



**COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH**

NO. 02-15-00148-CV

PAUL SUNG UH KANG

APPELLANT

V.

JIN SONG

APPELLEE

FROM THE 48TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 048-270933-14

MEMORANDUM OPINION¹

Appellant Paul Sung Uh Kang, pro se, appeals from the trial court's judgment awarding actual and exemplary damages of \$2,434,716.06, plus attorney's fees of \$730,414.81, to Appellee Jin Song. In two issues, Kang argues that the trial court should not have granted summary judgment for Song because Song presented no evidence of damages other than his own conclusory

¹See Tex. R. App. P. 47.4.

affidavit and that the trial court failed to consider the evidence Kang submitted. Because we hold that the trial court erred by granting summary judgment, we reverse.

Background

Song sued Kang for fraud, violations of the Texas Securities Act, violations of Texas's Deceptive Trade Practices Act (DTPA), breach of fiduciary duty, and negligence based on Kang's actions as Song's investment adviser. Song also pled alternative claims for negligent misrepresentation and breach of contract.

Song filed a motion for traditional summary judgment on each of his claims. As evidence, Song relied on his affidavit, the affidavit of his attorney, and deemed admissions. Kang filed a response to the motion and an affidavit contradicting some of the statements in Song's affidavit.

The trial court granted summary judgment for Song. The court's final judgment awarded Song economic damages of \$811,572.02, treble damages under the DTPA² of \$1,623,144.04, and attorney's fees of \$730,414.81.

Standard of Review

We review a summary judgment de novo.³ We consider the evidence presented in the light most favorable to the nonmovant, crediting evidence

²See Tex. Bus. & Com. Code Ann. § 17.50(b)(1) (West 2011) (allowing a consumer who prevails under that section to recover up to three times the amount of economic damages if the defendant's conduct was committed knowingly).

³*Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010).

favorable to the nonmovant if reasonable jurors could and disregarding evidence contrary to the nonmovant unless reasonable jurors could not.⁴ We indulge every reasonable inference and resolve any doubts in the nonmovant's favor.⁵ A plaintiff is entitled to summary judgment on a cause of action if it conclusively proves all essential elements of the claim.⁶

Discussion

In Kang's second issue, he argues that the trial court failed to consider his summary judgment evidence. We briefly address this issue first.

Song filed objections to Kang's summary judgment evidence, but the trial court did not sign an order ruling on them. The final judgment did not state what evidence the court had considered.⁷ Nothing in the record shows that the trial court implicitly sustained Song's objections. And the court stated in the final judgment that all requested relief not expressly granted by the judgment was denied. It is equally plausible that the court's granting of summary judgment for Song was because the court believed that Song had established his right to

⁴*Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009).

⁵*20801, Inc. v. Parker*, 249 S.W.3d 392, 399 (Tex. 2008).

⁶See Tex. R. Civ. P. 166a(a), (c); *MMP, Ltd. v. Jones*, 710 S.W.2d 59, 60 (Tex. 1986).

⁷*Cf. Frazier v. Yu*, 987 S.W.2d 607, 610 (Tex. App.—Fort Worth 1999, pet. denied) (holding that the trial court implicitly sustained objections to the competency of summary judgment evidence when the trial court's order granting summary judgment stated that it had reviewed the "competent" evidence).

summary judgment and that Kang's evidence failed to raise a fact issue.⁸ Because the record does not support Kang's argument that the trial court did not consider his summary judgment evidence, we overrule his second issue.

In Kang's first issue, he argues that the summary judgment could not be based on an unserved request for admissions and that Song did not otherwise provide sufficient evidence to be entitled to summary judgment. Although Kang phrases his issue as challenging whether Song proved his entitlement to damages, it is clear that he challenges not only whether Song proved up the amount of damages awarded but also whether Song established that Kang caused his damages—that is, he challenges the summary judgment as to liability and damages.

