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Anderson Chemical v. Portals Water Treatment: Ensuring an Inherent Risk of Business

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CASENOTES

Anderson Chemical v. Portals Water Treatment: Ensuring an Inherent Risk of Business

I. INTRODUCTION

In *Anderson Chemical v. Portals Water Treatment*,[1] the United States District Court for the Middle District of Georgia addressed the issue of whether a document executed between two corporations regarding a proposed stock purchase merger and acquisition agreement constituted a binding contract for the sale of securities or a non-binding letter of intent. Specifically, the court addressed a scenario in which a proposed purchaser of securities in an alleged stock purchase agreement made certain oral representations that directly contradicted limiting language in a document executed between the proposed seller and purchaser. The seller then acted in reliance upon the purchaser's representations in preparation for execution of the alleged agreement. When the purchaser ultimately decided not to consummate the alleged agreement, the seller brought suit claiming that there was an enforceable contract for the sale of securities between the parties, that the purchaser had breached that contract, and that the purchaser was liable for the seller's expenses of

1. 768 F. Supp. 1568 (M.D. Ga. 1991).

preparation.[2] In its ruling on the seller's summary judgment motion on the issue of whether the document executed between the two parties constituted an enforceable contract for the sale of securities or a non-binding letter of intent, the district court held that the document in question only constituted a non-binding letter of intent.[3] In its ruling, the district court also considered whether the seller's alleged part performance relieved it from the requirements of the Statute of Frauds, whether promissory estoppel was available to the seller in its request for relief from the burden of proving a valid contract, and whether there was fraudulent inducement in the initial negotiations by the buyer such that summary judgment would be appropriate as a matter of law.[4] The court ruled in defendant purchaser's favor on these issues.[5]

On July 31, 1992, the Court of Appeals for the Eleventh Circuit affirmed on all but one of the thirteen counts.[6] The court remanded for further hearing on the plaintiff seller's claim of fraudulent inducement.[7]

II. BACKGROUND

Portals Holdings PLC ("Portals") is an international chemical and water-treatment company with headquarters in the United Kingdom and several subsidiaries throughout the world. Portals operates in America through a holding company and through its Illinois-based water-treatment subsidiary, Wright Chemical Company ("Wright"). Due to Wright's disappointing financial performance, Portals hired an Atlanta-based business broker to find a suitable enterprise for Portals to purchase, ostensibly to bolster Wright's performance. That intermediary contacted Mr. Richard Anderson, chief executive officer and majority stockholder of Anderson Chemical Company of Macon, Georgia ("Anderson"), and suggested that Portals and Anderson meet to discuss a purchase agreement. Under a written agreement of confidentiality, the parties began discussions for an acquisition arrangement on July 6, 1987. After several meetings and reciprocal visits to each party's offices, extensive discussions, and disclosure of confidential operating and financial information, the parties signed the first and only written agreement on November 9, 1987 in Chi-

2. *Id.* at 1577.
3. *Id.* at 1580.
4. *Id.* at 1577.
5. *Id.*
6. Anderson Chem. Co. v. Portals Water Treatment, Inc., No. CIV-88-78-3-MAC (11th Cir. July 31, 1992) (unpublished opinion).
7. At the time of this writing, the issue of fraud in the inducement has not been formally adjudicated.

cago, Illinois.[8] These facts were undisputed. Portals agreed to purchase the three entities under the Anderson umbrella for $13,400,000.[9]

On November 14, Anderson assembled its employees in Macon, Georgia for a sales meeting. During that meeting, Anderson's chief executive officer informed the employees that Portals was purchasing the company. Anderson's representatives immediately informed its customers of the acquisition and that Anderson intended to conduct its business in the same manner.[10] Subsequently, pursuant to Item 6 of the document, Anderson allowed Portals full access to its books and records.

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8. 768 F. Supp. at 1570.

