Opinion issued July 6, 2017

In The

Court of Appeals

For The

First District of Texas

NO. 01-16-00311-CV

LEONARD HOLMES, Appellant

V.

STEVEN NEWMAN, Appellee

On Appeal from the 151st District Court
Harris County, Texas
Trial Court Case No. 2014-10578

MEMORANDUM OPINION

This case involves an investment in a start-up internet company that provides betting tips to gamblers for a fee. Appellant, Leonard J. Holmes, appeals from a summary judgment in favor of appellee, Steven Newman. In two issues on appeal, Holmes contends that (1) the trial court erred by excluding testimony from his expert

witness regarding the meaning of a term used by the parties in the contract; and (2) fact issues preclude summary judgment. We affirm in part and reverse and remand in part.

BACKGROUND

Holmes and Newman had a prior business relationship; Newman worked at TD Ameritrade and Holmes was a customer. Newman left TD Ameritrade before the events giving rise to this suit.

Newman made Holmes aware that he was looking for an investor to help fund a start-up website business that would provide advice and information to sports bettors. In April 2013, Holmes invested $50,000 in return for a 50% interest in SportsPicks.com, LLC.

The parties memorialized their agreement through a series of emails, which are dated April 3, 2013 and April 4, 2013. The April 3rd email from Newman to Holmes provides:

> This is what we came up [with].
>
> 50k for 50%.
>
> ***We also agreed the first return of capital would go to you up to 50k (your investment) and then be split according to ownership perpetually.***
>
> ***Capital will be distributed quarterly, 4 times a year.***
>
> 2 of the 3 partners must agree to make material decisions.

> If the site requires Rob [Abbott, the third investor] or I spending too much time on it, they will need to get paid at a reasonable rate.
>
> We do not foresee that being an issue the first 12 months.
>
> If it all sounds good, let me know if you would like to meet Rob or the best way to proceed to get this wrapped up.
>
> (emphasis added).

Holmes responded via email on April 4th that stated:

> no pay till I get paid is that ok . . . lets do it . . .thanks . . .jimmy

Newman responded on April 4th:

> Let's do it!
>
> We are going to set it up as an LLC . . . what name do you want on the paperwork? Address? I'm going to have the paperwork done tomorrow.
>
> Once set up, you can wire the money into the new account or if easier, write a check and we will get it deposited.

On April 10, 2013, a Certificate of Formation Limited Liability Company for SportsPicks.com was filed with the Texas Secretary of State.

The next day, on April 11, 2013, Holmes tendered to Newman a $50,000 check made payable to SportsPicks.com, LLC.

Feeling that the business needed further capital to become profitable, on February 19, 2014, Newman and Abbott requested an additional capital contribution, which Holmes declined to make. Newman and Abbott did make additional capital contributions, which Holmes alleges diluted his interest in the LLC.

On February 28, 2014, Holmes filed suit. In his seventh amended petition—the live petition at the time of summary judgment—Holmes alleged breach of contract, as well as several torts, including statutory and common-law fraud, fraudulent inducement, and breach of fiduciary duty.[1]

Newman filed a combined no-evidence and traditional motion for summary judgment. Holmes responded. Both parties attached evidence to their summary judgment filings. The trial court granted Newman's motion for summary judgment without specifying whether it was granting the no-evidence motion or the traditional motion and dismissed all claims asserted in Holmes's seventh amended petition.

This appeal followed.

PROPRIETY OF SUMMARY JUDGMENT

In his second issue on appeal, Holmes contends that "[t]he trial court erred in granting Appellee Newman's Motion for Summary Judgment because numerous fact issues existed and more than a scintilla of evidence has been produced by Appellant Holmes."

Standard of Review

[1] Holmes also asserted claims against Abbott, TD Ameritrade, and several other entitites, which were ultimately nonsuited or settled and are not part of this appeal.

We review a trial court's grant of summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). The party moving for summary judgment bears the burden of proof. *Roskey v. Tex. Health Facilities Comm'n*, 639 S.W.2d 302, 303 (Tex. 1982). Though these burdens vary for traditional and no-evidence motions, the summary judgment motion here was a hybrid motion and both parties brought forth summary judgment evidence; therefore, the differing burdens are immaterial, and the ultimate issue is whether a fact issue exists. *Neely v. Wilson*, 418 S.W.3d 52, 59 (Tex. 2013); *Buck v. Palmer*, 381 S.W.3d 525, 527 n.2 (Tex. 2012). A fact issue exists if there is more than a scintilla of probative evidence. *See id.* at 527; TEX. R. CIV. P. 166a(c),(i). We must review the summary judgment record "in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts against the motion." *City of Keller v. Wilson*, 168 S.W.3d 802, 824 (Tex. 2005). Therefore, this Court must determine whether a fact issue exists on the causes of action pleaded by Holmes.

