Affirmed, and Memorandum Opinion filed September 21, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00639-CV

KIM COMBS D/B/A MOONVINE FINANCIAL SERVICES, Appellant

v.

PROSPERITY BANK, Appellee

On Appeal from the 334th District Court
Harris County, Texas
Trial Court Cause No. 2007-48526A

MEMORANDUM OPINION

Appellant, Kim Combs, attempted to insert extra provisions into a standardized bank form and then sued appellee, Prosperity Bank, for failing to comply with his additional demands. In the absence of evidence that Prosperity actually agreed to the revised terms, the trial court granted summary judgment on Combs's claims for breach of contract and fraud. We affirm.

I.

BACKGROUND

In December 2003, appellant, Kim Combs d/b/a Moonvine Financial Services (collectively, "Combs") agreed to lease three pieces of medical equipment to Dr. Roger C. Willette for a period of four years. To facilitate Willette's monthly lease payments, the parties decided to arrange for an automatic transfer of money, on a monthly basis, out of Willette's bank account and into Combs's account.

At the time, Willette maintained a bank account with the appellee, Prosperity Bank ("Prosperity"). As a prerequisite to any automatic transfers out of a customer's account, Prosperity insisted upon written authorization from that customer, here, Willette. Accordingly, Willette completed and signed a standardized document, called an "automatic transfer agreement" (the "ATA"), authorizing automatic transfers from his account.

The pertinent provisions of the preprinted ATA form indicated that automatic transfers would remain in effect until terminated "by one of us." However, Combs crossed out that quoted language, apparently with Willette's permission, and replaced it with the language "by both of us." He then gave the executed ATA to one of Prosperity's bank tellers, who reportedly placed it into a file. Combs does not recall whether the teller signed the ATA, and the record does not indicate that he otherwise alerted the teller to the altered language he had inserted into the form. Combs did not keep a copy of the ATA, and the document now cannot be located.

In August 2006, roughly a year before the lease payments were to conclude, Willette ordered Prosperity to immediately cease making automatic transfers from his account. Prosperity complied with his instructions. Apparently, Willette made no further payments on the lease agreement after that date.

Combs sued Willette for breach of the lease agreement. In addition, Combs sued Prosperity, alleging breach of contract and fraud, for canceling the automatic transfers in compliance with its customer's instructions but without Combs's permission. Prosperity moved for traditional and no-evidence summary judgment on all claims. The trial court granted the motion, prompting this appeal.

II.

STANDARD OF REVIEW

We review a trial court's grant of summary judgment under well-established standards. *See Seidner v. Citibank (S.D.) N.A.*, 201 S.W.3d 332, 334 (Tex. App.—Houston [14th Dist.] 2006, pet. denied). We consider the summary-judgment motion and evidence *de novo*, but also view the evidence in the light most favorable to the non-movant. *See Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005); *Va. Power Energy Mktg., Inc. v. Apache Corp.*, 297 S.W.3d 397, 402 (Tex. App.—Houston [14th Dist.] 2009, pet. denied). We employ those same standards in reviewing a no-evidence summary judgment. *See U.S. Bank Nat'l Ass'n v. Stanley*, 297 S.W.3d 815, 819 (Tex. App.—Houston [14th Dist.] 2009, no pet.); *see also King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003) ("[A] no-evidence summary judgment is improperly granted if the respondent brings forth more than a scintilla of probative evidence to raise a genuine issue of material fact.").

In this case, the trial court granted summary judgment but did not identify the specific basis for its ruling. Therefore, on appeal, Combs must raise and defeat each ground upon which summary judgment might have been granted, properly or improperly. *See Chappell Hill Bank v. Smith*, 257 S.W.3d 320, 324 (Tex. App.—Houston [14th Dist.] 2008, no pet.) ("[T]he appealing party must show that it is error to base it on any ground asserted in the motion."); *Bailey v. Gulf States Utils. Co.*, 27 S.W.3d 713, 717 (Tex. App.—Beaumont 2000, pet. denied).

III.

ANALYSIS

On appeal, Prosperity presents several new grounds in support of the trial court's decision to grant summary judgment.[1] However, these additional arguments were not raised below, and we may not affirm summary judgment on grounds not expressly set forth in Prosperity's motion. *See Stiles v. Resolution Trust Corp.*, 867 S.W.2d 24, 26 (Tex. 1993); *J.M.K. 6, Inc. v. Gregg & Gregg, P.C.*, 192 S.W.3d 189, 204–05 (Tex. App.—Houston [14th Dist.] 2006, no pet.). Therefore, we must confine our analysis to the arguments actually presented in the motion for summary judgment.