1. The deemed admissions

When a party is served with a request for admissions, the party "must serve a written response on the requesting party within [thirty] days after service of the request."⁹ "If a response is not timely served, the request is considered admitted without the necessity of a court order."¹⁰ "Before untimely answered requests [for admissions] are automatically deemed admitted, proper service

⁸See *Wrenn v. G.A.T.X. Logistics, Inc.*, 73 S.W.3d 489, 498 (Tex. App.—Fort Worth 2002, no pet.) (declining to hold that the trial court had implicitly sustained the appellee's objections to the appellant's summary judgment evidence when nothing in the record showed an implicit ruling).

⁹See Tex. R. Civ. P. 198.2(a).

¹⁰Tex. R. Civ. P. 198.2(c).

must be shown.”¹¹ As the summary judgment movant, Song had the burden of conclusively establishing proper service of his request for admissions.¹²

Kang did not receive the request for admissions sent by certified mail, which, as shown by Song’s own summary judgment evidence, was returned undeliverable as addressed. The unsigned letter from Song’s law firm accompanying the request stated that it was also being sent by email and by first class mail, but Song did not establish that it was actually sent by either method.¹³ Song’s attorney’s law clerk wrote the letter, but neither he nor Song’s attorney signed it.¹⁴ And while the request itself includes a paragraph with the heading “certificate of service,” it is unsigned.¹⁵

¹¹*Sosa v. Williams*, 936 S.W.2d 708, 710 (Tex. App.—Waco 1996, writ denied); see *Ordonez v. Solorio*, 480 S.W.3d 56, 62 (Tex. App.—El Paso 2015, no pet.) (“[B]efore one has an obligation to answer admissions or before any inaction on the part of the individual can give rise to deemed admissions, it is axiomatic that the requests for admissions be served.” (quoting *Payton v. Ashton*, 29 S.W.3d 896, 898 (Tex. App.—Amarillo 2000, no pet.))).

¹²See *Sosa*, 936 S.W.2d at 710 (citing *Hudson v. Winn*, 859 S.W.2d 504, 507 (Tex. App.—Houston [1st Dist.] 1993, writ denied)).

¹³See Tex. R. Civ. P. 21a (stating that service may be done by mail or electronically through the electronic filing manager if the email address of the party or attorney to be served is on file with the electronic filing manager).

¹⁴See *Strobel v. Marlow*, 341 S.W.3d 470, 476 (Tex. App.—Dallas 2011, no pet.) (stating that the “transmittal letter” sent with the plaintiff’s expert report indicated that the report had been or was being served by fax, but it was signed by the appellee’s attorney’s legal assistant, not the attorney himself, and it did not constitute a certificate of service).

¹⁵See *id.* at 477 (stating that a certificate of service is prima facie evidence of the fact of service); see also Tex. R. Civ. P. 21(d) (requiring that certificate of

Merely listing Kang’s email address or stating “by first class mail” does not show that the request was actually sent.¹⁶ There was no signed certificate of service or affidavit certifying service from Song.¹⁷ Song argues in his brief that he served Kang by email, but to support this statement, he references “3SUPP4.” There is no third supplemental clerk’s record in the appellate record. The cite links to a page in Song’s appendix that is not in the appellate record—an email from Song’s law clerk to Kang’s email address. The text of this email says “Please see attached.” The attachments include a document titled “RFA.jh.141016-01.pdf.” Even were we to assume that “RFA” means “request for admissions,” that the attached document was the request for admissions, and that this attachment was received by Kang, this document was not before the trial court.

service be signed), 21a(e) (stating that “the party or attorney of record shall certify to the court compliance with this rule in writing over signature and on the filed instrument”).

¹⁶See *Strobel*, 341 S.W.3d at 476–77 (stating that “[a] certificate of service certifies to the court that a copy has been mailed to or otherwise served on all other parties,” that “[t]he purpose of a certificate of service is to prove that the documents to which the certificate relates were actually served on the party,” and that the letter sent by appellee’s attorney’s legal assistant stating that service had been or was being made by fax was not sufficient to show that the fax was sent and received (citation and internal quotation marks omitted)).

¹⁷See *Mathis v. Lockwood*, 166 S.W.3d 743, 745 (Tex. 2005) (stating that the record contained “no certificate of service, no return receipt from certified or registered mail, and no affidavit certifying service,” that there was therefore no presumption of service, and that “[w]ithout this presumption, there was no evidence [the appellant] received notice”).

