

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 CA 1610

BLD SERVICES, LLC AND McINNIS SERVICES, LLC

VERSUS

IED, LLC, UNIFIED RECOVERY GROUP, LLC AND J. S. LAWRENCE GREEN

Judgment rendered May 6, 2011.



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Appealed from the
19th Judicial District Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court No. 579,118
Honorable Timothy E. Kelley, Judge

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BEFORE: KUHN, PETTIGREW, AND HIGGINBOTHAM, JJ.

PETTIGREW, J.

In this action, plaintiff companies sought to recover the value of certain corporate assets that they allege were wrongfully retained by their former corporate partner following a "corporate divorce." Upon the dismissal of their case following the trial court's grant of a peremptory exception pleading the objection of no cause of action, plaintiff companies now appeal.

FACTS

Until August 29, 2008, plaintiffs BLD Services, LLC ("BLD") and McInnis Services, LLC ("McInnis") together with defendant IED, LLC ("IED") were the founders and joint owners of defendant Unified Recovery Group, LLC ("URG"), a debris removal contractor formed in the wake of Hurricane Katrina. On the aforementioned date, the three owners agreed to a "corporate divorce" and entered into eight separate written contracts whereby plaintiffs, BLD and McInnis would sell their controlling interest in "old" URG to IED in exchange for \$7.6 million in cash plus a two-thirds interest in a new entity, JKS-URG Management Co., LLC ("JKS"), which would be formed by the three partners.¹ IED would become the sole owner of "new" URG, which would continue in business. The aforementioned contracts involved various combinations of individuals and entities, i.e., the parties to one contract were not necessarily parties to the other contracts.

Following the split-up of the old URG, BLD and McInnis became dissatisfied with what they received in connection with the corporate divorce. Specifically, BLD and McInnis claimed that they had been given assurances that all of old URG's accounts receivable as of August 29, 2008, the date of closing, would be transferred to JKS as soon as possible.

¹ Because URG survived the transaction of Aug. 29, 2008, the limited liability company as it existed on and before August 29, 2008, is referred to herein as "old" URG whereas the limited liability company as it existed after August 29, 2008, is referred to herein as "new" URG.

On June 5, 2009, BLD and McInnis filed the instant litigation against IED, new URG, and J.S. Lawrence Green² (hereinafter collectively referred to as "defendants") in the 19th Judicial District Court for the Parish of East Baton Rouge, Louisiana. BLD and McInnis sought to recover unspecified damages allegedly incurred as a result of their detrimental reliance and/or defendants' breach of contract and fraud.

In response, defendants filed a dilatory exception raising an objection of vagueness and argued that BLD and McInnis had failed to plead fraud with particularity, and had further failed to particularize any special damages to which they may be entitled. Following a hearing, the trial court granted the exception and gave BLD and McInnis thirty days to amend their petition and plead fraud with greater particularity.

BLD and McInnis filed an Amended and Restated Petition on October 22, 2009, which amplified the allegations of their original petition and detailed the dates and times when their representatives were advised that all outstanding accounts receivable of old URG would thereafter be transferred to a new, wholly-owned subsidiary, JKS, for collection and the benefit of all three partners. BLD and McInnis admitted that although their representatives were not able to examine the list of contributed assets set forth in the "Contribution Agreement" entered into between the old URG and JKS, they relied upon assurances given to them by defendants and executed the contract documents. BLD and McInnis further alleged that following the corporate divorce, an audit of old URG revealed that the old URG intentionally withheld billing over \$5 million of accounts receivable, and that said accounts were never transferred to JKS.

Defendants responded by filing a second dilatory exception objecting to vagueness together with peremptory exceptions raising objections of no cause and no right of action and non-joinder of a party needed for just adjudication. Defendants contended that the new allegations put forth by BLD and McInnis remained vague, and that only the new entity, JKS, had standing to pursue damage claims.

² J.S. Lawrence Green served as one of the principals of IED and also helped to manage URG.

Prior to the hearing on the exceptions filed by defendants, BLD and McInnis filed a second amended and restated petition on January 19, 2010. This Second Amended and Restated Petition added the new entity, JKS, as an additional defendant in this matter, and set forth a derivative claim on its behalf. BLD and McInnis alleged that they were bringing suit individually and derivatively on behalf of JKS seeking to cure the lack of standing argument put forth by defendants in their objection of no right of action. BLD and McInnis further alleged that they were damaged individually by defendants' fraud and breach of contract – i.e., due to the fraud, they received less than the value of their interest in the old URG. BLD and McInnis further claimed that JKS was damaged in that it did not receive all of the accounts receivable it was supposed to receive in accordance with the Contribution Agreement entered into between JKS and the old URG.

