No. 05-09-00544-CV

In the Fifth Court of Appeals
Dallas, Texas

BOB DIXON AND ADRIENNE DIXON

Appellants

v.

ASHLI HERMAN, MATT CYPHERT, AND JH & AH ENTERPRISES, INC.

Appellees

APPEAL FROM CAUSE NO. 07-4832
116TH JUDICIAL DISTRICT COURT OF DALLAS COUNTY, TEXAS
THE HONORABLE BRUCE PRIDDY, PRESIDING

APPELLANTS' REPLY BRIEF

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TO THE HONORABLE FIFTH COURT OF APPEALS:

Appellants, Bob Dixon and Adrienne Dixon ("the Dixons"), file this reply to address certain arguments made in the appellees' brief. The Dixons respectfully show:

PRELIMINARY STATEMENT

As the movants on a traditional motion for summary judgment, the Sellers had to present competent evidence conclusively disproving at least one element of all of the Dixons' claims or conclusively establishing each element of an affirmative defense. The Sellers claim to have disproved the existence of a material misrepresentation, any agency relationships, and damages. They also assert that an "as is" clause precludes all recovery and that they established ratification as a matter of law. *See* Appellees' Br. at 6.

The Sellers eschew the standards of review for traditional summary judgments in favor of trying the case in this Court. A number of factual statements in their brief either lack evidentiary support or are just flat wrong. Viewing the record in the light most favorable to the Dixons, the Sellers have failed to demonstrate a right to summary judgment on any of the grounds asserted. The case should be remanded for trial.

ARGUMENT

I. The Sellers Were Not Entitled to Summary Judgment on the Existence of a Material Misrepresentation

The parties agree that the existence of a misrepresentation is intertwined with whether agency relationships existed between or among the Sellers and that the principal's right to control the agent's conduct is key. *See* Appellees' Br. at 10, 12. But that is where the agreement ends.

A. The Sellers Misplace the Burden on Agency

In the traditional summary-judgment context, the nonmovant does not bear the initial burden of proof. *See* TEX. R. CIV. P. 166a(c); *McMahon Contracting, L.P. v. City of Carrollton*, 277 S.W.3d 458, 467 (Tex. App.—Dallas 2009, pet. denied). Because the Sellers moved for a traditional summary judgment, they had the burden of establishing as a matter of law that Matt Cyphert was not Ashli Herman's and JH & AH Enterprises' agent and that Daniel Bedoya and John French were not Cyphert's subagents. *See Farmer Enters., Inc. v. Gulf States Ins. Co.*, 940 S.W.2d 103, 111 (Tex. App.—Dallas 1996, no writ). Therefore, the Sellers' attempt to shift the burden to the Dixons fails. *See* Appellees' Br. at 12.

For the reasons stated in the Dixons' opening brief, Cyphert's affidavit does not conclusively negate the existence of agency relationships between and among the Sellers because it is wholly silent on the right of control. *See* Appellants' Br. at 11. If anything, Cyphert's affidavit raises genuine issues of material fact on that question, requiring a trial on the merits. *See id*. Nothing in the Sellers' brief alters that conclusion.

B. The Mootness Doctrine Does Not Apply

The Sellers also contend that the trial court's ruling on their objections to the Dixons' summary-judgment evidence renders the agency issue moot. *See* Appellees' Br. at 11-12. The mootness doctrine applies when (1) there are no live controversies between the parties; and (2) any decision rendered by the appellate court would be an advisory opinion. *Trulock v. City of Duncanville*, 277 S.W.3d 920, 924 (Tex. App.—Dallas 2009, no pet.). Here, the Sellers are simply arguing whether fact issues exist on the question of

agency. *See* Appellees' Br. at 12. Because the Court's action in this case will plainly affect the parties' rights, the mootness doctrine is not at issue here.

C. The Dixons Presented More Than a Scintilla of Evidence That the Sellers Made Actionable Misrepresentations

As the Dixons acknowledged in their opening brief, the trial court sustained some of the Sellers' objections to the Dixons' summary-judgment evidence "to the extent [the affidavits] contain inadmissible hearsay . . . ." CR 198 (App. Tab A).[1] This ruling applies to paragraphs 2 and 3 of Robert Dixon's affidavit,[2] paragraph 3 of Adrienne Dixon's affidavit,[3] and paragraphs 3 and 4 of Carrie Atkinson's affidavit.[4] *Id.*

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[1] All appendix citations refer to the appendix submitted with the Dixons' opening brief.

