COPY
PATRICIA OYERSIDES
DISTRICT CLERK WARD CO., TX

CAUSE NO. C-12-06-22847-CVW

AUG 16 2013
ORIGINAL WAS FILED

WCT COWBOY COUNTRY RANCHES, L.L.C.,	§	IN THE DISTRICT COURT
Plaintiff,	§	
vs.	§	143rd JUDICIAL DISTRICT
ENERGEN RESOURCES CORPORATION, EASTEX CRUDE HOLDING COMPANY, ALAN RITCHEY, INC., ECLIPSE SERVICES, INC., J & T ENERGY SERVICES, INC., PLAINS MARKETING, L.P., PLAINS MARKETING, GP, INC., SV RELIABLE TRANSPORT, LLC, BTI SERVICES, INC., MR. PANDO TRUCKING, INC.,	§	
Defendants.	§	WARD COUNTY, TEXAS

COPY

DEFENDANT ENERGEN RESOURCES CORPORATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFF'S BREACH OF IMPLIED CONTRACT CLAIM BASED ON "NO-TRESPASSING" SIGNS

To the Honorable Court:

Pursuant to TEX. R. CIV. P. 166(a)(c), Defendant Energen Resources Corporation ("Energen") moves for partial summary judgment on Plaintiff's implied contract claim arising from its "no-trespassing" signs. In support of this motion, Energen respectfully shows the Court as follows:

I. INTRODUCTION AND PROCEDURAL HISTORY

1. This is a vehicular trespass case in which Plaintiff WCT Cowboy Country Ranches, L.L.C. alleges that Energen and its contractors wrongfully drove on Plaintiff's private roads to access certain of Energen's oil and gas wells. In addition to its trespass claim, Plaintiff

also appears to assert an implied contract claim based on Plaintiff's allegation that, by driving past Plaintiff's no-trespassing signs, Energen impliedly agreed to pay Plaintiff a "penalty" of $100 per rod of road on which Energen drove. (Fourth Am. Pet. ¶ 31 & Ex. H)

2. This Court has already expressed concerns about the validity of Plaintiff's attempt to use its no-trespassing signs as the basis for an implied contract claim. In the April 12, 2013 hearing on the Plains Defendants' Special Exceptions, which addressed this precise issue, the Court noted that it did not "understand how the sign can be the basis of an implied contract." (Apr. 12, 2013 Hr'g Tr. at 8) The Court further observed that "the sign can neither say more or less than it says" (*id.* at 10), and that any implied contract claim based on the signs was likely to fail as a matter of law (*id.* at 5, 11). Nevertheless, the Court gave Plaintiff a chance to replead the claim before dismissing it outright.

3. Plaintiff ignored the Court's admonitions and retained the sign allegations in its Fourth Amended Petition. Consequently, on or about July 12, 2013, the Plains Defendants filed their Motion to Strike and Dismiss Plaintiff's Implied-Contract Claim. On July 18, 2013, the Court signed an Agreed Order on the Plains' Defendants Motion to Strike, which struck the sign allegations against the Plains Defendants and certain other defendants in paragraphs 65-67 of the Petition.

4. Plaintiff, however, retained the no-trespassing sign allegations against Energen. (*See* Fourth Am. Pet. ¶¶ 31, 52) But the Court's initial instinct about this implied contract claim was correct. Because the undisputed facts demonstrate that the signs do not constitute an offer to contract, Energen did not impliedly accept any purported offer conveyed by the signs, and because the alleged implied contract is too indefinite to be enforced, that claim fails as a matter of law.

II. GROUND FOR SUMMARY JUDGMENT

5. Energen is entitled to partial summary judgment on Plaintiff's breach of implied contract claim against Energen on the ground that, as a matter of law and undisputed fact, the no-trespassing signs on Plaintiff's property do not give rise to an enforceable implied contract between Plaintiff and Energen.