9. *Id.* at 1571. Item 1(a) of the document specified an amount of $13,400,000 and allocated the purchase price percentages among the various entities of the seller. The document consisted of eleven items, with varying alphabetical subsections. In general, Item 1 confirmed the parties' discussions regarding the proposed purchase, and specified the purchase price and the capital stock purchase percentages. Item 2 provided that

> [u]pon execution by [Anderson] and return to [Portals] of this Letter of Intent, [Portal's] counsel will prepare a definitive purchase agreement ("Purchase Agreement"), execution of which shall be subject to approval by [Anderson] and the Board of Directors of Portals and a definitive merger agreement ("Merger Agreement"), execution of which shall be subject to the approvals of the Board of Directors of Portals [and Anderson].

Id. at 1573.

Item 6 provided for Portal's lawyers and accountants to have access to Anderson's premises, books, and records. *Id.* at 1574. Item 7 provided for the confidentiality of information furnished to Portals. *Id.* at 1575. Item 8 obligated Anderson to notify Portals of any other entity's expressed interest in acquiring Anderson and to continue operations as usual, pending completion of the acquisition. *Id.* Item 8 further specified that "[t]he parties agree that, in the event the parties have not entered into the Purchase Agreement and the Merger Agreement on or before January 31, 1988, the obligations set forth in this paragraph 8 shall terminate and be of no further force and effect." *Id.*

Item 9 provided that "[e]ach party will bear its own transaction expenses, including legal and accounting fees, with respect to the matters contemplated hereby." *Id.* at 1576.

Item 10 provided that

> [t]he parties will cooperate with all deliberate speed to sign the Purchase Agreement and Merger Agreement as soon as reasonably possible and close the Stock Purchase and Merger as soon as reasonably possible. We understand that [Anderson] . . . by [its] execution of this Letter of Intent . . . hereby indicate[s] [its] intent to proceed . . . on the terms set forth herein.

Id.

Finally, Item 11 provided that

> [t]his letter constitutes only an expression of intent and shall not constitute a binding agreement between the signatories to consummate the transaction contemplated hereby . . . . Consummation of the transactions contemplated hereby is specifically subject to the negotiation and execution of the definitive Purchase Agreement and Merger Agreement embodying the terms and conditions outlined herein . . . and finally is subject to approval by the main Board of Directors of Portals . . . prior to the execution of the Purchase Agreement.

Id.

10. *Id.* at 1576, 1577.

At the time the parties drafted the November 9 document, they contemplated preparing and executing a separate definitive purchase agreement. However, the parties never prepared that document. Between November 9 and December 21, 1987, Portal's management reevaluated Wright Chemical Company's financial condition and, consequently, its proposal to acquire Anderson. After the holiday season, Portal's management team reconvened and instructed its management in the United States to inform Anderson of its plans not to consummate the acquisition. Portal's representatives in the United States informed Anderson of that decision on January 8, 1988.[11] Anderson claimed that, by relying on Portals' alleged false representation that Portals was earnest in its intent to consummate the acquisition, Anderson incurred at least $1,700,000 in transaction-related expenses.[12] Anderson filed this lawsuit in federal court based on diversity jurisdiction with Georgia law controlling. Anderson's complaint included thirteen counts seeking damages for, among other things, breach of contract, promissory estoppel, and fraud in the inducement.[13]

III. The District Court's Opinion

Because Anderson premised most, if not all, of its claims on breach of contract, the initial question facing the court was whether the document executed on November 9 constituted an enforceable contract for the sale of securities or whether it constituted a non-binding letter of intent. The district court held that the document constituted only a non-binding letter of intent. Thus, no contract for the sale of securities existed between the parties.[14]

Regarding the alleged formation of a contract, Anderson first contended that the court should search through the depositions and other exhibits to discover the agreement of which it had been assured. The court rejected this contention, stating that the document of November 9, 1987 was clear and unambiguous on its face.[15] Furthermore, the court cited language from Item 8 as evidence that the agreement did not constitute a binding contract because the parties specified a date beyond which the agreement would be void:

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11. *Id.*

12. *Anderson*, No. CIV-88-78-3-MAC, at 8.