Breach of Contract

The essential elements of a breach of contract claim are (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages sustained as a result of the breach. *B & W Supply, Inc. v. Beckman*, 305 S.W.3d 10, 16 (Tex. App.—Houston [1st Dist.]

2009, pet. denied). A breach of contract occurs when a party to the contract fails or refuses to do something that he has promised to do. *Id*. (quoting *Mays v. Pierce*, 203 S.W.3d 564, 575 (Tex. App.—Houston [14th Dist.] 2006, pet. denied)).

The element at issue in this case is breach: Is there a fact question about whether Newman breached his contractual duties to Holmes by not returning his capital? To determine this, the Court must decide the meaning of the following provisions:

> We also agreed the ***first return of capital*** would go to you up to 50k (your investment) and then be split according to ownership perpetually. (emphasis added).
>
> ***Capital*** will be distributed quarterly, 4 times a year. (emphasis added).

Both parties contend that the provisions are unambiguous, but they offer differing interpretations of the provisions. Newman contends that the term "first return of capital" "is definite and unambiguous, in that it clearly sets forth the order in which capital will be returned, giving Plaintiff a priority, while it does not state that any capital will be returned in the first instance under any circumstances." Holmes, in contrast, argues that "[a] return of capital is completely different from a dividend," and that what Newman is describing—a distribution to shareholders based on profits—is a dividend, not a return of capital. Newman further argues that

the unambiguous meaning of the contract is that capital, i.e., his $50,000 investment, would be returned to him quarterly without regard to profit.

Although neither party argues the contract is ambiguous, "whether a contract is ambiguous is a question of law to be decided by the Court." *Progressive Cty. Mut. Ins. Co. v. Kelley*, 284 S.W.3d 805, 808–09 (Tex. 2009) (per curiam). A court may conclude a contract is ambiguous even in the absence of a claim of ambiguity by the parties. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 231 (Tex. 2003) ("[The dissent] implies that, because the parties do not contend the agreement is ambiguous, we may not hold that it is. This is contrary to Texas law."); *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983) (holding agreement was ambiguous even though both parties asserted agreement was unambiguous and moved for summary judgment). An appellate court may consider whether a contract is ambiguous for the first time on appeal from a summary judgment. *Furmanite Worldwide, Inc. v. NextCorp, Ltd.*, 339 S.W.3d 326, 332 (Tex. App.—Dallas 2011, no pet.) ("The court of appeals may determine ambiguity as a matter of law for the first time on appeal."); *Arredondo v. City of Dall.*, 79 S.W.3d 657, 666–67 (Tex. App.—Dallas 2002, pet. denied) ("Patent ambiguity of a contract may be considered for the first time on appeal from a motion for summary judgment."); *Donahue v. Bowles, Troy, Donahue, Johnson, Inc.*, 949 S.W.2d 746, 753 (Tex. App.—Dallas 1997, writ denied) ("A court may conclude that a contract is ambiguous even in the absence of such a pleading by either party.").

"When a contract contains an ambiguity, the granting of a motion for summary judgment is improper because the interpretation of the instrument becomes a fact issue." *Coker*, 650 S.W.2d at 394. When a contract is ambiguous, "a fact finder should resolve the meaning." *Progressive Cty.*, 284 S.W.3d at 809. Thus, we must determine whether either party's interpretation of the contract is correct as a matter of law, or whether there is an ambiguity. If there is an ambiguity, the summary judgment cannot stand. *See Coker*, 650 S.W.2d at 394.

When a court is called upon to interpret a contract, the court will give plain meaning to the words used in the writing. *See City of Pinehurst v. Spooner Addition Water Co.*, 432 S.W.2d 515, 518–19 (Tex. 1968). Our primary concern is to ascertain the true intent of the parties, as expressed in the instrument. *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 133 (Tex. 1994); *Coker*, 650 S.W.2d at 393. To ascertain the true intentions of the parties, as expressed in the instrument, we must examine and consider the entire writing in an effort to harmonize and give effect to all provisions of the contract so that none will be rendered meaningless. *Coker*, 650 S.W.2d at 393; *Universal C.I.T. Credit Corp. v. Daniel*, 150 Tex. 513, 243 S.W.2d 154, 158 (1951). No single provision, taken alone, will be given controlling effect; rather, all provisions must be considered within the context of the whole instrument. *Coker*, 650 S.W.2d at 393; *Myers v. Gulf Coast Minerals Mgmt. Corp.*, 361 S.W.2d 193, 196 (Tex. 1962). In interpreting a contract, we give undefined words their plain,

ordinary, and generally accepted meanings absent some indication of a different intent. *U.S. Metals, Inc. v. Liberty Mut. Grp., Inc.*, 490 S.W.3d 20, 23 (Tex. 2016).

