Affirmed and Memorandum Opinion filed July 29, 2010.

In The

Fourteenth Court of Appeals

NO. 14-08-01134-CV

CHARLES SO. T. CHEA AND DIANA CHEA, Appellants

V.

PAUL POON, JASON POON, RAYMOND POON, AND MARINE FOODS EXPRESS, LTD., Appellees

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On Appeal from the 152nd District Court
Harris County, Texas
Trial Court Cause No. 2006-47622

MEMORANDUM OPINION

Appellants/plaintiffs, former owners of a wholesale importation and distribution business appeal the trial court's summary judgment in favor of the appellees/defendants, one of whom purchased most of the assets of one of the appellants' companies at a foreclosure sale. The record reflects that, in response to the appellees' no-evidence summary-judgment grounds, the appellants failed to raise a genuine issue of material fact to preclude summary judgment as to their claims. Accordingly, we affirm the trial court's judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellants/plaintiffs Charles So. T. Chea and Diana Chea, as owners of several different business entities, were engaged in the wholesale seafood importation and distribution business in Houston for many years. One of the Cheas' companies, American General Food Corporation ("American General") had a $2 million line of credit ("Line of Credit") from Texas First National Bank ("Bank") secured by a security interest in most of American General's assets, including inventory, equipment, and accounts receivable. By the summer of 2002, the Cheas' businesses were in financial distress, and they were in default on the Line of Credit. On August 3, 2002, the Cheas entered into a contract (the "Contract") with Paul Poon that contained the following salient terms:

> 1. The parties will form a holding company probably in the form of a Limited Liability Partnership. There will be two partners. The first partner will be a corporation or a Limited Liability Company owned thirty percent (30%) by [the Cheas] and seventy percent (70%) by [Poon]. The entity will be named J.R.P. ENTERPRISES, L.L.P. and will be the real estate side of the business.
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>   The second partner will be a corporation or a Limited Liability Company owned thirty percent (30%) by [the Cheas] and seventy percent (70%) by [Poon]. The entity will be named MARINE FOODS EXPRESS, L.L.P., which will be the part of the business that distributes and markets various wholesale food products to the restaurant and food markets.
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> 2. MARINE FOODS EXPRESS, L.L.P. will assume the note with TEXAS FIRST NATIONAL BANK which involves American General Food Corporation, Cheas, Inc. d/b/a Captain Charlie Seafood, [and] Great Ocean, Inc. It will assume liability on the Two Million Dollars ($2,000,000.00) line of credit to TEXAS FIRST NATIONAL BANK and will include all accounts receivable, inventories, and all other fixed assets (equipment, furniture, fixtures, etc.).
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> 3. Accounts receivable and inventory will be verified by independent appraisers with a minimum of 1.5 million dollars in value. If the

value does not reach 1.5 million dollars then it will be worked out between [the Cheas] and [Poon].

4. POON shall inject Five Hundred Thousand and No/100 Dollars ($500,000.00) in cash at the time of closing. If necessary POON will inject another Four Hundred Thousand and No/100 Dollars ($400,000.00) by loan to MARINE FOODS EXPRESS, L.L.P. for additional capital.

. . .

6. MARINE FOODS EXPRESS will pay DIANA CHEA Seventy Thousand and No/100 Dollars ($70,000.00) annual salary and ten percent (10%) of the net annual income as a bonus. Fifty Thousand and No/100 Dollars ($50,000.00) will be advanced to DIANA CHEA paid monthly as prepaid annual bonus for the first year. In any case [sic] the net income results in a bonus of more than Fifty Thousand and No/100 Dollars ($50,000.00) the company will pay the difference. In any case [sic] the net annual income results in a bonus of less than Fifty Thousand and No/100 Dollars ($50,000.00) the amount over paid will be deducted from the next year's bonus. [The Cheas] will be directors of MARINE FOODS EXPRESS.

. . .

8. TEXAS FIRST NATIONAL BANK must approve in writing all transactions that have any affect [sic] on existing notes and/or collateral, assumption of debts, assets, and any other issue involving TEXAS FIRST NATIONAL BANK.

. . .

11. MARINE FOODS EXPRESS, L.L.P. agrees to pay [the Cheas] Two Hundred Thousand and No/100 Dollars ($200,000.00), in cash, at the closing.