A. Breach of Contract

Prosperity raised three summary-judgment arguments, which included both traditional and no-evidence grounds, to defeat Combs's claims for breach of contract.[2] All three arguments relate, in some fashion, to its claim that there was no evidence Prosperity signed the altered ATA form or otherwise agreed to assume any contractual duty to *Combs*, notwithstanding his efforts to insert additional terms into the document.[3] Therefore, we begin with that ground.

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[1] For example, Prosperity contends it cannot be liable for fraud because the record contains no evidence of any representation in which it agreed to comply with Combs's alterations to its standardized form. *See, e.g., Gray v. Waste Res., Inc.*, 222 S.W.3d 522, 524 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (confirming action for fraud requires, among other things, proof of material representation by defendant).

[2] Prosperity also asserted, as alternative summary-judgment grounds, the affirmative defenses of laches, ratification, and failure to mitigate. However, the trial court expressly rejected those arguments, and we do not address them here because Prosperity has not filed a cross-appeal complaining about that portion of the court's ruling. *See* Tex. R. App. P. 25.1(c); *Kelly v. Brown*, 260 S.W.3d 212, 217 (Tex. App.—Dallas 2008, pet. denied).

[3] Appellee's other two arguments involved the statute of frauds and parol evidence rule. Because we affirm summary judgment on Prosperity's no-evidence argument, we need not reach either of these alternative grounds. *See* Tex. R. App. P. 47.1.

In a general sense, a breach of contract occurs when a party fails or refuses to do something it has promised to do. *See West v. Triple B Servs., LLP*, 264 S.W.3d 440, 446 (Tex. App.—Houston [14th Dist.] 2008, no pet.). When that occurs, a plaintiff may recover for breach of contract by proving (1) the existence of a valid agreement between the plaintiff and defendant, (2) the plaintiff tendered performance or was legally excused from doing so, (3) the defendant breached the terms of the parties' agreement, and (4) the plaintiff suffered damages resulting from the defendant's breach. *See id*.

Thus, as a threshold matter, a plaintiff suing for breach of contract must prove that the parties actually *reached* some enforceable agreement. *See id*. The elements of a legally enforceable contract include (1) an offer, (2) a clear and definite acceptance in strict compliance with the terms of the offer, (3) a meeting of the minds between the parties, (4) each party's consent to the terms of the offer, and (5) execution and delivery of the contract with the intent to treat it as mutual and binding. *See Parker Drilling Co. v. Romfor Supply Co.*, 316 S.W.3d 68, 72–73 (Tex. App.—Houston [14th Dist.] 2010, no pet. h.); *Wal-Mart Stores, Inc. v. Lopez*, 93 S.W.3d 548, 555–56 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

In this case, the record contains no evidence that Prosperity knew of, much less accepted, the substitute terms Combs inserted into the standardized ATA form. On that point, Combs testified as follows:

> Q. What happened to the [ATA] card at that point?
>
> A. I took it back on my way back towards Houston – or the Woodlands, I guess. I dropped it by the bank, handed it to [the teller] and she said "Great" and she put it in a file.
>
> Q. Okay. *Did she sign it*?
>
> A. *I don't recall*.

. . . .

Q. . . . Do you recall if it had a space for a signature by a bank officer?

A. I do not recall.[4]

. . . .

A. *When I dropped it off, I don't remember if she signed it or didn't sign it . . . .*[5]

In addition, the record contains no evidence that would otherwise indicate Prosperity's express agreement to assume any contractual duties to *Combs* under an ATA respecting withdrawals from the bank account of a *different person*, Willette.

In some circumstances, a plaintiff may plead and prove that two parties entered into an *implied* contract, in which the parties' agreement to the terms may be inferred from their conduct and course of dealing. *See Parker Drilling*, 316 S.W.3d at 73; *Wal-Mart*, 93 S.W.3d at 557; *Hallmark v. Hand*, 833 S.W.2d 603, 607 (Tex. App.—Corpus Christi 1992, writ denied). Here, however, Combs did not plead, and has not argued, the existence of an implied contract. Therefore, we may not consider that possibility *sua sponte*. *See AKIB Constr., Inc. v. Neff Rental, Inc.*, No. 14-07-00063-CV, 2008 WL 878935, at *4 n.5 (Tex. App.—Houston [14th Dist.] Apr. 3, 2008, no pet.) (mem. op.) (declining to consider possibility of implied contract where issue was not raised by party); *Crull v. Rhodes*, No. 2-04-235-CV, 2005 WL 737473, at *4 (Tex. App.—Fort Worth Mar. 31, 2005, no pet.) (mem. op.) (holding plaintiff may not recover on implied-contract theory not supported by

[4] During his deposition, Combs was shown an exemplar ATA form apparently in use by Prosperity at some unspecified time. That document contained a signature blank bearing the notation, "Accepted by Prosperity representative." However, Combs could not remember whether the revised ATA he had submitted *also* contained that language, explaining, "I mean, I saw [the ATA] one time."

