be binding. Paradigm claims the draft changed the terms of the letter, thus showing that there was no binding agreement. To controvert this contention, Newman testified in his affidavit that Paradigm had been attempting to unilaterally change the letter agreement, but GMA refused to make the changes. GMA then submitted the November draft agreement after Paradigm agreed that any terms in the November agreement that departed from the letter agreement would be "without prejudice" to the terms previously agreed to in the letters. The November draft purchase agreement identifies SeisX and more completely describes its component parts. This document also provides for the same price and royalties, adding a minimum and maximum annual royalty amount, a closing date left blank but which is to be "mutually agree[d] upon in writing," and the same payment and financing terms. Therefore, we conclude that these terms are substantially the same as in the letter agreement and any differences only raise an issue as to whether the original letter would be modified, not that all terms were to be negotiated.

To support summary judgment, Paradigm also points to the letter's language requiring a "final, definitive agreement" and GMA's press release announcing the letter of intent to prove that there was no intent for the letter to be binding. GMA contends that, pursuant to Foreca, the question of whether the parties intended to be bound by the letter agreement is a question of fact. Paradigm counters that this case falls within Foreca's holding that intent to be bound may be a question of law.

In Foreca, the parties agreed in writing on the price, payment terms, delivery information and warranties, guarantee and cost provisions of a sale, and the document contained the following statement: "SUBJECT TO LEGAL DOCUMENTATION CONTRACT TO BE DRAFTED [by Foreca's attorney]." Foreca, 758 S.W.2d at 744-45. The supreme court rejected the contention that the "subject to legal documentation" provision was an unambiguous, and "uncomplied with," condition precedent to the formation of a contract. Id. at 744. The supreme court noted that the parties agreed on certain material terms "yet another formal document was contemplated by the parties." Id. at 745. The court concluded that whether "the contemplated formal document [was] a condition precedent to the formation of a contract or merely a memorial of an already enforceable contract" was determined by the intention of the parties and was a fact issue properly left to the jury's determination because the evidence was disputed and the "subject to legal documentation" language was not conclusive. Id. at 746. As in Foreca, GMA and Paradigm contemplated a more formal document based upon the letter of intent. Other than the fact that a "final, definitive agreement" was required, the provisions do not explicitly say that the parties do not consider the letter of intent binding. See, e.g., John Wood

Group USA, Inc. v. ICO, Inc., 26 S.W.3d 12, 20 (Tex. App._Houston [1st Dist.] 2000, pet. denied). Under Foreca, where essential terms are present, as they are here, this language would not support a finding of an "agreement to agree" as a matter of law. Nevertheless, Paradigm claims that GMA's press release upon the finalization of the letter of intent proves as a matter of law that there was no intent to enter a binding agreement because the release states "there can be no assurance that GMA's acquisition of the SeisX will close under the terms of the Letter of Intent or at all." This statement has been taken out of the context of the paragraph in which it appears. The release explains that the transaction may not occur because it is dependent on Paradigm's purchase of SeisX and regulatory approvals "beyond GMA's control." The release makes no reference to the binding nature of the letter. Therefore, we conclude the "final, definitive agreement" language and the press release are inconclusive on the issue of intent and a fact issue exists.

Thus, the evidence is disputed whether the letters constituted the memorialization of a negotiated agreement or were a preliminary proposal conditioned on final approval. We conclude that, as in Foreca, whether the parties intended to be bound is an issue of fact because the evidence is disputed and the language in the document inconclusive on whether the parties intended the agreement to be a memorialization of the parties' agreement or a condition precedent to the formation of a contract. See Foreca, 758 S.W.2d at 746. Therefore, the trial court improperly granted summary judgment on the grounds that the letters constituted an unenforceable agreement to negotiate. We resolve GMA's first and fourth issues in its favor.

CORPORATE APPROVAL

In its second issue, GMA contends the trial court erred in granting the summary judgment because a fact issue exists whether Paradigm's board of directors ratified the terms of the letter. GMA also contends the letter's obligations on Paradigm to negotiate in good faith and assist in due diligence satisfy the mutuality of obligation requirement. Paradigm moved for summary judgment on grounds that the letters were not enforceable because they lacked mutuality of obligation, i.e., they were subject to the parties' corporate approval, and Paradigm's board had disapproved and rejected the transaction on July 9, 1998. Paradigm argues the corporate approval requirement was an exculpatory clause expressing an intent not to be bound by the letters because each party reserved the right to seek corporate approval and could disapprove the contemplated transaction.