[2] The affected paragraphs of Robert Dixon's affidavit state:

> 2. Prior to wiring the funds for the purchase of a horse named Paramour (also previously known as Red, Islander and Puck), I communicated directly with Carrie Atkinson, Adrienne Dixon and Benson Carroll regarding the purchase of the horse. In late February or early March 2006, Carrie Atkinson or Benson Carroll informed me that John French had advised them that Paramour was 10 or 11 years old. In May of 2006, I communicated my offer to purchase the horse to Carrie Atkinson and/or Benson Carroll.
>
> 3. Based upon the representation that the horse was 10 or 11 years old, in May 2006 I wired $100,000.00 to an account as directed by Matt Cyphert for the purchase of the horse. In that I was purchasing the horse for my daughter's use, and as an investment for later resale, the age of [the] horse was of paramount importance to me.

CR 129-30.

[3] The affected portion of Adrienne Dixon's affidavit states: "About the time I first saw the horse, John French told me the horse was ten or eleven years old." CR 142.

[4] The relevant paragraphs from Carrie Atkinson's affidavit states:

> 3. In or around late February 2006, I was informed by Benson Carroll that he had been informed by John French that Paramour was 10 or 11 years of age. I then communicated this information to Robert Dixon. After Adrienne Dixon showed Paramour in several competitions in California, in late April or early May 2006 Robert Dixon informed me that since he had planned to resell the horse, the age of the horse was an important factor, and he asked me to communicate to Benson Carroll that he would purchase the horse, and I did so.

The Sellers' objections were plainly focused on the statements in each of these paragraphs regarding representations that Paramour was ten or eleven years old. None of these statements—and almost nothing in any of these paragraphs—is inadmissible hearsay. Considering that this lawsuit is based entirely on the Dixons' post-purchase discovery that the horse was actually thirteen years of age, the Dixons clearly did not offer this evidence to prove the horse was really ten or eleven years old. *See* TEX. R. EVID. 801(d) (defining hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted"). Based on the language and scope of the trial court's ruling on the Sellers' objections, these statements are part of the summary-judgment record and can be considered. *See Gaynier v. Ginsberg*, 715 S.W.2d 749, 759 (Tex. App.—Dallas 1986, writ ref'd n.r.e.) ("Whether evidence is hearsay or not is a question of law for the court to decide.").

In any event, the Sellers erroneously assume that the Dixons have no other summary-judgment evidence relevant to whether the Sellers misrepresented the horse's age. *See* Appellees' Br. at 10-11. To the contrary, the following evidence was not addressed in the trial court's evidentiary ruling:

> 4. In May 2006, after Robert Dixon informed me that he had wired the funds for the purchase of Paramour, I requested Matt Cyphert's cell phone number from John French so that I could call Cyphert to obtain the USEF number for Paramour. I called Matt Cyphert in May 2006 requesting the USEF number. Matt Cyphert informed me that he thought the USEF number was in "Red's" tack box at the barn and he would locate it and send it to me. However, he never did.

CR 146.

- Affidavit testimony from Robert Dixon that "Mr. Cyphert assured me that the horse was indeed 11 . . . ." CR 130 (¶ 5).

- Affidavit testimony from Robert Dixon that "Mr. Cyphert continued to assure me that the information was forthcoming and that the horse was indeed 11 years old." CR 130-31 (¶ 5)

- Affidavit testimony from Carrie Atkinson that "I made telephone calls to Matt Cyphert in June and July 2006 regarding this age discrepancy, and Mr. Cyphert insisted that the horse was indeed 11 and not 13." CR 146 (¶ 5).

Although this evidence relates to communications with Cyphert after the sale, it is consistent with the Dixons' position that the same representations were made beforehand. When provided opportunities to set the record straight, Cyphert stuck to the position that Paramour was eleven rather than thirteen years old. Viewing the record and inferences in the light most favorable to the Dixons, genuine issues of material fact precluded summary judgment on whether the Sellers misrepresented Paramour's age during negotiations. *See McMahon Contracting,* 277 S.W.3d at 467.[5]

II. The "As Is" Provision in the Unsigned Bill of Sale Cannot Be Enforced Against the Dixons

The Sellers dismiss the Dixons' statute of frauds argument as "misplaced" because "the sale was not conditioned upon delivery of a Bill of Sale." *See* Appellees' Br. at 26. This argument misses the point.

[5] As indicated in the Dixons' opening brief, direct communication between them and the Sellers is not a prerequisite to maintaining this action. *See* Appellants' Br at 7-9; *see also Ervin v. Mann,* 234 S.W.3d 172, 177 (Tex. App.—San Antonio 2007, no pet.) ("Direct communication by the professional to the user is not required to establish standing [to assert a misrepresentation claim]"); *Dallas Heating Co. v. Pardee*, 561 S.W.2d 16, 21 (Tex. Civ. App.—Dallas 1977, no writ) (noting that agency relationship does not depend upon express appointment or assent by principal, but may be implied from parties' conduct, including acquiescence in or accepting benefits of transaction).

