

Affirmed and Opinion filed September 28, 2000.



In The

Fourteenth Court of Appeals

NO. 14-99-00046-CV

MARK T. WESTERMAN, Appellant

V.

PARANET, INC., Appellee

**On Appeal from the 61st District Court
Harris County, Texas
Trial Court Cause No. 97-49292**

OPINION

Mark Westerman, the plaintiff in a suit for ownership of 3000 shares of common stock in Paranet, Inc., appeals from the grant of summary judgment in favor of Paranet. We affirm.

In a letter dated April 14, 1992, Paranet offered Westerman a position as a senior computer system's analyst. The position included options on thirty shares of common stock at a price of \$10.00 a share. Westerman accepted the position on April 17, 1992. While he was employed, the stock split, ten-for-one, and he was offered options on 100 more shares. He declined. On April 8, 1994, after working for the company for just under two years, Westerman resigned. Paranet's stock split a second time, again ten-for-one. On September

26, 1997, approximately three years after he resigned, Mr. Westerman tendered a check for \$3000.00¹ to Parinet and demanded 3000 shares of stock. Parinet refused and Westerman filed a suit for declaratory judgment, asking the court to either award him the 3000 shares or their present value. Parinet answered the suit, contending the stock options could only be exercised while Westerman was an employee of Parinet. Westerman, based on this answer, amended his petition to also allege fraud.

Parinet moved for summary judgment under both 166a, the traditional summary judgment, and 166a(i), the no-evidence summary judgment. Parinet's motion alleged that Westerman's claims were disposed of by the unambiguous language of its 1991 non-qualified stock option plan, which requires that stock options be exercised while the individual is still an employee; that Westerman's claims were barred by the statute of limitations; and that Westerman had no evidence of an unconditional stock option contract or of any material misrepresentations by Parinet. The trial court granted the motion without stating the grounds for its decision.

Westerman contends that three separate issues of material fact exist which preclude summary judgment. Specifically, he contends there is a genuine issue of material fact regarding whether or not he was ever given a copy of Parinet's 1991 stock option plan; whether or not Parinet fraudulently induced Westerman to enter an employment contract by misrepresenting its stock option plan; and, if so, when that cause of action accrued. Westerman also argued that Parinet failed to prove that his claim for breach of contract was barred by the statute of limitations.

¹ The tender price, after two stock splits, should have been \$300.00. Westerman's amended petition explains that he was originally unaware that the second split would reduce the price-per-share from \$1.00 to \$0.10.

The 1991 Non-qualified Stock Option Plan

Westerman claims Parinet's 1992 employment letter granted him an irrevocable, unconditional, interminable option to purchase 30 shares of common stock at the fixed price of ten dollars per share. Parinet claims the plain language of its 1991 stock option plan plainly states that the option is available only to persons currently employed by the company. In response, Westerman contends a genuine issue of material fact exists as to whether or not he was ever given a copy of Parinet's 1991 non-qualified stock option plan. Parinet filed both a traditional and no-evidence summary judgment contending, in part, that Westerman had no evidence that he had ever been granted an irrevocable, unconditional, and interminable option to purchase 30 shares of stock.

We apply the same legal sufficiency standard in reviewing a no-evidence summary judgment as we apply in reviewing a directed verdict. *See Moore v. KMart Corp.*, 981 S.W.2d 266, 269 (Tex. App.—San Antonio 1998, pet. denied). We look at the evidence in the light most favorable to the respondent against whom the summary judgment was rendered, disregarding all contrary evidence and inferences. *See id.*; *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997), *cert. denied*, 523 U.S. 1119, 118 S.Ct. 1799, 140 L.Ed.2d 939 (1998). A no-evidence summary judgment is properly granted if the respondent fails to bring forth more than a scintilla of probative evidence to raise a genuine issue of material fact as to an essential element of the respondent's case. *See Moore*, 981 S.W.2d at 269; TEX. R. CIV. P. 166a(i). Less than a scintilla of evidence exists when the evidence is "so weak as to do no more than create a mere surmise or suspicion" of a fact. *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983). More than a scintilla of evidence exists when the evidence "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499 (Tex. 1995).

The only summary judgment proof offered by Westerman demonstrating the existence of a contract was the letter Parinet sent him extending an offer of employment, and his own affidavit, the relevant portions of which were his interpretation and understanding of that letter.

The letter is primarily a list of bullet points under the heading of “financial considerations for your position.”² After listing the position’s base salary and explaining Paranet’s bonus plan, the letter states:

We feel strongly that you will be an important part of our success and as such should share in the growth of the company. We are offering you, pending final approval by the board of directors, options on 30 shares of common stock. The option price of each share is \$10.

After detailing the company’s medical and dental plan, life insurance, long term disability, 401(k), etc, the letter concludes:

In no way is this offer conditional, however we would prefer to have your start date with PARANET coincide with the start date of your first project. Before you turn in your resignation with your current employer please work with us to coordinate schedules. Since we are working to secure our employment needs we would request your positive response within 5 working days of this letter, at which point we remove our offer.