Neither of the two proposed entities—J.R.P. Enterprises L.L.P. and Marine Foods Express, L.L.P. ("Marine Foods LLP")—was ever formed. However, on August 2, 2002, Paul Poon's sons, Jason and Raymond, formed Marine Foods Express, Ltd. ("Marine Foods Ltd."), whose name is very similar to Marine Foods LLP's name. Because it was never formed, Marine Foods LLP could not assume or attempt to assume liability on the

Line of Credit. No closing under the Contract ever occurred. On September 26, 2002, the Bank foreclosed upon its security interest and sold American General's assets to Marine Foods Ltd. for $2 million. On November 25, 2002, the Cheas' companies, including American General, filed for protection under Chapter 7 of the United States Bankruptcy Code.

Diana Chea was employed as the general manager of Marine Foods Ltd. at some point subsequent to its formation, but Marine Foods Ltd. terminated her employment in June 2006. On August 2, 2006, the eve of the fourth anniversary of the execution of the Contract, the Cheas filed suit against appellees/defendants Paul Poon, Jason Poon, Raymond Poon, and Marine Foods Ltd. (collectively the "Poon Parties"). The Cheas alleged the following in support of their claims for fraud, conspiracy, breach of contract and breach of an employment contract:

- The Cheas entered into the Contract to form a new business entity to acquire and continue the seafood importation and distribution business that had been conducted by the Cheas. Paul Poon promised to form a new business entity with the Cheas to conduct a wholesale food product importation and distribution business, 30% of which would be owned by the Cheas and 70% of which would be owned by Paul Poon. This entity was to be known as "Marine Foods Express L.L.P."

- Paul Poon also promised that the Cheas would be paid $200,000 in cash at closing and that Marine Foods LLP, the new business entity, would employ Diana Chea as its general manager at an annual salary of $70,000, plus 10% of the net annual income as a bonus. In reliance upon these promises, the Cheas agreed to enter into the new business arrangement and effectively to sell Paul Poon their existing wholesale food products business.

- Paul Poon did not honor his promises, either to form the new business entity with the Cheas as 30% owners or to pay the Cheas $200,000 at closing. Instead, without the Cheas' knowledge, Paul conspired with Jason and Raymond to form another company to operate the Cheas' wholesale food interest, Marine Foods Ltd. The Cheas were deprived of any ownership interest in this company.

- The Poon Parties continuously have refused to (1) convey to the Cheas a 30% ownership interest in Marine Foods Ltd., (2) pay the Cheas 30% of the profits from Marine Foods Ltd.'s business, and (3) pay Diana Chea the agreed-upon bonus of

"10% of the company net annual income." The Poon Parties also caused Diana Chea's employment as general manager of Marine Foods Ltd. to be terminated without just cause, causing Diana Chea to lose her guaranteed salary and share of the net profits.

- Paul Poon engaged in fraud by making numerous promises to the Cheas with no present intention to perform. These promises induced the Cheas to enter into the Contract.

- The Poon Parties conspired with one another to defraud the Cheas of their ownership in the "Marine Foods Express business."

- Paul Poon breached the Contract because "Marine Foods Express" failed to pay the Cheas $200,000 at closing as promised in the Contract.

- The Poon Parties promised to employ Diana Chea as general manager of the Marine Foods operation. The Poon Parties breached their promises by terminating Diana Chea's employment without just cause in June 2006, which caused Diana Chea damages.

- Based on these allegations, the Cheas sought the imposition of a constructive trust, an accounting, actual damages, exemplary damages, attorney's fees, and prejudgment and postjudgment interest.

The Poon Parties answered the Cheas' lawsuit with verified denials, asserting that (a) no enforceable agreement arose because the Cheas failed to furnish the $1.5 million in accounts receivable and inventory referenced in the Contract and (b) Diana Chea's employment with Marine Foods Ltd. was terminated because, among other things, she abused her position and misappropriated confidential information for the benefit of her son's company, All Harvest Trading, LLC ("All Harvest"). The Poon Parties also counter-sued the Cheas, joining All Harvest as a third-party defendant. The Poon Parties asserted claims against the Cheas and All Harvest for misappropriation of trade secrets, breach of fiduciary duty, tortious interference with business relations, conspiracy, and defamation. They also sought injunctive relief.

