ORIGINAL

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
ENTERED
OCT 21 2002
TAWANA C. MARSHALL, CLERK
By _____
Deputy

IN RE:	§	
	§	
BRIDGESTONE HEALTHCARE MANAGEMENT, INC., DEBTOR.	§	CASE NO. 02-30150-SAF-7
	§	
BEN HIGBEE for himself and on behalf of BRIDGESTONE HEALTHCARE MANAGEMENT, INC., PLAINTIFFS,	§	
	§	
VS.	§	ADVERSARY NO. 02-3019
	§	
BRIDGESTONE HEALTHCARE MANAGEMENT, INC., DAVID E. SONES, CENTRAL DALLAS REHABILITATION & DIAGNOSTIC CENTER, LLC, DFW HEALTH RESOURCES, LLC, HALTHEON MANAGEMENT GROUP, L.P. and INWOOD TRANSPORTATION, LLC, DEFENDANTS.	§	

MEMORANDUM OPINION AND ORDER

David E. Sones moves the court for summary judgment dismissing the complaint of Ben Higbee. Except for the debtor, Bridgestone Healthcare Management, Inc., the other defendants join in the motion. Higbee opposes the motion. The court conducted a hearing on the motion on September 13, 2002.

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with

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the affidavits, if any, and other matters presented to the court show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby Inc., 477 U.S. 242, 250 (1986); Washington v. Armstrong World Indus. Inc., 839 F.2d 1121, 1122 (5th Cir. 1988). On a summary judgment motion the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Anderson, 477 U.S. at 255. A factual dispute bars summary judgment only when the disputed fact is determinative under governing law. Id. at 250.

The movant bears the initial burden of articulating the basis for its motion and identifying evidence which shows that there is no genuine issue of material fact. Celotex, 477 U.S. at 323. The respondent may not rest on the mere allegations or denials in its pleadings but must set forth specific facts showing that there is a genuine issue for trial. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986).

Higbee and Sones agreed to purchase a chiropractic clinic. Under a shareholder agreement dated December 16, 1999, Bridgestone, a corporation formed by Sones, would purchase the assets of the chiropractic clinic. Higbee obtained an option to purchase 5% of the Bridgestone stock for $47,500 within 10 days

following the closing of the purchase. Sones and Higbee agreed that Bridgestone would employ Higbee under an employment agreement. The shareholder agreement further provided that, after certain conditions had been met, Higbee could exercise an option to purchase an additional 44% of the Bridgestone stock for $100.

The next day, December 17, 1999, Bridgestone by Sones, its president, and Higbee entered into the employment agreement. The agreement provided that during the first 12 months of employment, Bridgestone could, without cause, terminate Higbee's employment and his option to purchase the additional 44% of the stock upon payment of $60,000 severance pay.

On May 9, 2000, Sones gave Higbee notice of the termination without cause of his employment with Bridgestone. Sones tendered Higbee $60,000, which Higbee accepted and retained.

In this adversary proceeding, Higbee contends that Sones breached the shareholder agreement, committed fraud, engaged in a civil conspiracy and violated the Texas Securities Act and the statutory fraud provision of the Texas Business & Commerce Code § 21.01. Sones moves for summary judgment dismissing all these claims.

Robert Yaquinto, the Chapter 7 trustee of the Bridgestone bankruptcy estate, reports that he anticipates having sufficient assets in the estate to make a distribution to the debtor. 11

U.S.C. § 726(a)(6). The parties agree that this adversary proceeding will determine the resulting distribution to the interest holders of the debtor, and have consented to the entry of a final judgment by this court. 28 U.S.C. §§ 157(b)(2)(O), (c)(2), (e) and 1334; 11 U.S.C. §§ 501(a) and 502.

Before this litigation had been removed from state court, Sones had filed a similar motion for summary judgment. The state court, by docket sheet minute dated May 24, 2001, denied the motion. The state court did not issue a written decision and, if the state court articulated reasons for its decision, the parties did not provide that statement to this court. Higbee argues that this court should not revisit the summary judgment issues, but, instead, proceed to trial.

