



NUMBER 13-13-00296-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

**MERCEDES-BENZ USA, LLC, JACK L. HOLT,
CRAIG W. DEARING, AND FRANK J. OSWALD JR.,** **Appellants,**

v.

CARDUCO, INC. D/B/A CARDENAS METROPLEX, **Appellee.**

**On appeal from the 445th District Court
of Cameron County, Texas.**

DISSENTING MEMORANDUM OPINION

**Before Chief Justice Valdez and Justices Rodriguez and Longoria
Dissenting Memorandum Opinion by Justice Rodriguez**

I respectfully dissent and would reverse and render a decision that Carduco, Inc. d/b/a Cardenas Metroplex take nothing on its fraudulent inducement and negligent representation claims because I would conclude that the alleged oral representations and non-disclosures about which Carduco complains are directly contradicted by the express,

unambiguous terms of the Dealer Agreement, and Carduco was not justified in relying upon them as a matter of law.

By their first issue, appellants challenge, as a matter of law, the reliance element of Carduco's fraudulent inducement and negligent misrepresentation claims, including any claim based on a non-disclosure theory. Appellants contend that Carduco could not justifiably rely on alleged misrepresentations that its bargain with MBUSA included the right to relocate and to enjoy exclusivity because any such representations were in conflict with the clear terms of the contract. Appellants assert that certain provisions in the Dealer Agreement preclude any claim that Carduco's bargain was to operate as the exclusive new Mercedes-Benz dealership in the region or that it was to construct a facility in McAllen, Texas.

Causes of action for fraudulent inducement and negligent misrepresentation require proof of reliance. *Miller Global Props., LLC v. Marriott Int'l, Inc.*, 418 S.W.3d 342, 347 (Tex. App.—Dallas 2012, pet. denied) (citing *Haase v. Glazner*, 62 S.W.3d 795, 798 (Tex. 2001); *Fed. Land Bank Ass'n of Tyler v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1991)). "[R]eliance upon an oral representation that is directly contradicted by the express, unambiguous terms of a written agreement between the parties is not justified as a matter of law." *Playboy Enters., Inc. v. Editorial Caballero, S.A. de C.V.*, 202 S.W.3d 250, 258 (Tex. App.—Corpus Christi 2006, pet. denied); see *DRC Parts & Accessories, L.L.C. v. VM Motori, S.P.A.*, 112 S.W.3d 854, 858 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (op. on reh'g en banc) (setting out that in order to negate justifiable reliance in this way, the extra-contractual misrepresentation must be "directly contradicted by the

express, unambiguous terms of a written agreement between the parties”). I would also apply these principles to fraud claims based on alleged non-disclosures because reliance is also an element of fraud by non-disclosure or fraud by omission. See *Horizon Shipbuilding, Inc. v. Blyn II Holding, LLC*, 324 S.W.3d 840, 850 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (setting out the elements of fraud by non-disclosure or fraud by omission as : (1) the defendant failed to disclose facts to the plaintiff when the defendant had a duty to disclose such facts; (2) the facts were material; (3) the defendant knew of the facts; (4) the defendant knew that the plaintiff was ignorant of the facts and did not have an equal opportunity to discover the truth; (5) the defendant was deliberately silent and failed to disclose the facts with the intent to induce the plaintiff to take some action; (6) *the plaintiff relied on the omission*; and (7) the plaintiff suffered injury as a result) (emphasis added).

Appellants direct this Court to the following terms of the Dealer Agreement that they assert conflict with Carduco’s claims of misrepresentation and non-disclosure.¹

Dealer . . . understands that its appointment as a Dealer (i) does not grant it an exclusive right to sell Mercedes-Benz Passenger Car Products in its Area of Influence [AOI] or any other geographic area

. . . .

Unless otherwise provided in the Dealer AOI Space Analysis Addendum, MBUSA hereby approves the location(s) of the Dealership Facilities identified in the Final Paragraph for the exclusive purpose of: (i) showroom and sales facility for Mercedes-Benz Passenger Cars; (ii) service and parts facility for Mercedes-Benz Passenger Cars; (iii) facilities for display and sale of pre-owned Mercedes-Benz vehicles; and (iv) if applicable, other facilities for such other purpose(s) as may be identified in

¹ I note that the complained-of non-disclosures are merely the converse of the alleged misrepresentations—both of which involve exclusivity and relocation.

the Final Paragraph. . . . Dealer shall not move, relocate or change the designated usage of function of the Approved Location(s) or any of the Dealership Facilities without the prior written consent of MBUSA. . . .

