[DO NOT PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 21-13803

Non-Argument Calendar

JOE B. CALLOWAY,
d.b.a. C-Squared Farms,
CYNTHIA CALLOWAY,
d.b.a. C-Squared Farms,

Plaintiffs-Appellants-Counter Defendants,

versus

OAKES FARMS INC.,
a Florida limited liability company,

Defendant-Appellee-Counter Claimant.

Appeal from the United States District Court
for the Northern District of Alabama
D.C. Docket No. 5:18-cv-01356-LCB

Before WILSON, BRASHER, and ANDERSON, Circuit Judges.

PER CURIAM:

This appeal involves a contract dispute between a produce farm, C-Squared Farms, and a distributor, Oakes Farm. C-Squared appeals the district court's judgment in favor of Oakes on its breach of contract claim. C-Squared also appeals the district court's pre-trial grant of partial summary judgment in favor of Oakes. For the reasons below, we affirm.

I.

In 2018, C-Squared, owned and operated by Joe and Cynthia Calloway, entered into a contract with Oakes Farms, Inc. Under the contract, C-Squared agreed to grow produce that Oakes would sell to third parties in exchange for a fee. The contract stipulated that Oakes was to act as the "exclusive sales agent" for the produce. Among other things, Oakes agreed to provide a Quality Control assistant, labor for harvesting, and "Grower Advances." The Grower Advances were to be issued to C-Squared on a bi-monthly basis from April 2018 to September 2018, the end of the contract

period. The contract also allowed for additional advances as needed.

In late May or early June of 2018, excess rain delayed at least one of the harvests, resulting in reduced need for harvesting labor. Despite this setback, Oakes initially fulfilled its obligation under the contract to provide harvesting labor and a quality control assistant, Oscar Garcia. However, on July 12, Garcia left the farm and never returned. On August 8, the harvesting crew also left and did not return.

Oakes also fulfilled its obligation to issue Grower Advances. However, it failed to issue an advance that was due on August 15. On August 24, C-Squared sued Oakes in district court for breach of contract, among other claims not relevant to this appeal. At that point, C-Squared severed all communication with Oakes and hired replacement sales agents. Oakes counter-claimed, alleging that C-Squared had breached the contract.

The parties filed competing motions for summary judgment. In its summary judgment motion, C-Squared claimed that Oakes had breached the contract by failing to 1) provide a quality control assistant 2) provide harvesters and 3) issue the August 15 Grower Advance. C-Squared argued that these failures amounted to repudiation of the contract by Oakes, excusing any further performance by C-Squared. In its motion for summary judgment, Oakes argued that C-Squared was the breaching party. Oakes contended that C-Squared breached the contract in one of two ways: 1) by treating the contract as continuing after it filed suit but failing

to continue performing its obligations; or 2) by repudiating the contract or rescinding without giving Oakes prior notice of the alleged breach and an opportunity to cure.

The district court awarded partial summary judgment to Oakes. Specifically, it concluded that Oakes's failure to provide harvest laborers or a quality control assistant did not amount to breach or repudiation of the contract. The district court also concluded that Oakes's failure to issue the August 15 Grower Advance did not amount to repudiation.

After summary judgment, the only remaining issue was whether Oakes's failure to issue the August 15 Grower Advance amounted to breach. And if so, whether C-Squared provided Oakes with notice and an opportunity to cure. In that case, C-Squared could have rescinded. However, if C-Squared did not provide notice and an opportunity to cure, then its decision to file suit and sever all communications could be considered a repudiation of the contract, excusing any further performance by Oakes.

After a bench trial, the district court ruled in favor of Oakes, concluding that C-Squared had no right to rescind because C-Squared failed to provide Oakes with notice and an opportunity to cure. Thus, the district court determined that C-Squared breached when it hired replacement sales agents. C-Squared appeals that ruling in addition to the district court's partial summary judgment ruling.

II.

We review the district court's summary judgment ruling *de novo*, using the same legal standard as the district court. *Feliciano v. City of Miami Beach*, 707 F.3d 1244, 1247 (11th Cir. 2013). Under that standard, summary judgment is appropriate if there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In conducting our review, we view all facts and resolve all doubts in favor of the nonmoving party. *Feliciano*, 707 F.3d at 1247.

We review "factual findings made by a district court after a bench trial for clear error, which is a highly deferential standard of review," and its conclusions of law *de novo*. *Renteria-Marin v. Ag-Mart Produce, Inc.*, 537 F.3d 1321, 1324 (11th Cir. 2008). A finding of fact is only clearly erroneous when the reviewing court, after reviewing all the evidence, is left with the "'definite and firm conviction that a mistake has been committed.'" *In re Int'l Admin. Servs., Inc.*, 408 F.3d 689, 698 (11th Cir. 2005) (quoting *Lykes Bros., Inc. v. United States Army Corps of Eng'rs*, 64 F.3d 630, 634 (11th Cir. 1995)).

