COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00117-CV

AMY JOHNSON NAQUIN F/K/A AMY C. NAQUIN — APPELLANT

V.

THOMAS A. CELLIO II AND VANESSA EUGENIA CELLIO — APPELLEES

FROM THE 431ST DISTRICT COURT OF DENTON COUNTY
TRIAL COURT NO. 14-04054-431

MEMORANDUM OPINION[1]

I. INTRODUCTION

Appellant Amy Johnson Naquin f/k/a Amy C. Naquin appeals the trial court's summary judgment orders in favor of Appellees Thomas A. Cellio II and Vanessa Eugenia Cellio. In seven issues, Naquin argues a myriad of theories contending that the trial court erred by granting summary judgment and that the

[1]*See* Tex. R. App. P. 47.4.

trial court improperly excluded her summary judgment evidence. Because we hold that the Cellios established as a matter of law that they were entitled to summary judgment, we will affirm the trial court's orders.

II. BACKGROUND

The Cellios, as part of the process of listing their home for sale, executed a Seller's Disclosure Notice on April 23, 2012. On April 30, 2012, the Cellios entered into a contract with Naquin for the sale of the home. As part of the sales contract, and for the payment of $200 consideration, Naquin had the unrestricted right to terminate the contract during a seven-day period.

During that seven-day period, Naquin hired Green Scene Home Inspections to conduct an inspection of the home. Clayton Bailey conducted the inspection on May 2, 2012. Among other things identified, the inspection report identified deficiencies to the home's structural systems and its grading and drainage. The report also stated that the sprinkler system did not have a system control panel and that each zone is operated by individual timers. The report further stated that the pool side "half bath" contained a commode that appeared to be "excessively loose at the floor mount" and that this condition "should be further evaluated and corrected as necessary."

The parties closed on the property on May 29, 2012. Two years later, on May 29, 2014, Naquin filed this suit, alleging that after moving into the house, she discovered that the Cellios had made misrepresentations regarding "the plumbing and septic systems, the pool house, an unpermitted sprinkler system,

and improper drainage." Specifically regarding the pool house, Naquin alleged that the water supply to the pool house was "simply taken from the swimming pool and the sewer and gray water lines from the pool house simply drained downhill on the property and were not properly treated or disposed." Naquin pleaded that these alleged misrepresentations constituted violations of the Texas Deceptive Trade Practices Act (DTPA) and statutory fraud and that she was entitled to exemplary damages and attorneys' fees.

The Cellios filed their no-evidence and traditional summary judgment motions on October 27, 2015. In their traditional summary judgment motion, among many arguments, the Cellios asserted that Naquin contractually accepted the property "in its present condition" at the time of sale, thereby waiving the right to claim alleged damages. The Cellios also asserted that Naquin had hired an independent inspector, whose report disclosed problems in the very areas Naquin complained about in her petition, and that she had relied on the inspector's professional judgment and not on the Cellios' representations when purchasing the home. Thus, according to the Cellios, Naquin could not establish reliance nor causation for either of her claims and thus her claims failed as a matter of law.

In her response, Naquin, among other contentions, argued that she had been fraudulently induced into purchasing the home and that the Cellios had made "extensive, but ineffectual repairs to the foundation and plumbing" of the home. Attached to her response, Naquin included her own affidavit, wherein she

stated that prior to her purchase of the home, she was unaware that the pool house's commode flushed untreated sewage onto the lawn; that the pool house's water supply was improperly taken from the swimming pool; and that she was unaware of the "unpermitted sprinkler system."

Without specifying the grounds for its rulings, the trial court granted both Cellios' no-evidence and traditional summary judgment motions. This appeal followed.

III. STANDARD OF REVIEW[2]

We review a summary judgment de novo. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). We consider the evidence presented in the light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if reasonable jurors could, and disregarding evidence contrary to the nonmovant unless reasonable jurors could not. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). We indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *20801, Inc. v. Parker*, 249 S.W.3d 392, 399 (Tex. 2008). A defendant who conclusively negates at least one essential element of a cause of action is entitled to summary judgment on that claim. *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 508 (Tex. 2010), *cert. denied*, 562 U.S. 1180 (2011); *see* Tex. R. Civ. P.