The final paragraph of the Dealer Agreement identified “111 South Loop 499[,] Harlingen, TX 78550” as the location of the showroom and sales facility for Mercedes-Benz passenger cars, the service and parts facility for Mercedes-Benz passenger cars, and the display and sales facility for pre-owned Mercedes-Benz vehicles. Finally, appellants direct this Court to the following two terms from the Standard Provisions document that was incorporated into the Dealer Agreement: “MBUSA may add new dealers to or relocate dealers into Dealer’s AOI,” and “Dealer shall conduct its Dealership Operations only from the Approved Location(s).”

In response, Carduco argues that “these provisions about needing permission to relocate from the original Harlingen location do not directly and unambiguously contradict the representation that Mercedes would grant that permission once a McAllen site was chosen.” Carduco identifies the following alleged misrepresentations and non-disclosures, which it asserts form the basis of its claims: “(1) that it could move to McAllen; (2) instructing Carduco to draw up plans for both Harlingen and McAllen; (3) sharing Mercedes documents indicating that the Harlingen-McAllen region could only support one dealership . . . ; but (4) failing to disclose the new dealer that would definitively block such a move.” Carduco directs this Court to, among other things, trial exhibits detailing email communications between MBUSA’s employees regarding alleged non-disclosures and misrepresentations made to Carduco. For example, on September 18, 2008, Frank Oswald, the Service and Parts Operations Manager for MBUSA Central

Region, emailed Robert Neis regarding a call he received from Robert Chappell, the sales manager at Cardenas Autoplex in McAllen. Oswald informed Neis that he was “planning on visiting Harlingen next Tuesday and Wednesday” and was going “to meet with Rene Cardenas and his [f]ather on Tuesday.” He “need[ed] to be prepared for more questions.” Oswald asked Neis “[w]hat c[ould] and c[ould]not be said about any future plans there?” Apparently, Andrew Noye, who was copied on the email, forwarded it to Holt. By return email, Holt advised Noye that he would “call Frank and advise him to basically be honest and tell the dealer he is not aware of plans but that these issues are not always handled with Market Team involvement.” A follow-up September 19, 2008 email from Holt to all email recipients informed them that he “[s]poke to Frank Oswald” and that “he will inform the dealer that he is not aware of decisions being made by MBUSA in his direction.” On September 29, 2008, Holt emailed Neis the following:

Home Office has now received the signed LOI [Letter of Intent] back from Bill Bird and Ron Heller concerning the McAllen open point. The next step is to notify the affected parties. I spoke to FN and specifically asked him “when should we notify Rene and Renaldo Cardenas of a new point in McAllen”? He stated that upon your OK we can proceed. This could affect the buy/sell between Rene and his father. If you think that now is the appropriate time to release this information I will review with Mark Kelly and our outside legal coun[sel] Buddy Ferguson. If all parties agree I will pursue and follow appropriate notification procedures. I think FN and myself will travel to Harlingen and personally let them know of our intentions.

And on September 29, 2008, Neis responded, “Hold off, Hold off . . . do not do anything. . . . lets [sic] talk. . . . Repeat. . . do nothing. . . . hold off. . . . we can discuss options tomorrow. . . . I will be in the office tomorrow. . . . BN [Neiss].”

Appellants argue that these alleged misrepresentations and non-disclosures

address Carduco's right to relocate upon acquiring the assets and the right to regional exclusivity. They claim that Carduco could not rely on MBUSA's challenged representations and non-disclosures because they are directly contradicted by the express terms of the parties' written agreement. I agree with appellants.

The Dealer Agreement specified that the only approved location for the Carduco facilities was 111 South Loop 499, Harlingen, TX 78550. Through the Dealer Agreement, Mercedes-Benz approved this Harlingen location. It approved no other location. The Dealer Agreement set out that Carduco "shall not move, relocate or change the designated usage or function of the Approved Location(s) or any of the Dealership Facilities without the prior written consent of MBUSA." The Standard Provisions, which Carduco signed and which the Dealer Agreement incorporated, provided that Carduco "shall conduct its Dealership Operations only from the Approved Location(s)." And by its signature, Carduco represented that it understood "that its appointment as a Dealer (i) d[id] not grant it an exclusive right to sell Mercedes-Benz Passenger Car Products in its Area of Influence [AOI] or any other geographic area." Carduco further acknowledged "MBUSA may add new dealers or relocate dealers into Dealer's AOI."

