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Court of Appeals of Texas,
Dallas.

INNOVATE TECHNOLOGY
SOLUTIONS, L.P., Appellant

v.

YOUNGSOFT, INC., Appellee.

No. 05-12-00658-CV. | Nov. 19, 2013.

Synopsis

Background: Firm that was retained by provider of information technology (IT) services to provide such services to provider's client brought action against provider for breach of express warranty and breach of **contract**. Provider brought counterclaim for breach of express warranty, breach of **contract**, and indemnification. The District Court, Dallas County, entered summary judgment in favor of firm, and near the end of trial, entered directed verdict in firm's favor on provider's indemnification claim, and following trial, entered judgment based on jury verdict in favor of firm. Provider appealed.

Holdings: The Court of Appeals, [Moseley, J.](#), held that:

[1] material fact issue regarding interpretation of agreement precluded summary judgment, and

[2] remand was required.

Reversed and remanded.

West Headnotes (17)

[1] [Appeal and Error](#)

[Cases Triable in Appellate Court](#)

Court of Appeals reviews de novo the trial court's summary judgment.

[2] [Judgment](#)

[Weight and Sufficiency](#)

To prevail on a traditional motion for summary judgment, a defendant must either disprove at least one element of the plaintiff's claim as a matter of law, or conclusively establish all elements of an affirmative defense. [Vernon's Ann.Texas Rules Civ.Proc., Rule 166a\(c\)](#).

[3] [Appeal and Error](#)

[Appeal from Ruling on Motion to Direct Verdict](#)

Court of Appeals reviews a trial court's ruling on a motion for directed verdict under a legal-sufficiency standard.

[4] [Appeal and Error](#)

[Appeal from Ruling on Motion to Direct Verdict](#)

Court of Appeals must determine whether the nonmovant for directed verdict produced more than a scintilla of probative evidence to raise a fact issue on the material questions presented.

[5] [Appeal and Error](#)

[Effect of Evidence and Inferences Therefrom on Direction of Verdict](#)

Court of Appeals reviews the evidence in the light most favorable to the nonmovant for directed verdict and indulges every reasonable inference to resolve any doubts against the motion.

[6] [Judgment](#)

[Contract Cases in General](#)

Genuine issue of material fact as to interpretation of **contract** between firm that was retained by provider of information technology (IT) services to provide such services to provider's

client precluded summary judgment in action by firm against provider for breach of express warranty and breach of **contract** and in which provider brought counterclaim for breach of express warranty, breach of **contract**, and indemnification.

[7] **Contracts**

🔑 Language of **Contract**

When construing a written **contract**, Court of Appeals' primary concern is to ascertain and give effect to the true intentions of the parties as expressed in the agreement.

[8] **Contracts**

🔑 Construction as a Whole

Court of Appeals construes the entire writing and attempts to harmonize and give effect to all the provisions of the **contract** by analyzing the provisions with reference to the whole agreement.

[9] **Contracts**

🔑 Construction as a Whole

No single provision of an agreement taken alone will be given controlling effect; rather, all the provisions must be considered with reference to the whole instrument.

[10] **Contracts**

🔑 Existence of **Ambiguity**

Contracts

🔑 Construction as a Whole

If Court of Appeals is unable to harmonize the provisions and give effect to all the **contract's** clauses, the **contract** is susceptible to more than one reasonable interpretation and is **ambiguous**.

[11] **Contracts**

🔑 **Ambiguity** in General

Whether a **contract** is **ambiguous** is a question of law.

[12] **Contracts**

🔑 Existence of **Ambiguity**

A court may conclude a **contract** is **ambiguous** even in the absence of such a pleading by either party.

[13] **Judgment**

🔑 **Contract** Cases in General

Trial

🔑 Nature and Grounds

When a **contract** contains an **ambiguity**, the granting of a motion for summary judgment or directed verdict is improper because the intent of the contracting parties is an issue of fact.

[14] **Contracts**

🔑 Construction as a Whole

Courts must favor an interpretation of **contract** that affords some consequence to each part of the instrument so that none of the provisions will be rendered meaningless.

[15] **Appeal and Error**

🔑 Ordering New Trial, and Directing Further Proceedings in Lower Court

Remand was required in action by firm that was retained by provider of information technology (IT) services to provide such services to provider's client for breach of express warranty and breach of **contract** and in which provider brought counterclaim for breach of express warranty, breach of **contract**, and indemnification, where the trial court erroneously granted summary judgment and directed verdict in favor of firm, the ruling shaped the development of the case, and, had the motions not been granted, both parties would have presented additional evidence and arguments during trial, and the jury would have been asked to decide additional issues.

