Affirmed and Memorandum Opinion filed June 15, 2010.

In The

Fourteenth Court of Appeals

NO. 14-08-00978-CV

BROOKS THOMPSON AND IAN TUNNICLIFFE, Appellants

V.

RAYMOND KERR, Appellee

On Appeal from the 270th District Court
Harris County, Texas
Trial Court Cause No. 2007-74509

MEMORANDUM OPINION

Appellants, Brooks Thompson and Ian Tunnicliffe, filed suit against appellee, Raymond Kerr, alleging he violated his duties as a trustee. Appellee, asserting numerous different grounds, filed a traditional motion for summary judgment, which the trial court granted. Appellants now appeal the trial court's summary judgment. Because we conclude appellants waived their claims against appellee, we affirm the trial court's summary judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In 1968, the Mowry family purchased Gull Industries, Inc. Kelly Mowry began working in the business in 1968 and eventually took over running it from his father. Mowry hired appellants to help manage the company.

Eventually, appellants suggested a plan that, if implemented as they suggested, would result in gross sales of $5 million for the year 2006. In return, appellants would receive an equity interest in Gull Industries. Based on appellants' representations, Mowry and his mother, Irma Knowlton, reached an agreement with appellants entitled "Ownership Changes in Gull Industries, Inc." ("Gull Ownership Agreement"). As a result of the Gull Ownership Agreement, Mowry held 787 shares of Gull Industries stock, Knowlton held 200 shares, and appellee held 790 shares as trustee for the benefit of appellants. The initial term of the Gull Ownership Agreement was to be from January 1, 2006 until the time in 2007 when the parties could determine whether Gull Industries' 2006 gross revenues had reached $5 million. If the $5 million level had been achieved, then appellee was to transfer 395 shares to Thompson and 395 shares to Tunnicliffe. If the $5 million level had not been reached, then appellee was to transfer the 790 shares directly to Mowry.

In conjunction with the Gull Ownership Agreement, appellants entered into a voting trust agreement with appellee. The voting trust agreement incorporated the timeline for achieving the $5 million level for gross revenue from the Gull Ownership Agreement. Eventually, appellants and appellee signed an amended voting trust agreement which removed the 2006 deadline for reaching the $5 million gross revenue level. Mowry and Knowlton did not sign the amended voting trust agreement.

At a time not disclosed in the record, Thompson moved to Florida and Tunnicliffe left the United States and was unable to re-enter. Based on these developments, appellee, on July 31, 2007, sent a letter to both appellants as well as to Mowry. In this letter, appellee wrote: "[b]ased on all of this information, I as Trustee, working in the best interest of my clients Gull Industries and Erma Knowlton, have determined that it is in the best

interest of those clients to terminate the Voting Trust, and I have conveyed the 790 Gull Shares in the Trust back to [Mowry]." In response to this letter, appellants noticed a Gull Industries board of directors meeting in Reynosa, Mexico.

As a result of this notice, Mowry initiated litigation against appellants seeking a temporary restraining order and a permanent injunction. Mowry and appellants eventually mediated their dispute which resulted in a Settlement and Release Agreement (the "Settlement Agreement"). The Settlement Agreement provides in pertinent part:

> WHEREAS, Mowry, Thompson and Tunnicliffe entered into an agreement known as the Voting Trust Agreement effective January 1, 2006 ("Voting Trust", the Ownership Agreement and the Voting Trust, as amended, are referred to as the "Shareholder Agreements"); …
>
> WHEREAS, the Parties attended a mediation and resolved their disputes arising out of the Shareholder Agreements and the Lawsuit as aforesaid; and
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> … the parties hereto desire to compromise and settle any and all claims and causes of action of any kind whatsoever which either Party has or may have against the other arising from the Agreement, and intend that the full terms and conditions of this compromise, settlement and release be set forth in this Agreement; and
>
> WHEREAS, in order to resolve their disputes, Thompson and Tunnicliffe agree to sell their stock and/or ownership interests in the Company to Mowry and resign from all positions and directorships they hold in the Company in return for the purchase of all the stock in the Company held by Thompson and Tunnicliffe, whether owned individually or held in trust, for the payment of One Million Dollars, …
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> C. Share Transfer. Upon payment of the Initial Payment, Thompson and Tunnicliffe will transfer their shares in the Company, including 790 shares currently held in trust, into the Escrow. Following completion of the payments to Thompson and Tunnicliffe, the Escrow shall be closed and all shares therein transferred to Mowry. …
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> E. Lawsuit. Upon delivery of the Initial Payments to Thompson and Tunnicliffe, the Parties will enter an agreed take nothing judgment of all claims in the Lawsuit …