Once again the defendants filed a dilatory exception objecting to vagueness together with peremptory exceptions raising objections of no cause and no right of action. Defendants argued that BLD and McInnis did not allege facts, which if true, would permit recovery on the breach of contract claims contained in the first and second counts of their second amended petition. The defendants further argued for dismissal of the derivative claim for the reason that JKS could not have been the victim of any fraud that pre-dated its organization. Lastly, defendants argued the plain words of the contract at issue precluded any recovery on the facts alleged.

ACTION OF THE TRIAL COURT

The trial court heard arguments on the defendants' exceptions on April 19, 2010. At the conclusion of the arguments, the trial court stated it would grant the peremptory exception filed by defendants that raised the objection of no cause of action, and indicated that this action would render moot the peremptory exception pleading the objection of no right of action as well as the dilatory exception urging vagueness. After the hearing, the trial court issued oral reasons for its judgment.

Although the trial court granted the peremptory exception, it offered BLD and McInnis an opportunity to amend their Second Amended and Restated Petition in an attempt to assert a cause of action for rescission rather than damages. BLD and McInnis

later declined to amend their petition and seek rescission of the contract. Therefore, in accordance with its oral reasons, the trial court entered judgment dismissing the claims of BLD and McInnis with prejudice. From this judgment, BLD and McInnis now appeal.

DISCUSSION

The basic thrust put forth by BLD and McInnis in connection with their appeal in this matter is that pursuant to Section 2 of the Contribution Agreement, the "Contributor", i.e., old URG, agreed to transfer to the "Subsidiary", i.e., JKS, all of its right, title, and interest in and to the "Contributed Assets," including those items set forth in subparagraph (b) and defined as:

(b) All accounts receivable of Contributor associated with the provision of services by Contributor **and billed** on and before the Effective Date, including, without limitation, those certain accounts receivable set forth on Exhibit 2(b) attached hereto (the "Accounts") [Bold emphasis supplied];

BLD and McInnis contend that the initial phrase in the foregoing paragraph "should be construed to be simply a description of the accounts, *i.e.*, a representation by URG as to the status of 'all accounts,' not a limitation as to which accounts would be conveyed and which would not." Defendants assert that the clear meaning of the provision in question is that "URG convey[ed] to JKS the accounts receivable that were (1) associated with the provision of services by URG and (2) billed on and before the Effective Date." Defendants argue that said words are susceptible to no other interpretation. We agree. When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent. La. Civ. Code art. 2046.

Additionally, BLD and McInnis further attempt to put forth an action for fraud based upon an untruthful statement allegedly made by Joel Scales, the Chief Financial Officer ("CFO") of old URG to his superior, John McInnis, Jr., who was at the time the Chief Executive Officer ("CEO") when BLD and McInnis had control of the company. Mr. Scales presently continues to serve both as CFO for new URG as well as manager of JKS. Mr. Scales allegedly advised Mr. McInnis, in the presence of Mr. Green of IED, that all of the accounts receivable belonging to old URG had either been billed or would be billed

before the closing of the transaction and would then be transferred to JKS for collection. BLD and McInnis claim that Mr. Scales did this to induce them to enter into the contracts.

Assuming such a false statement was made, Mr. Scales could not be said to have been acting in the course and scope of his employment with old URG and Mr. Scales was not personally sued or named as a defendant in this litigation. Furthermore, BLD and McInnis do not seek rescission of the contracts, only damages. Such a statement by Mr. Scales would not render Mr. Green or IED answerable in fraud. Additionally, BLD and McInnis have not alleged that Mr. Green and IED even knew that Mr. Scales was lying.

BLD and McInnis claim they did not know what the value of the receivables were at closing; however, the written terms of the Contribution Agreement clearly stated what assets were transferred. Section 8, subparagraph (h) of the Contribution Agreement provides as follows:

(h) Prior Understandings. This Agreement supersedes any and all prior discussions and agreements between the Contributor [old URG] and Subsidiary [JKS] with respect to the contribution and transfer of the Contributed Assets and other matters contained herein, and this Agreement contains the sole and entire understanding between the parties hereto with respect to the specific transactions contemplated in this Agreement.

In addressing the merits of this appeal, we cannot find, based upon our review of the Second Amended and Restated Petition of BLD and McInnis, that the trial court erred in sustaining defendants' exception raising the objection of no cause of action. Accepting all of the allegations in the petition as true, and applying the legal principles for the exception raising the objection of no cause of action to the facts herein, we find the trial court properly sustained defendants' exception raising the objection of no cause of action. There are simply no factual allegations in the Second Amended and Restated Petition of BLD and McInnis to support a cause of action against defendants. Thus, for the above and foregoing reasons, we affirm the judgment of the trial court and assess all costs associated with this appeal against defendants. We issue this memorandum opinion in accordance with Uniform Rules—Courts of Appeal, Rule 2-16.1B.

AFFIRMED.