Here, the terms "first return of capital" and "capital" are not defined by the parties. Thus, we will determine whether their meaning can be interpreted as a matter of law, or whether those terms are ambiguous as used in this contract.

We agree with Holmes that the ordinary and generally accepted meaning of "capital" and "return of capital," refers to a disbursement returning one's investment. *See* Alan S. Gutterman, *Business Transactions Solutions*, § 39.39 (2016) ("If a distribution by a corporation is in an amount exceeding the current . . . earnings and profits of the corporation, the excess is treated as a return of the recipient shareholder's capital."); *see also Boulware v. U.S.*, 552 U.S. 421, 431, 128 S. Ct. 1168, 1177 (2008) (noting that whether a disbursement is a return of capital or a dividend depends on whether the corporation had earnings and profits and the amount of the recipient's basis for his stock). Thus, under the ordinary and generally accepted meaning, "return of capital" means return of the amount invested, and the contract would require Newman to return a portion of Holmes's investment four times per year. We also note that a shareholder like Holmes can negotiate to have his investment returned however and whenever he and the other shareholders see fit. *See Ritchie v. Rupe*, 443 S.W.3d 856, 879 (Tex. 2014) (noting that minority shareholders ordinarily have no right to receive a "return of capital" unless they

contract for such shareholder rights). And, the requirement that "capital will be distributed quarterly" suggests that *something* would be distributed four times per year, and there can be no profit distributions unless there are profits, but a corporation could return capital four times per year until one's investment is completely returned.

However, there are other indications in the plain text of the agreement that suggest that the parties' meant something other than the ordinary and generally accepted meaning of "capital." For example, the clause also provides that, after the "first return of capital" to Holmes, the capital would then be "split according to ownership perpetually." This usage would suggest that, in the second part of the sentence, perhaps the parties were referring to profits or dividends rather than capital, because capital cannot be split "perpetually" once the amount of a shareholder's investment has been returned. Similarly, "capital," if defined as one's investment, is not generally returned quarterly, but remains invested until the company shows a profit. To return capital quarterly would pull money out of the company before it has had an opportunity to become profitable. Further, the clause does not say how much capital would be returned quarterly, or when such quarterly payments would commence.

Newman argues that "first return of capital" merely sets up a priority for returning shareholder capital, but does not require that any capital be returned at all.

But, that explanation does not suggest what is meant by the requirement that capital be returned quarterly, if no return of capital was required at all.

In sum, the court cannot determine from the face of this contract what the parties meant when they agreed that Holmes would be entitled to the "first return of capital," and that such "capital" would be split according to ownership and distributed quarterly. While the plain language of the term suggests that the parties meant that a portion of Holmes's investment would be returned quarterly (but does not state how much of the investment would be returned), the manner in which that term "first return of capital" is used suggests that the parties may have meant profits or dividends would be paid quarterly, or may have intended to create a priority for Holmes to receive his investment, i.e. his capital, out of the corporation's first profits. Indeed, it appears that the parties' may have used the same word—capital—to mean a shareholder's investment in one place and profits or dividends in another place.

After applying established rules of contract construction, the agreement in this case is susceptible to more than one reasonable meaning. *See DeWitt Cty. Elect. Coop., Inc. v. Parks*, 1 S.W.3d 96, 100 (Tex. 1999). Thus, the contract is ambiguous. *Id.* "When a contract contains an ambiguity, the granting of a motion for summary judgment is improper because the interpretation of the instrument becomes a fact

issue[,]" *Coker*, 650 S.W.2d at 394, and a factfinder should resolve the meaning. *Progressive Cty.*, 284 S.W.3d at 809.

In light of the ambiguity, we reverse the summary judgment on Holmes's breach of contract claim and remand for further proceedings.

Fraud Claims

Holmes also filed tort claims, including statutory fraud, common-law fraud, and fraudulent inducement. In his motion for summary judgment, Newman argued that because of the "economic loss rule," "the existence of a contract precludes remedies sounding in fraud." We disagree in this case.