Because there was no signed certificate of service in the record and no other evidence of service in the record, Song could not rely on the presumption of service.¹⁸ The appellate record contains no evidence or finding that Kang dodged or refused delivery of certified mail, and therefore Song did not establish constructive service.¹⁹ If the request was not served, the admissions could not be deemed.²⁰ The trial court therefore could not have granted summary judgment on the basis of deemed admissions.

Kang also argues that he had not been served with a complete copy of the original petition or the motion for summary judgment. As for the original petition, Kang made an appearance in the case and thereby waived any complaints about the lack of service of process.²¹ As for the motion for summary judgment,

¹⁸*See id.*

¹⁹*See Etheredge v. Hidden Valley Airpark Ass'n, Inc.*, 169 S.W.3d 378, 382 (Tex. App.—Fort Worth 2005, pet. denied) (stating that constructive service may be established by evidence “that the intended recipient engaged in instances of selective acceptance or refusal of certified mail relating to the case”).

²⁰*See Sosa*, 936 S.W.2d at 710.

²¹*See* Tex. R. Civ. P. 120 (providing that an appearance by the defendant has “the same force and effect as if the citation had been duly issued and served”); *Baker v. Monsanto Co.*, 111 S.W.3d 158, 160 (Tex. 2003) (holding that the defendant made a general appearance when it answered the suit and that the appearance “relieved the intervenors of the responsibility to serve [the defendant] with citation”). Kang acknowledged in an affidavit in the record that he received a copy of the petition by email.

contrary to Kang's assertion, the record shows that Kang did receive the motion and that he timely responded to it.²²

2. Song's other summary judgment evidence

In addition to relying on deemed admissions, Song submitted other summary judgment evidence in the form of his own affidavit and that of his attorney.

A. Damages and attorney's fees

Song's affidavit is conclusory as to damages.²³ He stated twice that Kang's management of his trading account caused him "massive losses." He further stated, "I lost \$811,572.02 out of my \$2,000,000.00 [in his trading account]. I have been damaged in the total amount of \$811,572.02 by the knowing and intentional wrongful conduct of the Defendant." But nowhere in the affidavit did he link up any conduct by Kang with the losses he alleged.²⁴ The

²²See Tex. R. Civ. P. 166a (requiring summary judgment motion and any supporting affidavits to be filed and served at least twenty-one days before the time specified for hearing).

²³See *Souder v. Cannon*, 235 S.W.3d 841, 849 (Tex. App.—Fort Worth 2007, no pet.) ("A conclusory statement is one that does not provide the underlying facts to support the conclusion.").

²⁴See *Haygood v. De Escabedo*, 356 S.W.3d 390, 399 (Tex. 2011) (setting out the "fundamental rule" that "[t]o recover damages, the burden is on the plaintiff to produce evidence from which the jury may reasonably infer that the damages claimed resulted from the defendant's conduct" (citation and internal quotation marks omitted)); *Lakewood Pipe of Tex., Inc. v. Conveying Techniques, Inc.*, 814 S.W.2d 553, 556 (Tex. App.—Houston [1st Dist.] 1991, no writ) (stating that the plaintiff has "the burden of proving with some degree of

affidavit of Song's attorney concerns only attorney's fees and is no evidence of Song's damages. Because Song did not prove his damages as a matter of law, he did not establish his entitlement to summary judgment on the amount of damages awarded.

As for the award of attorney's fees, Song's attorney stated in his affidavit that he has a contingency fee agreement with Song, that "it is [his] opinion that a thirty percent (30%) contingency fee in this case is reasonable and necessary," and that "[a]ssuming that a Judgment is rendered in the total amount of [\$2,434,716.06] for actual and punitive damages, Plaintiff[']s total attorney's fees to pursue Plaintiff's claim against Defendant in the amount of [\$730,414.80] is reasonable and necessary." The attorney stated that he is "familiar with the fees charged and expended by hourly and contingency fees for lawyers in Tarrant County[,] Texas" and that "[t]he reasonableness of the fee also takes into account the fact that the defendant lives in New York" and "the potential collectability of a Judgment entered in this case on a foreign out-of-state judgment debtor."

