In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-14-00141-CV

MICHAEL BRISCOE AND JOHN MARGETIS, APPELLANTS

V.

B & G INVESTMENTS, GENE BEHNE, BRANDON NICHOLS, AND BARRETT WORTHAM, APPELLEES

On Appeal from County Court at Law
Navarro County, Texas
Trial Court No. C13-22353-CV; Honorable Amanda Putman, Presiding

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April 6, 2016

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and PIRTLE, JJ.

This appeal[1] arises from an order granting a no-evidence motion for summary judgment in a dispute concerning a lease agreement. After a long and protracted, clearly acrimonious, series of legal proceedings, where a patient but tried trial judge on

[1] Originally appealed to the Tenth Court of Appeals, this appeal was transferred to this court by the Texas Supreme Court pursuant to its docket equalization efforts. TEX. GOV'T CODE ANN. § 73.001 (West 2013). We are unaware of any conflict between precedent of the Tenth Court of Appeals and that of this court on any relevant issue. TEX. R. APP. P. 41.3.

more than one occasion deemed it necessary to admonish both the parties and legal counsel to cease acting like children, ended in a no-evidence summary judgment in favor of the original defendants and Appellees herein, B & G Investments, Gene Behne, Brandon Nichols, and Barrett Wortham (collectively referred to as B & G Investments), the original plaintiffs and Appellants herein, Michael Briscoe and John Margetis, acting *pro se,* filed their original notice of appeal.

By five issues, Briscoe and Margetis contend (1) the trial court erred in granting the no-evidence motion for summary judgment filed by B & G Investments because they presented more than a scintilla of evidence raising a genuine issue of material fact as to each cause of action being asserted, (2) the trial court erred in granting summary judgment when they were unable to attend the hearing, (3) the trial court abused its discretion by contacting the Federal District Court in Plano, Texas, and setting the summary judgment hearing on the same date as another hearing in that court, (4) the trial court abused its discretion in denying two motions for continuance, and (5) the trial court erred in granting summary judgment by "default" while Briscoe was hospitalized and Margetis was in federal court on another case. For the reasons explained below, we affirm in part and reverse and remand in part.

BACKGROUND

Kent Meyer leased land near Corsicana, Texas, from B & G Investments, for his portable buildings business. The lease agreement was signed on May 14, 2012, and it provided for a term of twelve months, with payments of $400 per month for the first six months and payments of $500 for the next six months. The lease agreement described the leased premises as being property located at "4104 S Hwy 287, Corsicana, TX

75109." It further described the leased property as being "the property East of the second TxDot [sic] entrance along 287," with "[t]his entrance [being] a mutual access driveway for any future business to be located at 4102 S Hwy 287, Corsicana, Texas 75109." The "USE OF PREMISES" provision of the lease agreement provided that the tenants could use the premises for "Storing and Selling Portable Buildings ONLY." The "RENEWAL TERMS" provision of the lease agreement stated:

> The Tenant would like to extend the term of this lease for (1) additional year lease. Landlord and Tenant will discuss term renewal. The lease terms during any such renewal term shall be the same as those contained in this Lease.

Shortly after entering into this lease agreement, Meyer sold his business to Briscoe and Margetis. On June 29, 2012, Briscoe assumed the remainder of Meyer's lease and signed an *Assignment of Lease* with B & G Investments. The assignment provided, in part, as follows:

> All terms shall remain the same. The lease agreement to be assigned to Michael Briscoe with all terms and conditions intact with the exceptions addition use of the lot located at [Corsicana address]. The additional items are as follows:
>
> 1- Portable Buildings and Auto Sales
> 2- Carports
> 3- U Haul and moving supplies
> 4- Furniture
> 5- Iron work

In January 2013, during the initial term of the lease, B & G Investments opened a new business adjacent to the leased property and began storing property on the premises. Briscoe and Margetis contend this activity encroached on the leased premises to the detriment of their business. According to the pleadings, B & G