III. SUMMARY JUDGMENT EVIDENCE

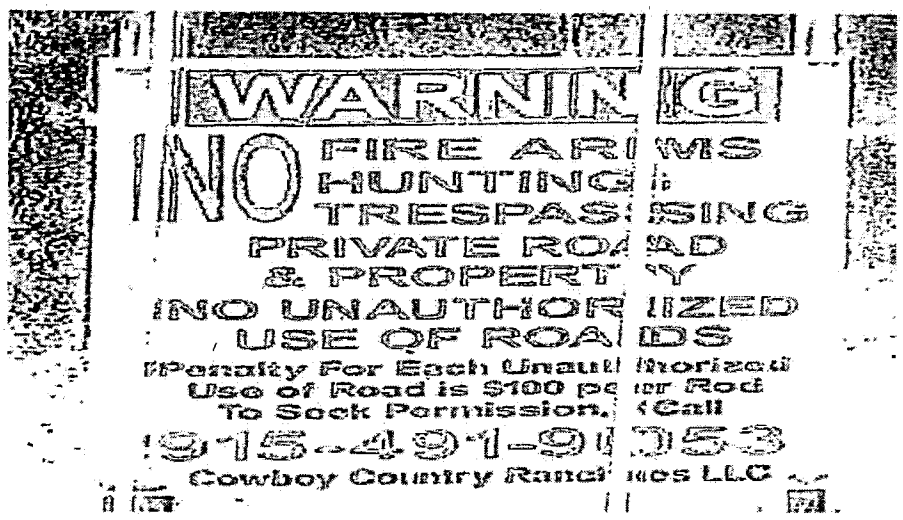
6. In support of this Motion, Energen relies on the allegations in Plaintiff's Fourth Amended Petition, as well as the following summary judgment evidence attached hereto and incorporated herein by reference:

- Tab 1: Excerpts from the deposition of Coll Bramblett (July 1, 2013)
- Tab 2: Correspondence from J. Monty Stevens to Energen (March 28, 2012) (Bates No. CCR000295-301)
- Tab 3: Correspondence from J. Monty Stevens to Energen (Ex. 23) (April 5, 2012)

IV. FACTUAL BACKGROUND

7. Plaintiff owns the surface estate to a 22,000-acre ranch in Ward County. (Fourth Am. Pet. ¶ 15) In 2012, Plaintiff sued Energen for trespass, breach of contract, and other claims, alleging that Energen owes Plaintiff millions of dollars for Energen's alleged "unauthorized use of [Plaintiff's] roads" and for allegedly "traveling on and over [Plaintiff's] private properties and roads without consent" in order to access Energen's oil and gas wells. (*Id.* ¶¶ 28, 32, 44, 52) Coll Bramblett, one of the Plaintiff's principals, testified that the trespass arises from Energen's alleged "unauthorized use of [Plaintiff's roads] . . . due to vehicular traffic." (Deposition of Coll Bramblett ["Bramblett Dep."] at 102-03 [Tab 1])

8. Around August 2010, Plaintiff installed "no trespassing" signs on its roads:



(Bramblett Dep. at 204, 230-31 [Tab 1])[1] Plaintiff claims Energen has disregarded these signs in accessing its oil and gas wells. (Fourth Am. Pet. ¶ 31) The signs warn against trespassing and purport to impose a "penalty" for unauthorized use at the rate of $100 per rod of road. (*Id.*) The signs also provide a telephone number for persons to call "to seek permission" to use the roads. (*Id.*) Bramblett drafted the language on the signs without conducting any legal research about the penalty provision. (Bramblett Dep. at 95 [Tab 1])

9. In late March 2012, Plaintiff's counsel, J. Monty Stevens, sent a letter to Energen complaining about its alleged unauthorized use of Plaintiff's roads. (3/28/2012 Stevens Letter [Tab 2]) Mr. Stevens notified Energen that if "Energen, its employees, contractors and subcontractors continue the [sic] any wrongful use of CCR's roads, those trespasses will be based on the $100 per rod that is clearly stated on all of the NO TRESPASSING signs." (*Id.* at CCR000298-299) One week later, Mr. Stevens sent another letter to Energen in which he stated that because he had not heard from Energen and because Energen supposedly kept using the

