IN THE SUPREME COURT OF TEXAS

NO. 08-0989

ITALIAN COWBOY PARTNERS, LTD.,
FRANCESCO SECCHI AND JANE SECCHI, PETITIONERS,

v.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA AND
FOUR PARTNERS, LLC D/B/A PRIZM PARTNERS AND
D/B/A UNITED COMMERCIAL PROPERTY SERVICES, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE ELEVENTH DISTRICT OF TEXAS

Argued April 14, 2010

JUSTICE HECHT, joined by JUSTICE WILLETT and JUSTICE GUZMAN, dissenting.

Francesco and Jane Secchi owned and operated two successful Dallas-area restaurants. Italian Cowboy was to be the third. To find just the right location, they secured a broker, conducted demographic studies, examined restaurant reports by the Texas Alcoholic Beverage Commission, and viewed many potential sites. They learned that a restaurant was closing in the Keystone Park Shopping Center, an area they liked. They had eaten at other restaurants in the shopping center, and they found out those restaurants were operating profitably. They met with the landlord's agent, and for five months, assisted by their attorney, they negotiated a lease. In the meantime, they inspected

the property repeatedly, sometimes with the agent present and sometimes by themselves. The lease went through seven drafts. The Secchis had been in the restaurant business twenty-five years. This was not their first rodeo.

On October 18, 2000, Francesco Secchi signed a lease on behalf of the tenant, Italian Cowboy Partners, Ltd. Not quite nine months later, on July 12, 2001, the Secchis sued the landlord, Prudential Insurance Co., and its agent, Prizm Partners.

The lease stated:	The petition stated:
Tenant acknowledges that neither Landlord nor Landlord's agents, employees or contractors have made any representations or promises with respect to the Site, the Shopping Center or this lease except as expressly set forth herein.	Italian Cowboy Partners and the Secchis reasonably and detrimentally relied on the representations of Prudential and Prizm that the Premises were suitable for use as a restaurant and were a prime restaurant site.

Each statement is a statement of *fact*, like "the sun is shining" or "the sky is blue". In the lease, Italian Cowboy stated that Prudential and Prizm *did not make* representations other than those contained in the lease. In the petition, Italian Cowboy stated that Prudential and Prizm *did make* representations, representations that were not contained in the lease. Both statements cannot be true. Either representations not contained in the lease were made, or they were not made.

The Secchis knew full well whether the statement in the lease was true when they made it. They were Italian Cowboy's only representatives. They do not claim to have been mistaken — that representations made by Prudential and Prizm were supposed to have been included in the lease but were inadvertently omitted by mistake. They do not claim to have been tricked — that important provisions were surreptitiously removed from the lease before Francesco signed it. The Secchis do

not contend that after studying seven drafts of the lease with their lawyer, they just forgot to include representations that Prudential and Prizm had made about the suitability of the site for use as a restaurant. They do not plead that they were only rubes duped into stating something that was not true. The lease stated the facts as the Secchis knew them to be: representations not included in the lease were not made.

And that is exactly what Frances Fox Powell, the person who dealt with the Secchis for Prudential and Prizm, testified to at trial. The Secchis testified, contrary to the lease, that Powell had told them the building was "problem-free", that previous tenants had "no problems" with the building, and that it was a "perfect building". Asked at trial whether she had told the Secchis "that the building was in perfect condition", she answered, "No." Had she made "any misrepresentations concerning the condition of the building?" "No." Had "a sewer gas odor ever [been] pointed out . . . or mentioned . . . as being present" by the general manager of the restaurant that had vacated the premises before Italian Cowboy leased them? "No." Powell testified that the Secchis' first mention of an unpleasant odor was in February 2001. She testified:

> Q At any time prior to the closing of the restaurant permanently and the filing of this lawsuit, did either Mr. or Mrs. Secchi ever come to you and say, "Mrs. Powell, you failed to tell us something about this restaurant that was significant", or "there was something about this restaurant that you told us that proved to be contrary". Did that ever take place?
>
> A No.
>
> Q In December, January, February, March, April, May, June up through July, did Mr. and Mrs. Secchi and you have any conversation where it was suggested to you that you had made a statement to them that had proven to be untrue?
>
> A No.

Q Or that you failed to disclose something to them?

A No.

Had she concealed anything she knew about the premises from the Secchis? "No." Had she deceived them in any of her dealings with them? "No." Had she "always [been] truthful with them"? "Yes."

Of course, as the Court notes, Powell's testimony was rejected by the trial court, as reflected in its findings of fact and judgment. But the issue is not whether Powell was truthful or whether there is evidence to support the judgment. Powell's testimony cannot be ignored because it establishes that the parties now dispute *a fact* — what representations were made — about which they unquestionably agreed at the time they inked the lease. The issue is whether the law allows a sophisticated party in a commercial transaction, represented by counsel, with full knowledge of all the circumstances, without mistake or duress of any kind, to include in a contract a statement of fact that is important to the other party, and later disavow it as having been false at the time it was made. Italian Cowboy and the Secchis can prevail on their fraud claim only if they successfully defrauded Prudential and Prizm. Can a party claim fraud based on his own fraud?