Investments began moving rocks, trash, dirt, and other items onto the leased property and it stored trailers, dumpsters, and other items, giving the property the "appearance of a junkyard." Briscoe and Margetis further contend the activities of B & G Investments made the only entrance to their business inaccessible to their customers, causing them to suffer financial losses. They further maintain representations were made to them by B & G Investments that the lease term would be extended for three years at the rate of $500 per month.[2]

On May 9, 2013, Gene Behne provided a letter to a salesperson for Briscoe and Margetis, notifying them they had until May 15, 2013, to vacate the property because the lease term had expired. They were also served with eviction papers; however, the forcible entry and detainer case was subsequently dismissed for failure to give proper notice.

On June 20, 2013, Briscoe and Margetis filed suit against B & G Investments for breach of contract, fraud, fraudulent misrepresentation, fraudulent inducement, negligent misrepresentation, promissory estoppel, and tortious interference with prospective business relations. They sought recovery of monetary damages and attorney's fees. They requested and were granted a temporary restraining order giving B & G Investments twenty-four hours to remove all encroaching items from the leased premises. Nine days later, however, the trial court dissolved the temporary restraining order based upon the short length of time remaining on the lease and placed a "joint and mutual temporary injunction" on both parties during the pendency of the case.

[2] Briscoe and Margetis maintain that B & G Investments assured them the lease would be extended another three years and that B & G Investments would not open a new business on the leased premises "for a year or so . . . ."

B & G Investments answered the suit by general denial, alleged the affirmative defense of estoppel, and applied for a temporary injunction. Specifically, it alleged there was no agreement to extend the lease or to allow Briscoe and Margetis to holdover. Thus, B & G Investments maintained that once the lease expired, Briscoe and Margetis had no right to occupy the leased premises.

After an adequate time for discovery passed, B & G Investments filed a no-evidence motion for summary judgment asserting there was no evidence concerning one or more of the elements of each of the alleged causes of action. According to B & G Investments, the lease agreement was fully performed prior to suit being filed.

Briscoe and Margetis filed a response and objection to B & G Investments' no-evidence motion for summary judgment. Exhibits to the response included a copy of the original lease between Meyer and B & G Investments, a crudely drawn map of the leased premises, a copy of the assignment of lease, numerous photographs of the leased premises, a copy of the transcript from a hearing on Briscoe and Margetis' motion for contempt and sanctions, and affidavits from Briscoe and Margetis.[3]

A hearing was set for March 21, 2014. Briscoe and Margetis filed an *Amended Emergency Motion for Continuance* asserting that neither of them would be available on the date of the hearing due to proceedings in other courts. That motion was never ruled on. By order dated March 21, 2014, the trial court granted B & G Investments' no-evidence motion for summary judgment. The trial court ordered that all causes of action

[3] The affidavits were identical. B & G Investments moved to strike the affidavits for being conclusory, containing hearsay, being defective, and being untimely filed. The trial court never ruled on the motion to strike.

against B & G Investments were dismissed and that Behne, Nichols, and Wortham recover from Briscoe and Margetis the sum of $23,821 as reasonable and necessary attorney's fees through the trial court level, with additional sums conditioned on an unsuccessful appeal by Briscoe and Margetis. On March 31, 2013, Briscoe and Margetis filed a request for findings of fact and conclusions of law.[4] Briscoe and Margetis also moved for a new trial which the trial court denied by written order.

