Affirmed and Memorandum Opinion filed March 30, 2010

In The

Fourteenth Court of Appeals

NO. 14-08-00653-CV

JOE M. GARZA, PAY PHONE OWNERS LEGAL FUND, LLC, AND ERNEST BUSTOS, Appellants

V.

TERRA NOVA INSURANCE COMPANY, LTD., GUARANTY NATIONAL INSURANCE COMPANY, THE BURLINGTON INSURANCE COMPANY, AND UNITED NATIONAL INSURANCE COMPANY, Appellees

---

On Appeal from the 434th District Court
Fort Bend County, Texas
Trial Court Cause No. 07-DCV-155905-B

MEMORANDUM OPINION

Appellants Joe M. Garza, Pay Phone Owners Legal Fund, LLC, and Ernest Bustos appeal the trial court's order to transfer venue from Hidalgo County to Fort Bend County. Appellants also appeal the trial court's grant of summary judgment in favor of appellees Terra Nova Insurance Company, Ltd., Guaranty National Insurance Company, The Burlington Insurance Company, and United National Insurance Company. We affirm.

I

Appellants Joe M. Garza, Pay Phone Owners Legal Fund, LLC, and Ernest Bustos purchased pay telephones from American Telecommunications Company, Inc. ("ATC") in 2000 and 2001. When the appellants were purchasing the telephones, ATC allegedly represented to them that it would buy back the telephones at the original price after 36 months or at a reduced price before 36 months if the appellants were not satisfied with the telephones. ATC also allegedly represented to the appellants that it had insured the value of the telephones if it was unable to repurchase them. Additionally, ATC allegedly marketed that Northern & Western Insurance Company would provide primary insurance for its "buy-back program," and additional insurance companies would provide excess insurance for the program.[1] But when the appellants submitted requests for ATC to buy back the telephones, ATC did not honor the requests. Some appellants tried to collect on the insurance policies, but those claims were denied because the policies were standard commercial general liability policies that did not cover the appellants' claims.

The additional insurance companies included appellees Terra Nova Insurance Company, Ltd., Guaranty National Insurance Company, The Burlington Insurance Company, and United National Insurance Company. The appellees assert that the appellants were victims of ATC's Ponzi scheme. Furthermore, the appellees contend that they provided standard commercial general liability coverage to ATC, not to the appellants, and the coverage was not designated for the "buy-back program." The coverage was simply applicable to unexpected or unintended "bodily injury" and "property damage" that ATC might become legally obligated to pay.

The appellees filed a motion to transfer venue from Hidalgo County to either Harris County or Fort Bend County. The Hidalgo County trial court granted the motion and transferred the case to Fort Bend County. The appellees then moved for summary

[1] Northern & Western Insurance Company is not a party in this proceeding.

judgment, and the trial court granted their motion. Finally, the appellees moved to sever the matter, and the trial court also granted the severance. This appeal followed.

II

The appellants contend the Hidalgo County trial court erred in granting the motion to transfer venue to Fort Bend County. The appellees respond that the appellants failed to bring forward a complete and adequate record with regard to the transfer of venue. After reviewing the record, we note that the appellees' motion to transfer venue as well as a response from the appellants was not included, but we take as true statements of facts in briefs unless the opposing party contradicts them. *See Garza v. Reed*, No. 14-08-00211-CV, 2009 WL 4270888, at *1 (Tex. App.—Houston [14th Dist.] July 7, 2009, no pet.) (mem. op.). In their briefs, the parties seem to agree that one reason the appellees requested a venue transfer was on the basis of convenience. *See* Tex. Civ. Prac. & Rem. Code Ann. § 15.002(b) (Vernon 2002) (authorizing a court to transfer venue "[f]or the convenience of the parties and witnesses and in the interest of justice"). A trial court's decision to grant or deny a transfer based on convenience "is not grounds for appeal" and "is not reversible error." *Id.* § 15.002(c).