The Court ignores this issue and presents instead the question "whether the lease agreement disclaims reliance on representations made by Prudential, negating an element of Italian Cowboy's fraud claim."[1] Since the lease says absolutely nothing about reliance, this is a pretty easy question to answer, and the Court's poor strawman does not put up much of a struggle before being

[1] *Ante* at ___.

demolished. As the Court observes, the law has long been skeptical of a party's agreement, sometimes referred to generally as a merger clause, not to rely on statements made by the other party outside the contract. Experience teaches that people are often not as serious as they should be in agreeing to such provisions. That, the Court concludes, is the situation we have here. Italian Cowboy intended nothing by its statement in the lease other than a merger clause; merger clauses often use similar language; merger clauses do not effectively disclaim reliance; and therefore, Italian Cowboy's statement does not disclaim reliance.

At the risk of appearing a stickler, I think what matters is the statement Italian Cowboy made, not what it may have intended would result. Even if intent were important in this situation, one cannot say the word "none" and intend by it to mean the word "some". In the Court's view, by stating that Prudential and Prizm had not "made any representations", Italian Cowboy either meant the exact opposite — that Prudential and Prizm had made *some* representations — or it meant nothing at all.

The principal authority on which the Court relies is our 1957 decision in *Dallas Farm Machinery Co. v. Reaves*,[2] so its facts are worth recounting. Reaves traded in his two Ford tractors and loaders for a new Oliver tractor and loader on the strength of a salesman's representations that the new equipment would do a better job faster.[3] After trying out the new machinery for 45 minutes,

[2] 307 S.W.2d 233 (Tex. 1957).

[3] *Dallas Farm Mach. Co. v. Reaves*, 300 S.W.2d 180, 181 (Tex. Civ. App.–Fort Worth 1957), *aff'd*, 307 S.W.2d 233 (Tex. 1957).

Reaves concluded it was worthless and the representations were false.[4] He demanded the return of his old equipment. Dallas Farm Machinery refused and sued for the balance due on the contract.[5] The contract was a one-page form with a provision on the back warranting that the goods sold were "well made and of good material", agreeing to replace defective parts for six months, and stating: "This warranty is made in lieu of all other warranties, express or implied, and no warranty is made or authorized to be made other than herein set forth."[6] The Court held that this provision did not preclude Reaves's counterclaim for rescission based on fraudulent inducement.[7] The Court did not suggest that Reaves was familiar with the capabilities of the equipment he bought — on the contrary, it was his lack of familiarity with the Oliver equipment that led to his complaints — or that the contract was negotiated, or that he was represented by counsel.

Reaves recognizes the reality that parties do not always pay attention to contractual provisions or recognize their consequences. But in three cases since — *Prudential Insurance Co. of America v. Jefferson Associates, Ltd.*,[8] *Schlumberger Technology Corp. v. Swanson*,[9] and *Forest Oil Corp. v. McAllen*[10] — we have refused to apply *Reaves* absolutely when sophisticated parties

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[4] 300 S.W.2d at 181.

[5] *Id.*

[6] 307 S.W.2d at 234.

[7] *Id.* at 239-241.

[8] 896 S.W.2d 156, 161-162 (Tex. 1995).

[9] 959 S.W.2d 171, 180 (Tex. 1997).

[10] 268 S.W.3d 51, 58 (Tex. 2008).

represented by legal counsel negotiate commercial agreements. The Court acknowledges that the *Reaves* rule has exceptions, but only if parties choose clear and unequivocal language and disclaim reliance on representations rather than the existence of representations. The contracts in *Schlumberger* and *Forest Oil* both stated that "no promise or agreement which is not herein expressed has been made",[11] provisions substantively indistinguishable to Italian Cowboy's acknowledgment that neither Prudential nor its agents had "made any representations or promises . . . except as expressly set forth" in the lease. But the parties in *Schlumberger* and *Forest Oil* added that they were not "relying upon any statement or representation" of any other party but were instead "relying on [their] own judgment".[12] According to the Court, the contracts in *Schlumberger* and *Forest Oil* precluded fraud claims only because they used the word "relying", which Italian Cowboy's lease did not do.

The requirement that parties use clear and unequivocal language helps ensure that they will understand the import of their contractual statements, so it is surprising that the examples the Court offers are provisions in which the language is internally inconsistent. The parties in *Schlumberger* and *Forest Oil* agreed that no representations had been made and that they were not relying on ones that had been made. For lawyers accustomed to pleading in the alternative, this may make perfect sense, but someone less flexible might have more trouble understanding how representations were both made and not made. A flat-out averment like Italian Cowboy's, that no representations were

[11] *Forest Oil*, 268 S.W.3d at 54 n.4; *Schlumberger*, 959 S.W.2d at 180.