A federal trial court takes a removed state court case as if all prior proceedings had taken place in federal court. See Vernon Sav. & Loan Ass'n v. Commerce Sav. & Loan Ass'n, 677 F.Supp. 495, 498-99 (N.D. Tex. 1988). The federal court resumes where the state court stopped. A federal court may not, however, sit as a state appellate court. Rooker v. Fid. Trust Co., 263 U.S. 413 (1923); D.C. Ct. App. v. Feldman, 460 U.S. 462, 476, 482 (1933). But a federal court in a removed action may vacate a state court default judgment, Beighley v. F.D.I.C., 868 F.2d 776, 781 (5th Cir. 1989), may consider a motion for new trial, F.D.I.C. v. Taylor, 727 F.Supp. 326, 328-29 (S.D. Tex. 1989), and

may grant relief from a state court judgment. See Northshore Dev., Inc. v. Lee, 835 F.2d 580, 583 (5th Cir. 1988). Since the state court did not issue a written decision explaining its ruling, consideration of the motion for summary judgment would not amount to a review of the state court decision. Without a record explaining the state court's denial of the motion, this court's consideration of the motion would not functionally differ from granting a motion for relief from a state court default judgment or granting a motion for a new trial and proceeding to consideration of the merits of a case. The federal court, on removal, may resume a case by revisiting a minute entry order denying a summary judgment motion. In the absence of a state court record explaining the state court's denial of the motion, this court will adjudicate the renewed motion.

Contract

Higbee contends that Sones breached the shareholder agreement by failing to allow Higbee to exercise his option to acquire the additional 44% of the Bridgestone stock. Higbee further argues that Sones breached the contract by transferring Bridgestone's assets to other entities. Any claim concerning the transfer of Bridgestone assets belongs to the Bridgestone bankruptcy estate, and does not inform the breach of contract claim between Higbee and Sones.

The shareholder agreement, dated December 16, 1999, and the employment agreement, dated December 17, 1999, essentially constitute a simultaneous transaction. The court therefore reads both agreements together. The court is bound to read all parts of a contract together to ascertain the agreement of the parties. The contract must be considered as a whole, with each part of the contract given effect. Matador Petroleum Corp. v. St Paul Surplus Lines Ins. Co., 174 F.3d 653, 656-57 (5th Cir. 1999) (citing Forbau v. Aetna Life Ins. Co., 876 S.W.2d 132, 133 (Tex. 1994)). Higbee and Sones both signed the shareholder agreement. Sones signed the employment agreement for Bridgestone as its president. Higbee also signed the employment agreement.

Bridgestone had the right, under the employment agreement, to terminate Higbee's employment without cause during the first year of the contract. If Bridgestone exercised that right and thereupon paid Higbee $60,000, Higbee's option to purchase 44% of the Bridgestone stock under the shareholder agreement would also be terminated.

Sones, as president of Bridgestone, caused Bridgestone to terminate Higbee's employment during the first year of the employment contract. The notice of termination acknowledges that the termination was without cause. Bridgestone paid Higbee the $60,000. Higbee received and retained the $60,000.

There are no genuine issues of material fact regarding the breach of contract claim. As relevant to the claim, the shareholder agreement and the employment agreement are unambiguous. Both Higbee and Sones agreed to the terms of the agreements. If Bridgestone terminated Higbee's employment without cause during the first year of his employment and paid Higbee $60,000, Higbee's option to purchase the stock would terminate. That is precisely what happened. Bridgestone, by Sones, its president, acted within the plain language of the employment agreement.

The court will therefore grant Sones summary judgment dismissing the breach of contract claim.

Common Law Fraud

Higbee contends that Sones fraudulently induced him to enter the agreements. Higbee asserts that Sones had no intention to ever allow Higbee to exercise the option to purchase 44% of the Bridgestone stock. Sones requests a summary judgment dismissing this claim.

Under Texas law, fraud requires that "(1) a material representation was made (2) that was false when made (3) by a speaker who either knew the statement was false or made it as a positive assertion recklessly and without knowledge of its truth (4) with the intent that the statement be acted upon, and (5) the party opposite acted in reliance on the false representation and

(6) was injured as a result of doing so." Stinnett v. Colorado Interstate Gas Co., 227 F.3d 247, 253 (5th Cir. 2000)(applying Texas Law). Failure to perform under a contract does not constitute fraud, but a promise to act in the future may be actionable if the promissor had no intention of performing when he made the promise. U.S. Quest Ltd. v. Kimmons, 228 F.3d 399, 403 (5th Cir. 2000).