The Poon Parties filed an amended summary-judgment motion, seeking a traditional summary judgment as well as a no-evidence summary judgment. The Poon

Parties asserted that there is no evidence of the following: (1) all essential elements of the fraud claim, (2) all essential elements of the conspiracy claim, (3) all essential elements of the breach-of-contract claim except for the existence-of-a-contract element, and (4) all essential elements of the breach-of-employment-contract claim. The Cheas filed a response, with affidavits attached from both Charles and Diana Chea.

The trial court granted the Poon Parties' summary-judgment motion on June 10, 2008. This judgment was not final because it did not dispose of the Poon Parties' pending counterclaims and third-party claims. However, on June 30, 2008, the Poon Parties nonsuited these claims, and on July 21, 2008, the trial court signed an order of nonsuit. When they nonsuited their claims, the Poon Parties also moved for entry of final judgment, attaching a proposed judgment. On July 25, 2008, the trial court signed the proposed final judgment submitted by the Poon Parties. The Cheas filed a motion for new trial within thirty days of the July 25, 2008 judgment but not within thirty days of the July 21, 2008 order. In response, the Poon Parties asserted that the trial court lacked plenary power because the trial court had rendered a final judgment on July 21, 2008, and its plenary power had expired before the motion for new trial was filed. In reply, the Cheas asserted that any prior final judgment had been modified by the July 25, 2008 final judgment and, in the alternative, the Cheas filed a motion under Texas Rule of Civil Procedure 306a as to the July 21, 2008 order. The trial court did not expressly rule on any post-judgment motions.

II. ISSUES AND ANALYSIS

In two issues, the Cheas assert first that their post-judgment motions were timely filed and second that the trial court erred in granting summary judgment in favor of the Poon Parties.

A. Does this court have jurisdiction over this appeal?

In their first issue, the Cheas assert that their motion for new trial and notice of appeal were filed timely and therefore this court has appellate jurisdiction. In response,

the Poon Parties contend that the trial court's summary judgment became final on July 21, 2008, when the court signed its nonsuit order. Thus, they argue that the Cheas' motion for new trial, filed more than thirty days later on August 25, 2008, was a legal nullity. According to the Poon Parties, because the Cheas' motion for new trial was a legal nullity, there was no extension of the time to file a notice of appeal, and the Cheas' notice of appeal, filed on October 23, 2008, was likewise late. Thus, the Poon Parties assert that this court lacks jurisdiction over this appeal. We disagree.

When the trial court signed the nonsuit order on July 21, 2008, there was a final judgment because the trial court had actually disposed of all claims and parties before the court. *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 192, 200 (Tex. 2001). However, "if a judgment is modified, corrected or reformed in any respect, the time for appeal shall run from the time the modified, corrected, or reformed judgment is signed." TEX. R. CIV. P. 329b(h).

The trial court rendered a judgment on July 25, 2008, in which it stated that it had granted summary judgment as to the Cheas' claims and that the Poon Parties had nonsuited their claims. The trial court then rendered judgment on July 25, 2008, that all the relief requested by the parties was denied, and the court stated that the judgment was final and disposed of all claims and parties. The trial court issued this judgment while it still had plenary power over the case, and there is no indication that the trial court issued this judgment solely for the purpose of extending the appellate timetable. Under these circumstances, the prior final judgment was modified by the July 25, 2008 judgment, and the appellate timetables then began to run from the July 25, 2008 judgment. *See* TEX. R. CIV. P. 329b(h); *Mackie v. Mackie*, 890 S.W.2d 807, 808 (Tex. 1994) (per curiam). Because the Cheas filed their motion for new trial within thirty days of this modified final judgment, their motion was filed timely. *See* TEX. R. CIV. P. 329b(a),(h). Likewise, the Cheas timely filed their notice of appeal within ninety days after the trial court's modified judgment. *See* TEX. R. APP. P. 26.1(a) (stating that, when a motion for new trial has been

timely filed, a party must file its notice of appeal within ninety days of the judgment). We thus have jurisdiction over this appeal.[1]

B. Did the trial court properly grant summary judgment?

The Cheas assert that the trial court erred in granting summary judgment in favor of the Poon Parties because they did not conclusively prove any affirmative defense or negate any challenged elements in their motion for summary judgment. Additionally, the Cheas contend that more than a scintilla of evidence exists as to the Cheas' fraud, breach-of-contract, conspiracy, and breach-of-employment-contract claims; thus, summary judgment was also improper on the no-evidence grounds. We first review the no-evidence grounds.