Although the stock option is expressly conditioned upon “final approval by the board of directors,” Westerman claims the offer is made unconditional and absolute by the inclusion of the phrase “[i]n no way is this offer conditional.” Westerman contends that, regardless of how long he worked for Paranet, and how much time elapsed between the end of his employment and his demand to purchase the shares, Paranet was absolutely bound by the aforementioned letter to sell him the shares upon proper tender.

We find Westerman’s construction of the letter to be absurd. The stock option is listed in the letter among other financial considerations for the position, including: a salary of \$60,000 per year, an incentive compensation plan, a comprehensive medical and dental plan, a life insurance policy, and a long term disability plan. No one could reasonably contend that these incentives were absolute and not conditioned upon employment with the company. We find no ambiguity in the letter; it is what it appears to be—an offer of employment. As the letter plainly states, the stock option is simply one of the “financial considerations for your

² The letter, in its entirety, is set out in the appendix.

position.” Once Westerman resigned, he had no “position” with the company. Accordingly, Westerman has presented less than a scintilla of evidence in support of his assertion of an unconditional contract for stock options.

Fraudulent Misrepresentations

Paranet also asserted in its motion for summary judgment that Westerman had no proof of any misrepresentations made by Paranet. Westerman responded by contending that if Paranet’s offer of stock options was, in fact, “conditional,” then its “unconditional” offer of stock options in its employment letter was necessarily fraudulent. Thus, Westerman relies solely on the employment letter as summary judgment proof. As we have already found, no reasonable person could interpret the letter as an unconditional offer of stock options. Accordingly, Westerman has failed to bring forward more than a scintilla of evidence to support his claim of fraud.

Statute of Limitations

Westerman also contends that Paranet did not prove, as a matter of law, that his claims for breach of contract and fraud are barred by the statute of limitations. Summary judgment was properly granted for Westerman’s failure to produce more than a scintilla of competent evidence to support his claim. Accordingly, we need not decide the issue.

The judgment of the trial court is affirmed.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed September 28, 2000.

Panel consists of Chief Justice Murphy and Justices Hudson and Wittig.

Do Not Publish — TEX. R. APP. P. 47.3(b).

Appendix

PARANET

April 14, 1992

Mark T. Westerman
[Appellant's address]

Dear Mark,

I am very pleased to extend to you an offer to join PARANET. Your talents, aspirations and customer orientation are an ideal match for our short and long term plans. In joining PARANET as a Senior Systems Analyst you would report directly to Deepak Khosla, and your responsibilities will include among other tasks:

Systems Administration, Software Development, Porting of Software Packages, Network Analysis for Customers, and any needed research.

The financial considerations for your position are as follows:

- A salary of \$60,000.00 per year, paid on the 1st and 16th of each month.
- We believe that you will be an immediate contributor to PARANET, and as such you are eligible to participate in the company's incentive compensation plan immediately. The incentive plan gives you the opportunity to earn project related bonuses based on several factors including revenue generated, performance and customer satisfaction. This plan will be finalized shortly and if current estimates and assumptions hold, you could easily earn an extra \$3000.00 (3-5%) over the course of your first year of employment.
- We feel strongly that you will be an important part of our success and as such should share in the growth of the company. We are offering you, pending final approval by the board of directors, options on 30 shares of common stock. The option price of each share is \$10.
- A comprehensive medical and dental plan are provided for you at no cost to you. Our medical insurance is through Aetna and we believe you will find it excellent. Additional members of your family (if any) can easily be added to our policy at a reasonable monthly cost. We expect to subsidize a portion of their costs as the company grows.
- A Life Insurance policy with a cash value of one (1) times your salary is also provided for you as part of your employment.
- Likewise a long Term Disability plan is in place for you at no additional cost.
- We understand the importance of a good 401 K plan. We are working on a 401 K plan and expect it to be in place shortly. You may roll your existing 401 K into this plan and make additional pre-tax dollar contributions if you choose to do so.

- Keeping you [sic] skills razor sharp is clearly in all of our best interests. As such, we have budgeted two major training programs for you each year which can include trade shows, symposiums, or classes. I will work with you to identify and select the ones most appropriate for your growth.

- The company will reimburse you for any expenses you incur on our behalf, expense reports are to be filled out weekly. As with most companies, your first paycheck will be deferred for 2 weeks so please plan accordingly. Vacations are accrued at the rate of 2 weeks per year and PARANET employees enjoy 10 paid holidays.

- In no way is this offer conditional, however we would prefer to have your start date with PARANET coincide with the start date of your first project. Before you turn in your resignation with your current employer please work with us to coordinate schedules. Since we are working to secure our employment needs we would request your positive response within 5 working days of this letter, at which point we remove our offer.

I am certain that there will be some questions so please let me know. On behalf of Mike, Steve, Deepak and myself, we are looking forward to you joining our team.

Sincerely,

[signature]

Mona Cabler
Business Manager

Please respond by: 4/20/92

MAC/file .

I have read and understand the details of my employment as outlined in this letter to me. I accept this offer with my signature below:

Accepted:

Name (Print) [appellant's name]

Signature [signature]

Date: 4-17-92