Because the amount of attorney's fees requested were based on the assumption of a specified amount of damages being awarded and this court is reversing the damages award, the attorney's fees award has to be reversed as well. Further, Song requested attorney's fees under civil practice and remedies

certainty a factual basis to support the amount of damages awarded" and that "[r]ecovery of damages cannot be based on pure speculation").

code section 38.001,²⁵ but (as discussed below) he did not establish his right to summary judgment on his breach of contract claim. Thus, Song did not establish his entitlement to his requested attorney's fees.

Summary judgment may be granted in part on the issue of liability, leaving the amount of damages to be determined separately.²⁶ Thus, we must consider whether the summary judgment may be affirmed in part as to liability on any of Song's claims.

B. Liability

1. Song's claims based on misrepresentations

Song alleged in his petition that in 2013, Kang approached him about Kang's investment consulting and financial analyst services, claiming to be a highly successful founder of AltaCap Group, a private investment bank. Song alleged that Kang told him that he was acting on behalf of AltaCap; that he had a Series 7 and a Series 66 license; that he was a highly experienced securities broker who had managed third party accounts for many years; that he was an experienced investment adviser; and that he had successfully invested in the public markets without losses to his investment portfolios.

²⁵See Tex. Civ. Prac. & Rem. Code Ann. § 38.001 (West 2015) (allowing for the recovery of attorney's fees in an action based on a contract).

²⁶See Tex. R. Civ. P. 166a(a) ("A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to amount of damages.").

Song further alleged that Kang told him that Kang’s equity trading scheme “was grounded upon an ‘event driven’ investing strategy and guaranteed [Song] that he would not lose any of his principal investment.” He stated that Kang “promised to only use shorts to hedge, not to speculate” and that he never explained the high risks associated with his investments. Song alleged that as of March 2013—a few months after Kang had approached him—Kang was no longer registered as an investment adviser representative and was no longer registered as a broker with the Financial Industry Regulatory Authority (FINRA). He stated that contrary to Kang’s representations, Kang had passed his exams for his Series 7 and Series 66 licenses only the year before.

Based on these same allegations, Song moved for summary judgment for his claims for fraud, fraud by nondisclosure, the Texas Securities Act,²⁷ and negligent misrepresentation. And for one of his DTPA claims, he alleged that Kang violated subsections 17.50(a)(1)²⁸ of the DTPA by representing that his services had “sponsorship, approval, [or] characteristics . . . which they [did] not have”; that his services were “of a particular standard, quality or grade . . . [when] they [were] of another”; and that “an agreement confer[red] or involve[d] rights, remedies, or obligations which it [did] not have or involve, or which [were]

²⁷Tex. Rev. Civ. Stat. Ann. art. 581-33 (West 2010); see also *id.* art. 581-1 (West 2010) (“This Act shall be known and may be cited as ‘The Securities Act.’”).

²⁸Tex. Bus. & Com. Code Ann. § 17.50(a)(1) (West 2011).

prohibited by law.” Song alleged that this conduct constituted false, misleading, or deceptive acts under the DTPA.

Song stated in his affidavit that

- in January 2013, Kang approached him about using his financial services and requested that Song allow him to trade securities on Song’s behalf;
- Kang initially said he worked at Wells Fargo as a financial advisor and “used his position and title with this major financial and banking institution in order to gain [Song’s] trust”;
- Kang later told Song he was acting on behalf of AltaCap Group, a private investment bank he represented;
- Kang told Song that “he had traded stock before and was a capable ‘Investment Advisor’²⁹ who had managed third party accounts for years”;
- Kang told Song that he had both a Series 7 and a Series 66 license;
- Kang guaranteed that Song would not lose any of Song’s principal investment and would definitely receive a profit; and
- Song relied on Kang’s representations of a conservative investment model, Kang’s “claimed expertise with great market knowledge and success in investing, and guarantee that [Song] would not lose any of [his] principal investment and would make money,” and Kang’s representations “regarding his experience [and] position with Wells Fargo” to allow Kang to have access to his trading account and to trade on his behalf.