In a deposition, Renn Nielson, an attorney, testified that he had been present at a meeting with Higbee, Sones and others in May 2000 where Sones stated that Sones never intended to allow Higbee to purchase the stock or for Bridgestone to transfer to Higbee the 44% of the Bridgestone stock for $100 as provided in the shareholder agreement. In his deposition, Higbee testified that during the negotiations over the agreements, Sones had expressed a concern that he may not be able to work with Higbee. In his affidavit, Sones averred that because he and Higbee had no prior dealings, they agreed that the option could be extinguished along with Higbee's employment by the payment of one year's severance salary. In his affidavit, Higbee averred that in April 2000 Sones informed Higbee that Sones would transfer assets from Bridgestone. According to Higbee, Sones offered Higbee a 2% interest in Sones' other entities, but that Higbee would have to forfeit his right to acquire the additional 44% of Bridgestone. Higbee declined. Higbee averred that Sones then stated that

Higbee was not worth "that type of money." Higbee further averred that he convened the May 2000 meeting to determine why he could not exercise his option to acquire the Bridgestone stock. Higbee averred that Sones said that Sones never intended to allow Higbee to exercise the option. Higbee argues that this summary judgment establishes a genuine issue of material fact that Sones never intended to perform the stock option agreement.

Sones argues that the May 2000 meeting constituted a settlement conference. Consequently, Sones contends that evidence of any statements he made at the conference cannot be admitted into evidence, citing Fed. R. Evid. 408. Higbee contends that Rule 408 does not apply. Higbee argues that Sones' statement may be admitted to show state of mind and intent. However, the federal rule bars "statements made in compromise negotiations" from admission into evidence. Discussions in settlement conferences may be both heated and exaggerated. The rule encourages free communication by shielding statements made during those negotiations from admission into evidence.

But Sones has not established, on this summary judgment record, that Rule 408 applies. Federal courts recognize that it is often difficult to determine whether statements have been made "in compromising or attempting to compromise a claim." Pierce v. F.R. Tripler & Co., 955 F.2d 820, 827 (2d Cir. 1992). Both the timing of the statement and the existence of a disputed claim are

relevant to the determination. Id. Business communications made prior to threatened litigation are not offers to compromise a dispute. Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co., 561 F.2d 1365, 1373 (10th Cir. 1977).

Where a party is represented by counsel, threatens litigation and has initiated the first administrative steps in that litigation, statements made in connection with an offer will be presumed to be within the scope of Rule 408. Pierce, 955 F.2d at 827. While Rule 408 is not limited to settlement negotiations that commence after a lawsuit is filed, the gap in time between the statement and litigation informs the court's analysis of the applicability of Rule 408. Ferguson v. F.D.I.C., No. 3:91-CV-2494-D, 1997 WL 135597, at *2 (N.D. Tex. Mar. 19, 1997).

In his affidavit, Sones stated that by May 2000 he and Higbee had differences regarding clinic operations. In an effort to settle their differences, Sones averred that he agreed to meet with Higbee in May 2000. Higbee attended the meeting with two attorneys, Matt Larsen and Renn Nielson. Sones brought Gordon Cullum, his financial advisor. Sones averred that the sole purpose of the meeting was to discuss a possible compromise and settlement of their differences. Sones did not want notes taken. Sones stated in his affidavit that the attorneys assured him that discussions during the meeting would be confidential. In his affidavit, Cullum averred that he arranged the May 2000 meeting

for Sones and Higbee to attempt to settle their differences. Cullum averred that the parties met at the Fairmont Hotel in Dallas, rather than at the clinic, to insure privacy and confidentiality. In his deposition, Nielson acknowledged that the parties met to attempt to settle their disputes. In his affidavit, Higbee averred that he convened the meeting to determine why Sones was refusing to allow Higbee to exercise his option to purchase the stock.

On this summary judgment record, there is no genuine issue of material fact that Sones and Higbee met in May 2000 to attempt to settle their differences regarding the operation of the clinic and the exercise of the stock option. But that does not make Rule 408 applicable. There is no evidence of threatened litigation. There is no evidence of Sones or Higbee taking any steps to initiate litigation. Sones was not represented by counsel at the meeting. At the time of the meeting, the dispute concerned, from Sones' point of view, business differences regarding clinic operations and, from Higbee's point of view, questions about the exercise of the stock option. On this summary judgment record, the statements appear to be more in the nature of business communications made prior to threatened litigation. For summary judgment, the court does not apply Rule 408.