[5] (Emphases added). Because Combs offered no evidence that the bank clerk signed the altered ATA, we need not reach the hypothetical question of whether a teller could ever unilaterally bind a bank to additional terms and obligations inserted into a standardized bank form.

its pleadings); *Stern v. Wonzer*, 846 S.W.2d 939, 945 (Tex. App.—Houston [1st Dist.] 1993, no writ).

In this case, the record contains no evidence suggesting Combs and Prosperity entered into a legally enforceable agreement. Therefore, we hold the trial court properly granted a no-evidence summary judgment on Combs's claims for breach of contract. *See* Tex. R. Civ. P. 166a(i) ("The court *must* grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact.") (emphasis added); *Parker Drilling*, 316 S.W.3d at 74–75. Accordingly, we affirm summary judgment on appellant's breach-of-contract claims against Prosperity.

B. Fraud

Prosperity also moved for summary judgment on Combs's fraud claims, arguing, among other things,[6] that appellant's pleadings were insufficient to support a claim for fraud. Specifically, Prosperity argued:

> Fraud requires proof of (1) a representation; (2) that is false; (3) made with intent to defraud; and (4) from which the plaintiff suffered damages. The Amended Petition fails to even allege that the Bank made a misrepresentation of a material fact, that was false when made, or that it was made with the intention of committing fraud. The Bank is entitled to summary judgment on that basis alone.

Combs did not respond to that argument below and has not attacked that ground on appeal. Therefore, relying on binding authority from the Texas Supreme Court, we must affirm summary judgment on that basis.

[6] In addition, Prosperity contended (1) Combs's fraud claims were barred by the statute of frauds, and (2) there was no evidence to support appellant's claim that one of the bank employees fraudulently destroyed the ATA. Because we affirm on other grounds, we do not address these alternative arguments. *See* Tex. R. App. P. 47.1.

We may not reverse a trial court's judgment in the absence of properly assigned error. *Vawter v. Garvey*, 786 S.W.2d 263, 264 (Tex. 1990). Therefore, it is incumbent upon an appealing party to challenge and negate *all* possible grounds on which summary judgment could have been granted, properly or improperly.[7] *See Chappell Hill*, 257 S.W.3d at 324; *Bailey*, 27 S.W.3d at 717; *Janis v. Melvin Simon Assocs., Inc.*, 2 S.W.3d 647, 650 (Tex. App.—Corpus Christi 1999, pet. denied) ("Because the trial court granted summary judgment, *properly or improperly*, on a ground which Janis did not challenge on appeal[,] we affirm that portion of the summary judgment . . . .") (emphasis added).

The Texas Supreme Court has previously addressed the very same fact pattern presented here. In *Vawter v. Garvey*, the trial court granted summary judgment on the basis of an alleged pleading defect. *See Vawter*, 786 S.W.2d at 263–64. The court of appeals reversed because "the proper method for attacking sufficiency of the pleadings is by special exception" rather than summary judgment. *See id*. at 264. However, Garvey had not raised that complaint in response to the motion for summary judgment or on appeal. *See id*. Accordingly, the Texas Supreme Court reversed, holding the appellate court erred by *sua sponte* raising that ground for reversal. *See id*.

Vawter is controlling here.[8] Therefore, for the same reason, we must affirm summary judgment on appellant's fraud claims against Prosperity. *See Vawter*, 786 S.W.2d at 264; *San Jacinto River Auth. v. Duke*, 783 S.W.2d 209, 210 (Tex. 1990); *Chappell Hill*, 257 S.W.3d at 324.

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[7] Generally, a party's failure to plead all of the elements of a cause of action – the specific pleading defect asserted below – should be handled, if at all, by special exceptions rather than summary judgment. *See Friesenhahn v. Ryan*, 960 S.W.2d 656, 658–59 (Tex. 1998); *Mowbray v. Avery*, 76 S.W.3d 663, 677–78 (Tex. App.—Corpus Christi 2002, pet. denied). However, we are precluded from reversing on this ground because of Combs's failure to raise it in response to the motion for summary judgment or on appeal. *See Vawter*, 786 S.W.2d at 264.

[8] For that matter, the Texas Supreme Court also addressed this scenario in *San Jacinto River Authority v. Duke*, and reached the same conclusion. *See Duke*, 783 S.W.2d 209, 209–10 (Tex. 1990).

IV.

CONCLUSION

We find no merit in the issues presented. Accordingly, we affirm the trial court's judgment.

/s/ Kent C. Sullivan
Justice

Panel consists of Justices Brown, Sullivan, and Christopher.