²⁹See *Investment Advisers*, FINRA, <https://www.finra.org/investors/investment-advisers> (last visited Sept. 8, 2016) (“Although most people would use an ‘o,’ we purposely spell adviser with an ‘e’ when we talk about investment advisers. That’s because the laws that govern this type of investment professional spell the title this way.”)

Song further stated that Kang “stated that it would be difficult to invest effectively or hedge without being able to ‘short,’” promised Song “he would only use the ‘shorts’ to hedge[] and would not speculate or make high-risk investments,” and “never counseled [Song] on the high risks associated with the investments he would be actually be making.”

Song also stated that Kang “later admitted that he did not understand the market and that he should have gotten out earlier” and that it was only after Song had closed his account that he discovered that Kang had lost his securities broker license while managing Song’s trading account and that AltaCap was never registered or listed on FINRA. Song’s affidavit does not make clear what his business or contractual relationship with AltaCap was and whether his business dealings were with Kang individually or through AltaCap with Kang as its representative.

Song relied on this evidence in his summary judgment motion to establish his reliance on Kang’s representations and omissions as part of his claims for fraud, fraud by nondisclosure, negligent misrepresentation, violations of section 17.50(a)(1) of the DTPA, as well as to establish that Kang made misrepresentations as part of his claims based on article 581-33 of the Texas Securities Act. Song’s affidavit, however, is no evidence that Kang knew that Song was relying on his continued holding of securities licenses to allow him to invest, that Kang did not work for Wells Fargo or did not work in the capacity he

represented, that AltaCap was required to be registered or listed on FINRA, or that Song relied on AltaCap's registration with or listing on FINRA.

Further, assuming the statements Song alleged that Kang made about his abilities and the future profitability of his investment strategies were more than opinion or puffery,³⁰ Kang responded to the summary judgment motion with an affidavit stating that he has worked as a financial advisor for twenty-five years and that he had been Song's financial advisor for eighteen years. Kang further averred that Song is a "sophisticated business owner and investor." To support that statement, Kang averred that Song owns various companies—three of which Kang named in his affidavit—including one that Song purchased out of bankruptcy, the purchase for which Kang provided financial advice. He stated that in his capacity as Song's financial advisor, he assisted in dealings that increased the value of Song's companies by millions of dollars. Finally, Kang stated that Song told him that Song's investment objective for his stock investments is to double the value each year.

Kang asserted in his summary judgment response that he was first licensed as a stockbroker in 1989 when he joined Goldman Sachs, that he had a license at the time of all of the transactions at issue in this case, and that he did

³⁰*Tex. Capital Sec., Inc. v. Sandefer*, 58 S.W.3d 760, 776 (Tex. App.—Houston [1st Dist.] 2001, pet. denied) ("Statements of opinion, including opinions regarding value are generally not actionable under the [Securities] Act."). *But see* Tex. Rev. Civ. Stat. Ann. art. 581-4(F) (West 2010) (defining "fraud" to include "any promise or representation or predication as to the future not made honestly and in good faith").

not need a license because the trades were done through TDAmeritrade, which acted as the broker. He also asserted that Song's losses were caused because Song—not Kang—made the decision to sell his securities at the time that he did and that if Song had waited one month longer, he would have mitigated his losses. Those assertions were not included in Kang's affidavit.

Statements made in responses to summary judgment motions are not evidence, even if sworn to.³¹ However, the above-mentioned statements in Kang's affidavit are some evidence of Song's own business acumen and his long-standing business relationship with Kang during which Kang served as his financial advisor, which raises a fact question about whether it was Kang's statements in 2013 that led Song to give Kang access to his accounts and to allow him to make the complained-of trades on Song's behalf. These statements further raise a fact question about whether Kang made a misrepresentation by way of using his position at Wells Fargo to gain Song's trust and about whether Song told Kang to follow a conservative investment strategy.

Viewing the summary judgment evidence in the light most favorable to Kang, we conclude that it does not establish as a matter of law that Song relied on Kang's alleged representations to his detriment. Thus, Song did not establish

³¹*Quanaim v. Frasco Rest. & Catering*, 17 S.W.3d 30, 42 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (noting that a summary judgment response, even if sworn to, is not proper summary judgment proof).

his right to summary judgment on his claims for fraud,³² fraud by nondisclosure,³³ violation of section 17.50(a)(1) of the DTPA, selling securities by a material misrepresentation or omission, or negligent misrepresentation. Accordingly, the trial court erred by granting summary judgment on these claims.