[2]Because our disposition of this case is predicated upon a ground asserted in the Cellios' traditional motion for summary judgment, we need not address the standard of review for a no-evidence motion for summary judgment.

166a(b), (c). Also, a defendant is entitled to summary judgment on an affirmative defense if the defendant conclusively proves all the elements of the affirmative defense. *Frost*, 315 S.W.3d at 508–09; *see* Tex. R. Civ. P. 166a(b), (c). To accomplish this, the defendant-movant must present summary judgment evidence that conclusively establishes each element of the affirmative defense. *See Chau v. Riddle*, 254 S.W.3d 453, 455 (Tex. 2008).

When a trial court's order granting summary judgment does not specify the ground or grounds relied on for its ruling, summary judgment will be affirmed on appeal if any of the theories presented to the trial court and preserved for appellate review are meritorious. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 216 (Tex. 2003); *Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 473 (Tex. 1995).

IV. DISCUSSION

In part of her first issue, Naquin argues that the trial court erred by granting summary judgment predicated on the Cellios' argument that the sales contract's "as is" language, coupled with Naquin's independent inspection of the home, superseded any alleged misrepresentations by the Cellios and that they were therefore entitled to summary judgment as a matter of law. We disagree.

The parties used a standard contract form prepared by the Texas Real Estate Commission (TREC) for the transaction. In the contract, Naquin contractually bound herself to accept the property "in its present condition." The

relevant contract provision states "ACCEPTANCE OF PROPERTY CONDITION: . . . (1) Buyer accepts the Property in its present condition."

Texas courts, including this court, have interpreted contract language stating "in its present condition" to be an agreement to purchase the property "as is." *See Volmich v. Neiman*, No. 02-12-00050-CV, 2013 WL 978770, at *6 (Tex. App.—Fort Worth Mar. 14, 2013, no pet.) (mem. op.) (construing "in its present condition" as an "as is" agreement); *see also Cherry v. McCall*, 138 S.W.3d 35, 39 (Tex. App.—San Antonio 2004, pet. denied) (same); *Larsen v. Carlene Langford & Assocs., Inc.*, 41 S.W.3d 245, 251 (Tex. App.—Waco 2001, pet. denied) (construing contract language stating that "[b]uyer accepts the Property in its present condition. Buyer shall pay for any repairs designated by a lender" to be an "as is" agreement); *Fletcher v. Edwards*, 26 S.W.3d 66, 75 (Tex. App.—Waco 2000, pet. denied) (construing "in its present condition" in earnest money contract to be an agreement to purchase the property "as is"); *Sims v. Century 21 Capital Team, Inc.*, No. 03–05–00461–CV, 2006 WL 2589358, at *2 (Tex. App.—Austin Sept. 8, 2006, no pet.) (mem. op.) (construing "in its current condition" as the plain-English equivalent of "as is").

A valid "as is" agreement prevents a buyer from holding a seller liable if the thing sold turns out to be worth less than the price paid. *Prudential Ins. Co. of Am. v. Jefferson Assocs., Ltd.*, 896 S.W.2d 156, 161 (Tex. 1995). When considering the enforceability of an "as is" clause, courts consider the totality of the circumstances, including (1) the sophistication of the parties and whether

they were represented by counsel, (2) whether the contract was an arm's-length transaction, (3) the relative bargaining power of the parties and whether the contractual language was freely negotiated, and (4) whether that language was an important part of the parties' bargain as opposed to being a "boiler-plate" provision. *Id.* at 162.

In this case, both parties were represented by real estate agents. Neither party was represented by counsel, but the circumstances do not suggest any disparity of bargaining power that would affect the enforceability of the "as is" clause. Indeed, although the "as is" language was contained within the standard TREC contract form, the parties negotiated that specific part of the sales contract by choosing the "in its present condition" option instead of agreeing to the option that the Cellios would pay to have the property repaired or treated in an agreed-upon manner. The parties also negotiated a seven-day termination period for Naquin to complete her independent inspection. And the Cellios gave Naquin access to complete the inspection. The totality of the circumstances therefore leads us to conclude that the "as is" clause in this contract is enforceable as an arm's-length transaction between parties with equal bargaining strength. *See Larsen*, 41 S.W.3d at 252–53.