Newman contends that the economic loss rule bars Holmes's fraud claims. But, the economic loss rule does not bar recovery of tort damages in fraud cases. *Formosa Plastics Corp. USA v. Presidio Eng'rs and Contractors, Inc.*, 960 S.W.2d 41, 46 (Tex. 1998). In *Formosa Plastics Corp*., the Texas Supreme Court explained that "tort damages are recoverable for a fraudulent inducement claim irrespective of whether the fraudulent misrepresentations are later subsumed in a contract or whether the plaintiff only suffers an economic loss related to the subject matter of the contract." *Id.* at 47; *see also Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 306 (Tex. 2006) (holding that when plaintiff proved defendant never intended to perform contract, she could assert fraud and DTPA claims).

Here, Holmes pleaded that Newman never intended to distribute capital quarterly and that, but for that alleged misrepresentation, Holmes would never have entered into the contract. As such, Holmes's tort claims are based on fraudulent inducement and are not precluded by the economic loss rule.

Because Holmes's tort claims are not precluded as a matter of law by the economic loss rule, we must decide whether there is a fact issue precluding summary judgment on the fraud claims. We begin by noting that the oral misrepresentations asserted in Holmes's fraud claims are the same as those asserted in his breach of contract claim, i.e., that Newman would distribute capital quarterly, and that but for this misrepresentation, Holmes would not have entered the contract.

The same question, however, is presented regarding alleged misrepresentations as there was regarding breach of contract: What did the parties intend when they used the terms "first return of capital" and "capital." If the parties meant the return of part of Holmes's investment on a quarterly basis, there could be a misrepresentation, but if by using those terms the parties meant something else, there was no misrepresentation. Newman's defense is, essentially, that under his interpretation of the statement, there is no misrepresentation because his statement was true.

This Court has stated:

> In the context of a material ambiguity in a contract, the granting of a motion for summary judgment is improper because the interpretation

> of the instrument becomes a fact issue. *Coker v. Coker*, 650 S.W.2d 391, 394 (Tex. 1983*). The same logic holds true for the disputed interpretation of an alleged oral misrepresentation to the extent that the defendant claims truth as his legal defense*. *See id.*; *see also Nelson* [*v. Najim*, 127 S.W.3d 170], at 175 [(Tex. App—Houston [1st Dist. 2003, pet. denied)] (finding an affirmative misrepresentation when defendants statements created false impression of facts.).

Muske v. Menke, No. 01-10-00479-CV, 2011 WL 3612293, slip op. at *5 (Tex. App—Houston 1st Dist. Aug. 18, 2011, no pet.) (mem. op.) (emphasis added).

Because Holmes's fraud claims turn on what the parties meant when they used the terms "return of capital" and "capital," there is a genuine issue of material fact as to whether Newman made a misrepresentation. *See Muske*, 2011 WL 3612293, at *5 (finding question of fact when parties disagree as to what was meant in alleged misrepresentation). Accordingly, we reverse the summary judgment on Holmes's fraud claims and remand for further proceedings. In light of our disposition of Holmes's fraud and breach of contract claims, we need not address his issue regarding the erroneous exclusion of evidence, and decline to do so.

Breach of Fiduciary Duty

Holmes also pleaded breach of fiduciary duty, asserting "he relied on Appellee Newman for financial guidance as his broker at TD Ameritrade and thereafter up to and including his investment in SportsPicks.com." To recover under a cause of action for breach of fiduciary duty, a plaintiff must show that the defendant owed

him a fiduciary duty and breached that duty, and that the breach proximately caused him damages. *See, e.g., Plotkin v. Joekel*, 304 S.W.3d 455, 479 (Tex. App.—Houston [1st Dist.] 2009, pet. denied).

Not every relationship involving a high degree of trust and confidence rises to the stature of a fiduciary relationship. *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 176–177 (Tex.1997) (*citing Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 594 (Tex. 1992), *superseded by statute on other grounds as noted in Subaru of Am., Inc. v. David McDavid Nissan*, Inc., 84 S.W.3d 212, 225–26 (Tex. 2002)). "'Whe[n] the underlying facts are undisputed, determination of the existence, and breach, of fiduciary duties are questions of law, exclusively within the province of the court.'" *Nat'l Med. Enters. v. Godbey*, 924 S.W.2d 123, 147 (Tex. 1996) (*quoting Lacy v. Ticor Title Ins. Co.*, 794 S.W.2d 781, 787 (Tex. App.—Dallas 1990), *writ ref'd per curiam*, 803 S.W.2d 265 (Tex. 1991)). In certain formal relationships, such as an attorney-client, trustee, or principal/agent relationship, a fiduciary duty arises as a matter of law. *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 199 (Tex. 2002); *see also Ins. Co. of N. Am. v. Morris*, 981 S.W.2d 667, 674 (Tex.1998).