The parties dispute whether Sones had a duty to disclose any intention not to perform on the stock option. Higbee contends that when Sones stated that Higbee would have the stock option, Sones had a duty to further disclose that Sones had no intention of ever letting Higbee exercise that option. Sones counters that he had no duty to speak. The court does not need to address the question of law. Sones did speak. He negotiated a contractual alternative to the stock option, which he could invoke without cause. Higbee, in turn, agreed to that contractual provision.

Sones' statement that he never intended to allow Higbee to purchase the stock and Sones' explanation of the circumstances establish a genuine issue of material fact of whether Sones intended to perform the stock option. Drawing inferences in Higbee's favor, there is a genuine issue of material fact of whether Sones made a knowingly false statement regarding the stock option, with the intention that Higbee act on it. But, although Higbee averred that he relied on the statement, he cannot establish reliance based on the only reasonable inference to be drawn from the uncontested facts of this case. Sones and Higbee agreed that Sones could extinguish the stock option by terminating Higbee's employment with Bridgestone, without cause, that is, for any reason, provided that Bridgestone pay Higbee $60,000. Sones requested an out from the stock option obligation, and Higbee agreed to one. Higbee cannot establish

that he entered the agreements relying on the stock option, when he agreed to a provision that would extinguish the option, "without cause."

The court therefore concludes that Sones is entitled to summary judgment dismissing the common law fraud claim.

Conspiracy

Higbee contends that Sones and several of his entities conspired to transfer assets from Bridgestone. Claims concerning the transfer of Bridgestone assets constitute property of the Bridgestone bankruptcy estate, 11 U.S.C. § 541, and, consequently, must be brought by the trustee. Higbee lacks standing to prosecute the claim. Sones is entitled to a partial summary judgment dismissing the claim, without prejudice.

Texas Securities Act

Higbee claims that defendants Sones, Bridgestone, or both, offered or sold a security by means of an untrue statement of material fact or omitted to state a material fact necessary in order to make the statements made not misleading. Sones moves for partial summary judgment dismissing the claim. Sones contends that there is no evidence that he made an untrue statement of material fact. Sones further contends that he offered to rescind the shareholder agreement.

The Texas Securities Act provides:

> (2) Untruth or omission. A person who offers or sells a security (whether or not the security or transaction

> is exempt under Section 5 or 6 of this Act) by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, is liable to the person buying the security from him, who may sue either at law or in equity for rescission, or for damages if the buyer no longer owns the security. However, a person is not liable if he sustains the burden of proof that either (a) the buyer knew of the untruth or omission or (b) he (the offeror or seller) did not know, and in the exercise of reasonable care could not have known, of the untruth or omission. . .

Tex. Rev. Civ. Stat. Ann. art. 581-33(A)(2)(Vernon Supp. 2002).

For purposes of this claim, there is a genuine issue of material fact concerning whether Sones intended at the time of the shareholder agreement to allow Higbee to exercise the stock option. If, at trial, Higbee establishes that Sones did not ever intend to allow Higbee to exercise the stock option, then there may exist an "untrue statement of material fact" or "an omission to state a material fact."

Sones would not, however, be liable if he establishes at trial that Higbee knew of the untruth or omission. There is summary judgment evidence that Sones expressed a concern in their negotiations about the prospect of the employment arrangement not working. Higbee agreed to an alternative to the stock option. Drawing inferences in favor of the party opposing the motion, there are genuine issues of material fact concerning this claim.

Nevertheless, Higbee's only remedy may be rescission. Higbee continues to own 5% of the stock of Bridgestone, which he

acquired pursuant to the shareholder agreement. Under the statute, Higbee may only seek damages for a violation of the Act, "if the buyer no longer owns the security." Since Higbee still owns the security, he may not pursue damages. As a result, Higbee may only seek rescission. Sones has offered to rescind the agreement. See Pontiac v. Nix, 681 S.W.2d at 831, 836 (Tex. App.--Dallas 1984, writ refused n.r.e.).

Consequently, Sones is entitled to summary judgment dismissing the claim for violation of the Texas Securities Act.