2. Additional claim under the Texas Securities Act

In addition to claiming that Kang sold securities by way of an untrue statement or omission of material fact, Song appeared to seek summary judgment on another claim under the Texas Securities Act. He listed the elements of “a cause of action for violations of the Texas Securities Act” as the sale of a security to a purchaser by someone who is not registered as required by section 12 of the Act and then asserted that Kang was liable to him for rescission or for damages under section 33 of the Act.³⁴ But Song offered no

³²*Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 337 (Tex. 2011) (including in the elements of fraud that the defendant made a material misrepresentation on which the plaintiff relied).

³³*Strickland Grp, Inc. v. Pathfinder Expl., LLC*, No. 02-12-00187-CV, 2013 WL 4773363, at *11 (Tex. App.—Fort Worth Sept. 5, 2013, no pet.) (mem. op.) (stating that the elements of fraud by nondisclosure include the defendant’s failure to disclose material facts of which the defendant knew the plaintiff was ignorant and which the plaintiff did not have an equal opportunity to discover and that the plaintiff relied on the defendant’s nondisclosure); see *7979 Airport Garage, L.L.C. v. Dollar Rent A Car Sys., Inc.*, 245 S.W.3d 488, 507 n.27 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

³⁴See Tex. Rev. Civ. Stat. Ann. art. 581-33(A)(1) (providing that a person who offers or sells a security in violation of that article is liable to the person buying the security, who may sue for rescission or damages); see *also id.* art. 581-12(A) (West 2010) (providing that no person shall sell or offer for sale any security in the state without first being registered as provided in the Act).

evidence to support a violation of this subsection of article 581-33. He offered no evidence that Kang was required to be registered for the purpose of trading in the securities involved (or even what the securities were, other than that they were stocks of some kind),³⁵ and although he stated in his affidavit that AltaCap was not registered with FINRA, he offered no evidence that Kang was required to be registered as provided by the Act or that he was not so registered. Thus, the trial court erred by granting summary judgment on this claim.

3. Breach of fiduciary duty

Song's fourth claim was for breach of fiduciary duty. The elements of a claim for breach of fiduciary duty are "(1) a fiduciary relationship existed between the plaintiff and the defendant, (2) the defendant breached its fiduciary duty, and (3) the breach resulted in injury to the plaintiff or benefit to the defendant."³⁶ Song alleged that Kang breached the duties of "[1] reasonable care of any assets within [his] custody, as well as duties of [2] loyalty and utmost good faith, [3]

³⁵See *id.* art. 581-5 (West 2010) (listing transactions exempt from the Act's application).

³⁶*Chan v. Sharpe*, No. 02-14-00286-CV, 2015 WL 5722833, at *2 (Tex. App.—Fort Worth Aug. 26, 2015) (mem. op.) (citing *Heritage Gulf Props., Ltd. v. Sandalwood Apartments, Inc.*, 416 S.W.3d 642, 650 (Tex. App.—Houston [14th Dist.] 2013, no pet.)), *cert. denied sub nom. Francis Wing-Sing Chan v. Sharpe*, 136 S. Ct. 1717 (2016).

candor,³⁷ [4] to refrain from self-dealing,³⁸ [5] to act with integrity of the strictest kind,³⁹ [6] duty of fair and honest dealing,⁴⁰ [and] [7] duty of full disclosure.”⁴¹

Song characterized Kang as an investment adviser, while Kang referred to himself as a financial advisor. An investment or financial advisor generally owes a fiduciary duty to clients,⁴² and thus, under either characterization of Kang’s role,

³⁷See *Chien v. Chen*, 759 S.W.2d 484, 495 (Tex. App.—Austin 1988, no writ) (stating that a fiduciary relationship imputes to the relationship duties that include “good faith and candor”).

³⁸See *Dearing Inc. v. Spiller*, 824 S.W.2d 728, 733 (Tex. App.—Fort Worth 1992, writ denied) (“[W]hen the standard is one of fiduciary obligation, any self-dealing is prohibited.”).

