

Affirmed and Opinion filed March 8, 2001.

In The
Fourteenth Court of Appeals

NO. 14-98-01063-CV

NOBLE DRILLING CORPORATION, Appellant

V.

ROBERT F. FULTON, Appellee

**On Appeal from the 151st District Court
Harris County, Texas
Trial Court Cause No. 95-40181**

OPINION

A jury found Noble Drilling Corporation failed to comply with the terms of Robert F. Fulton's severance agreement when it did not pay him. The trial court rendered judgment accordingly. Noble Drilling appeals, contending the trial court improperly submitted the resolution of the legal construction of the contract to the jury. Noble Drilling contends the court should instead have rendered judgment as a matter of law under the unambiguous language of the contract. We find no patent ambiguity, but find the contract latently ambiguous, and affirm.

I. SUMMARY OF FACTS AND EVENTS

Noble Drilling Corporation acquired Chiles Offshore Corporation in 1994. Fulton was Chiles' chief financial officer. In 1993, the year before the acquisition, Chiles and Fulton had entered into a severance agreement. A few months after the merger, Fulton resigned from the successor in interest to his company, and Noble Drilling refused to pay under the severance agreement. Fulton filed suit. The trial court denied cross motions for summary judgment, and the case went to a jury trial.

The disputed severance agreement provided in relevant part as follows:

1. Payment of Severance Amount. "Upon the occurrence of a Termination Event (as defined in paragraph 2), the company shall:

(i.) pay Employee an amount equal to Employee's Base Annual Salary (as defined in paragraph 2) multiplied by the Employment Term Factor (as defined in paragraph 2), payable as a lump sum cash payment within 30 days after5 the date of the termination constituting such Termination Event (the "Termination Date").

2. Definitions.

(a) A "Termination Event" shall be deemed to have occurred if:

* * *

(ii) The Employee shall voluntarily terminate his employment for "good reason" within one year of an acquisition upon the occurrence of any of the following:

[A] A significant and material change in the nature or scope of the Employee's duties from those engaged in immediately prior to the date on which a Change of Control occurs to duties that are, taken as a whole, inconsistent with Employee's range and duration of experience; provided, however, that Employee's title, scope of responsibility and authority may be altered (by reason of demotion, the creation of or filling of offices with the Company senior to Employee's office or otherwise) without constituting "good reason" so long as Employee's new duties are not inconsistent with his prior experience

* * *

[C] A diminution in Employee's eligibility to participate in bonus, stock option or other incentive compensation plans or employee benefit plans (including medical, dental, life insurance and long -term disability plans) provided for executives with comparable duties.

Noble Drilling contends there is no dispute about what material events occurred. The merger required myriad decisions and activities to integrate extensive personnel and resources. The agreement did not make Fulton's demotion a termination event if his duties were "not inconsistent with his prior experience." Fulton testified that in the immediate aftermath of the merger, his duties were inconsistent with his experience. With integration incomplete, Noble argues, Fulton's testimony that he was not furnished a job description cannot support his claim that his duties would not have (1) become better defined, (2) been consistent with his prior experience, and (3) become known to him as the integration progressed. In Noble's view, Fulton's duties could hardly provide a "termination event" when they were not yet fully defined and formalized.

Noble Drilling argues there could be no termination event based upon bonuses because Fulton did not remain employed long enough to receive a bonus. Fulton was subject to the same rules as other executives in determining bonuses. All executives were subject to the board's discretion and to the rule that an executive had to work for Noble Drilling a full year before they were eligible for bonuses. In Noble Drilling's view, the trial court should have settled the meaning of the contract as a matter of law in light of the undisputed material events.

Fulton viewed the same nexus of fact from a different perspective. He testified that as Chief Financial Officer ("CFO") at Chiles he had supervised the entire capitalization and finances of the company. After the merger, he had "nothing to do." At trial, Fulton described his broad responsibilities at Chiles Offshore Corporation, and his perception of the diminution and limitation of his responsibilities and functions after the merger. He filled out paperwork for a waiver for Noble Drilling to be listed on the New York Stock Exchange, reviewed some accounting software, and attended some committee meetings. He was told the controller would report to him, but the controller by-passed him and dealt directly with Noble Drilling's CFO. Fulton testified his experience at Chiles had included constant participation in the company's important decisions, but the CEO made most decisions at

Noble Drilling, and Fulton was kicked out of the CEO's office when he tried to drop by.¹

Noble Drilling failed to respond to his concerns about his lack of responsibilities. At trial, Noble Drilling presented the jury a job description prepared for Fulton's much less-experienced successor. The description provided vastly greater duties than Fulton testified he was allowed to perform. Fulton argues that Noble's assignment of greater duties to a less-experienced successor supports his contention that his lesser duties after the merger were "inconsistent with his prior experience."