1. Standard of Review

In reviewing a no-evidence summary judgment, we ascertain whether the nonmovant pointed out summary-judgment evidence raising a genuine issue of fact as to the essential elements attacked in the no-evidence motion. *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 206–08 (Tex. 2002). In our de novo review of a trial court's summary judgment, we consider all the evidence in the light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006). The evidence raises a genuine issue of fact if reasonable and fair-minded jurors could differ in their conclusions in light of all of the summary-judgment evidence. *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007) (per curiam). When, as in this case, the order granting summary judgment does not specify the grounds upon which the trial court relied, we must affirm the summary judgment if any of the independent summary-judgment grounds is

[1] We need not and do not consider whether the trial court erred in failing to conduct an evidentiary hearing based on the Cheas' motion under Texas Rule of Civil Procedure 306a.

meritorious. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000).

2. No Evidence of Causation as to the Fraud Claim

To prevail on a fraud claim, a plaintiff must prove, among other things, that the plaintiff's justifiable reliance upon the false representation was a proximate cause of damage to the plaintiff. *See McWhorter v. Sheller*, 993 S.W.2d 781, 785 (Tex. App.—Houston [14th Dist.] 1999, pet. denied). The Poon Parties asserted in their summary-judgment motion that there is no evidence of causation. The only alleged misrepresentations asserted by the Cheas were the promises made by Paul Poon in the Contract. The Cheas assert that at the time Paul Poon signed the Contract, he had no intention of performing these promises. In the Contract, the parties agreed that they would (1) form new companies, including Marine Foods LLP, (2) have Marine Foods LLP assume American General's obligations under the note and the Line of Credit with the Bank, and (3) take various actions at the closing of this transaction. However, no closing and no assumption of liability under the Line of Credit could occur without the Bank's written approval. The parties stated this requirement of Bank approval in the Contract. Therefore, even if Paul Poon and the Cheas had fully performed their promises and obligations under the Contract, there would be no assumption and no closing absent written approval by the Bank.

However, on appeal, the Cheas do not argue that the Bank would have given written approval for such an assumption, and the summary-judgment evidence does not raise a genuine fact issue in this regard. In his two affidavits, Charles Chea testified in pertinent part as follows:

> Mr. Poon expressly agreed to have the new company assume the liability for the Texas First National Bank debt, which would have prevented Texas First National Bank from foreclosing on its lien, and would have preserved the assets of Marine Foods['] business for the new entity that Mr. Poon promised to form with us. In short, if Mr. Poon had complied with his obligations, there would have been no foreclosure sale of the assets at all.

. . .

> [W]here Mr. Poon promised to have the Texas First National Bank debt assumed by the new company that was to be formed pursuant to the [Contract], and then failed to perform that promise, but instead knowingly allowed his sons' partnership to assume the debt instead, the foreclosure sale occurred only because of the Poons' repudiation of their obligations.

In his testimony, Charles Chea does not provide any evidence that the Bank would have approved an assumption of liability under the Line of Credit by Marine Foods LLP. Rather, he states in a conclusory fashion that, if Paul Poon had performed his obligations under the Contract, there would have been no foreclosure sale of the assets of American General. These conclusory statements do not raise a genuine fact issue as to whether the Bank would have approved the transaction. *See Coastal Transport Co., Inc. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 232 (Tex. 2004) (stating that even unobjected-to conclusory testimony does not raise a fact issue); *Dolcefino v. Randolph*, 19 S.W.3d 906, 930 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (explaining that conclusory allegations in affidavits are insufficient to raise a fact issue).

In their affidavits, both of the Cheas testify that they have been damaged by the Poon Parties' failure to pay the $200,000 that, in the Contract, Marine Foods LLP promised to pay the Cheas at closing. However, no closing could occur without the Bank's approval, and there is no evidence that the Bank would have approved.

As to the Cheas' fraudulent inducement claim, presuming that there were false representations upon which the Cheas justifiably relied in entering into the Contract, the Cheas still would have to raise a fact issue as to whether their entering into the Contract was a proximate cause of their alleged damages. In their appellate brief, the Cheas state that, "Had Appellees not defrauded the Cheas, the Cheas could have looked for and *possibly* found another business partner to work with them and save their business." (emphasis added). However, there is no summary-judgment evidence that raises a fact issue in this regard.

