United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
April 4, 2022
Lyle W. Cayce
Clerk

No. 21-20165

HARRIS COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT NUMBER 89,

Plaintiff—Appellant,

versus

PHILADELPHIA INDEMNITY INSURANCE COMPANY; E&M ENTERPRISES, INCORPORATED,

Defendants—Appellees.

Appeal from the United States District Court
for the Southern District of Texas
No. 4:19-cv-1755

Before SMITH, ELROD, and OLDHAM, *Circuit Judges*.

JERRY E. SMITH, *Circuit Judge*:

A water control and improvement district in Harris County, Texas, wanted a new headquarters, so it contracted with a construction company to build one. The District required the company to post a performance bond. The company engaged Philadelphia Indemnity Insurance Co. ("Philadelphia") to provide that bond, which explicitly stated that changes to the construction contract would not void Philadelphia's obligations.

Before work could begin, however, the District's project manager

backed out. That led the District and the construction company to execute a new agreement without Philadelphia's knowledge or consent. The text of that agreement suggested that the parties intended it to amend a section of the project manual included in their original contract. Even so, the new agreement never explicitly said that it amended the old agreement.

After construction began, the project ran into trouble, and the construction company failed to complete it. The District then sought what it thought it was owed under the performance bond, but Philadelphia refused to pay. It claimed that the second agreement had created a new contract that it had never agreed to bond. The District sued for breach of contract, but the district court agreed with Philadelphia. Because Texas courts would likely hold otherwise, we reverse.

I.

The District decided to construct a building to serve as a permanent meeting place for its leadership and as an emergency center during natural disasters. It hired an architect to design the building and manage the construction process. The architect prepared a project manual and drawings for the District to use in soliciting construction bids.

That manual was divided into numbered sections and contained hundreds of pages detailing the project's specifications and the materials that the District would require its contractor to use. It also discussed the District's procurement process and included document templates that would be used in that process. Two sections of the project manual are most relevant here.

The first is Section 00510 (titled "Agreement"). That section provided that the "Contract for Construction" would comprise the project manual, the drawings, and two templates created by the American Institute of Architects ("AIA"), a trade group. Those AIA templates detailed how the architect would supervise and manage the project. One was described as the

contract's "General Conditions."

The second is Section 00610 (titled "Performance Bond"). That section provided a template that the contractor had to use when obtaining a performance bond for the project. That template included this crucial term:

> Surety, for value received, stipulates and agrees that no change, extension of time, alteration or addition to the terms of the contract, or the work performed thereunder, or the plans, specifications or drawings accompanying the same, shall in any way affect its obligation on this bond, and it does hereby waive notice of any such change, extension of time, alteration or addition to the terms of the contract, or the work to be performed thereunder.

Using those documents, the District solicited bids for the construction project in July 2015. E&M Enterprises submitted a bid for $1.38 million and received a notice of award from the District on September 16. E&M signed it two days later. Together with the project manual, we'll call this the "2015 Agreement."

Per the terms of the project manual, E&M then purchased a performance bond from Philadelphia, as surety, to cover the price of the project. Two aspects of that performance bond are key. First, the bond was executed using the project manual's template, so it included the waiver provision mentioned above. Second, it identified the subject of the bond as the contract made on September 16, 2015—the date that the District had sent the notice of award to E&M.

Before construction could begin, however, the District's architect backed out of its promise to manage construction due to project delays. That required the District to find a new project manager. And as a result, the District and E&M signed a new agreement on March 22, 2016. This is what we'll call the "2016 Agreement."

Like Section 00510 of the 2015 Agreement, the 2016 Agreement was labeled "Section 00510" and titled "Agreement." It stated that it had been "Revised [on] 2/29/16." And just like the old Section 00510, the 2016 Agreement incorporated the "general conditions" for the contract—now labeled "Section 00700." But those conditions weren't exactly the same; they were adapted from a template created by the Construction Specifications Institute instead of the original AIA template. And unlike the original Section 00510, the 2016 Agreement restated several key terms of the contract, though none differed from those included in the 2015 Agreement.[1]

E&M began working on the construction project shortly thereafter but was unable to complete it. The District then sought payment under the performance bond. When Philadelphia denied its request, the District sued Philadelphia in Texas state court for breach of contract. Notably, the District identified the 2016 Agreement as the contract that Philadelphia had bonded. Because the District is a citizen of Texas and Philadelphia is a citizen of Pennsylvania, Philadelphia removed the case to federal court.[2]

During discovery, Philadelphia realized that its performance bond identified the 2015 Agreement—not the 2016 Agreement—as the subject of its suretyship agreement. Philadelphia moved for summary judgment, claiming that the District had sued based on a contract that Philadelphia had not bonded. In Philadelphia's telling, the 2016 Agreement was a new contract separate from the 2015 Agreement.