III.

We divide our discussion in three parts. First, we consider C-Squared's appeal of the district court's summary judgment in favor of Oakes regarding Oakes's failure to provide harvesters and a

quality control assistant. Next, we consider C-Squared's appeal of the district court's summary judgment ruling that Oakes did not repudiate the contract by failing to make the August 15 Grower Advance. Finally, we consider the district court's post-trial ruling that Oakes did not breach the contract by failing to issue the August 15 Grower Advance.

A. The Harvesters

On summary judgment, the district court ruled that Oakes did not breach by failing to provide harvesters because C-Squared had waived that duty. The parties do not dispute that the contract was formed in Alabama, thus Alabama law is controlling here. *See St. Paul Fire & Marine Ins. Co. v. ERA Oxford Realty Co. Greystone, LLC*, 572 F.3d 893, 895 (11th Cir. 2009) ("A federal court sitting in diversity, as in this case, must apply the choice of law principles of the state in which it sits. In determining which state's law applies in a contract dispute, Alabama follows the principle of *lex loci contractus*, applying the law of the state where the contract was formed."). Under Alabama law, "[a] waiver consists of a voluntary and intentional surrender or relinquishment of a known right and the burden of proof in establishing a waiver rests upon the party asserting the claim." *Bentley Sys. v. Intergraph Corp.*, 922 So. 2d 61, 92 (Ala. 2005) (internal quotations and citations omitted). "Whether there has been a waiver is a question of fact." *Id.*

Here, the district court concluded that C-Squared waived Oakes's obligation to provide harvesters based on a series of text

messages between Chance Calloway, Joe and Cynthia's son, and Steve Veneziano, Oakes's vice president. On August 7, 2018, Calloway messaged Veneziano that C-Squared would "only need one crew" because "[p]icking will be slow for a few weeks." The next day, Calloway informed Veneziano that both crews were leaving, "[w]e needed one crew to stay and both were pulled." A few hours later, Veneziano replied that he was trying to find a replacement crew. However, Calloway then responded that he had a crew of fifteen people coming a few days later, and that this would suffice "for a little while." Veneziano suggested that C-Squared would eventually need approximately thirty harvesters to which Calloway replied, "[b]ut we don't need that many at the moment." Calloway also stipulated that he "d[id]n't want to close any doors" as to Oakes sourcing future crews.

Based on this evidence, the district court concluded that "C-Squared affirmatively waived, at least temporarily, Oakes's obligation to provide harvesting crews beginning on August 8, 2018." On appeal, C-Squared argues that text messages from Veneziano five days later indicating he was still looking for replacement crews is evidence that Oakes did not believe that its duty to provide harvesters had been waived. Even if true, Oakes's belief is not dispositive as to whether C-Squared waived its rights under the contract. *See Bentley Sys.*, 922 So. 2d at 91. Moreover, Veneziano's continuing efforts to locate harvesters is consistent with the existence of a temporary waiver since both Veneziano and Calloway agreed that C-Squared would eventually need more harvesters. However,

Calloway confirmed that C-Squared did not need any additional harvesters "at the moment" and would not, at least, "for a little while." Thus, the district court did not err in concluding that C-Squared had waived, at least temporarily, Oakes's duty to provide harvesters on August 8. And as the district court pointed out, any obligation by Oakes to provide harvesters ended on August 24, when C-Squared filed its complaint and severed all communications, effectively repudiating the contract. Accordingly, the district court was correct in concluding this waiver was in effect from August 8 through August 24, and that any failure by Oakes to provide harvesters during that time was not in breach of the contract.

B. The Quality Control Assistant

On appeal, C-Squared makes only passing references to Oakes's failure to provide a quality control assistant and does not meaningfully challenge the district court's conclusion that Oakes did not breach in that respect. C-Squared does not address any of the factual or legal grounds on which the district court based its ruling. Therefore, C-Squared has abandoned this argument on appeal. *See Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681-82 (11th Cir. 2014) (an appellant abandons a claim when he makes only passing reference to it or raises it in a perfunctory manner without supporting arguments and authority).