The issue is whether the "as is" provision in the bill of sale at issue can be enforced against the Dixons, not whether delivery of the bill was negotiated as part of the transaction. The provision cannot be enforced here because the Sellers cannot produce a signed copy of the document. *See* Appellants' Br. at 12. The alleged "judicial admission" in the Dixons' petition does not satisfy the statutory prerequisite of a signature. *See* TEX. BUS. & COM. CODE § 2.201(a) (App. Tab C); *Koons v. Impact Sales & Mktg. Group, Inc.*, No. 02-07-0010-CV, 2007 WL 4292423, at *2 (Tex. App.—Ft. Worth Dec. 6, 2007, no. pet.) (mem. op.) (noting that statute defines "signed" as including "any symbol executed or adopted with present intention to accept a writing," and holding that transmission of proposed bill of sale on company letterhead was insufficient).

Moreover, the Sellers take inherently inconsistent positions. They argue that the bill of sale is not relevant because "the parties' transaction was complete" before Cyphert ever sent it to Dixon (Appellees' Br. at 19) and deny that the bill of sale confirms previous representations regarding Paramour's age, yet the Sellers want to enforce the "as is" provision to the extent it favors them.

The Court should reject this attempt to cherry-pick the facts and hold that the Sellers failed to establish the existence of a written contract between the parties containing an enforceable "as is" provision. *See City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979) (noting that, even when no response is filed, movant "still must establish his entitlement to a summary judgment on the issues expressly presented to the trial court by conclusively proving all essential elements of his cause of action or defense as a matter of law"). But even if the "as is" provision could be

enforced, a jury should make the decision whether to do so, for the reasons stated in the Dixons' opening brief.

III. The Sellers Failed to Conclusively Establish Ratification

The Seller's argument that they conclusively established each element of their ratification defense boils down to an assertion that the Dixons were on notice of Paramour's true age because they possessed the horse's USEF number and went online to change his ownership records, a theme repeated frequently throughout their brief. *See* Appellees' Br. at 25-26; *see also id.* at 20. This position wrongly assumes that the trial court took judicial notice that "the USEF number alone (or the name of the horse for that matter) enables anyone to go on-line at any time and determine the age of a USEF recorded horse . . . ." *Id*. at 5.

The record does not reflect that the trial court took judicial notice of what the Sellers claim it did. And there is no evidence supporting the Sellers' assertion that anyone can obtain information about a horse by inputting a registration number on the USEF website. Furthermore, the Sellers fail to address the Dixons' argument that there is no evidence (much less conclusive evidence) the Dixons knew about the fraud or breach, but intentionally and voluntarily ratified the contract despite that knowledge. *See* Appellants' Br. at 15 (citing *Martin v. Martin*, 287 S.W.3d 260, 266-67 (Tex. App.—Dallas 2009, pet. denied); *LSR Joint Venture No. 2 v. Callewart*, 837 S.W.2d 693, 699 (Tex. App.—Dallas 1992, writ denied); *Spangler v. Jones*, 797 S.W.2d 125, 131-32 (Tex. App.—Dallas 1990, writ denied)). In sum, the Sellers did not carry their summary-judgment burden on ratification.

IV. The Sellers Were Not Entitled to Summary Judgment on Damages

As in the trial court, the Sellers rely on snippets of deposition testimony from the Dixons to support their position that summary judgment was appropriate on the issue of damages. *See* Appellees' Br. at 27 (citing CR 76, 83). Because they filed a traditional motion only, the Sellers' initial burden was to show that no material fact issue existed and that they were entitled to judgment as a matter of law. *See* TEX. R. CIV. P. 166a(c); *McMahon Contracting*, 277 S.W .3d at 467.

Viewing the Sellers' evidence in the light most favorable to the Dixons, the Sellers failed to conclusively disprove damages. Rather, their evidence only tends to show that the Dixons believed $100,000 was Paramour's fair market value when paid—that is, before they became aware that the show horse was about two to three years older than represented and had suffered undisclosed injuries. *See* Appellants' Br. at 16. The Dixons' assessment of market value before they became aware of the misrepresentations at issue is irrelevant to the amount of damages they suffered. Thus, the only evidence upon which the Sellers rely to support their position on damages does not rise to a level capable of supporting summary judgment.

With respect to the Dixons' summary-judgment evidence, the Sellers again want it both ways. If the Dixons' testimony that a fair price would be less than what they paid is not probative of market value (as the Sellers contend), then testimony that Paramour's fair market value was $100,000 before they discovered the misrepresentations also is not probative. *See* Appellees' Br. at 31. In either event, summary judgment on damages was inappropriate, and the trial court's judgment should be reversed.

CONCLUSION AND PRAYER

The Dixons renew their request for the relief specified in their principal brief. The Dixons request all other appropriate relief to which they are entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On December 2, 2009, in compliance with Texas Rule of Appellate Procedure 9.5, I served a copy of this brief upon all other parties to the trial court's judgment by first-class United States mail, properly posted and deliverable as follows:

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