---

[1] Specifically, the 2016 Agreement restated the subject matter of the contract, the price, the commencement date, the completion date, and the requirement that E&M furnish all materials necessary to complete the project.

[2] The District also sued E&M (a citizen of Nevada) in Texas state court. E&M then consented to removal. But E&M never filed an answer in federal court, so the district court entered a default against it.

The District responded that the 2016 Agreement was merely an amendment to the 2015 Agreement. It maintained that in the performance bond, Philadelphia had waived its right to object to such amendments.

The district court agreed with Philadelphia and granted summary judgment. It held that the 2016 Agreement was a new contract, not an amendment to the 2015 Agreement. The district court reached that conclusion based on its view that, under Texas law, any change to a bonded contract creates a new contract to which the surety is not bound. The District appeals.

II.

This appeal presents one question: whether the 2016 Agreement created a new contract between the District and E&M or merely amended their 2015 Agreement. Unlike the district court, we conclude that the 2016 Agreement was an amendment under Texas law.

The district court held that the 2016 Agreement created a new contract that Philadelphia had not bonded. It believed that Texas suretyship law does not permit *any* change to be made to a bonded contract without a surety's consent.

That was once the rule. *See, e.g.*, *Jarecki Mfg. Co. v. Hinds*, 295 S.W. 274, 275 (Tex. Civ. App.—Eastland 1927, writ dism'd). But since the 1960s, the Supreme Court of Texas has held that only *material* alterations to a bonded contract will relieve a surety from its obligations.[3] And although that

[3] *Vastine v. Bank of Dall.*, 808 S.W.2d 463, 464 (Tex. 1991) (per curiam) ("[S]ureties are released from liability when there is a *material* alteration in, and deviation from, the terms of the contract without the surety's consent and to its prejudice." (emphasis added)); *McKnight v. Va. Mirror Co.*, 463 S.W.2d 428, 430 (Tex. 1971) (similar); *Old Colony Ins. Co. v. City of Quitman*, 352 S.W.2d 452, 455 (Tex. 1961) (similar); *cf. United Concrete Pipe Corp. v. Spin-Line Co.*, 430 S.W.2d 360, 366 (Tex. 1968) ("[W]here the nature of alteration is such, that as a matter of law can only be beneficial to the surety, he is not discharged.").

court has not discussed the rule recently, contemporary decisions of the Texas Courts of Appeals continue to apply it.[4] The district court thus erred in holding that *any* alteration to the 2015 Agreement would create a new and independent contract.[5]

Philadelphia, however, does not assert a material alteration defense against the District. That's likely because its performance bond specifies that "no change" or "alteration" to the 2015 Agreement would "affect its obligation on this bond." To dodge that term, Philadelphia claims that the 2016 Agreement created a new, independent contract that happened to embrace the same subject matter as the 2015 Agreement. In contrast, the District maintains that the 2016 Agreement merely amended the 2015 Agreement.

Texas caselaw does not distinguish those two situations. That means we "must make an *Erie* guess" how the Supreme Court of Texas would answer that question.[6] In doing that, we aim to "predict" Texas contract law,

---

[4] *See, e.g.*, *Fernandez v. Indep. Bank*, No. 02-20-00375-CV, 2021 WL 4621758, at *4 (Tex. App.—Fort Worth Oct. 7, 2021, no pet.); *U.S. Foodservice, Inc. v. Winfield Project Mgmt., LLC*, No. 03-14-00405-CV, 2016 WL 1639804, at *5 (Tex. App.—Austin Apr. 20, 2016, no pet.); *Futerfas Fam. Partners v. Griffin*, 374 S.W.3d 473, 478 (Tex. App.—Dallas 2012, no pet.).

[5] In fairness to the district court, our past decisions could have been clearer on this point. *See United States v. Vahlco Corp.*, 800 F.2d 462, 465 (5th Cir. 1986) (discussing the law of material alteration but also stating that "[a]ny modification of the terms of the underlying contract discharges [a] guarantor's obligation"); *Tomlin v. Ceres Corp.*, 507 F.2d 642, 646 (5th Cir. 1975) (same). But even if those decisions had applied the old rule, *Vastine* means that they would no longer bind us. *See Newman v. Plains All-Am. Pipeline, L.P.*, 23 F.4th 393, 404 (5th Cir. 2022) (noting that the rule of orderliness applies to questions of state law in diversity cases); *cf. Gahagan v. U.S. Citizenship & Immigr. Servs.*, 911 F.3d 298, 302 (5th Cir. 2018) (stating that the rule of orderliness does not apply when the U.S. Supreme Court has unmistakably abrogated a panel's decision).