Even if C-Squared had properly preserved this challenge, it fails on the merits. The district court concluded that C-Squared never inquired about a replacement for Garcia and never told

Oakes that it considered his departure to be in breach of the contract. In fact, Joe Calloway agreed that things "went more smoothly" after Garcia left the farm. Thus, Oakes did not breach in failing to provide a replacement. And, as the district court explained, even if it had, there is no dispute that C-Squared failed to give Oakes notice and an opportunity to cure. *See Nelson Realty Co. v. Darling Shop of Birmingham, Inc.*, 101 So. 2d 78, 85 (Ala. 1957) ("[W]here there is a contract involving mutual continuing duties on the part of both parties, and one party has breached, but has not repudiated, the contract, it is the duty of the other before rescission to give notice and opportunity to live up to the contract . . . ."). Accordingly, the district court did not err in concluding Oakes's failure to provide a quality control assistant did not amount to breach.

C. The August 13 Conversation

In its motion for summary judgment, C-Squared argued that Oakes repudiated the contract based on a series of text messages between Chance Calloway and Steve Veneziano on August 13. In those messages, Calloway said to Veneziano, "[w]e're out of money. Need to know what we need to do. Dad [Joe Calloway] wants a face to face. Need you to call him." Veneziano replied, "I'm not advancing any more money. You guys should not have farmed if you don't have any money. Absolutely ridiculous."

C-Squared claimed Calloway's request for money was a demand for payment of any past due Grower Advances. Oakes, on

the other hand, claimed that Veneziano was not referring to the Grower Advances. Instead, he was referring to money that Oakes had advanced for non-harvesting labor. The district court determined that under either interpretation, the statement by Veneziano that he would "not advanc[e] any more money" was not a repudiation of the contract.

"A repudiation is a manifestation by one party to the other that the first cannot or will not perform at least some of his obligations under the contract." *Cong. Life Ins. Co. v. Barstow*, 799 So. 2d 931, 938 (Ala. 2001) (quoting E. Allan Farnsworth, Contracts, § 8.21, at 633–34 (1982)). "Merely because a given act or course of conduct of one party to a contract is inconsistent with the contract is not sufficient; it must be inconsistent with the intention to be . . . bound by it." *Bd. of Water & Sewer Comm'rs of Mobile v. Bill Harbert Constr. Co.*, 27 So. 3d 1223, 1258 (Ala. 2009).

In its summary judgment ruling, the district court concluded that Veneziano's statement did not amount to repudiation because the parties continued to perform under the contract, thus evincing an intent to be bound by it. For example, on August 18, Calloway and Veneziano exchanged text messages about different types of produce that had been harvested and logistics for shipping them. And C-Squared continued to send harvested produce to Oakes. At no point did C-Squared indicate that it considered Veneziano's August 13 statement to be a repudiation of the contract. The district court also pointed out that C-Squared's complaint treated the

contract as ongoing. These actions are consistent with an intent to be bound by the contract. Accordingly, the district court did not err in concluding that Oakes did not repudiate the contract. *See Bd. of Water & Sewer Comm'rs of Mobile*, 27 So. 3d at 1258.

On appeal, C-Squared argues that the district court applied the wrong test by considering C-Squared's beliefs in determining whether Oakes had repudiated. According to C-Squared, repudiation is determined by what a "reasonable observer" would have believed based on the words and actions of the repudiating party. In support, C-Squared relies on *Lansing v. Carroll*, No. 11 CV 4153, 2016 U.S. Dist. LEXIS 98877, at *44-45 (N.D. Ill. July 28, 2016) and *Kaiser-Francis Oil Co. v. Producer's Gas Co.*, 870 F.2d 563, 568 (10th Cir. 1989). But those cases are not binding here. And in any event, the district court specifically concluded that "[e]ven when all of the evidence is viewed in the light most favorable to C-Squared, no reasonable factfinder could determine that Oakes repudiated the contract" based on the August 13 message. Thus, even under C-Squared's reasonable observer standard, the district court did not err in concluding that Oakes had not repudiated the contract.

After trial, the district court found that the "advances" Veneziano referred to in his August 13 message were not Grower Advances, which Oakes was contractually obligated to make. Instead, the district court concluded that he was referring to "money that Oakes had advanced for non-harvesting labor." Veneziano testified that the harvesting crews soon ran out of crop to harvest due to the

reduced crop yields. Because those workers are paid by the amount of crop they harvest rather than an hourly wage, both Oakes and C-Squared were concerned that the crews would leave to find other work. To keep the crews from leaving, Oakes advanced money to C-Squared to pay the harvesting crews an hourly wage to perform other, non-harvesting work. Thus, the district court's finding is supported by the record. Reviewing for clear error, we are not left with a "definite and firm conviction that a mistake has been committed." *In re Int'l Admin. Servs., Inc.*, 408 F.3d at 698. Based on these facts, the district court correctly concluded that Veneziano's August 13 message did not amount to a breach because Oakes was not obligated to make those payments under the contract.