[16] Appeal and Error

🔑 **Ordering New Trial, and Directing Further Proceedings in Lower Court**

Appellate courts have broad discretion to remand a case for a new trial in the interest of justice.

[17] Appeal and Error

🔑 **Failure to Urge Objections**

Remand is appropriate when, for any reason, a case has not been fully developed, including where the trial court's action prevented the case from being properly developed and presented at trial.

Attorneys and Law Firms

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Before Justices MOSELEY, LANG, and RICHTER.¹

Opinion

OPINION

Opinion by Justice MOSELEY.

*1 Appellant Innovate Technology Solutions, L.P. appeals the trial court's adverse summary judgment and adverse directed verdict on its counterclaims against appellee Youngsoft, Inc. In two issues, Innovate argues the trial court erred by concluding its claims were barred by a limitation of liability provision contained in the parties' agreement and that the evidence was insufficient to support the trial court's judgment.

We conclude the trial court erred by granting Youngsoft's motions for summary judgment and for directed verdict. We do not reach Innovate's argument regarding sufficiency of the evidence. We reverse the trial court's judgment and remand for further proceedings.

Innovate provides information technology (IT) consulting and training services and software to its clients. In connection with a client project, it entered into a Professional Services Agreement (Agreement) to acquire IT services from Youngsoft. There is evidence the project did not proceed smoothly and that the client was unhappy.

Subsequently, Youngsoft sued Innovate for nonpayment; Innovate counterclaimed for breach of express warranty and breach of **contract**. Youngsoft moved for summary judgment, arguing that all of Innovate's counterclaims were all barred by a limitation of liability clause in the Agreement. The trial court granted Youngsoft's motion. Innovate later filed another counterclaim for indemnification.

The case proceeded to trial on Youngsoft's claims and Innovate's remaining indemnification counterclaim. Near the end of the trial, the trial court granted a directed verdict in Youngsoft's favor on Innovate's indemnification claim. The trial judge stated he believed that Youngsoft's indemnification claim "was taken care of in the summary judgment," and that "there is no affirmative relief available to" Innovate.

Youngsoft's case was submitted to the jury, which answered a single liability question in Youngsoft's favor and awarded damages of \$43,452.50. The trial court entered judgment based on the verdict. Innovate appealed.

In its second issue, Innovate argues the trial court erred by granting Youngsoft's motion for summary judgment and motion for directed verdict.

[1] [2] We review the trial court's summary judgment de novo. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex.2003). A motion for summary judgment on traditional grounds must show there is no genuine issue as to a specified material fact and, therefore, the moving party is entitled to judgment as a matter of law. *TEX.R. CIV. P. 166a(c)*. Thus, to prevail on a traditional motion for summary judgment, a defendant must either disprove at least one element of the plaintiff's claim as a matter of law, or conclusively establish all elements of an affirmative defense. *See Friendswood Dev. Co. v. McDade & Co.*, 926 S.W.2d 280, 282 (Tex.1996).

[3] [4] [5] We review a trial court's ruling on a motion for directed verdict under a legal-sufficiency standard. *City of Keller v. Wilson*, 168 S.W.3d 802, 823–24 (Tex.2005). A directed verdict is proper when a defect in the opponent's

pleadings makes them insufficient to support a judgment, the evidence conclusively proves the fact that establishes a party's right to judgment as a matter of law, or the evidence is insufficient to raise an issue of fact. *Keyes Helium Co. v. Regency Gas Servs., L.P.*, 393 S.W.3d 858, 864 (Tex.App.-Dallas 2012, no pet.). We must determine whether the nonmovant produced more than a scintilla of probative evidence to raise a fact issue on the material questions presented. See *Yost v. Jered Custom Homes*, 399 S.W.3d 653, 659 (Tex.App.-Dallas 2013, no pet.). We consider the evidence in the light most favorable to the nonmovant and indulge every reasonable inference to resolve any doubts against the motion. *Id.*

*2 [6] Youngsoft's motions for summary judgment and for directed verdict are both based on section 6 of the Agreement, which states:

6. LIMITATION OF LIABILITY

Notwithstanding anything contained elsewhere in this Agreement and under any circumstance, for any reason whatsoever, YS shall not be liable for any incidental, ancillary, direct, indirect, special or consequential damages, including but not limited to lost profits, whether in tort or **contract**, and based on any theory of liability.