13. 768 F. Supp. at 1577.

14. *Id.* at 1580.

15. *Id.* at 1578. "When clear and unambiguous, [a] contract is presumed to express the parties' intentions and will be enforced according to its terms." *Id.* (quoting Insurance Concepts, Inc. v. Western Life Ins. Co., 639 F.2d 1108 (5th Cir. 1981)).

> In the event either or both parties failed to approve, these provisions specified a date that ended the efforts to effect agreement and specified the then remaining obligations of the parties. The parties thus contemplated that they might fail to agree on the terms and conditions of a definitive purchase and/or merger agreement or might fail to secure the necessary approval.[16]

Second, Anderson contended that Item 10[17] created a mutual obligation for the parties to consummate the acquisition. Thus, Anderson maintained, it directly contradicted Item 11.[18] The district court flatly rejected this position, and refused, in effect, to latch on to the first sentence of Item 10 and find a contract in the face of contrary language.[19]

Furthermore, the district court rejected Anderson's argument that its part performance on the alleged contract, based upon various oral representations by Portals' representatives that the stock purchase was a done deal, removed the document from the requirements of the Statute of Frauds.[20] Anderson based its position on the fact that, pursuant to Item 10,[21] it had divulged significant confidential information to Portals, publicly announced the acquisition, revealed product lines and formulas to Portals, and allowed Portals to meet with its existing customer base.[22] However, the district court cited case law challenging that position:

> Under Georgia law, part performance to take an oral agreement out of the Statute of Frauds, "must be a part performance of the contract, and the doing by either party of some independent act, not a part of the contract, does not become a part performance because the doer was led so to act by his belief that the parol contract would be performed by the other party . . . . [A]nything done which is outside the limits of the contract . . . is insufficient to cause the case to fall within the exception to the statute . . . ."[23]

"Such performance done even upon the advice of the other party does not alter the rule."[24] The district court determined that Anderson's actions constituted nothing more than " 'preparation for performance, and not part performance of the contract itself.' "[25] Thus, the court determined

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16. *Id.* at 1579.
17. *See supra* note 9.
18. *See supra* note 9.
19. 768 F. Supp. at 1580.
20. *Id.* at 1580-81.
21. *See supra* note 9.
22. 768 F. Supp. at 1581.
23. *Id.* (quoting Hotel Candler, Inc. v. Candler, 198 Ga. 339, 347-49, 31 S.E.2d 693, 699-700 (1944)).
24. *Id.* (citing Cofer v. Wofford Oil Co., 85 Ga. App. 444, 450, 69 S.E.2d 674, 679 (1952)).
25. *Id.* (quoting 85 Ga. App. at 450, 69 S.E.2d at 679).

that neither Anderson's part performance pursuant to Item 10 nor any oral representations by Portal's representatives to Anderson's employees, stockholders, and customers that the proposed stock purchase acquisition had been officially consummated, removed the document from the Statute of Frauds.[26]

Finally, the district court rejected Anderson's argument that Portals was precluded from terminating the acquisition due to promissory estoppel. On this point, Anderson relied on the definition of promissory estoppel as found in the Official Code of Georgia Annotated ("O.C.G.A.") section 13-3-44(a):

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.[27]

Anderson maintained that the following representations on the part of Portals' representatives substantiated its actions in reliance on the alleged contract: (1) The language in Item 10 to the effect that the parties would cooperate with all deliberate speed to consummate the Purchase and Merger Agreements as soon as reasonably possible;[28] (2) Portals' statement that, although it was unwilling to pay earnest money, if Portals said it would do something, it would go through with it; (3) Portals' representatives on October 23, 1987 telling Mr. Richard Anderson that Portals U.K. had approved the transaction; (4) Portals' representatives telling Anderson's employees and stockholders that Portals had bought the company; and (5) Portals' representatives stating at a December 10, 1987 meeting that the Purchase Agreement had been worked out, a deal was in effect, and that there were no open issues.[29]