D. The August 15 Grower Advance

The parties do not dispute that Oakes failed to issue the August 15 Grower Advance. However, C-Squared argues that the district court erred in concluding that this failure did not amount to a breach and that C-Squared was required to provide notice and an opportunity to cure. "[W]here there is a contract involving mutual continuing duties on the part of both parties, and one party has breached, but has not repudiated, the contract, it is the duty of the other before rescission to give notice and opportunity to live up to the contract . . . ." *Nelson Realty Co.*, 101 So. 2d at 85. At trial, Joe Calloway admitted that "C-Squared did not notify Oakes of the missed payment as it had in the past nor did it give [Oakes] a chance

to cure the deficiency." And the district court concluded at summary judgment that this failure did not amount to repudiation because both parties continued to perform as if the contract was still in effect. *See Bd. of Water & Sewer Comm'rs of Mobile*, 27 So. 3d at 1258 (conduct must be inconsistent with an intent to be bound by the contract to amount to repudiation). Accordingly, the district court correctly concluded C-Squared was required to provide Oakes with notice and an opportunity to cure before rescinding the contract.

On appeal, C-Squared argues the district court erred in concluding that it was required to provide notice and an opportunity to cure. C-Squared argues that notice and an opportunity to cure are not prerequisites to rescission when "a fixed payment is due under contract on a date-certain," citing *Alabama Football, Inc. v. Stabler,* 319 So. 2d 678 (Ala. 1975). But *Stabler* does not stand for that proposition. In *Stabler*, the Alabama Supreme Court explained that "the conduct of the parties themselves" may vitiate the need for notice and an opportunity to cure. *Id.* at 554. There, the court determined that formal notice and an opportunity to cure were not required where the non-breaching party made "repeated demands" for performance upon the breaching party. *Id.*

Unlike in *Stabler*, the conduct of the parties here did not vitiate the need for notice and an opportunity to cure. C-Squared never demanded payment after Oakes failed to issue the August 15 payment, despite doing so on previous occasions. The record established that C-Squared previously accepted late payments from

Oakes on at least two occasions after notifying Oakes that payment was due. Far from vitiating the need for notice and an opportunity to cure, the parties' conduct signaled that the need for notice and an opportunity to cure was particularly warranted.

C-Squared also argues that notice and an opportunity to cure were not required because "time was of the essence." Even assuming this is true, C-Squared does not explain why time was of the essence only as to the August 15 payment. As previously discussed, C-Squared accepted late payments from Oakes on more than one occasion prior to the August 15 payment.

Finally, C-Squared argues that notice and an opportunity to cure were not required because Oakes's failure to issue the August 15 payment was a material breach. C-Squared relies on *Health Care Mgmt. Corp. v. Rubenstein*, 540 So. 2d 77, 78 (Ala. Civ. App. 1989) for the proposition that notice and an opportunity to cure are not required in cases of "material breach." A material breach is one "that touches the fundamental purposes of the contract and defeats the object of the parties in making the contract." *Sokol v. Bruno's, Inc.*, 527 So. 2d 1245, 1248 (Ala. 1988). Here, Oakes had previously missed payment deadlines, yet the parties continued to perform under the contract. C-Squared would notify Oakes about a missed payment and Oakes would issue payment. Thus, C-Squared cannot claim that missing the due date for the August 15 payment "defeat[ed] the object of the parties in making the contract." Particularly when it never requested payment as it had with previous late payments.

Based on its conclusion that Oakes had not breached, the district court determined that the contract was still in effect when C-Squared cut off all communication, filed suit, and hired replacement sales agents. Thus, the district court concluded C-Squared breached based on Oakes's contractual right to be the exclusive sales agent. And it concluded that this breach amounted to repudiation, excusing Oakes from any further performance. This conclusion was supported by the record, which confirms C-Squared was looking to "pull out" from its agreement with Oakes. And Joe Calloway admitted that C-Squared began using a number of replacement sales agents immediately after its August 24 notice to Oakes. These actions clearly amounted to a manifestation of C-Squared's unwillingness or inability to perform at least some of its obligations under the contract. Moreover, Oakes provided notice and an opportunity to cure. Upon notice of C-Squared's plans to sell its own produce, Oakes immediately responded that it was "illegal" for C-Squared to use another sales agent under the contract. On the other hand, C-Squared provided no notice or opportunity to cure when Oakes failed to issue the August 15 Advance, despite having done so with previous late payments. Instead, C-Squared filed suit, cut off all communications, and hired replacement sales agents. Accordingly, the district court did not err in concluding C-Squared repudiated the contract in that respect.

IV.

Because the district court did not err in its summary judgment or post-trial rulings, we **AFFIRM**.