[1] A copy of the sign is attached to Plaintiff's Fourth Amended Petition as Exhibit H.

roads, he would "accept that Energen, by way of implication, has agreed to the $100.00/per rod fee." (4/5/12 Stevens Letter at ERC 010012 [Tab 3]; Bramblett Dep. at 93-94 [Tab 1])

10. In its Fourth Amended Petition, Plaintiff echoes Mr. Stevens' reasoning:

> [E]ach sign specifically sets out the liquidated monetary damages per rod ($100 per rod) due for each unauthorized use of Cowboy Country's private properties and roads. Therefore, by continuing to travel on and over Cowboy Country's private properties and roads without authorization, Energen has obligated itself to pay Cowboy Country the $100 per rod charge . . . .

(Fourth Am. Pet. ¶ 31)[2] Based on these allegations, Plaintiff seeks *actual* damages against Energen of more than $7 million -- "calculated as a charge of $100.00 per rod, on a well-specific basis." (*Id.* ¶ 52)

V. ARGUMENT

A. Summary judgment standard

11. In a traditional summary judgment motion, a movant must show there is no genuine issue of material fact, and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). The movant meets this burden by either disproving at least one essential element of each theory of recovery or by conclusively proving all elements of an affirmative defense. *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995).

B. Plaintiff's implied contract claim against Energen based on "no-trespassing" signs fails a matter of law.

12. Implied contracts must satisfy all of the elements required to form any binding contract, including (among other elements) a legally-cognizable offer to contract and acceptance

---

[2] The sign allegations in Plaintiff's Fourth Amended Petition appear to assert an implied contract claim even though Plaintiff does not expressly denominate those allegations as such. To the extent Plaintiff asserts that its no-trespassing signs entitle it to *trespass* damages calculated at $100 per rod of road used, there is no Texas authority that would allow a property owner to unilaterally modify the common-law measure of damage for the tort of trespass simply by posting a sign declaring its desired "penalty" rate for trespass. The proper measure of damages in a suit for the tort of trespass is discussed in detail in Energen's Motion for Partial Summary Judgment on the Proper Measure of Trespass Damages, filed August 1, 2013.

in strict compliance with the terms of the offer. *Hallmark v. Hand*, 885 S.W.2d 471, 476 (Tex. App. -- El Paso 1994, writ denied) (the "well-established elements of a contract are the same whether the contract is implied or express" and include an offer and acceptance in strict compliance with terms of offer); *see Plotkin v. Joekel*, 304 S.W.3d 455, 476 (Tex. App. -- Houston [1st Dist.] 2009, pet. denied) ("[t]he elements of a contract, express or implied, are identical" and include an offer and acceptance). Moreover, to be enforceable, the terms of a contract must be sufficiently definite to enable a court to understand what the promisor undertook. *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex. 1992); *Mann v. Trend Exploration Co.*, 934 S.W.2d 709, 712-73 (Tex. App. -- El Paso 1996, writ denied) (affirming summary judgment that purported contract was too indefinite to be enforceable).

13. Here, Plaintiff's implied contract claim premised on its "no trespassing" signs fails all of these requirements: the signs do not constitute legally cognizable offers to contract; Energen did not impliedly accept Plaintiff's demand to pay a "penalty" to use Plaintiff's roads; and the "terms" of the signs are too indefinite to constitute an enforceable agreement as a matter of law.

1. Warnings and demands are not offers to contract.

14. To begin with, the signs do not represent a valid offer to sell access to Plaintiff's roads. (Fourth Am. Pet. at Ex. H) "An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." RESTATEMENT (SECOND) OF CONTRACTS § 24 (1981). To prove a valid offer, a party must show (1) the offeror intended to make an offer, (2) the terms of the offer were clear and definite, and (3) the offeror communicated the essential terms of the offer to the

offeree. *KW Constr. v. Stephens & Sons Concrete Contractors, Inc.*, 165 S.W.3d 874, 883 (Tex. App. -- Texarkana 2005, pet. denied). None of these elements are satisfied here.

