# In The
# Court of Appeals
# Seventh District of Texas at Amarillo

No. 07-17-00020-CV

MAHMOUD ABDALLA, APPELLANT

V.

FARMERS INSURANCE EXCHANGE, APPELLEE

On Appeal from the 153rd District Court
Tarrant County, Texas
Trial Court No. 153-269720-13, Honorable Susan H. McCoy, Presiding

May 14, 2018

## MEMORANDUM OPINION

Before QUINN, CJ., and CAMPBELL and PARKER, JJ.

Mahmoud Abdalla (Abdalla) appeals from a final summary judgment denying him recovery against Farmers Insurance Exchange. He sued Farmers alleging breach of contract and various extra-contractual claims. The dispute emanated from a loss covered under a policy Abdalla acquired from Farmers. The loss was attributable to water damage. The extent of the damage and insurance proceeds payable was ultimately submitted to appraisers in accordance with policy terms. An umpire appointed by the trial court eventually (1) found the appraisal developed by Farmers's appraiser (the Albright

appraisal) to be the "more sound and well supported appraisal" and (2) designated the actual cash value of the loss at $345,664.21. Farmers tendered the sum, less applicable deductions and prior payments, within seven days of the umpire's decision. Yet, Abdalla believed the umpire was wrong. This inspired him to move the trial court to both vacate the award and appoint a new umpire. The ground he cited to support those avenues of relief was "mistake"; that is, he asserted that the award was "clearly a product of mistake."

Also pending at the time Abdalla filed his motion was that of Farmers seeking summary judgment. Upon considering each, the trial court denied Abdalla's requests and "affirmed" the umpire's award. And, while it also denied aspects of the motion filed by Farmers, it granted that portion attacking Abdalla's cause of action for breached contract. In other words, it declared that Farmers proved as a matter of law that it had not breached the insurance policy. That left the extra-contractual causes of action pending for disposition. In effort to defeat them, Farmers tendered a second motion for summary judgment containing both traditional and no-evidence aspects. That motion was granted, resulting in the execution of a final summary judgment denying Abdalla recovery on all of his claims. This appeal followed.

Abdalla's two appellate issues attack the decisions to deny his motion to vacate the umpire's award and to grant summary judgment favoring the insurer. We affirm. [1]

[1] Because this appeal was transferred from the Second Court of Appeals, we are obligated to apply its precedent when available in the event of a conflict between the precedents of that court and this court. *See* TEX. R. APP. P. 41.3.

*Motion to Vacate*

We first consider argument related to the motion to vacate the award. Abdalla contends that the trial court erred in denying his motion because the award was a product of mistake. We disagree.

Mistake is one of the few grounds upon which an insurance appraisal award may be vacated. *See Garcia v. State Farm Lloyds*, 514 S.W.3d 257, 265 (Tex. App.—San Antonio 2016, pet. denied) (stating that Texas courts have recognized three grounds on which the results of an otherwise binding appraisal may be set aside and they are when the award fails to comply with the policy, was made without authority, or resulted from fraud, accident, or mistake); *Barnes v. W. Alliance Ins. Co*., 844 S.W.2d 264, 267 (Tex. App.—Fort Worth 1992, writ dism'd by agr.) (stating that an award entered by appraisers and an umpire can be disregarded only if it was made without authority or made as the result of fraud, accident, or mistake). Mistake applies when the award fails to speak what the appraisers intended. *Garcia*, 514 S.W.3d at 269 That is, it applies when the complainant establishes that the appraisers were operating under a mistake of fact which resulted in an unintended award. *See Providence Wash. Ins. Co. v. Farmers Elevator Co*., 141 S.W.2d 1024, 1026–27 (Tex. Civ. App.—Amarillo 1940, no writ); *Gulf Ins. Co. v. Pappas*, 73 S.W.2d 145, 146 (Tex. Civ. App.—San Antonio 1934, writ ref'd).