Under its bonus policy requiring a year's service for bonus eligibility, the successor in interest to Fulton's company refused to credit his time with the company. This would have deprived him of any bonus the first year after the merger, while Noble Drilling's executives with comparable duties were eligible. His severance agreement would expire before his employer recognized his eligibility.

Further, Fulton described shabby or unfair treatment at the hands of Noble executives. From these circumstances, the jury could have inferred that the board's discretion regarding bonuses would be exercised to Fulton's disadvantage. This would support a conclusion by the jury that Fulton's "eligibility" for incentive compensation was thereby diminished from that of executives with "comparable" duties. It might have appeared to the jury, in other words, that Fulton was not as eligible to receive bonuses as more favored executives at his official rank.

After the charge conference at trial, counsel for both parties objected to the charge on essentially the same ground. Noble Drilling contended the court should construe the contract as a matter of law, and argued there was no evidence to submit to the jury. Fulton claimed the severance agreement unambiguously required judgment in his favor as a matter of law. Accordingly, both parties argued the trial court should construe the severance agreement and

¹ Noble presented testimony that Fulton was escorted out because he had not made an appointment.

render judgment, rather than submit the issue of breach to the jury.

Nevertheless, the trial court submitted the charge to the jury. The jury charge informed the jury it was their duty to interpret the language of the Severance Agreement set forth above in this opinion. Thereafter, it instructed the jury, “*You must decide the meaning of that language by determining the intent of the parties at the time of the agreement. Consider all the facts and circumstances surrounding the making of the agreement, the interpretation placed on the agreement by the parties, and the conduct of the parties.*” The parties stipulated to the amounts of any damages, and the jury answered a single question, “*Did Noble Drilling Corporation fail to comply with the Severance Agreement when it did not pay Robert Fulton a severance payment?*” The jury answered “yes.”

II. ANALYSIS

The trial judge has broad discretion in determining the issues and instructions to be submitted to a jury. *Mobil Chem. Co. v. Bell*, 517 S.W.2d 245, 256 (Tex. 1974). To the extent Noble Drilling’s claim asserts legal insufficiency, this court will consider the record as a whole, viewing the evidence and inferences most favorable to the jury verdict and disregarding all other evidence and inferences. *Garza v. Alviar*, 395 S.W.2d 821 (Tex. 1965).

With respect to matters committed to the trial court's discretion, the reviewing court may not substitute its judgment for that of the trial court. *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992). On the other hand, there is no discretion in determining the law or applying the law to the facts, so a clear failure by the trial court to analyze or apply the law correctly is an abuse of discretion. *Id.*

Alleged error will be deemed reversible only if, when viewed in the totality of the circumstances, it amounted to such a denial of the rights of the complaining party as was reasonably calculated to cause, and probably did cause, the rendition of an improper judgment. *Island Recreational Dev. Corp. v. Republic of Tex. Sav. Ass'n*, 710 S.W.2d 551,

555 (Tex. 1986). Thus, Noble Drilling can only prevail if it is entitled to judgment on the contract as a matter of law.

A. Claims on Appeal

Fulton acknowledges Noble Drilling’s claim on appeal is not an objection to the form of issue the jury considered, noting that Noble Drilling provided the global issue to the court. Instead, Noble Drilling’s trial objection and argument on appeal is that the contract was unambiguous. *See Larsen v. FDIC/Manager Fund*, 835 S.W.2d 66, 74 n.11 (Tex. 1992) (judgment can only be reversed on issue raised at trial). Neither party pled ambiguity, and both parties argued the contract was unambiguous. Accordingly, Noble contends the court should have settled the meaning of the severance agreement as an issue of law. Thus, Noble Drilling asserts, there was no basis in the law or evidence to support any jury issue.

The Texas Supreme Court has explained the principle underlying rules concerning the preservation of error in the charge: “There should be but one test for determining if a party has preserved error in the jury charge, and that is whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling.” *State Dept. of Highways v. Payne*, 838 S.W.2d 235, 241 (Tex.1992). Noble Drilling clearly and timely presented its arguments to the trial court before the court submitted the case to the jury.

B. Ambiguity in Contracts

Fulton and Noble Drilling both claimed they were entitled to judgment under the unambiguous agreement as a matter of law. Both parties objected on that ground to submitting the severance agreement to the jury. At trial and on appeal, the parties have each skillfully advocated diametrically opposed, reasonable applications of the severance agreement to its subject matter.

1. Applicable Standards and Principles of Law

a. Whether contracts are ambiguous is a question of law.