We also recognize an informal fiduciary duty that arises from "a moral, social, domestic or purely personal relationship of trust and confidence." *Associated Indem. Corp. v. CAT Contracting, Inc.*, 964 S.W.2d 276, 287 (Tex. 1998); *see also*

Schlumberger Tech. Corp., 959 S.W.2d at 176. However, "[i]n order to give full force to contracts, we do not create such a relationship lightly." *Schlumberger Tech. Corp.*, 959 S.W.2d at 177. "To impose an informal fiduciary duty in a business transaction, the special relationship of trust and confidence must exist prior to, and apart from, the agreement made the basis of the suit." *Associated Indem. Corp.*, 964 S.W.2d at 288.

Holmes does not contend that any formal relationship between him and Newman at the time of their agreement gave rise to a fiduciary duty. Instead, he argues that the prior broker/client relationship between the two, which was a formal fiduciary relationship, gave rise to an informal fiduciary duty because that prior relationship of trust and confidence caused him to rely on Newman for financial advice, including the decision to invest in SportsPicks.com.

Holmes presented deposition testimony in which he repeatedly stated that he did no due diligence on the SportsPicks.com investment, but "trusted Steve Newman totally" and "completely." In *Meyer v. Cathey*, the supreme court noted that "mere subjective trust does not transform arm's length dealing into a fiduciary relationship" and declined to find an informal fiduciary relationship between two business associates because there was "no evidence of such a preexisting relationship [of trust and confidence] between Meyer and Cathey." 167 S.W.3d 327, 331 (Tex. 2005).

Thus, this case turns on whether there is evidence in the record of a preexisting relationship of trust and confidence between Holmes and Newman. The record contains little more than Holmes's assertion that Newman was his broker at TD Ameritrade, that Holmes had over a million dollars in cash in an account at TD Ameritrade, that Holmes indicated that he was interested in making "conservative" investments with his cash, and that most of his investments made through TD Ameritrade were in bonds. When questioned, Holmes acknowledged that he would have to give Newman permission to make any trades.[2]

While a broker owes his investor-client a fiduciary duty, that duty varies in scope with the nature of their relationship. *Romano v. Merrill Lynch, Pierce, Fenner & Smith*, 834 F.2d 523, 530 (5th Cir. 1987); *In re Enron Corp. Secs., Derivative & "ERISA" Litigation*, __F. Supp.3d___, 2017 WL 814191, at *26 (S.D. Tex. Feb. 28, 2017). The nature of the account—whether nondiscretionary or discretionary—is one factor to be considered, as are the degree of trust placed in the broker and the intelligence and qualities of the consumer. *Id.* A broker's duty is usually restricted to executing the investor's order when the investor controls a nondiscretionary account and retains the ability to make investment decisions. *Id.* In a

[2] When asked whether he knew what a discretionary account was, which would allow a broker to perform acts without his signature, Holmes responded, "Yeah, I think I had those a couple of times." There is nothing in the record, however, to show that Newman had permission while at TD Ameritrade to make any trades using Holmes's cash without Holmes's permission.

nondiscretionary account, the fiduciary relationship is one of principal/agent, and the agency relationship begins when the customer places the order and ends when the broker executes it; the broker's duties in this type of account are only to fulfill the mechanical, ministerial requirements of the purchase or sale of the security or futures contracts on the market. *Hand v. Dean Witter Reynolds, Inc.*, 889 S.W.2d 483, 493–94 (Tex. App.—Houston [14th Dist.] 1994, writ denied). As a general proposition, a broker's duty in relation to a nondiscretionary account is complete, and his authority ceases, when the sale or purchase in made and the receipts therefrom accounted for. *Id.*

There is nothing in the record to show that Holmes's account with TD Ameritrade was discretionary or that the broker/client relationship between the two gave rise to anything other than a principal/agent duty to execute the trades ordered. Thus, Holmes has not raised a fact question regarding whether Newman owed him any fiduciary duty other than fulfilling the trades authorized by Newman.

Because Newman's fiduciary duty was satisfied once the trades were made in accordance with Holmes's instructions, it is not the sort of preexisting relationship of trust and confidence that would give rise to a continuing, informal relationship imposing even broader fiduciary duties than Newman held under the prior relationship.

Accordingly, the trial court properly granted Newman summary judgment on Holmes's breach of fiduciary duty claims.

CONCLUSION

Because we have determined that fact questions exist regarding Holmes's breach of contract and fraud claims, we reverse the trial court's judgment as to those claims and remand for further proceedings. We affirm the remaining portions of the trial court's judgment.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Brown and Lloyd.