F. Shareholder Agreements. Upon payment of the Initial Payment and Dismissal of the Lawsuit, the Shareholder Agreements shall be cancelled. …

3. RELEASE BY THOMPSON AND TUNNICLIFFE

Thompson and Tunnicliffe, for and in consideration of the recitals and consideration described above, the receipt and sufficiency of which are hereby acknowledged, have this day released and by these presents do release, acquit, and forever discharge Mowry and the Company, their heirs, successors and assigns, officers, directors, employees, and agents, from any and all claims or causes of action of any kind whatsoever, related to their stock or any ownership interest in the Company, the termination of the Shareholder Agreements, Voting Trust Agreement or Amended and Restated Voting Trust Agreement, and any fees or expenses arising therefrom, at common law, by statute, or otherwise, which Thompson and Tunnicliffe have or might have, known or unknown, now existing or that might arise hereafter, directly or indirectly attributable to the above described controversy, it being intended to release all claims of any kind which Thompson and Tunnicliffe might have against those hereby released including Mowry and the Company. All parties intend this release to be construed in the broadest manner allowed by Texas law as all parties intend to release every claim that they have against the other, other than claims arising out of this Settlement and Release Agreement. …

7. COVENANT NOT TO SUE

In further consideration of the mutual covenants set forth herein, the parties specifically agree never to institute any action or suit at law or in equity one against the other or institute, prosecute or in any way aid in the institution or prosecution of any claim, demand, action or cause of action whether known or unknown, past, present or future, arising out of, or in any way related to or concerning the Shareholder Agreements or the Lawsuit, provided that this section may not be read or construed to affect any right to enforce the terms of this Agreement.

Following the mediated settlement, the trial court signed an agreed final judgment dismissing Mowry's claims against appellants and appellants' counterclaims against Mowry.

Soon after the settlement, appellants initiated this lawsuit against appellee asserting causes of action for breach of fiduciary duty, breach of contract, and breach of trust. All three causes of action were based on the same factual basis: that appellee's July 31, 2007 letter violated the amended trust agreement. Eventually, appellee moved for summary judgment on several affirmative defenses: collateral estoppel, the one satisfaction rule, waiver, release, and the covenant not to sue. In addition to a summary judgment response, appellants also moved for partial summary judgment on some liability aspects of their claims against appellee. The trial court denied appellants' motion for partial summary judgment. The trial court then, without specifying the grounds relied on, granted appellee's motion on each of appellants' causes of action. This appeal followed.

DISCUSSION

In six issues on appeal, appellants challenge the trial court's granting of appellee's motion for summary judgment, as well as the denial of their motion for partial summary judgment.

I. The Standard of Review

The movant for summary judgment has the burden to show there is no genuine issue of material fact and it is entitled to judgment as a matter of law. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985). In determining whether there is a genuine fact issue precluding summary judgment, evidence favorable to the non-movant is taken as true and the reviewing court makes all reasonable inferences and resolves all doubts in the non-movant's favor. *Id.* at 548–49. A defendant is entitled to a summary judgment on an affirmative defense if the defendant conclusively proves all the elements of the affirmative defense. *Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999). To accomplish this, the defendant must present summary judgment evidence that establishes each element of the affirmative defense as a matter of law. *Ryland Group, Inc. v. Hood*, 924 S.W.2d 120, 121 (Tex. 1996). Once the movant establishes its right to summary judgment, only then does the burden shift to the non-movant to come forward with competent

controverting evidence raising a genuine issue of material fact. *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995). If there is no genuine issue of material fact, summary judgment should issue as a matter of law. *Haase v. Glazner*, 62 S.W.3d 795, 797 (Tex. 2001). We review a trial court's summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). We may affirm a summary judgment only on grounds specifically stated in the motion. *Cruikshank v. Consumer Direct Mortg., Inc.*, 138 S.W.3d 497, 500 (Tex. App.—Houston [14th Dist.] 2004, pet. denied). Where, as here, the trial court's order granting summary judgment does not specify on what grounds it was granted, it must be affirmed if any of the grounds asserted are meritorious. *W. Invs., Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005).