³⁹See *Anderson v. Griffith*, 501 S.W.2d 695, 700 (Tex. Civ. App.—Fort Worth 1973, writ ref’d n.r.e.) (citing 2 Tex. Jur. 2d 557 for the proposition that a fiduciary owes the duty of loyalty and good faith and of “integrity of the strictest kind”).

⁴⁰See *Lesley v. Veterans Land Bd.*, 352 S.W.3d 479, 490 (Tex. 2011) (stating that a fiduciary has a duty of utmost fair dealing).

⁴¹See *Chien*, 759 S.W.2d at 495 (stating that fiduciary duties include “the duty of *full disclosure* respecting matters affecting the principal’s interests”).

⁴²See *Izzo v. Izzo*, No. 03-09-00395-CV, 2010 WL 1930179, at *7 (Tex. App.—Austin May 14, 2010, pet. denied) (mem. op.) (holding that sufficient evidence supported the trial court’s conclusion that the appellee acted as the appellant’s investment adviser prior to their marriage and that he therefore owed the appellee a fiduciary duty that arose prior to the marriage); *W. Reserve Life Assur. Co. of Ohio v. Graben*, 233 S.W.3d 360, 374 (Tex. App.—Fort Worth 2007, no pet.) (holding that the appellee’s financial advisor had a duty to act as a fiduciary). See also William Alan Nelson II, *Broker-Dealer: A Fiduciary by Any Other Name?*, 20 Fordham J. Corp. & Fin. L. 637, 659–60 (2015) (stating that “courts and regulators look to the substance of the relationship rather than relying on titles to discern fiduciary responsibility,” regardless of whether individuals describe themselves as investment advisers, financial advisors, brokers, or dealers).

he owed a fiduciary duty to Song.⁴³ However, what a fiduciary duty requires of the fiduciary can vary.⁴⁴ Song's affidavit was evidence that Kang did more than merely act at Song's direction in making investments and that Kang acted as an advisor trusted by Song to make appropriate trades in line with Song's conservative investment strategy. But Kang produced his own affidavit to contradict Song's. While Kang's affidavit is short, it is some evidence that Song is an experienced business person who follows an aggressive investment strategy with the intent to double his investments each year, rather than an unsophisticated investor relying on his advisor to make decisions about investment strategy.

And while Song stated that he relied on Kang's having stockbroker licenses and his statements about his past success in trading in deciding to trust and hire Kang, Kang produced evidence that they had a nearly two-decade

⁴³See *W. Reserve Life Assur. Co. of Ohio*, 233 S.W.3d at 374 (holding that the defendant financial advisor took on a fiduciary duty "by the very nature of [his] actions" in assuming the role to act as a financial adviser to his clients and monitor their investments); see also *Robinson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 337 F. Supp. 107, 110 (N.D. Ala. 1971) ("When a broker serves as a customer's agent, he has certain duties, just as in any principal-agent relationship."), *aff'd*, 453 F.2d 417 (5th Cir. 1972).

⁴⁴See *Romano v. Merrill Lynch, Pierce, Fenner & Smith*, 834 F.2d 523, 530 (5th Cir. 1987) (stating that "a broker does owe his client a fiduciary duty" but that "the nature of the fiduciary duty owed will vary, depending on the relationship between the broker and the investor" and is "necessarily particularly fact-based" and holding that when the client was "an alert and vigilant businessman" who controlled his account and the broker acted solely at the client's direction, there was no breach of fiduciary duty based on the brokerage firm's failure to disclose its own activity in the same futures market in which the client was investing).

history of Kang providing Song with financial advice and working with him on business deals, raising a question about what factors led Song to give Kang access to his trading accounts, and thus whether Kang breached any duties to Song with respect to his obligation to disclose relevant information.