15. By their plain terms, the signs do not express Plaintiff's "willingness to enter into a bargain." (*See* Fourth Am. Pet. at Ex. H) Nor do they express an intent to "invite" Energen -- or anyone else -- to purchase access to Plaintiffs' roads at the price of $100 per rod or any other definitive terms. (*Id.*) Rather, the signs warn starkly "NO TRESPASSING" and "NO UNAUTHORIZED USE OF ROADS." (*Id.*) The import of the signs is clear: anyone who makes "unauthorized" use of the roads is a "trespass[er]" -- *i.e.*, "one who . . . makes entry upon land *without consent*," *Castano v. San Filipe Agric., Mfg., & Irr. Co.*, 147 S.W.3d 444, 452 (Tex. App. -- San Antonio 2004, no pet.) (emphasis added) -- and trespassers are supposedly required pay a "penalty" of $100 per rod "for each unauthorized use" of Plaintiff's roads. As a matter of law, these signs do not constitute an offer to authorize persons to use Plaintiff's roads; to the contrary, they warn unauthorized persons not to use the roads, and they threaten them with monetary penalties if they ignore those warnings.

16. For these reasons alone, Energen is entitled to summary judgment on Plaintiff's implied contract claim.

2. Invitations to negotiate are not offers to contract.

17. The statement on the signs providing a telephone number that one may call "to seek permission" to use Plaintiff's roads confirms that the signs themselves are not offers to contract. (Fourth Am. Pet. at Ex. H) That statement is, at most, an invitation to negotiate for "permission" to use the land under some unspecified terms. (*Id.*) Invitations to negotiate, however, are not offers to contract as a matter of law. *Baldwin v. New*, 736 S.W.2d 148, 152 (Tex. App. -- Dallas 1987, writ denied) ("an invitation to enter into negotiations is not an

'offer'"); *Smith v. Sabine Royalty Corp.*, 556 S.W.2d 365, 372 (Tex. Civ. App. -- Amarillo 1977, no writ) (document was merely an invitation to negotiate rather than an offer to contract).

18. Plaintiff admitted that its signs are nothing more than an invitation to negotiate in the now-stricken paragraph 65 of its Fourth Amended Petition: "[T]he specific 'NO TRESPASSING' signs contained both a prohibition and an offer. . . . The offer is to use the road *after* obtaining permission . . . ." (Fourth Am. Pet. ¶ 65 (emphasis added)) Similarly, Coll Bramblett testified that the "no trespassing sign was telling [Energen] to stop and get permission." (Bramblett Dep. at 95 [Tab 1]) Thus, as Plaintiff itself acknowledges, the sign is, at best, an invitation to negotiate for permission to use Plaintiff's roads. (*Id.*) Because an invitation to negotiate is not an offer to contract as a matter of law, Plaintiff's implied contract claim based on the no-trespassing signs fails for this reason as well. *See Mann*, 934 S.W.2d at 713 ("[w]here an essential term is left open for future negotiation, there is no binding contract").

3. Energen's alleged continued use of Plaintiff's roads does not manifest its acceptance of any purported offer.

19. Plaintiff alleges that, by continuing to drive over Plaintiff's roads and ignoring the no-trespassing signs, Energen impliedly agreed to pay the sign's $100 per rod "penalty." (Fourth Am. Pet. ¶ 31 & Ex. H; *see* Bramblett Dep. at 135) The Texas Supreme Court, however, has rejected attempts to create implied contracts through a demand like that found in Plaintiff's signs. For example, in *Galveston Wharf Co. v. Gulf, Colorado & Santa Fe Railway Co.*, 10 S.W. 537, 537 (Tex. 1889), a railroad company laid track and built structures on a portion of a lot belonging to the Galveston Wharf Company. When the wharf discovered the trespass, it sent letters to the railroad that if it chose to remain on the property, it would be required to pay $100 a month in rent. *Id.* at 538. The railroad refused to pay the demand and continued to use the wharf's property. *Id.* The wharf argued that the railroad was still obliged to pay the rent because

an implied contract was created by the railroad's continued use and occupation of the property after receipt of the demands. *Id.*