Under the applicable standard of review, even presuming that the Cheas justifiably relied upon the Poon Parties' alleged false representations, the evidence does not raise a genuine fact issue as to whether the Cheas' justifiable reliance upon these representations was a proximate cause of the Cheas' alleged damages. *See LMB, Ltd. v. Moreno*, 201 S.W.3d 686, 688–89 (Tex. 2006) (per curiam); *American Steel & Supply, Inc. v. Commercial Metals, Inc.*, No. 13-08-00502-CV, 2010 WL 877661, at *6 (Tex. App.—Corpus Christi Mar. 11, 2010, no pet. h.) (mem. op.). Thus, the summary-judgment record contains no evidence of one of the essential elements of the Cheas' fraud claim, and the trial court did not err in granting summary judgment as to the fraud claim.

3. No Evidence of Conspiracy

The Cheas' civil conspiracy claim requires an underlying tort claim. *See Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co.*, 51 S.W.3d 573, 583 (Tex. 2001). The only underlying tort they have alleged is fraud. Because summary judgment was proper as to the fraud claim, it was also proper as to the Cheas' civil conspiracy claim. *See id.* Therefore, the trial court did not err in granting summary judgment as to this claim.

4. No Evidence that Alleged Breach of Contract Caused Damages

To recover damages for breach of contract, the Cheas would have to prove that the alleged breaches of contract caused their alleged damages. *See Clearview Prop., L.P. v. Prop. Tex. SC One Corp.*, 287 S.W.3d 132, 139–40 (Tex. App.—Houston [14th Dist.] 2009, pet. denied). The Poon Parties asserted, among other things, that the Cheas had no evidence that the Cheas' damages, if any, resulted from the Poon Parties' alleged breaches of the Contract. For the same reasons as discussed above in section II.B.2 of this opinion, we conclude that the evidence does not raise a genuine fact issue as to whether the Cheas' alleged contract damages were the result of the Poon Parties' alleged breaches of contract. *See id.* Because there is no evidence of an essential element of the Cheas' breach-of-contract claim, the trial court did not err in granting summary judgment as to this claim.

5. No Evidence of Breach of Employment Contract

In Texas, absent a specific contract term to the contrary, employment contracts are terminable at will by either party. *See Cruikshank v. Consumer Direct Mortgage, Inc.*, 138 S.W.3d 497, 501 (Tex. App.—Houston [14th Dist.] 2004, pet. denied). Thus, to succeed on her breach-of-employment-contract claim, Diana Chea would have to prove, among other things, that she and her employer had a contract that specifically provided that the employer did not have the right to terminate her employment at will. *See id.*

In their motion for summary judgment, the Poon Parties asserted that the Cheas had no evidence of an employment contract between Diana Chea and any of the Poon Parties specifically providing that the employer did not have the right to terminate Diana Chea's employment at will. There is no summary-judgment evidence that Paul Poon, Jason Poon or Raymond Poon ever employed Diana Chea. There is summary-judgment evidence that Marine Foods Ltd. employed Diana Chea. However, the Contract is not an employment agreement between Marine Foods Ltd. and Diana Chea, and there is no summary-judgment evidence raising a fact issue as to the existence of a contract specifically providing that Marine Foods Ltd. did not have the right to terminate Diana Chea's employment at will. The Cheas instead rely upon provisions of the Contract between Paul Poon and the Cheas, excerpted above, regarding Marine Food LLP's anticipated employment of Diana Chea. These provisions are not binding on Marine Foods Ltd., which was not a party to the Contract.

In any event, even if the Contract had required Marine Foods Ltd. to employ Diana Chea under the terms stated in the Contract, there is no provision anywhere in the Contract that Diana Chea's employer did not have the right to terminate her employment at will. Diana Chea failed to raise a genuine fact issue as to an essential element of her breach-of-employment-contract claim, and the trial court did not err in granting summary judgment as to this claim. *See id.*

III. CONCLUSION

Because the trial court's July 25, 2008 judgment modified its prior final judgment, this court has jurisdiction over this appeal. The Cheas cannot prevail on appeal because they failed to raise a genuine fact issue as to an essential element of each of their claims. Thus, the trial court did not err in granting summary judgment based on the no-evidence grounds.[2] Accordingly, we overrule the Cheas' second issue and affirm the trial court's judgment.

/s/ Kem Thompson Frost
Justice

Panel consists of Justices Frost, Boyce, and Sullivan.

[2] We need not and do not address the traditional summary-judgment grounds.