Statutory Fraud Claims

Higbee claims that the defendants committed fraud in a stock transaction under Texas Business & Commerce Code § 27.01(a), by making a false representation or false promise with actual awareness of the falsity. Sones moves for summary judgment dismissing this claim.

Section 27.01(a) of the Texas Business and Commerce Code provides, in part, that "fraud in a transaction involving . . . stock in a corporation . . .consists of a (2) false promise to do an act, when the false promise is (A) material; (B) made with the intention of not fulfilling it; and (C) made to a person for the purpose of inducing that person to enter a contract; and relied on by that person in entering that contract." Tex. Bus. & Com. Code § 27.01(a)(2).

Sones argues he did not make false representations of material existing facts to Higbee in order to induce Higbee to sign either the shareholder or employment agreement. Sones also argues he did not make a false promise to perform an act. Further, Sones states Higbee's stock fraud claims under § 27.01 fail because they relate to options which never vested. Contrary to Sones' argument, the stock option is a transaction involving stock in a corporation.

Sones and Higbee agreed to the stock option. Sones and Higbee agreed to an alternative whereby the stock option could be extinguished.

Higbee nevertheless contends that Sones never intended to allow Higbee to exercise the stock option. Higbee therefore argues that Sones made a material promise to perform an act with no intention of fulfilling it. Higbee's affidavit establishes genuine issues of material fact regarding the claim except that Higbee relied on the stock option portion of the agreements when he entered the contract.

In his affidavit, Higbee states that in November 1999 he executed an agreement with Dr. Daniel Lohr in which he would purchase the chiropractic practice. Then, after negotiations with Sones, Higbee executed the shareholder agreement with Sones containing a 5% stock purchase of Bridgestone and an option to purchase another 44%. That agreement was contingent upon Higbee

revoking and destroying his agreement with Dr. Lohr. Higbee did destroy the agreement with Dr. Lohr and entered into the agreement with Sones. Higbee argues that he relied on the stock option, to his detriment because he lost the Lohr deal.

In a supplemental affidavit, Sones suggests that Higbee could not finance a cash transaction with Lohr for the purchase of the chiropractic practice. Higbee objects to this supplemental affidavit pursuant to N.D. TX L.R. 56.7. The court sustains the objection. The supplemental appendix to David E. Sones' reply in support of summary judgment and the supplemental affidavit of David E. Sones in support of Dr. Sones' reply to Dr. Higbee's response to Sones' motion for summary judgment will not be considered for summary judgment.

Nevertheless, if Sones had no intention to perform, Higbee cannot establish that he relied on the stock option when he entered the shareholder and employment agreements because he agreed to the termination provision in the employment agreement. Higbee can establish at trial that he relied on the agreements themselves in their entirety. Sones does not contest that. The employment agreement provided Sones an alternative to allowing Higbee to exercise the stock option under the shareholder agreement. Sones could buy Higbee out by terminating his employment with Bridgestone thereby extinguishing the stock option upon payment of $60,000. The agreements are not

ambiguous. The only reasonable inference to be drawn from the summary judgment evidence is that Higbee relied on the totality of the agreements and he got what he relied on. Even if Higbee established that Sones had no intention of performing the stock option, there is no summary judgment evidence that Sones did not intend to act consistently with the parties' agreements. There is no genuine issue of material fact that Sones acted consistently with the agreements. Since Higbee cannot establish that he relied solely on the stock option provision, he cannot recover on the statutory fraud claim.

Sones is therefore entitled to a summary judgment dismissing this claim.

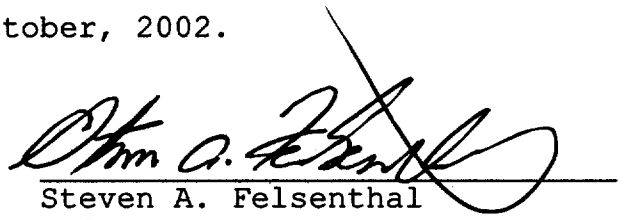
Order

Based on the foregoing,

IT IS ORDERED that the motion of David Sones for summary judgment is **GRANTED**.

Counsel for Sones shall prepare a judgment consistent with this order.

Signed this 16th day of October, 2002.



Steven A. Felsenthal
United States Bankruptcy Judge