Youngsoft argues section 6, by its plain language, overrides all other provisions in the Agreement, and (to quote its brief) means that "Innovate is not entitled to recover any damages from Youngsoft under any circumstances, notwithstanding anything to the contrary in the ... Agreement."

[7] [8] [9] When construing a written **contract**, our primary concern is to ascertain and give effect to the true intentions of the parties as expressed in the agreement. *El Paso Field Servs., L.P. v. MasTec N. Am., Inc.*, 389 S.W.3d 802, 805 (Tex.2012); *Carbona v. CH Med., Inc.*, 266 S.W.3d 675, 680 (Tex.App.-Dallas 2008, no pet.). We consider the entire writing and attempt to harmonize and give effect to all the provisions of the **contract** by analyzing the provisions with reference to the whole agreement. *Frost Nat'l Bank v. L & F Distribs., Ltd.*, 165 S.W.3d 310, 311–12 (Tex.2005) (per curiam); *Hackberry Creek Country Club, Inc. v. Hackberry Creek Home Owners Assn.*, 205 S.W.3d 46, 55 (Tex.App.-Dallas 2006, pet. denied). "No single provision taken alone will be given controlling effect; rather, all the provisions must be considered with reference to the whole instrument." *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex.2003).

[10] [11] [12] [13] If we are unable to harmonize the provisions and give effect to all the **contract's** clauses, the **contract** is susceptible to more than one reasonable interpretation and is **ambiguous**. *Hackberry Creek Country Club*, 205 S.W.3d at 56. Whether a **contract** is **ambiguous** is a question of law. *Id.; Coker v. Coker*, 650 S.W.2d 391, 394 (Tex.1983). A court may conclude a **contract** is **ambiguous** even in the absence of such a pleading by either party. *Hackberry Creek*, 205 S.W.3d at 56 (citing *Sage St. Assocs. v. Northdale Constr. Co.*, 863 S.W.2d 438, 445 (Tex.1993)). When a **contract** contains an **ambiguity**, the granting of a motion for summary judgment or directed verdict is improper because the intent of the contracting parties is an issue of fact. See *Coker*, 650 S.W.2d at 394 (summary judgment); *Hackberry Creek*, 205 S.W.3d at 56 (summary judgment); *Schwartz v. Prairie Producing Co., Inc.*, 833 S.W.2d 629, 632 (Tex.App.-Houston [1st Dist.] 1992, writ dismissed) (instructed verdict); *ETL Corp. v. Forrester*, 667 S.W.2d 247, 249 (Tex.App.-Dallas 1984, no writ) (**ambiguous contract** entitled party to jury findings on questions of fact raised by evidence); *Baker v. Powell*, 105 S.W.2d 289, 291 (Tex.Civ.App.-Amarillo 1937, no writ) (directed verdict).

*3 Youngsoft's motions and argument are based entirely on the limitation of damages provision found in section 6. However, Youngsoft's proposed interpretation of section 6 considers that provision only, isolating it from all other provisions in the Agreement. Youngsoft's interpretation fails to consider the entire Agreement and does not attempt to harmonize and give effect to all the provisions. See *Hackberry Creek*, 205 S.W.3d at 55.

For example, to accept Youngsoft's interpretation, we must ignore the mutual indemnity provision in the Agreement, which states:

9. INDEMNIFICATION

YS shall indemnify, defend and hold harmless [Innovate] ... from and against any and all claims, damages and judgments, including reasonable attorney's fees and expenses, arising out of or relating to any breach of this Agreement.

If Youngsoft's interpretation of the Agreement is correct, and section 6 means that "Innovate is not entitled to recover any damages from Youngsoft under any circumstances, notwithstanding anything to the contrary in the Professional Services Agreement," then Innovate could not enforce the

indemnification provision against Youngsoft if Youngsoft failed to perform its contractual obligations. Similarly, Youngsoft's interpretation would leave Innovate without a remedy if Youngsoft breached sections 3, 8, and 17 of the Agreement, which obligate Youngsoft to perform its services in a professional and workmanlike manner, maintain the confidentiality of Innovate's information, and maintain certain insurance coverage.

[14] Youngsoft's interpretation would render all of these provisions of the Agreement surplusage, preventing the court from giving effect to all provisions of the **contract**. See *Frost Nat'l Bank*, 165 S.W.3d at 312. But courts “must favor an interpretation that affords some consequence to each part of the instrument so that none of the provisions will be rendered meaningless.” *Coker*, 650 S.W.2d at 394.