Although the clause is enforceable standing alone, Naquin is not bound by the "as is" clause if she was induced into the contract because of a fraudulent representation or a concealment of information by the Cellios. *See Prudential*, 896 S.W.2d at 162. A party claiming fraud in the inducement must demonstrate

that: (1) the defendant made a representation to the plaintiff; (2) the representation was material; (3) the representation was false; (4) when the defendant made the representation, the defendant (a) knew the representation was false or (b) made the representation recklessly as a positive assertion with the intent that the plaintiff act on it; (5) the defendant made the representation with the intent that the plaintiff act on it; (6) the plaintiff relied on the representation; and (7) the representation caused the plaintiff injury. *Exxon Corp. v. Emerald Oil & Gas Co.*, 348 S.W.3d 194, 217 (Tex. 2011) (op. on reh'g).

The summary judgment evidence establishes that the Cellios executed the Seller's Disclosure Notice on April 23, 2012, and that they indicated on the form that they were not aware of any defects in structural components, plumbing systems, or the sprinkler system. The Cellios also indicated in the disclosure that no alterations had been made to the home "without necessary permits or not in compliance with building codes in effect at the time." The summary judgment evidence further establishes that Naquin paid for an inspection of the home and a report, which revealed deficiencies to the home's structural and drainage systems, issues with the sprinkler system, and problems with the commode located within the enclosure near the swimming pool. Also in the summary judgment record is Thomas Cellio's affidavit, wherein he averred that the home

> had a pool next to which we built a small enclosure with a toilet fed by water from the swimming pool. The purpose of the enclosure was to allow swimmers, and more specifically our sons, to urinate without needing to dry off or track water into the house. It was never

> intended to be a "fully functional" restroom and the water from the toilet was distributed into the side yard.

Based on this summary judgment evidence, Naquin argues that she is not bound by her agreement to purchase the property "as is" because the Cellios induced her to make the agreement by concealing defects in the home's plumbing and septic systems, the pool house, an unpermitted sprinkler system, and improper drainage. The Cellios respond that they did not make any false representations, that Naquin was aware of the home's condition at the time of the purchase because she obtained her own inspection, and that the inspection disclosed problems in the very areas about which Naquin now complains.

Naquin's fraudulent inducement claim requires a showing of reliance. *Eagle Props., Ltd. v. Scharbauer*, 807 S.W.2d 714, 723 (Tex. 1990). Texas courts have held that when false and fraudulent representations are made concerning the subject matter of a contract but when the person to whom they are made conducts an independent investigation into the matters covered by the representations before closing, it is presumed that reliance is placed on the information acquired by such investigation and not on the representations made to her and that she therefore cannot seek relief because the bargain later proves unsatisfactory. *Marcus v. Kinabrew*, 438 S.W.2d 431, 432 (Tex. Civ. App.—Tyler 1969, no writ); *see also Kolb v. Tex. Emp'rs' Ins. Ass'n*, 585 S.W.2d 870, 872 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); *Lone Star Mach. Corp. v. Frankel*, 564 S.W.2d 135, 138 (Tex. Civ. App.—Beaumont 1978, no writ); *M.L.*

Mayfield Petroleum Corp. v. Kelly, 450 S.W.2d 104, 109–10 (Tex. Civ. App.—Tyler 1970, writ ref'd n.r.e.). "The common thread of the decisions reaching this conclusion is that, regardless of the result of his investigation, the buyer's decision to undertake such an investigation indicates that he or she is not relying on the seller's representations about the property." *Bartlett v. Schmidt*, 33 S.W.3d 35, 38 (Tex. App.—Corpus Christi 2000, pet. denied).