[6] *McDonnel Grp., L.L.C. v. Starr Surplus Lines Ins. Co.*, 15 F.4th 343, 346 (5th Cir. 2021) (quoting *Six Flags, Inc. v. Westchester Surplus Lines Ins. Co.*, 565 F.3d 948, 954 (5th Cir. 2009)).

not "create or modify" it.[7] To do so, we may consult "the rationales and analyses underlying state supreme court decisions on related issues"[8] as well as relevant decisions of state appellate courts.[9]

Based on those sources, we predict that the Supreme Court of Texas would examine the text of *both* agreements to discover the District's and E&M's objective intent in executing the 2016 Agreement. Two considerations inform our guess.

First, objective intent is the alpha and omega of contract interpretation in Texas. As the Supreme Court of Texas has put it, "[a court's] task is to determine and enforce the parties' intent as expressed within the four corners of the written agreement."[10] If the parties' objective intent is unambiguous from a contract's text, it governs. *Piranha Partners*, 596 S.W.3d at 744.

Second, our guess parallels how Texas courts analyze objective intent in the related context of a novation. In Texas, "novations" include the "substitution of a new agreement in place of an existing agreement between the same parties." *In re B.N.L.-B.*, 523 S.W.3d 254, 263 (Tex. App.—Dallas 2017, no pet.). As in all matters of contract interpretation, Texas courts seek out a contract's objective intent to determine whether a novation has occurred. *Id.* at 264 (citing *Chastain v. Cooper & Reed*, 257 S.W.2d 422, 424 (Tex. 1953)). That intent can reveal itself through an explicit term, such as one that

---

[7] *Campos v. Steves & Sons, Inc.*, 10 F.4th 515, 526 (5th Cir. 2021) (quoting *Lawrence v. Va. Ins. Reciprocal*, 979 F.2d 1053, 1055 (5th Cir. 1992)).

[8] *Weatherly v. Pershing, L.L.C.*, 945 F.3d 915, 920 (5th Cir. 2019) (alterations adopted) (quoting *In re DePuy Orthopaedics, Inc.*, 888 F.3d 753, 765 n.5 (5th Cir. 2018)).

[9] *See Ledford v. Keen*, 9 F.4th 335, 339–40 (5th Cir. 2021).

[10] *Piranha Partners v. Neuhoff*, 596 S.W.3d 740, 743 (Tex. 2020); *see also URI, Inc. v. Kleberg County*, 543 S.W.3d 755, 763 (Tex. 2018) ("Objective manifestations of intent control . . . .").

describes the new contract as a novation of the old. *Id.*

But that isn't the only way. When there isn't an express term in the new agreement, Texas courts attempt to find objective intent by comparing the text of both agreements. *See, e.g.*, *Fulcrum Cent. v. Auto Tester, Inc.*, 102 S.W.3d 274, 278 (Tex. App.—Dallas 2003, no pet.).

Applying those principles, we conclude that the 2016 Agreement amended—instead of replaced—the 2015 Agreement. Though lacking an explicit term to that effect, the 2016 Agreement's text makes plain the parties' intent to amend the original Section 00510. The 2016 Agreement has the same section number, the same title, and the same subject matter (the general conditions) as the first Section 00510.[11] Plus, the 2016 Agreement describes itself as a "Revised" version. Those details show that it was objectively intended to be an adjustment to the project manual in the 2015 Agreement, not a brand-new contract.

True, the 2016 Agreement restated several critical terms (such as price) and adopted general conditions different from those in the 2015 Agreement. But as "restated" implies, the multiple critical terms were identical to those included in the first agreement. And as we've already discussed, a mere alteration to an existing contract isn't enough to make that contract new under Texas law. Instead, the parties' choice to describe the new conditions as "Section 00700"—i.e., as a section of the project manual—reveals their objective intent to change terms of the contract they had previously made. The text of the agreements thus compels the conclusion that the 2016 Agreement

[11] The old Section 00510 also defined the "contract documents." The new Section 00510 does so indirectly by incorporating the new "general conditions," which include a term that specifies the contract documents.

was an amendment to the 2015 Agreement.[12]

III.

The parties clash over several other issues,[13] but the district court didn't reach any of them. Because "the general rule is that 'we are a court of review, not of first view,'" we leave them for the district court to address in the first instance. *Texas v. Biden*, 20 F.4th 928, 965 (5th Cir. 2021) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)).

* * * *

The judgment is REVERSED and REMANDED. We place no limitation on the matters that the district court may address on remand.

---

[12] Philadelphia replies that the District's representative stated during a deposition that the 2016 Agreement "looks like it replace[d]" the 2015 Agreement. But extrinsic evidence may be used to clarify the meaning only of *ambiguous* contracts. *Cmty. Health Sys. Pro. Servs. Corp. v. Hansen*, 525 S.W.3d 671, 681 (Tex. 2017). And the objective intent of the 2016 Agreement is unambiguous: to amend, not replace, the 2015 Agreement.

[13] Specifically, the parties dispute whether the performance bond's waiver encompasses Philadelphia's material alteration defense and, if so, whether the 2016 Agreement was a material alteration. The District also claims that Philadelphia forfeited that defense by failing to raise it in its amended answer.