20. The Texas Supreme Court rejected the wharf's implied contract claim. As the Court recognized, to have a contract to pay rent, "there must be an agreement to pay the rent to which the minds of both parties have assented." *Id.* at 539. Significantly, however, the Court held that such agreement or consent could not be inferred from the bare demand from an owner to a trespasser "that unless [the trespasser] gives up the possession he will be charged rent at a certain rate":

> To so hold would be to decide that the owner of the land, by giving notice to the trespasser that he must pay rent or abandon the premises, could change the relation of the parties, and of his own motion make them landlord and tenant. Not only this, but by fixing the amount of rent to be paid, he could recover in his action a sum not agreed upon by the occupant, but arbitrarily fixed by himself.

Id.

21. The Texas Supreme Court's reasoning in *Galveston Wharf* applies with equal force here. Just as the railroad did not impliedly consent to the wharf's rent demands by refusing to pay the demand and continuing to occupy the wharf's property, Energen did not impliedly agree to pay the sign's "penalty" of $100 per rod by allegedly refusing to pay the "penalty" and continuing to use Plaintiff's roads. (4/5/12 Stevens Letter [Tab 3]) Nor did Energen impliedly or expressly accept Plaintiff's purported offer when it did not respond to Plaintiff's demand letters. (*See* 3/28/12 Stevens Letter [Tab 2]; 4/5/12 Stevens Letter [Tab 3]) Plaintiff cannot convert an alleged trespass into a breach of contract -- thereby changing "the relation of the parties" -- simply by posting no-trespassing signs (or sending letters) and demanding an arbitrary penalty for the use of Plaintiff's roads. *See id.*

4. The no-trespassing signs are too indefinite to constitute a contract.

22. Energen is also entitled to partial summary judgment for the independent reason that, as a matter of law, the no-trespassing signs are too indefinite to create a contract. The Texas Supreme Court has made clear that, to be legally binding, "a contract must be sufficiently definite in its terms so that a court can understand what the promisor undertook." *T.O. Stanley Boot Co.*, 847 S.W.2d at 221; *see also Mann*, 934 S.W.2d at 713. This means the material terms of a purported contract must be agreed upon before a court can enforce it. *T.O. Stanley Boot Co.*, 847 S.W.2d at 221. If the agreement upon which the plaintiff relies is so indefinite as to make it impossible for the court to determine the legal obligations of the parties, it is not an enforceable contract. *Searcy v. DDA, Inc.*, 201 S.W.3d 319, 322 (Tex. App. -- Dallas 2006, no pet.). These rules regarding indefiniteness of the material terms of a contract are based on the concept that a party cannot accept an offer, and thereby form a contract, unless the terms of the contract are reasonably certain. *Fort Worth Indep. Sch. Dist. v. City of Fort Worth*, 22 S.W.3d 831, 846 (Tex. 2000). Whether a contract contains all of the essential terms for it to be enforceable is a question of law. *Parker Drilling Co. v. Romfor Supply Co.*, 316 S.W.3d 68, 74 (Tex. App. -- Houston [14th Dist.] 2010, pet. denied).

23. Here, the language in Plaintiff's signs is too indefinite to form the basis of an implied contract. As a threshold matter, Plaintiff is not even consistent itself as to the terms of the purported "offer" conveyed by the signs. In the now-stricken paragraph 66 of its petition (which had been asserted against the Plains Defendants and certain other defendants), Plaintiff claimed that the signs offer a rate of "$100.00 per rod, "on a *per use* basis." (Fourth Am. Pet. ¶ 66 (emphasis added)) But at the same time, Plaintiff also claimed that the signs offer a rate of "$100.00 per rod, on a *well-specific* basis" -- an entirely different calculation. (*Id.* ¶ 52

(emphasis added)) The signs also do not indicate what an *authorized* person would have to pay to use the roads pursuant to some hypothetical contract with Plaintiff. (*See id.* at Ex. H) Nor do the signs specify what one purchases in exchange for the $100 per rod "penalty" posted on the signs -- a license, an easement, neither, or something else entirely. (*Id.*) The signs also do not specify the duration (if any) of whatever property interest would be created by payment of the "penalty." (*Id.*)