Moreover, interpreting the Agreement to mean (in Youngsoft's words) that “Innovate is not entitled to recover any damages from Youngsoft under any circumstances, notwithstanding anything to the contrary ...” renders the Agreement illusory, void, and unenforceable. See *Tex. S. Univ. v. State Street Bank & Trust Co.*, 212 S.W.3d 893, 914 (Tex.App.-Houston [1st Dist.] 2007, pet. denied); *In re 24R, Inc.*, 324 S.W.3d 564, 567 (Tex.2010) (“When illusory promises are all that support a purported bilateral **contract**, there is no mutuality of obligation, and therefore, no **contract**”); *D.R. Horton, Inc. v. Brooks*, 207 S.W.3d 862, 867 (Tex.App.-Houston [14th Dist.] 2006, no pet.) (illusory promise is one that fails to bind the promisor who retains the option of discontinuing performance). If Youngsoft is completely insulated from any damage claims from Innovate, it effectively retains the option of discontinuing performance at any time.

At the trial court, Innovate argued for a different interpretation of Section 6; it asserted the limitation of liability provision

*4 protects Youngsoft against purchasers from Innovate (i.e., third parties to the relationship between Youngsoft and Innovate ...); but it does not protect Youngsoft from Innovate in its capacity as a Client of Youngsoft.... If the Limitation of Liability provision prohibits Innovate from recovering for damages and losses inflicted on Innovate by Youngsoft's breaches of duty to Innovate, then the Warranty provision

is rendered meaningless and the Indemnity provision endangered.

This interpretation of the Agreement gives effect to other provisions of the Agreement mentioned above, while it leaves Section 6 with some meaning. However, it renders meaningless the introductory phrase of Section 6, namely the phrase: “Notwithstanding anything contained elsewhere in this Agreement and under any circumstance, for any reason whatsoever ...”

Having reviewed the parties' arguments, we conclude Youngsoft did not demonstrate that its construction of the Agreement is a reasonable interpretation of the Agreement —much less the *only* reasonable interpretation. Therefore, Youngsoft did not meet its burdens to show it was entitled to summary judgment, see *Hackberry Creek Country Club*, 205 S.W.3d at 63–64, or directed verdict, see *Keyes Helium Co.*, 393 S.W.3d at 864, and the trial court erred by granting its motions. We sustain Innovate's second issue.

In its first issue, Innovate asserts the expert opinion presented at trial by Youngsoft was conclusory, speculative, subjective, unsubstantiated, and not probative. As a result, Innovate argues, there was no evidence showing whether the damages sought by Youngsoft were for services performed in a professional and workman-like manner, and the evidence did not support the jury's finding. We decline to address this argument.

[15] [16] [17] “Appellate courts have broad discretion to remand a case for a new trial in the interest of justice.” *Knapp v. Wilson N. Jones Mem'l Hosp.*, 281 S.W.3d 163, 176 (Tex.App.-Dallas 2009, no pet.) (citing TEX.R.APP. P. 43.3(b); *Scott Bader, Inc. v. Sandstone Prods., Inc.*, 248 S.W.3d 802, 822 (Tex.App.-Houston [1st Dist.] 2008, no pet.); *Ahmed v. Ahmed*, 261 S.W.3d 190, 196 (Tex.App.-Houston [14th Dist.] 2008, no pet.). “Remand is appropriate when, for any reason, a case has not been fully developed,” including where the trial courts action prevented the case from being properly developed and presented at trial. *Knapp*, 281 S.W.3d at 176; *Ahmed*, 261 S.W.3d at 196 (“As long as there is a probability that a case has, for any reason, not been fully developed, an appellate court has discretion to remand for a new trial rather than render a decision.”); *In re S.E.W.*, 168 S.W.3d 875, 885–86 (Tex.App.-Dallas 2005, no pet.).

When the trial court granted summary judgment and a directed verdict in Youngsoft's favor, the court shaped the development of the case and its presentation to the jury;

the trial court's rulings on Youngsoft's motions prevented Innovate from properly developing and presenting its claims to a jury. See *Knapp*, 281 S.W.3d at 176. It seems clear that had the trial court not granted the motion for summary judgment, both parties would have presented additional evidence and arguments during trial, and the jury would have been asked to decide additional issues. See *id.* (citing *Scott Bader, Inc.*, 248 S.W.3d at 822).

*5 Because we conclude that the trial court erred by granting Youngsoft's motions for summary judgment and directed verdict, thereby shaping the development and outcome of the case, we conclude the proper disposition of this appeal is to reverse the trial court's judgment and remand this case to the trial court for further proceedings.

Footnotes

1 The Hon. Martin Richter, Justice, Assigned.

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