A contract that imposes no definite obligation on one party to perform lacks mutuality. Bank of El Paso v. T.O. Stanley Boot Co., 809 S.W.2d 279, 285 (Tex. App._El Paso 1991), aff'd in part & rev'd in part on other grounds, 847 S.W.2d 218 (Tex. 1992). Writings that contain exculpatory clauses in favor of either party fail for lack of obligation. See Spellman v. Lyons Petroleum, Inc., 709 S.W.2d 295, 297-98 (Tex. App._Houston [14th Dist.] 1986, writ ref'd n.r.e.) (contract containing "no liability" clause fails for lack of mutuality of obligation). However, an exculpatory clause conditioned on "good faith" or "reasonable efforts" does not fail for want of mutuality. See Fuqua v. Fuqua, 528 S.W.2d 896, 900 (Tex. Civ. App._Houston [14th Dist.] 1975, writ ref'd n.r.e.) (contract is enforceable that requires

approval exercised in good faith); Sterling Computer Sys. of Tex., Inc. v. Tex. Pipe Bending Co., 507 S.W.2d 282, 283 (Tex. Civ. App._Houston [14th Dist.] 1974, writ ref'd) (contrasting exculpatory clause permitting party to refuse to perform "with impunity" with clause requiring "reasonable effort to perform"). The letter clearly requires that the parties negotiate in good faith and obligates Paradigm to cooperate and assist in the due diligence review by supplying documentation relating to SeisX. We conclude these obligations satisfy the mutuality of obligation requirement as a matter of law and whether Paradigm discharged these obligations in good faith is a question of fact.

Paradigm asserted that the letters were not enforceable because its board rejected them. However, GMA contends there are issues of fact whether the board approved the transaction at the time the letters were executed because Weiss was a member of Paradigm's Board of Directors and executed the letters on behalf of Paradigm as its CEO. GMA also points to an affidavit by Newman, in which he stated that Weiss represented that Paradigm's Board of Directors required the modifications set out in the August 12 letter to approve the sale agreement. Further, Newman also signed both letters in his corporate capacity. According to GMA, this is evidence that Paradigm's board initially approved the transaction and only rejected it later after the lawsuit was filed.

We agree with GMA that the evidence raises a fact issue whether Paradigm's Board approved the transaction first, thus meeting the requirement of board approval, and then disapproved it. We resolve GMA's second issue in its favor.

EXPIRATION OF THE AGREEMENT

In its third issue, GMA contends the trial court erred in granting the summary judgment because it erroneously held that as a matter of law the letter of intent expired by its own terms. Paradigm asserted that the letter expired by its own terms before any final definitive agreement was reached, relying on the provision for termination of any obligation if the parties did not enter into a final, definitive agreement within thirty-one days of the closing of the purchase of SeisX, conditioned on both parties negotiating in good faith towards that agreement.

The letter required the parties to negotiate the final agreement in good faith and, if they did so negotiate and did not reach a final agreement, then all obligations terminated. The summary judgment evidence showed that Paradigm acquired SeisX on October 14, 1997, and failed to give GMA any asset list until November 10, 1997. Further, according to Newman, Paradigm, after failing to cooperate, unilaterally imposed another expiration date of December 1, 1997. The evidence shows Paradigm was trying to change the agreement unilaterally. GMA then sent a draft proposed agreement, that included substantially the same terms as the letter agreement, on November 28, 1997, but Paradigm did not accept it before the expiration date of December 1, and thereafter declared the agreement terminated.

The evidence shows Paradigm did not cooperate in the completion of this transaction, including

providing the asset list necessary for a final, definitive agreement. Any expiration date depended on both parties acting in good faith to negotiate a final, definitive agreement. We conclude the evidence raises a fact issue on whether Paradigm negotiated in good faith, thereby allowing the letter to terminate on its own terms. Thus, the trial court improperly granted summary judgment on the ground that the letter expired by its own terms. We resolve GMA's third issue in its favor.[3]

CONCLUSION

Having resolved GMA's four issues in its favor, we reverse the trial court's judgment and remand this case for further proceedings.

Do Not Publish Tex. R. App. P. 47

1. The Honorable Barbara Rosenberg, Former Justice, Court of Appeals, Fifth District of Texas at Dallas, sitting by assignment.

2. GMA also requested injunctive relief but directs no point of error or argument to this request.

3. Paradigm argues that we should affirm the summary judgment because GMA's four points of error do not address all six grounds on which summary judgment could have been granted, and GMA did not bring a general point of error pursuant to Malooly Bros., Inc. v. Napier, 461 S.W.2d 119, 121 (Tex. 1970). Paradigm does not identify which ground GMA neglected to brief. We have reviewed the motions and responses, and we have concluded that the issues and arguments address each ground. See Tex. R. App. P. 38.1 (e).