24. Accordingly, even if the no-trespassing signs could somehow be considered offers to contract (and they cannot, for the reasons discussed above), the scant language in the signs is far too indefinite for a court to determine the purported legal obligations of the parties. Thus, any contract based on the no-trespassing signs would be unenforceable as a matter of law, and the Court should grant summary judgment for this reason as well. *T.O. Stanley Boot Co.*, 847 S.W.2d at 221; *see Mann*, 934 S.W.2d at 713 (affirming summary judgment that parties did not have a sufficiently definite agreement to permit recovery).[3]

VI. PRAYER

For the foregoing reasons, Defendant Energen Resources Corporation prays that the Court grant this motion for partial summary judgment on Plaintiff's implied contract cause arising from its no-trespassing signs, render judgment that Plaintiff take nothing on its implied contract claim based on the no-trespassing signs, and grant Energen such other relief to which it may be entitled.

---

[3] Even indulging the fiction that the statement on the signs that a person can call to request permission constitutes an "agreement to agree," that purported agreement also would be too indefinite to be enforceable. *Fort Worth Indep. Sch. Dist.*, 22 S.W.3d at 846 (An agreement to make a future contract is "enforceable only if it is specific as to all essential terms, and no terms of the proposed agreement may be left to future negotiations."). The signs plainly do not provide *any* terms -- much less all essential terms -- that one would obtain by calling the listed telephone number to seek "permission." (Fourth Am. Pet. at Ex. H)

Respectfully submitted,

JOHN A. "JAD" DAVIS
State Bar No. 05511400
JILL C. PENNINGTON
State Bar No. 24007825
DAVIS, GERALD & CREMER
A Professional Corporation
400 W. Illinois, Ste. 1400 (79701)
P.O. Box 2796
Midland, Texas 79702
Telephone: 432-687-0011
Facsimile: 432-687-1735

DEBORAH G. HANKINSON
State Bar No. 00000020
STEPHANIE DOOLEY NELSON
State Bar No. 24002006
RYAN CLINTON
State Bar No. 24027934
HANKINSON LLP
750 North St. Paul St., Suite 1800
Dallas, Texas 75201
Telephone: 214-754-9190
Facsimile: 214-754-9140

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was served upon the following attorneys of record via electronic service or in accordance with TEX. R. CIV. P. 21a on this 16TH day of August, 2013:

Attorneys for Plaintiff:
James M. Truss
Corey F. Wehmeyer
Christopher M. West
Cox Smith Matthews Incorporated
112 East Pecan, Suite 1800
San Antonio, Texas 78205

Greg M. Holly
Attorney at Law
P.O. Box 1408
Monahans, Texas 79756

Attorneys for Defendants Alan Ritchey, Inc., Eastex Crude Holding Company and Eclipse Services, Inc.:
Michael B. McKinney
McKinney & Tighe L.L.P.
24 Smith Road, Suite 505, Tgaar Tower
Midland, Texas 79702

Attorneys for Defendant Plains Marketing, L.P. and Plains Marketing GP, Inc.:
John Zavitsanos
Timothy C. Shelby
Kyril V. Talanov
Ahmad, Zavitsanos, Anaipakos, Alavi & Mensing, P.C.
1221 McKinney Street, Suite 3460
Houston, Texas 77010

Attorneys for Defendant BTI Services, Inc.:
B. Blue Hyatt
Lynch, Chappell & Alsup
The Summit, Suite 700
300 North Marienfeld
Midland, Texas 79701

Attorneys for Defendant Mr. Pando Trucking, Inc.:
Eric C. Augesen
Attorney at Law
408 N. Texas Avenue
Odessa, Texas 79761

Attorneys for Defendant J & T Energy Services, Inc.:
Stewart McKeehan
617 E. 7th St.
Odessa, Texas 79761

Attorneys for Defendant SV Reliable Transport, LLC:
Darrell W. Corzine
Kelly, Morgan, Dennis, Corzine & Hansen, P.C.
401 East 42nd Street, Suite 200
Odessa, Texas 79762