

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

FUGRO-MCCLELLAND MARINE	§	
GEOSCIENCES, INC.,	§	
<i>Plaintiff,</i>	§	
	§	
vs.	§	CIVIL ACTION H-07-1731
	§	
STEADFAST INSURANCE CO. AND	§	
LEXINGTON INSURANCE CO.,	§	
<i>Defendants.</i>	§	

MEMORANDUM AND RECOMMENDATION

This insurance dispute is before the court on Plaintiff Fugro-McClelland Marine Geosciences, Inc.'s (FMMG's) motion to enforce a settlement agreement with defendant Steadfast Insurance Company (Dkt. 7). Having reviewed the parties' submissions, all matters of record, and the law, the court recommends that FMMG's motion be denied.

Background

FMMG was sued in federal court in the Eastern District of Louisiana by J. Ray McDermot Engineering, L.L.C. and others for breach of contract and negligent performance of services (the *McDermot* lawsuit). Steadfast Insurance Company issued a Commercial General Liability Policy to FMMG. Lexington Insurance Company issued a Professional Liability Policy to FMMG. FMMG asserted coverage for indemnity and defense of the *McDermot* lawsuit under both policies. FMMG settled the *McDermot* lawsuit for \$3.7 million. FMMG funded the settlement out of its own pocket. FMMG filed this federal lawsuit on May 23, 2007 to collect the settlement amount and defense costs from its insurers.

FMMG and its insurers engaged in settlement negotiations soon after this suit was filed. Steadfast, through its counsel Carol Keough, offered to settle the matter in a May 30, 2007 letter. The settlement offer contained 7 enumerated elements, one of which was “Steadfast will offer \$500,000.00 to FMMG to be paid to the plaintiffs in the *McDermott* lawsuit.”¹ The settlement offer also required FMMG’s agreement “not to dismiss the suit against Lexington and/or to interfere with or release and/or settle defense costs with Lexington.”² FMMG, through its representative Charlie Steen, responded to Steadfast’s offer letter with a June 7, 2007 e-mail that reads in its entirety as follows:

Carol,
Jim Tompkins is out of town so I am responding to your letter of May 30, 2007.
Steadfast’s offer to contribute \$500,000 to the \$3,700,000 settlement with McDermott is acceptable. We will need to agree to the remaining defense costs and in that regard I will send you a final itemization. I ask that you send me your proposed verbiage for retaining any rights of recovery for defense costs that Steadfast may have against Lexington. I assume you will prepare the release documents as respects Steadfast.
Regards,
Charlie³

The parties refer to the May 30, 2007 letter and June 7, 2007 e-mail together as the “settlement agreement.” By this motion FMMG seeks to enforce the settlement agreement and collect \$500,000 from Steadfast. Steadfast asserts that it is not obligated to pay the

¹ FMMG’s Exhibit A, at 6 (Dkt. 7-2).

² *Id.*

³ FMMG’s Exhibit B (Dkt. 7-2).

\$500,000 because FMMG breached the settlement agreement by releasing Lexington from a claim for defense costs and agreeing to dismiss this lawsuit against Lexington with prejudice.

Analysis

In essence, what FMMG wants is a judgment against Steadfast for \$500,000 based on the settlement agreement. The court cannot enter judgment on the settlement agreement without Steadfast's consent. "A party may revoke his consent to settle a case anytime before judgment is rendered." *S & A Restaurant Corp. v. Leal*, 892 S.W.2d 855, 857 (Tex. 1995); *Quintero v. Jim Walter Homes, Inc.*, 654 S.W.2d 442, 444 (Tex. 1983); *Samples Exterminators v. Samples*, 640 S.W.2d 873, 874-75 (Tex. 1982). It is clear that Steadfast does not consent to entry of judgment in this case.⁴

Once a party accepts a settlement offer, enforcement is by suit on the contract, either for breach or for specific performance.⁵ *Stevens v. Snyder*, 874 S.W.2d 241, 243 (Tex. App. – Dallas 1994, writ denied). The party seeking enforcement must support it by pleadings and proof. *Id.*; *Quintero v. Jim Walter Homes, Inc.*, 654 S.W.2d 442, 444 (Tex. 1983) ("The

⁴ To the contrary, Steadfast has filed a motion for summary judgment (Dkt. 33) on the merits of FMMG's original complaint.