I would conclude that these provisions from the Dealer Agreement directly conflict with any oral representations or non-disclosures regarding appellants' consent or any future consent for Carduco to relocate or to regional exclusivity. I do not believe that Carduco could have justifiably relied on what appellants communicated or failed to communicate as a matter of law because those alleged misrepresentations and non-

disclosures were directly contradicted by the express, unambiguous terms of the written agreement between the parties.

Unlike the majority, I would conclude that this Court's opinion in *Playboy* is indistinguishable on this issue. See 202 S.W.3d at 257–58. Like Carduco, the *Playboy* plaintiffs claimed to have relied on representations relating to issues that were specifically addressed in a written contract and directly contradicted by the contract. See *id.* For example, the *Playboy* plaintiffs claimed to have relied on an oral representation that it could import the Spanish language magazines into the United States, even though the contract provided “[d]istribution and sale of the Foreign Edition in any country other than Mexico will be subject to [Playboy’s] prior written approval” *Id.* at 258. Instead of holding that the possibility of future written approval saved the plaintiffs’ claim, we held that the alleged right to distribute in the United States was “directly contradicted by the express, unambiguous terms of the License Agreement.” *Id.* The *Playboy* plaintiffs also claimed to have relied on a promise that Playboy would not enforce or terminate the license agreement. *Id.* Yet the written contract provided that in the event of default, “the non-defaulting party may terminate the [l]icense by written notice to the party in default.” *Id.* Because the written contract gave Playboy discretion to act inconsistently with the alleged extra-contractual representation, we again held that the representation was directly contradicted by the contract. *Id.*

This Court rejected the plaintiffs’ claims in *Playboy* because the complained-of oral representations were “directly contradicted by the express, unambiguous terms of the

[contract],” and so the plaintiffs were “not justified in relying upon them as a matter of law.”

Id. at 258. We explained that

a party to an arm’s length transaction must exercise ordinary care and reasonable diligence for the protection of his own interests, and a failure to do so is not excused by mere confidence in the honesty and integrity of the other party. Therefore, reliance upon an oral representation that is directly contradicted by the express, unambiguous terms of a written agreement between the parties is not justified as a matter of law.

Id. at 257–58 (quoting *DRC Parts & Accessories*, 112 S.W.3d at 859). I would conclude that this same reasoning applies in this case.

Because the Dealer Agreement expressly allows dealers to move or relocate only with the prior written consent of MBUSA and because the Dealer Agreement allows MBUSA to add new dealers to or relocate dealers into Carduco’s AOI, I would determine that it directly contradicts any alleged representation—either by an oral promise or a non-disclosure—that MBUSA would approve Carduco’s future relocation requests or that it would allow Carduco to be the exclusive Mercedes-Benz dealer in its AOI. A party “is not rewarded with a claim for fraudulent inducement[, or negligent misrepresentation,] when the other party seeks to invoke its rights under the contract.” *DRC Parts & Accessories*, 112 S.W.3d at 859.

I disagree with the majority’s reasoning “that because the jury was not instructed that it was limited to finding fraud only if it determined that [appellants] either (1) told Carduco that it could move to McAllen or (2) failed to tell Carduco that it would not be the exclusive dealership in its AOI[, . . . it was free to come to its own conclusion concerning what [appellants] misrepresented or failed to disclose to Carduco based on the evidence presented at trial.” Unlike the majority, I believe that even without such a limitation, the

evidence presented at trial upon which the jury could have made its determinations regarding any misrepresentations or non-disclosures did, in fact, relate to the move or to the exclusivity of the dealership in the AOI. So I would conclude that *all* misrepresentations and non-disclosures about which Carduco complains are directly contradicted by the express, unambiguous terms of the Dealer Agreement and are barred on that basis. Determining that Carduco was not justified in relying upon them as a matter of law, I would sustain appellants' first issue.²

With the above analysis, I would conclude that Carduco's fraud in the inducement and negligent misrepresentation claims based on the representations and non-disclosures regarding any relocation or any exclusivity are barred, and I would reverse and render judgment that Carduco, Inc. d/b/a Cardenas Metroplex take nothing on its fraudulent inducement and negligent representation claims.

Accordingly, I respectfully dissent.

NELDA V. RODRIGUEZ
Justice

Delivered and filed the
31st day of March, 2016.

² I would not address the remaining issues as the disposition of appellant's first issue would be dispositive of this appeal. See TEX. R. APP. P. 47.1.