ISSUE ONE—NO-EVIDENCE MOTION FOR SUMMARY JUDGMENT

A no-evidence motion for summary judgment is essentially a motion for a pretrial directed verdict, and we apply the same legal sufficiency standard we would apply in reviewing a directed verdict. *See King Ranch*, *Inc. v. Chapman*, 118 S.W.3d 742, 750 (Tex. 2003). In a no-evidence summary judgment motion, the movant contends there is no evidence of one or more essential elements of a claim or defense on which the non-movant would have the burden of proof at trial. TEX. R. CIV. P. 166a(i); *Hamilton v. Wilson*, 249 S.W.3d 425, 426 (Tex. 2008). The motion must state the elements as to which there is no evidence. TEX. R. CIV. P. 166a(i). Once the motion is filed, the burden shifts to the non-movant to present evidence raising an issue of material fact as to the challenged elements of its cause of action or defense. *See Mack Trucks*, *Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006). If the non-movant produces more than a scintilla of probative evidence raising a genuine issue of material fact on the challenged elements, the trial court must deny the motion. *See Hamilton*, 249 S.W.3d at 426. *See also* TEX. R. CIV. P. 166a(c), (i). More than a scintilla of evidence exists when the evidence rises to a level that would enable reasonable and fair-minded people to differ in their

[4] Findings of fact and conclusions of law have no place in a summary judgment proceeding. *See Linwood v. NCNB Tex.*, 885 S.W.2d 102, 103 (Tex. 1994).

conclusions. *See City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005); *Merrell Dow Pharmaceuticals v. Havner,* 953 S.W.2d 706, 711 (Tex. 1997), *cert. denied,* 523 U.S. 1119, 118 S. Ct. 1799, 140 L. Ed. 2d 939 (1998). A non-moving party is not required to marshal its entire proof, as its response need only raise a fact issue on the challenged elements. TEX. R. CIV. P. 166a(i), Notes and Comments (1997); *Hamilton*, 249 S.W.3d at 426.

We review a no-evidence summary judgment for evidence that would enable reasonable and fair-minded jurors to differ in their conclusions. *See City of Keller,* 168 S.W.3d at 827. A no-evidence challenge is appropriate and should be sustained when (a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact. *King Ranch*, 118 S.W.3d at 751. Summary judgment evidence in the form of an affidavit from an interested party must be "clear, positive and direct, otherwise credible and free from contradictions and inconsistencies," and susceptible of being readily controverted. TEX. R. CIV. P. 166a(c); *Haynes v. City of Beaumont*, 35 S.W.3d 166, 178 (Tex. App.—Texarkana 2000, no pet.).

Here, B & G Investments alleged there was no evidence of one or more essential elements of each claim on which Briscoe and Margetis had the burden of proof at trial. The no-evidence motion for summary judgment detailed each cause of action and the element or elements upon which there was no evidence. The responsive summary judgment evidence produced by Briscoe and Margetis established that the property in

question was leased to Kent Meyer pursuant to an original lease, signed on June 14, 2012, for a term of twelve months. The affidavits provided by Briscoe and Margetis, which are identical, established that the lease agreement was assigned to them, with the consent of B & G Investments, by an *Assignment of Lease*, signed June 29, 2012. The affidavits further averred that Briscoe and Margetis were "assured that there would be no problem and that [B & G Investments] would extend the lease another three years at the rate of $500.00 per month" and they relied upon those assurances in purchasing Meyer's business and ordering inventory. The affidavits further averred that Briscoe and Margetis were assured B & G Investments would not be opening a new business on the adjacent property "for a year or so." The affidavits further provided that, in contravention of the assurances made, B & G Investments opened its adjacent business in January of 2013, and started encroaching on the leased property in February of that year. The affidavits further provided the activities of B & G Investments "blocked our only entrance to the location causing us to lose tens of thousands of dollars in sales."

Briscoe and Margetis' summary judgment evidence also included a certified transcript from an earlier hearing on their *Motion for Sanctions* wherein Behne testified he never told Briscoe and Margetis that B & G Investments' new business would be delayed for a few years or that they could have their lease extended. In that same proceeding, Nichols testified the lease expired after twelve months and that the only agreement thereafter was for a short extension to July 18, 2013, given for the purpose

of allowing Briscoe and Margetis time to remove their property.[5] Nichols further testified that the agreed-upon prorated rent for the extension period was never paid.