In *Garza v. Garcia*, the Texas Supreme Court reviewed a trial court's order granting a motion to transfer venue. 137 S.W.3d 36, 37, 38–39 (Tex. 2004). The trial court did not specify in the order the reason or reasons why it granted the motion; it simply stated "'after considering the motion, the pleadings, the affidavits, the responses . . . arguments . . . and hearing, the Court grants Defendants' Motion to Transfer Venue.'" *Id*. at 38. The supreme court held that an appellate court must affirm any such order because of the presumption that a venue order is granted on convenience grounds. *Id*. at 40; *accord Trend Offset Printing Servs., Inc. v. Collin County Cmty. Coll. Dist.*, 249 S.W.3d 429, 430 (Tex. 2008). Here, the trial court did not specify in the order its reason for granting the venue transfer. The trial court could have granted the motion based on convenience, and section 15.002(c) of the Texas Civil Practices and Remedies Code

expressly precludes this court from reversal if the decision was based on convenience. *See Garza*, 137 S.W.3d at 40. Accordingly, we overrule the appellants' first issue.

III

In their second contention, the appellants argue the trial court erred in granting the appellees' motion for summary judgment. In their brief, the appellants assert the appellees' misrepresentations are actionable under the Texas Insurance Code and Texas Deceptive Trade Practices Act ("DTPA"), and the appellants relied on these misrepresentations when purchasing ATC's telephones. The appellees contend the appellants have failed to show evidence of any misrepresentation to defeat the summary judgment because the appellants did not file a response to the motion for summary judgment. We agree with the appellees.

We review the trial court's summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005); *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). Here, the appellees moved for summary judgment on both traditional and no-evidence grounds. *See* Tex. R. App. P. 166a(c), 166a(i). If the trial court does not specify which it granted, as in this case, we may uphold the summary judgment on either ground. *See Taylor v. Carley*, 158 S.W.3d 1, 8 (Tex. App.—Houston [14th Dist.] 2004, pet. denied); *Samson v. Manley*, No. 14-07-01085-CV, 2009 WL 3790410, *3 (Tex. App.—Houston [14th Dist.] Oct. 6, 2009, pet. denied) (mem. op.). The party moving for a traditional summary judgment has the burden to show that no material fact exists and that it is entitled to summary judgment as a matter of law. Tex. R. App. P. 166a(c); *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000) (per curiam). We will assume that all evidence favorable to the non-movant is true and indulge every reasonable inference in favor of the non-movant. *KPMG Peat Marwick v. Harrison County Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). "In a no-evidence summary judgment, the movant must specifically state the elements as to which there is no evidence." *Rivers v. Charlie Thomas Ford, LTD.*, 289 S.W.3d 353,

357–58 (Tex. App.—Houston [14th Dist.] 2009, no pet.); *Walker v. Thomasson Lumber Co.*, 203 S.W.3d 470, 473–74 (Tex. App.—Houston [14th Dist.] 2006, no pet.). The trial court must grant the motion unless the non-movant can point out evidence that raises a fact issue on the challenged elements. *See* Tex. R. Civ. P. 166a(i); *Hamilton v. Wilson*, 249 S.W.3d 425, 426 (Tex. 2008). We must determine de novo whether the non-movant produced more than a scintilla of probative evidence to raise an issue of genuine material fact. *See Allen v. Connolly*, 158 S.W.3d 61, 64 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

In their original petition, the appellants cited to Section 17.46(b) of the Texas Business and Commerce Code to allege which provision of the DTPA the appellees had violated and generally referenced former Article 21.21 of the Texas Insurance Code. The appellants generally claimed the appellees made untrue and deceptive statements representing the terms of the insurance policies. In the appellees' motion for summary judgment, they argued the appellants have not produced any evidence that the appellees "made representations and/or statements concerning excess insurance covering the ATC buy-back program" or "failed to disclose any information" to appellants. The appellees highlighted portions of the DTPA, contending the appellants had not proved the appellees made false representations or failed to disclose information about the insurance policies. Additionally, the appellees selected sections of the Texas Insurance Code that the appellants were relying on in their petition, and then demonstrated that the appellants had produced no evidence to support their claims.

Because the record does not contain the appellants' response to the summary-judgment motion, we conclude there is no evidence raising a genuine issue of material fact about any of the claims. Because a "court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact," we hold the trial court did not err in granting the appellees' motion for summary

judgment. *See* Tex. R. App. P. 166a(i). Therefore we overrule the appellants' second issue.

* * *

For the foregoing reasons, we affirm the trial court's judgment.

/s/ Jeffrey V. Brown
Justice

Panel consists of Justices Yates, Seymore, and Brown.