In its analysis of Anderson's promissory estoppel argument, the district court looked directly to the applicable Georgia statute, O.C.G.A. section 11-8-319(a)-(d).[30] The court determined that promissory estoppel did not apply and was unavailable to Anderson in its effort to escape its burden

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26. *Id.*
27. O.C.G.A. § 13-3-44(a) (1982).
28. *See supra* note 9.
29. 768 F. Supp. at 1581-82.
30. *Id.* at 1582. O.C.G.A. § 11-8-319 (a)-(d) states:

> A contract for the sale of securities is not enforceable by way of action or defense unless:
>
> (a) There is some writing signed by the party against whom enforcement is sought . . . sufficient to indicate that a contract has been made for sale of a stated quantity of described securities at a defined or stated price;

of proving an enforceable contract for the sale of securities.[31] "[I]f promissory estoppel were applicable, [Anderson's] reliance [on Portals' oral representations] must be reasonable. The question of whether [Anderson's] reliance was reasonable is one for the court to decide."[32] Here, the district court determined that, because Portals' oral representations directly contradicted the language in the November 9 agreement, it was unreasonable for Anderson to act in reliance upon them.[33] Furthermore, the court stated that there was no change in position not specifically contemplated by Item 9[34] of the document, which provided that each party agreed to bear its own transaction expenses.[35] In essence, the court determined that Anderson's actions, under the management and supervision of competent, experienced businesspeople, were ill-advised in light of the document's specific limiting language, and that Anderson must bear the financial burden of an unreasonable course of action. As a result, the district court granted Portals' motion for summary judgment on all thirteen counts.[36]

IV. THE COURT OF APPEALS REVIEW

The court of appeals affirmed on twelve of the thirteen counts against Portals. However, as the court concluded that the district court erred in granting summary judgment on Anderson's claim of fraud in the inducement, it vacated that part of the judgment and remanded for further proceedings.[37]

> (b) Delivery of a certificated security . . . has been accepted, . . . or payment has been made, but the contract is enforceable under this provision only to the extent of such delivery . . . or payment;
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> (c) Within a reasonable time a writing in confirmation of the sale or purchase and sufficient against the sender under paragraph (a) has been received by the party against whom enforcement is sought and he has failed to send written objection to its contents within ten days after its receipt; or
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> (d) The party against whom enforcement is sought admits in his pleading, testimony, or otherwise in court that a contract was made for the sale of a stated quantity of described securities at a defined or stated price.

O.C.G.A. § 11-8-319(a)-(d) (1982 & Supp. 1992).

31. 768 F. Supp. at 1582. *See* Smith v. Baker, 715 S.W.2d 890 (Ky. Ct. App. 1968); Thomas v. Prewitt, 355 So. 2d 657 (Miss. 1978).

32. 768 F. Supp. at 1583 (citing Atkinson v. American Agency Life Ins. Co., 165 Ga. App. 102, 105, 299 S.E.2d 600, 603 (1983)).

33. *Id.*

34. *See supra* note 9.

35. 768 F. Supp. at 1582-83.

36. *Id.* at 1584.

37. *Anderson*, No. CIV-88-78-3-MAC, at 5.

The law in Georgia is clear. " '[A writing] must be construed by the court to mean what it says . . . [T]he "language used must be afforded its literal meaning and plain ordinary words given their usual significance." '"[38] " '[N]o construction is required or permitted where the language of the contract is plain, unambiguous and capable of only one reasonable interpretation.' "[39] Today's commercial realities dictate that letters of intent are not only useful, but are often indispensable in facilitating intricate commercial agreements:

> A complex business transaction . . . requires a significant expenditure of time, effort, research and finances simply to arrive at its terms. The books of the companies must be carefully reviewed, difficult judgments of valuation must be made, financing must be secured, new corporations may have to be formed . . . . [O]ther professional services such as accounting and financing may have to be commissioned as well . . . . When a deal is necessarily preceded by costly groundwork, a letter of intent may benefit both the purchaser and the seller . . . . Neither party has committed himself to the exchange. Both have agreed to work toward it. While success is not certain, it is more likely and the fear of wasted or duplicative effort is reduced.[40]

On its face, Item 11[41] of the November 9 document unambiguously states that the document "constitutes only an expression of intent and shall not constitute a binding agreement between the signatories to consummate the transaction contemplated hereby . . . ."[42] Furthermore, it clearly states that "[c]onsummation of the transactions contemplated hereby is specifically subject to the negotiation and execution of the definitive Purchase Agreement . . . and finally is subject to approval by the main Board of Directors . . . prior to the execution of the Purchase Agreement."[43] In light of this language, the court of appeals agreed with the district court and held that the document constituted a letter of intent, and that either party was free to suspend its performance.[44]

Likewise, the district court and the court of appeals held that Georgia's Statute of Frauds precluded Anderson from establishing a parol agreement from Portals' representations and conduct after signing the November 9 document. A written contract may properly be modified by an oral

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38. 768 F. Supp. at 1578 (quoting Porter Coatings v. Stein Steel & Supply Co., 157 Ga. App. 260, 262, 277 S.E.2d 272, 274 (1981)).

39. *Id.* (quoting Petroziello v. United States Leasing Corp., EOS Leasing Div., 176 Ga. App. 858, 861, 338 S.E.2d 63, 66 (1985)).

40. Feldman v. Allegheny Intern, Inc., 850 F.2d 1217, 1221 (7th Cir. 1988).

41. *See supra* note 9.

42. 768 F. Supp. at 1570.

43. *Id.*

44. *Id.* at 1577.

representation only when the representation is not inconsistent with express or implied conditions of the contract, and is one that the parties could not reasonably be expected to embody in the writing.[45] In this case, however, Portals' alleged representations of a completed acquisition were completely inconsistent with the express language of the agreement. Regardless of any oral representations to the contrary, the document clearly stated that the acquisition was predicated upon the execution and approval of subsequent Purchase and Merger Agreements and director approval thereof. As such, "it would frustrate the Statute of Frauds to search through the depositions in an effort to find [the parties' intent to be bound]."[46]

In addition, the district court and the court of appeals held that promissory estoppel should not compel Portals to consummate the acquisition. The Georgia Statute of Frauds applicable to this proposed securities transaction does not make promissory estoppel available to Anderson. Furthermore, "[t]here can be no reasonable reliance by an experienced business[person] in light of oral representations directly contrary to limiting terms of a written agreement."[47] It is not the job of the courts to rescue businesspeople from imprudent business decisions against which a combination of experience, common sense, and advice of counsel should advise.

However, the court of appeals did find that the district court erred in granting Portals' motion for summary judgment on Anderson's claim of fraud in the inducement. A reasonable inference could be drawn from the evidence that Portals never actually intended to purchase Anderson and that Portals entered into negotiations solely to prop up the market price of Wright, its Illinois subsidiary, for subsequent sale.[48] Anderson pointed to two items at trial to support its fraud claim. First, Portals' management team presented a proposal to its Board of Directors in March 1987, stating that:

> [I]f the [Wright] overheads are too high for the sales and we cannot reduce overheads or increase sales (quickly enough) our future strategy can only be a) sell Wright Chemicals or b) buy U.S. water treatment chemical companies to add sales to our operation. We are proposing (b) as our first choice strategy but if we predict at the end of [the second quarter] a loss in 1987 of a similar level to 1986, we will move to (a).[49]

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45. Booth v. Booth & Bayliss & Commercial Sch., Inc., 180 A. 278 (Conn. 1935).

46. *Anderson*, No. CIV-88-78-3-MAC, at 10 (citing Beaulieu of America, Inc. v. Coronet Indus., Inc., 173 Ga. App. 556, 559, 327 S.E.2d 508, 510 (1985)).