II. Did appellants waive their causes of action against appellee?

In their third issue, appellants assert that the trial court erred when it granted appellee's motion for summary judgment on the affirmative defense of waiver. We disagree.

Waiver is an affirmative defense and may be grounds for summary judgment. *See Tenneco Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 643 (Tex. 1996) (providing an example of when evidence is sufficient to establish waiver for summary judgment). Waiver is the intentional relinquishment of a right actually known, or intentional conduct inconsistent with claiming that right. *Ulico Cas. Co. v. Allied Pilots Ass'n*, 262 S.W.3d 773, 778 (Tex. 2008); *Tennec, Inc.*, 925 S.W.2d at 643. The elements of waiver include (1) an existing right, benefit, or advantage held by a party; (2) the party's actual knowledge of its existence; and (3) the party's actual intent to relinquish the right, or intentional conduct inconsistent with the right. *Ulico Cas. Co.*, 262 S.W.3d at 778. The right, benefit, or privilege must exist before the waiver occurs. *Tri-Steel Structures, Inc. v. Baptist Found. of Texas*, 166 S.W.3d 443, 451 (Tex. App.—Fort Worth 2005, pet. denied). Intent to waive must be clear, decisive, and unequivocal. *Ferguson v. Ferguson*, 111 S.W.3d 589, 598 (Tex. App.—Fort Worth 2003, pet. denied). A court should find waiver where a party

unequivocally manifested an intent to no longer assert its rights. *Robinson v. Robinson*, 961 S.W.2d 292, 299 (Tex. App.—Houston [1st Dist.] 1997, no writ).

Although waiver is generally a question of fact to be determined by a jury, if the facts and circumstances are clearly established, then waiver becomes a question of law. *Tenneco Inc.*, 925 S.W.2d at 643. Here, appellee's waiver argument rests entirely on the language of the Settlement Agreement between appellants and Mowry; therefore, the facts are undisputed and waiver is a question of law in this instance. *Motor Vehicle Bd. of the Tex. Dep't. of Transp. v. El Paso Indep. Auto. Dealers Ass'n*, 1 S.W.3d 108, 111 (Tex. 1999).

It is undisputed that appellants signed the Settlement Agreement with full knowledge of their potential claims against appellee. Appellee's letter that serves as the basis for appellants' causes of action against appellee is dated July 31, 2007. Mowry filed suit against appellants on August 16, 2007 and that lawsuit was settled and the Settlement Agreement was signed on November 12, 2007.

The Settlement Agreement contains the following language: "the parties specifically agree never to … institute, … prosecute or in any way aid in the institution or prosecution of any claim, demand, action or cause of action whether known or unknown, past, present or future, arising out of, or in any way related to or concerning the Shareholder Agreements …." In addition, in the Settlement Agreement, the parties agreed that "[u]pon payment of the Initial Payment and Dismissal of the Lawsuit, the Shareholder Agreements shall be cancelled." The Settlement Agreement defined "Shareholder Agreements" as including not only the Gull Ownership Agreement, but also the original and amended voting trust agreements. We conclude this language establishes that appellants waived any claims they may have had against appellee in any way related to the voting trust agreements and the trial court did not err when it granted appellee's motion for summary judgment based on waiver. *See Tenneco Inc.*, 925 S.W.2d at 643 ("A party's express renunciation of a known right can establish waiver."); *see also Ford v. Culbertson*,

308 S.W.2d 855, 865 (Tex. 1958) ("A waiver … occurs where one in possession of any right, whether conferred by law or by contract, with full knowledge of the material facts, does or forbears to do something, the doing of which or the failure or forbearance to do which is inconsistent with the right or his intention to rely upon it."); *see also STS Gas Services, Inc. v. Seth*, No. 13-05-463-CV, 2008 WL 152229, at *8 (Tex. App.—Corpus Christi Jan. 17, 2008, no pet.) (mem. op.) (affirming summary judgment based on waiver arising out of representation made to a third party by the predecessor to nonmovant). We overrule appellants' third issue and affirm the trial court's summary judgment in favor of appellee.[1]

/s/ John S. Anderson
Justice

Panel consists of Justices Anderson, Boyce, and Sullivan.

[1] Because we have affirmed the trial court's summary judgment based on waiver, we need not address appellants' remaining issues. Tex. R. App. P. 47.1; *W. Invs., Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005).