⁵ Specific performance is an equitable remedy that may be awarded upon a showing of breach of contract. It is not a separate cause of action, but is used as a substitute for money damages when such damages would not be adequate. *Stafford v. Southern Vanity Magazine, Inc.*, 231 S.W.3d 530, 535 (Tex. App. – Dallas 2007, pet. denied).

validity of the settlement agreement . . . may not be determined without proper pleadings and full resolution of the surrounding facts and circumstances.”).

FMMG’s pleadings do not support this motion. Its complaint seeks a declaratory judgment of coverage under the insurance policies issued by the defendants, as well as damages from defendants for “failure to honor their contractual obligations” under those policies. Nothing in the complaint refers to the purported settlement agreement, which is unsurprising because it was negotiated after the complaint was filed. The Texas Supreme Court in *Quintero* made it quite clear that an action to enforce a settlement agreement must be supported by proper pleadings like any other breach of contract claim.⁶ FMMG has not done this.

Even if FMMG had properly sought leave to amend its complaint to allege a breach of the settlement agreement, the record currently before the court seems rife with factual

⁶ A plaintiff pursuing a breach of contract claim must plead and prove four elements: (1) a valid contract; (2) the plaintiff performed or tendered performance; (3) the defendant breached the contract; and (4) the plaintiff suffered damages resulting from the breach. *Disney*, 233 S.W.3d at 597; *Vermont Info. Proc., Inc. v. Montana Beverage Corp.*, 227 S.W.3d 846, 852 (Tex. App. – El Paso 2007, n.p.h.). A valid and binding contract is formed by: (1) an offer; (2) an acceptance in strict compliance with the terms of the offer; (3) a meeting of the minds; (4) each party’s consent to the terms; (5) execution and delivery of the contract with the intent that it be mutual and binding. *Vermont Info.*, 227 S.W.3d at 852.

disputes which would defy summary resolution. These include issues of contract formation⁷ as well as alleged material breach by FMMG.⁸

There is no need to rule on such questions at this point, however, because FMMG has not pleaded a claim for breach of the settlement agreement in this lawsuit. The court cannot enter a judgment enforcing the settlement agreement on the basis of FMMG's motion for enforcement alone.

Conclusion and Recommendation

For the reasons discussed above, the court recommends that FMMG's motion to enforce the settlement agreement (Dkt. 7) be denied.⁹

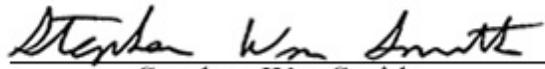
The parties have ten days from service of this Memorandum and Recommendation to file written objections. Failure to file timely objections will preclude appellate review of factual findings or legal conclusions, except for plain error. *See* FED. R. CIV. P. 72.

⁷ The existence of a contract is a generally question of law. But where there are disputes about subsidiary facts, such as whether there was a meeting of the minds or consent as to all material terms of the agreement, ruling on a breach of contract claim as a matter of law is not possible. *See Vermont Info.*, 227 S.w.3d at 852 (“whether the parties intended to enter into an agreement is generally a question of fact.”).

⁸ FMMG dismissed Lexington with prejudice after this motion was filed and fully briefed. *See* Dkt. 28. The effect of Lexington's dismissal on FMMG's ability to prove its performance under the settlement agreement is not fully addressed by the parties and is not determined here. However, the court notes that any fact issue whether FMMG performed its obligations, or whether Steadfast's failure to pay \$500,000 by a certain date relieved FMMG of its performance obligations, would prevent ruling as a matter of law on a contract claim. *See Disney*, 233 S.W.3d at 597 (fact issues inextricably tied to performance preclude ruling as a matter of law).

⁹ Steadfast's cross-motion to dismiss motion (Dkt. 17) should be granted for the same reasons.

Signed at Houston, Texas on December 10, 2007.



Stephen Wm Smith
United States Magistrate Judge