A term is not ambiguous merely because parties to an agreement proffer different

interpretations of a term. *DeWitt County Elec. Co-op., Inc. v. Parks*, 1 S.W.3d 96, 100 (Tex. 1999). Conversely, a court may conclude that a contract is ambiguous even when the parties do not plead ambiguity. *Sage St. Assocs. v. Northdale Constr. Co.*, 863 S.W.2d 438, 445 (Tex. 1993).

Construing a contract is a matter of law. *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983); *Sun Oil Co. v. Madeley*, 626 S.W.2d 726, 731-32 (Tex. 1981); *City of Pinehurst v. Spooner Addition Water Co.*, 432 S.W.2d 515, 518 (Tex.1968). Courts construe unambiguous contracts by ascertaining the parties' true intentions as expressed within the four corners of the written contract. *Coker*, 650 S.W.2d at 393. Courts interpret the language by its plain, grammatical meaning unless doing so would clearly defeat the intention of the parties. *Lyons v. Montgomery*, 701 S.W.2d 641, 643 (Tex. 1985). When a potential ambiguity arises, deciding whether the language is ambiguous is an issue of contract construction. *See Candlelight Hills Civic Ass'n, Inc. v. Goodwin*, 763 S.W.2d 474, 477 (Tex. App.—Houston [14th Dist.] 1988, writ denied). Although both parties contended the contract was unambiguous, the trial court followed the law. *See Goodwin*, 763 S.W.2d at 477.

b. Determining ambiguity

If an agreement's wording has a certain or definite legal meaning or interpretation, then it is not ambiguous. *Coker*, 650 S.W.2d at 393. If, on the other hand, applying the proper rules of construction to an agreement leaves it susceptible to more than one *reasonable* meaning, the agreement is ambiguous. *National Union Fire Ins. Co. v. Insurance Co. of North America*, 955 S.W.2d 120, 128 (Tex. App.—Houston [14th Dist.] 1997), *aff'd sub nom Keck, Mahin & Cate v. National Union Fire Ins. Co.*, 20 S.W.3d 692 (Tex. 2000).

When the language within the four corners of a contract could have more than one reasonable meaning, the document is *patently* ambiguous. *See Friendswood Dev. Co. v. McDade & Co.*, 926 S.W.2d 280, 282 (Tex. 1996); *National Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995). If more than one reasonable interpretation

arises only when the contract is applied to its subject matter, the contract is *latently* ambiguous. *Friendswood*, 926 S.W.2d at 282.²

c. Evidence of parties' intent and understanding only to resolve ambiguity

An unambiguous contract renders immaterial any extrinsic evidence of the parties' subjective understanding and intent regarding the meaning of the contract. *E.g., Sun Oil Co.*, 626 S.W.2d at 732. Interpretation of a contract is not a fact issue to be resolved by extrinsic evidence unless applying the pertinent rules of construction leaves a genuine uncertainty as to which of two meanings is proper. *Universal C.I.T. Credit Corp. v. Daniel*, 150 Tex. 513, 243 S.W.2d 154 (1951). Evidence of intent is not admissible to create the ambiguity. *National Union Fire Ins. Co. of Pittsburgh, PA v. CBI Industries, Inc.*, 907 S.W.2d 517, 521 (Tex. 1995).

When attempting to apply the contract to its subject matter reveals latent ambiguity, evidence of intent becomes admissible. *CBI Industries, Inc.*, 907 S.W.2d at 521. The finder of fact must examine the contract as a whole in light of the circumstances present when the contract was entered and with reference to the facts of the claim. *CBI Industries, Inc.*, 907 S.W.2d at 520. Determining the intent of the parties by extrinsic evidence is an issue uniquely within the realm of the trier of fact because it depends heavily upon the credibility and weight of the evidence. *Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 434 (Tex. 1986); *Coker*, 650 S.W.2d at 393.

C. Application

Applying the definition of "Termination Event" to the circumstances of Fulton's resignation does not resolve whether his resignation constituted a Termination Event. Both parties correctly contend the contract is not patently ambiguous. However, the circumstances

² The determination the contract is latently ambiguous is not a factual inference that can be indulged in favor of the jury's verdict and against Noble Drilling in the context of its "no evidence" contention. *See CBI Industries*, 907 S.W.2d at 521 n.5 (refusing to treat finding of latent ambiguity as an inference to be made against the movant in the summary judgment context).

of this case reveal that the definition of “Termination Event” is latently ambiguous. Did Fulton’s duties have to be consistent with his prior experience immediately after the merger, or did the contract contemplate a period of integration before a Termination Event could occur? What duties at the much larger corporation would be “consistent with” his prior experience? Fulton had worked more than a year for Chiles (Noble Drilling’s predecessor in interest). Noble refused Fulton’s eligibility for bonuses for an additional year. By that time, the severance agreement would have expired. Did the parties intend Fulton’s resignation under these circumstances to be a Termination Event? Without resolving questions of fact such as these, neither interpretation of the contract could be ruled out. Accordingly, a jury had to ascertain the parties’ intent at the time of contracting. Then it had to compare that intent to the circumstances and determine whether events constituting a “Termination Event” had occurred. The trial court properly submitted the latently ambiguous contract to the jury.