As to the breach of contract cause of action, B & G Investments alleged that there was no evidence of (a) a valid, enforceable contract, (b) a breach of that contract by B & G Investments, and (c) an injury as a result of that breach. B & G Investments argues that no "valid enforceable contract existed *at the time of the filing of* [Briscoe and Margetis'] *petition.*" They further contend that any alleged breach was not the proximate cause of any injury or damage. These allegations are clearly controverted by the summary judgment evidence that contends an encroachment on the leased property during the original term of the lease. Accordingly, the trial court erred in granting a no-evidence summary judgment on the breach of contract cause of action.

As to the fraudulent inducement and fraudulent misrepresentation causes of action, B & G Investments alleged there was no evidence of (a) a false material representation, (b) made with the intent that Briscoe and Margetis rely on it, (c) that caused injury. While the affidavits of Briscoe and Margetis do aver that "assurances" were made, these statements were not "clear, positive and direct," or otherwise "susceptible of being readily controverted." As such, they are conclusory and insufficient to create a fact question to defeat a no-evidence summary judgment. Similarly, Briscoe and Margetis failed to raise more than a scintilla of probative evidence

[5] A hand-written extension agreement was signed by Kevin McDonnell as "attorney for Plaintiff (B & G Investments and Brandon Nichols)." Exhibit 11 to Briscoe and Margetis' *Motion for Sanctions and Contempt* is a copy of that handwritten *Agreement*. It bears a Justice Court, Precinct 3 cause number of 201305280042 and it provides that Briscoe shall pay June 2013 rent and then a prorated rent from July 1, 2013 through July 18, 2013. The *Agreement* concludes "[Briscoe] shall surrender, vacate and quit possession of the property that is the subject of the suit . . . on or before 7/18/13." According to Brandon Nichols, the handwritten agreement was entered into to allow Briscoe and Margetis time to remove their property from the premises.

raising a genuine issue of material fact on the challenged elements of their negligent misrepresentation and promissory estoppel causes of action. Therefore, the trial court did not err in granting summary judgment as to the fraudulent inducement, fraudulent misrepresentation, negligent misrepresentation, and promissory estoppel causes of action.

Finally, as to the tortious interference with prospective business relations cause of action, B & G Investments asserted there was no evidence that (a) there was a business relationship, (b) intentionally interfered with, (c) that caused Briscoe and Margetis to suffer actual damages or loss. In response, Briscoe and Margetis averred that B & G Investments "blocked our only entrance to the location causing us to lose tens of thousands of dollars in sales." This statement is conclusory. It is accompanied by no facts or evidence explaining how the supposed "tens of thousands of dollars" in lost sales was calculated or otherwise derived. Furthermore, even if this unsubstantiated claim were to be accepted as a scintilla of evidence of actual damages, there is no competent summary judgment evidence showing how the alleged tortious interference was a proximate cause of those damages. As a result, we find that Briscoe and Margetis failed to raise more than a scintilla of evidence that any alleged tortious interference with their business by B & G Investments proximately caused them any damages. Accordingly, the trial court did not err in granting summary judgment as to the tortious interference cause of action.

Based on these findings, issue one is sustained as to the breach of contract cause of action and overruled as to the remaining causes of action.

ISSUES TWO, THREE, FOUR, AND FIVE

By four issues, Briscoe and Margetis challenge the trial court's denial of their two motions for continuance and attack the granting of summary judgment in their absence due to Briscoe's hospitalization and Margetis being unavailable while attending another hearing in federal court. They further assert they were denied an opportunity to be heard because the trial court communicated with the federal court and set the hearings on the same date.

MOTION FOR CONTINUANCE

We review a trial court's ruling on a motion for continuance for abuse of discretion. *See McAleer v. McAleer*, 394 S.W.3d 613, 616 (Tex. App.—Houston [1st Dist.] 2012, no pet.) (citing *Villegas v. Carter*, 711 S.W.2d 624, 626 (Tex. 1986)). The trial court has broad discretion to deny or grant a motion for continuance, and an appellate court will not reverse the trial court's ruling absent a clear abuse of discretion. *Villegas*, 711 SW.2d at 626.