Excluded from the scope of mistake, though, are those situations where one appraiser simply disagrees with an umpire's decision to adopt the estimates of the other appraiser. *See MLCSV10 v. Stateside Enters., Inc.*, 866 F. Supp. 2d 691, 702 (S.D. Tex. 2012) (wherein one appraiser objected to the umpire's adoption of the other appraiser's estimates because the latter allegedly failed to support his estimates). As said in

*Stateside,* "[a]n umpire must often choose between two competing values." *Id.* Indeed, such would only seem logical, for there would seldom be a need for the intervention of a third party if the decision of the two appraisers was always unanimous. In view of this role played by the umpire, his decision to select between competing viewpoints or appraisals "does not mean that the appraisal resulted from accident or mistake." *Id.*

The trial court in *Stateside* was not alone in opining that a mere difference of opinion failed to illustrate a mistake. We said as much in *Providence Washington*. There, reference was made to the difference between what a trial court would have awarded and what the appraiser awarded in effort to illustrate a mistake. We observed that such was simply a matter of opinion, not an instance of mistaken intention. *Providence Wash. Ins. Co.*, 141 S.W.2d at 1026–27.

Also worth mentioning, is the decision in *Garcia.* There, the insured contended that the appraisal award was the result of mistake because it omitted damages from a prior estimate and, therefore, failed to "'provide a correct appraisement of the full amount of loss.'" *Garcia*, 514 S.W.3d at 269. The reviewing court turned to *Stateside* for assistance in gauging the accuracy of Garcia's allegation. Upon doing so, it concluded that evidence of the mere omission of some aspect of damage from the appraisal was not sufficient to create an issue of fact regarding the presence of a mistake, as that term is contemplated within the realm of settling insurance disputes through the appraisal process. *Id.* at 270.

The sum and substance of the mistake urged by Abdalla here likens to those in *Stateside*, *Providence*, and *Garcia.* It involved both a disagreement between appraisers about the extent of damage and the omission from the ultimate award of damages that

Abdalla's appraiser thought should be included. Simply put, the appraisers disagreed on the extent of the loss suffered by Abdalla, and the umpire chose one appraisal over the other. Such evinced a split of opinions which the umpire was called upon to settle. So, in following the lead provided us in *Stateside* and *Providence*, we too conclude that a disagreement like that at bar falls short of illustrating the umpire operated under a mistake of fact resulting in an unintended award. That means, then, the trial court did not err in denying Abdalla's motion to vacate.

*Summary Judgment*

Next, we address the contention that the trial court erred in granting summary judgment against Abdalla on his multiple causes of action. The first cause of action we address is that for breached contract. Regarding the claims, Abdalla simply argued that: "As demonstrated above, the Trial Court erred in denying Appellant's motion to vacate. Accordingly, the Trial Court's granting of Appellee's summary judgment on Appellant's contractual claims is also in err [sic]." In other words, because the trial court should have vacated the award, it should not have granted summary judgment upon the claim of breached contract. Yet, we found no error in the trial court's decision regarding the former. So, it follows that Abdalla's contention regarding summary judgment upon the breached contract allegation lacks basis.

The next category of claims we address are those arising under the Texas Deceptive Trade Practices Act. *See* TEX. BUS. & COM. CODE ANN. §§ 17.01–17.926 (West 2011 & Supp. 2017). Abdalla averred in his live pleading that Farmers violated that Act in numerous ways. Farmers attempted to defeat recovery upon those claims on several grounds via its second motion for summary judgment. Through one such ground, it

argued that Abdalla presented "no evidence of . . . economic damages or mental anguish." The trial court did not specify if this ground was determinative or not. Instead, it simply granted the motion for summary judgment without explanation.