Noble Drilling contends that when ambiguity has not been pled, the courts must resolve any ambiguity by construing the disputed language. Generally, in the summary judgment context, the interpretation of an ambiguous contractual provision is a fact issue. *See Harris v. Rowe*, 593 S.W.2d 303, 306 (Tex. 1980). However, the Texas Supreme Court acknowledged an exception to that rule when the ambiguity has not been raised before a summary judgment is rendered in *Coker* and *White v. Moore*, 760 S.W.2d 242, 243 (Tex. 1988). In these summary judgment cases, courts settle the meaning of the unpled ambiguities.

In trials, however, if the parties try the meaning of the ambiguity by consent resolution by the court of unpled ambiguity is unnecessary. *Sage Street*, 863 S.W.2d at 445-46. In *Sage Street*, as here, the trial court found the agreement ambiguous and submitted the case to the jury. The Texas Supreme Court explained that the determination whether an issue is tried by consent does not turn upon whether there is evidence in the record relevant to the claim.³

³ The supreme court did disagree with *Sage Street*’s contention that all of the evidence pertaining to the contract interpretation was also relevant to the fraud claim.

Instead, the parties must have actually tried the issue.

Sage Street attempted to argue to the Texas Supreme Court it had not tried the issue by consent because the evidence pertaining to interpretation of the contract was also relevant to a fraud claim. The court disagreed, citing parole evidence about the subjective understanding and intentions of the parties at the time of contracting that was only relevant to interpreting an ambiguous contract.

In the present case, both parties filed motions for summary judgment, and both motions were denied. As in *Sage Street*, neither party objected before trial to submitting the interpretation to the jury, and each party vigorously advocated to the jury a different interpretation. During trial, Noble Drilling and Fulton advanced their view of the meaning of “Termination Event” in the context of the case, with supporting evidence. Noble Drilling cross-examined Fulton closely upon the circumstances surrounding the formation of the contract. The entire trial concerned the circumstances and whether the facts satisfied each party’s reasonable interpretation of the contract.

The evidence could be interpreted either as conflicting or as reconcilable. The jury had to weigh credibility. It had to decide whether reconciling the evidence would arrive at the truth, or if interpreting some evidence in a light of its disbelief of other evidence would produce a more correct conclusion. Here, as in *Sage Street*, evidence about applying the severance agreement to later events could be attributed to construing an unambiguous contract, but the parole evidence about the subjective understanding and intentions of the parties at the time of contracting is only relevant to interpreting an ambiguous contract. In *Sage Street*, as here, the trial court made the legal determination the contract was ambiguous, and submitted the breach issue to the jury. Although Noble Drilling objected after the charge conference to submitting interpretation of the contract to the jury, the parties had already tried the issue by consent.

III. CONCLUSION

While most evidentiary facts were undisputed, the evidence presented and both

parties' arguments to the jury illustrate the necessity for factual determinations. Both parties submitted evidence of subjective intent offered to support their differing interpretations of the disputed language. The trial court fulfilled its role by deciding the contract was ambiguous.

The trial presented an issue of material fact for the jury, and the trial court properly submitted the breach issue. *Island Recreational Dev. Corp. v. Republic of Texas Savings Ass'n*, 710 S.W.2d 551, 554 (Tex. 1986) (finding broad form submission asking whether "plaintiffs performed their obligations under the commitment letter in question" was a proper way to submit the factual issues to the jury). Noble Drilling did not submit proposed instructions to construe any unambiguous portion of the severance agreement or to limit the jury's consideration to the ambiguous portion. *Id.* (approving broad issue submissions and accompanying instructions as requested). Noble Drilling objected to submitting any of the case to the jury. Evidence supported the jury's determination, and since Noble Drilling was not entitled as a matter of law to judgment, we affirm.

/s/ Norman Lee
Justice

Judgment rendered and Opinion filed March 8, 2001.

Panel consists of Justices Sears, Draughn, and Lee.⁴

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⁴ Senior Justices Ross A. Sears, Joe L. Draughn, and Norman Lee sitting by assignment.