[12] *Forest Oil*, 268 S.W.3d at 54 n.4; *Schlumberger*, 959 S.W.2d at 180.

made, period, is surely clearer and less equivocal than a statement that representations were not made, or if they were, they were not relied on.

The Court's preference for a disclaimer of reliance over a disclaimer of representations is simply a mystery. According to the Court, a party who states (somewhat equivocally) that although representations may have been made, he is not relying on any of them, should be held to his word and his later claim of fraud foreclosed. But a party who unequivocally denies that any representations were made to induce his agreement, other than those in the agreement itself, may later sue for fraud on representations he denied were ever made. For purposes of forestalling litigation, his denial is essentially void. If the Court has any reason for distinguishing between the two disclaimers, it is nowhere explained.

It may not matter. In a footnote, the Court warns that even "a clear and unequivocal disclaimer of reliance" may not be "binding on the parties involved", depending on "the circumstances".[13] When would such a disclaimer not be binding? According to the Court, whenever the parties have not discussed during their negotiations the substance of the later-alleged misrepresentation — in this case, the unpleasant odor on the premises.[14] But Italian Cowboy, Prudential, and Prizm all claim they knew nothing about the odor before the lease was signed. Since Italian Cowboy had had every opportunity to inspect the premises and discuss their suitability with prior restaurant tenants, the purpose of the disclaimer was to avoid disputes over such matters after the contract was signed. The trial court did not believe Prudential and Prizm, but if it had, the

[13] *Ante* at ___ n.8.

[14] This is one of several instances cited by the Court in which a disclaimer would not be binding.

discussion the Court would require to uphold the disclaimer would have been impossible, and the disclaimer would not have precluded the lawsuit. In the Court's view, a clear and equivocal disclaimer of reliance is effective only if no dispute arises after the contract was signed that was not discussed beforehand. Otherwise, the Court gives parties but one choice: litigate.

I would hold Italian Cowboy to the statement it made in the lease when it was completely capable of being accurate, ably counseled, and fully incentivized: "neither Landlord nor Landlord's agents, employees or contractors have made any representations or promises with respect to the Site".[15] Italian Cowboy's recourse should lie solely in its claim for breach of an implied warranty of suitability. But that claim, too, is precluded by Italian Cowboy's agreement. In the lease, it agreed to "be responsible for all repairs to the interior and non-structural components of the Premises, including but not limited to the interior . . . , and all . . . ventilating . . . systems . . . ." I disagree with the Court that work necessary to remedy the odor in the premises fell outside this responsibility. In fact, the odor was later remedied, by the restaurant-tenant who succeeded Italian Cowboy, by repairs to the interior, including the ventilating systems.

The Court's depreciation of the written word in this case is troubling and exacts a high price, not only to the parties here, but to all who are denied the right to negotiate freedom from uncertain, unending litigation. This case was filed in July 2001, over nine years ago. Were Italian Cowboy

[15] Apparently confused about the issues in the case, the Court mischaracterizes the dissent and Prudential as arguing that a merger clause excuses parties from "hav[ing] to disclose known defects". *Ante* at ___. This case does not involve an issue of nondisclosure. Italian Cowboy claims that Prudential made affirmative misrepresentations that were fraudulent, not that it failed to disclose information. "Failing to disclose information is equivalent to a false representation only when particular circumstances impose a duty on a party to speak, and the party deliberately remains silent." *In re Int'l Profit Assocs., Inc.* 274 S.W.3d 672, 678 (Tex. 2009) (citing *Bradford v. Vento*, 48 S.W.3d 749, 755 (Tex. 2001), and *SmithKline Beecham Corp. v. Doe*, 903 S.W.2d 347, 353 (Tex. 1995)). Italian Cowboy does not assert that Prudential was under such a duty in negotiating the lease.

bound by its statements in the lease, its fraud claim could have been quickly dismissed, leaving only the warranty claim and the simpler issue of how the lease allocated responsibility for repairing a problem like the odor. The case has already been to this Court once before, with Italian Cowboy arguing unsuccessfully that its agreement to waive a jury was not binding — other words it used and didn't mean.[16] The trial court's judgment, rendered in 2005, awarded Italian Cowboy $650,700.40 in damages and $705,000 attorney fees. With interest, the judgment is well now over $2 million. The case is remanded for its third hearing in the court of appeals. A new trial is still a possibility. The cost and delay are no one's fault; they are simply the price the system exacts for the denial of freedom of contract. The law should allow willing and able parties to avoid a litigation toll-tax and agree to greater certainty in their dealings. Because today's opinion refuses that opportunity, I respectfully dissent.

Nathan L. Hecht
Justice

Opinion delivered: April 15, 2011

[16] *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 140-141 (Tex. 2004).