Given the general nature of the summary judgment entered by the trial court, Abdalla was obligated to illustrate on appeal that none of the grounds within Farmers's second motion supported the trial court's ruling. *See State Farm Fire & Cas. Co. v. S.S.*, 858 S.W.2d 374, 381 (Tex. 1993) (stating that when a litigant presents multiple grounds for summary judgment and the summary judgment does not specify the ground upon which the trial court rendered its judgment, the appellant must negate all grounds on appeal); *Raines v. Hale*, No. 07-17-00288-CV, 2018 Tex. App. LEXIS 2232, at *4 (Tex. App.—Amarillo Mar. 28, 2018, no pet.) (mem. op.) (stating the same). He did not, though. That is, he made no effort on appeal to discuss the economic damages or damages for mental anguish he purportedly suffered. Nor did he cite us to any evidence establishing a fact issue on the existence of such damages. Since we have no responsibility to *sua sponte* delve into the record to find such evidence, *see B.T. Healthcare, Inc. v. Honeycutt*, 196 S.W.3d 296, 300 (Tex. App.—Amarillo 2006, no pet.), Abdalla failed to prove that the trial court would have erred by accepting the argument that summary judgment was appropriate due to the absence of evidence regarding the existence of economic damages or those attributable to mental anguish.

The next causes of action we address are those asserted by Abdalla as arising under the various provisions of the Texas Insurance Code. With regard to them, Farmers also contended in its second motion that Abdalla had no evidence that he suffered damage due to those purported violations. Given the general nature of the trial court's

summary judgment, Abdalla again was obligated to illustrate to us why none of the grounds mentioned in Farmers's second motion permitted summary judgment, but he did not do that. He said nothing in his appellate brief of any actual damages purportedly caused by Farmers's conduct. *See USAA Tex. Lloyds Co. v. Menchaca*, __S.W.3d__, __, 2018 Tex. LEXIS 313, at *9 (Tex. Apr. 13, 2018) (noting that an insured may recover actual damages caused by an insurer's violation of certain Insurance Code provisions and defining such damages under the Code as damages recoverable at common law). Nor did he cite us to any evidence of record creating a material issue of fact on the subject. Rather, he merely argued that provisions of the Code may entitle a successful insured to recover additional damages, three times the amount of actual damages, and "statutory damages of 18% per year on the amount of the claim." What his additional, actual, or statutory damages were, though, went unmentioned. So, we also must conclude that Abdalla failed to carry his appellate burden of establishing that the trial court erred in denying him recovery upon his claims implicating the Insurance Code.

The only cause of action left for us to address is that involving the purported breach of Farmers's duty of good faith and fair dealing. He alleged that Farmers's conduct "breached the common law duty of good faith and fair dealing by denying [his] claims or inadequately adjusting and making an offer on Plaintiff's claims without any reasonable basis, and by failing to conduct a reasonable investigation to determine whether there was a reasonable basis for this denial." Allegedly, Farmers also breach the duty by "unreasonably delaying payment of [his] entire claims and by failing to settle [his] claims." Of the various summary judgment grounds proffered by Farmers addressing these

contentions, one consisted of the proposition that Abdalla "has offered no evidence of an independent injury to support his extra contractual causes of action."

The need of an independent injury to support extra-contractual causes of action was reaffirmed in *Menchaca*. After discussing its own precedent, the Supreme Court first reiterated that "an insured can recover actual damages caused by the insurer's bad-faith conduct if the damages 'are separate from and . . . differ from benefits under the contract.'" *Id.* at *37 (quoting *Twin City Fire Ins. Co. v. Davis*, 904 S.W.2d 663, 666 (Tex. 1995)). Then, it observed that damages were recoverable "only if [they] are truly independent of the insured's right to receive policy benefits." *Id.* at *37–38.[2]

As previously mentioned, Abdalla cited us to no evidence of him suffering damages, much less to evidence of an injury causing damages independent of the benefits under the Farmers insurance policy. And, because we need not ourselves parse through the appellate record in search of such evidence, he failed to illustrate that the trial court erred in entering summary judgment upon the allegation that Farmers breached its duty to act in good faith and deal fairly.

In sum, we overrule the issues raised by Abdalla and affirm the final summary judgment of the trial court.

Per Curiam

[2] The same is also true of claims founded upon an insurer's statutory violation; such a violation "does not permit the insured to recover *any* damages beyond policy benefits unless the violation causes an injury that is independent of the loss of the benefits." *Menchaca*, 2018 Tex. LEXIS 313, at *38–39.