Initially, we note that Briscoe and Margetis' *pro se* status does not exempt them from compliance with rules of procedure. *Pena v. McDowell*, 201 S.W.3d 665, 667 (Tex. 2006). Rule 251 of the Texas Rules of Civil Procedure requires, among other alternatives not applicable here, that a motion for continuance be supported by affidavit.

Briscoe and Margetis filed two emergency motions for continuance of the summary judgment hearing on the ground that Margetis would be at a hearing in federal court in Plano, Texas, on the date of the hearing, and as it turned out, Briscoe was hospitalized on that same date. Neither motion was supported by affidavit as required

by Rule 251. Additionally, a motion for continuance based on unavailability due to illness should include a doctor's affidavit. *Hawthorne v. Guenther*, 917 S.W.2d 924, 930 (Tex. App.—Houston [1st Dist.] 1996, writ denied). Both motions for continuance were unsupported by affidavit. There is nothing in the record to support Briscoe and Margetis' assertion that the trial court and federal court conspired to set hearings on the same date. Consequently, the trial court did not abuse its discretion in denying the motions for continuance.

Briscoe and Margetis contend that in their absence, the trial court granted a "default" summary judgment because they were unavailable for the hearing.[6] Rule 166a(c) of the Texas Rules of Civil Procedure does not require an oral hearing, and if one is held, no oral testimony is permitted. *Martin v. Cohen*, 804 S.W.2d 201, 203 (Tex. App.—Houston [14th Dist.] 1991, no writ). Summary judgment is decided on the merits of the motion based on the pleadings, discovery responses, stipulations, and any sworn affidavits. *Id.* The trial court had all the necessary documents before it to rule on B & G Investments' no-evidence motion for summary judgment. Based on these premises, we conclude the trial court did not err in granting summary judgment without Briscoe or Margetis being present. Issues two, three, four, and five are overruled.

ATTORNEY'S FEES

Because we affirm in part and reverse and remand in part, we deem it appropriate to address the trial court's award of attorney's fees. In addition to ordering that all causes of action against B & G Investments be dismissed, the trial court also

[6] A "default" summary judgment occurs when summary judgment is granted without the non-movant having filed an answer or response to the summary judgment motion and the movant's summary judgment proof is insufficient. *City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671, 678 (Tex. 1979).

ordered that Behne, Nichols, and Wortham recover from Briscoe and Margetis $23,821 as reasonable and necessary attorney's fees through the trial court level, with additional sums conditioned on an unsuccessful appeal by Briscoe and Margetis. To do so was improper because a movant is not entitled to a no-evidence summary judgment on a claim or defense on which the movant has the burden of proof at trial. *See* TEX. R. CIV. P. 166a(i) (this is so because a no-evidence summary judgment is appropriate only as to claims or defenses *on which an adverse party would have the burden of proof at trial*); *Flying Diamond-West Madisonville Ltd. P'ship v. GW Petroleum, Inc.,* No. 10-07-00281-CV, 2009 Tex. App. LEXIS 6891, at *12 (Tex. App.—Waco Aug. 26, 2009, no pet.) (mem. op.); *Sanders v. Household Mortg. Servs.*, No. 10-07-00233-CV, 2009 Tex. App. LEXIS 4988, at *2 (Tex. App.—Waco July 1, 2009, no pet.) (mem. op.). That is to say, a no-evidence summary judgment is appropriate to *deny* relief when there is no evidence of one or more essential elements of a cause of action being claimed or to *defeat* a defense when there is no evidence of one or more essential elements of a defense being asserted, but it is not an appropriate vehicle for the rendition of relief upon which the movant has the burden of proof at trial. Because B & G Investments had the burden of proof on their claim for attorney's fees, a no-evidence summary judgment was inappropriate.

CONCLUSION

The trial court's no-evidence summary judgment is reversed and the cause is remanded for further proceedings as to the breach of contract cause of action and all claims for the recovery of attorney's fees; however, it is affirmed as to the fraudulent

misrepresentation, fraudulent inducement, negligent misrepresentation, promissory estoppel, and tortious interference causes of action.

Patrick A. Pirtle
Justice