In other words, Kang was Song's fiduciary and as such owed him certain duties, but the summary judgment evidence did not establish as a matter of law what those duties encompassed or whether they were breached. And because Kang's affidavit raised a fact issue about the nature of the investment strategy Song instructed him to follow, Song's affidavit does not establish as a matter of law that his losses came from Kang's breach of any duties, rather than the inherent risk of trading in securities.⁴⁵ Viewing the evidence in the light most favorable to Kang, we conclude that Song did not establish his claim for breach of fiduciary duty as a matter of law, and thus the trial court erred by granting summary judgment on that claim.

⁴⁵ See *Emp. Ret. Sys. of Tex. v. Putnam, LLC*, 294 S.W.3d 309, 316–17 (Tex. App.—Austin 2009, no pet.) (stating that the plaintiff's complained-of injury—"the difference in the performance of the [defendant]-advised portfolio and the hypothetical investment returns of the path not chosen"—was caused by "the risks inherent in the securities market" rather than any misrepresentation by the defendant and that "the law does not allow an investor to use tort claims as a vehicle to insure itself against market risks").

4. Additional DTPA claim

In addition to his DTPA claim based on misrepresentations under section 17.50(a)(1), Song also alleged a violation of section 17.50(a)(4) of the DTPA.⁴⁶ Section 17.50(a)(4) provides a cause of action against a person for that person's use or employment of an act or practice in violation of chapter 541 of the insurance code.⁴⁷ Nothing in Song's affidavit references insurance or asserts that Kang was or represented himself to be in the business of insurance. Therefore, the trial court erred by granting summary judgment on this ground.

5. Negligence

Song also asserted a claim for negligence. "The elements of a negligence cause of action are the existence of a legal duty, a breach of that duty, and damages proximately caused by the breach."⁴⁸ Song alleged that Kang had a fiduciary duty to Song based upon the assets entrusted to him and that Kang negligently breached his fiduciary duty. He made the same assertions in his motion for summary judgment.

As we have explained, Song did not establish as a matter of law what Kang's fiduciary duties encompassed, whether he breached those duties

⁴⁶Tex. Bus. & Com. Code Ann. § 17.50(a)(1), (4).

⁴⁷*Id.* § 17.50(a)(4); see Tex. Ins. Code Ann. § 541.001 (West 2009) (providing for the regulation of trade practices in the insurance business).

⁴⁸*Gharda USA, Inc. v. Control Sols., Inc.*, 464 S.W.3d 338, 352 (Tex. 2015) (citation and quotation marks omitted).

(negligently or otherwise), or whether any such breach caused Song's damages. The trial court therefore could not have granted summary judgment on Song's negligence claim.

6. Breach of contract

Song also made an alternative claim for breach of contract. The elements of a breach of contract claim are "(1) the existence of a valid contract, (2) performance or tendered performance by the plaintiff, (3) breach of the contract by the defendant, and (4) resulting damages to the plaintiff."⁴⁹ As to the first element, a valid contract requires "(1) an offer; (2) an acceptance in strict compliance with the terms of the offer; (3) a meeting of the minds; (4) each party's consent to the terms; and (5) execution and delivery of the contract with the intent that it be mutual and binding."⁵⁰ A valid contract also requires consideration.⁵¹

In Song's affidavit, he stated that Kang approached him in 2013 about using Kang's financial services, "guaranteed . . . that he would not lose any of [Song's] principal investment," and promised him that he "would definitely receive a profit." Song also averred that Kang required a \$20,000 consulting fee. This evidence does not establish as a matter of law the elements of a valid contract

⁴⁹*Rice v. Metro. Life Ins. Co.*, 324 S.W.3d 660, 666 (Tex. App.—Fort Worth 2010, no pet.) (citation and internal quotation marks omitted).

⁵⁰*Id.* at 670 (citation omitted).

⁵¹*Id.*

and the breach thereof. Accordingly, the trial court could not have granted summary judgment on Song's breach of contract claim.

We sustain Kang's first issue.

Conclusion

Having sustained Kang's first issue, we reverse the trial court's summary judgment and remand the case for further proceedings.⁵²

/s/ Lee Ann Dauphinot
LEE ANN DAUPHINOT
JUSTICE

PANEL: DAUPHINOT, MEIER, and GABRIEL, JJ.

GABRIEL, J., concurs without opinion.

DELIVERED: September 15, 2016

⁵²See Tex. R. App. P. 43.2(d).