47. 768 F. Supp. at 1583 (citing Runnemede Owners, Inc. v. Crest Mortgage Corp., 861 F.2d 1053, 1058-59 (7th Cir. 1988)).

48. *Anderson*, No. CIV-88-78-3-MAC, at 7.

49. *Id.* at 6.

In addition, Anderson pointed to a May 1987 Portals confidential memorandum, stating that "the Portals board had decided to sell Wright in May 1987, *one month before it began negotiating with Anderson.*"[50]

The court of appeals held that the district court erred "by misinterpreting Anderson's cause of action" and by concluding that "there could be no fraud claim because Anderson could not have reasonably relied on an unenforceable promise."[51] Based on the laws of Georgia (the place of the contract) regarding proof of a claim of fraud

> [t]he question . . . is not whether Portals made an unenforceable promise. Instead, the proper questions are (1) did Portals falsely represent to Anderson that it might buy Anderson, (2) did Portals know this representation to be false, (3) did Portals intend to deceive Anderson with this representation, (4) could Anderson have reasonably relied on this representation, and (5) did Anderson sustain a loss as a proximate cause of this false representation.[52]

V. ANALYSIS

The court of appeals properly remanded for further proceedings on Anderson's fraud claim. Based on the March 1987 proposal to Portals' Board of Directors and the May 1987 confidential memorandum, a genuine issue of material fact certainly existed as to whether Portals ever intended to purchase Anderson, or whether the negotiations were commenced simply to make Wright a more attractive and viable target for acquisition. If Portals intended the latter, it would constitute fraud in the inducement of an agreement, and would be actionable for damages in reliance.

Courts should expect experienced, competent businesspeople to use sound business judgment in their respective dealings. To that end, however, courts certainly cannot expect businesspeople to know, with absolute certainty, the inward motivations of other parties with whom they deal. Yet, by granting Portals' motion for summary judgment on Anderson's fraud claim, the district court seems to feel that Anderson failed in that very responsibility. Commercial realities should not require such a high degree of risk assumption on the part of businesspeople. It is one thing to require experienced businesspeople to use sound business judgment in assessing another's capabilities. That responsibility comes part and parcel with the negotiation process. Nevertheless, it is another matter entirely to require a businessperson to assess another's covert intentions. In business, one can only assess that which is either made known to him or is discoverable through reasonable investigation. Courts should ac-

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50. *Id.* at 7.
51. *Id.* at 8.
52. *Id.*

knowledge this commercial reality. In this case, Anderson failed to use sound business judgment in light of the terms of the document executed between the parties on November 9. Nonetheless, Anderson deserves the opportunity to establish that Portals committed fraud in the inducement by compelling Anderson to act to its detriment while never intending to consummate the stock purchase. Consequently, the court of appeals properly remanded on the issue of fraud.

VI. CONCLUSION

Courts are designed to redress legitimate grievances when parties have been injured through the acts of others in contravention of the law. To that end, however, courts should not serve as a forum for businesses and corporations with otherwise competent management to seek recovery for ill-advised and imprudent business decisions. Business necessarily involves a host of risks. One of those risks is, and should be, the inherent risk of acting in reliance on a proposed transaction without sufficiently guaranteeing another's reciprocal, bargained for performance. Competent management, coupled with good legal representation, can and should mitigate that risk.

Courts must recognize that every business bears the risk of making imprudent decisions. The court in *Anderson Chemical* recognized this. When owners and managers make business decisions, they necessarily take calculated risks based upon their knowledge and experience. They are rewarded for decisions that prove correct, and penalized for those that prove ill-advised. Courts must continue to recognize that risk is a necessary and indispensable element in the business world, and that the role of the judiciary is not to remove it altogether. To that end, it is not oversimplification to say that our legal system must continue to allow for one of the most elemental risks not only of business, but of life, itself, the risk of exercising poor judgment and having to learn from one's mistakes.

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