Similarly, Naquin's DTPA claim requires proof of producing cause. *See Prudential*, 896 S.W.2d at 161 ("For DTPA violations, only producing cause must be shown.") (*citing* Tex. Bus. & Com. Code Ann. § 17.50(a)). Producing cause under the DTPA "requires proof that an act or omission was a substantial factor in bringing about injury which would not otherwise have occurred." *Id.* (*citing McClure v. Allied Stores of Tex., Inc.*, 608 S.W.2d 901, 903 (Tex. 1980)). Texas courts have held that if a defendant can demonstrate that a new and independent basis for the plaintiff's cause of action exists, that proof may negate that the defendant's acts were the producing cause of the plaintiff's injury. *Bartlett*, 33 S.W.3d at 39; *Dubow v. Dragon*, 746 S.W.2d 857, 860 (Tex. App.—Dallas 1988, no writ). Reliance on external assessments of the feasibility of purchasing land has been held to introduce a new and independent cause of the buyer's damages in several DTPA cases, thus negating the producing cause element of a DTPA claim. *Bartlett*, 33 S.W.3d at 40; *Camden Mach. & Tool, Inc. v. Cascade Co.*, 870 S.W.2d 304, 313 (Tex. App.—Fort Worth 1993, no writ); *Dubow*, 746 S.W.2d at 860.

Here, the Cellios met their traditional summary judgment burden by presenting evidence that they had no knowledge of any alleged defects, that Naquin obtained and reviewed an inspection of the home before purchasing it, and that the sales contract contained an "as is" clause. That evidence conclusively proved the Cellios' entitlement to summary judgment on Naquin's fraudulent inducement and DTPA claims. *See Camden*, 870 S.W.2d at 311, 313; *Dubow*, 746 S.W.2d at 860; *see also Bartlett*, 33 S.W.3d at 38–39.

Because the Cellios met their summary judgment burden, the summary judgment burden then shifted to Naquin to present evidence raising fact issues. *See Van v. Peña*, 990 S.W.2d 751, 753 (Tex. 1999) ("Once the movant produces evidence entitling it to summary judgment, the burden shifts to the nonmovant to present evidence that raises a fact issue.") (*citing Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996)). But there are at least two deficiencies in Naquin's summary judgment evidence. First, Naquin has no evidence disputing the Cellios' evidence that the pool side commode is functioning as intended and that their representations made in the disclosure were true and accurate. Naquin's statements that she did not discover that the pool side commode was not connected to a drainage system until after she moved in is not inconsistent with the Cellios' summary judgment evidence and does not create a fact issue. Second, the independent inspection that Naquin commissioned and reviewed before deciding to purchase the home supersedes any alleged misrepresentation or failure to disclose by the Cellios. *See Volmich*, No. 02-12-00050-CV, 2013 WL

978770, at *8 (holding that buyers who purchased a home "as is" and conducted independent inspection failed to create genuine issues of material fact on each element of their fraud and DTPA claims). And it is noteworthy that the inspection revealed numerous existing or past problems with the home, including problems with the home's structural systems, its grading and drainage systems, and its sprinkler system. The report also revealed that the pool side commode needed further evaluation and possible correction.

Naquin argues that her case is distinct from *Volmich* in that she was unaware of the defects she complains of. She also argues that *Volmich* stands for the proposition that "when the buyer knows of a problem, that buyer cannot claim damages later." But that is not the holding of *Volmich*. *Id.* In *Volmich*, this court held that the plaintiff-buyers failed to provide summary judgment evidence creating a fact issue "as to whether they should not be bound by their contractual agreement to purchase the house 'as-is' in light of their own independent inspection of the property." *Id.* at *7. And that is this court's holding in this case as well. We overrule this portion of Naquin's first issue.

Because this court's resolution of this portion of Naquin's first issue is sufficient to affirm the trial court's orders, we need not address the remainder of her issues. *See* Tex. R. App. P. 47.1.

V. CONCLUSION

Having overruled the dispositive portion of Naquin's first issue and not needing to address her remaining issues, we affirm the trial court's orders.

/s/ Bill Meier
BILL MEIER
JUSTICE

PANEL: MEIER, GABRIEL, and SUDDERTH, JJ.

GABRIEL, J., concurs without opinion.

SUDDERTH, J., filed a concurring opinion.

DELIVERED: May 18, 2017