IN THE
TENTH COURT OF APPEALS

No. 10-15-00411-CV

GONZALO SALDANA,

Appellant

v.

ESTELA SALDANA,

Appellee

From the 13th District Court
Navarro County, Texas
Trial Court No. D15-23988-CV

MEMORANDUM OPINION

In two issues, appellant, Gonzalo Saldana, challenges the trial court's granting of summary judgment in favor of appellee, Estela Saldana. Because we conclude that more than an adequate time for discovery passed, and because the record is devoid of evidence of extrinsic fraud, we affirm.

I. BACKGROUND

In 1972, Gonzalo and Estela were married and remained so until Gonzalo filed for divorce in December 2010. Thereafter, the trial court entered temporary orders, which

included an agreement that Estela would temporarily receive the exclusive use and possession of the family business known as Mexia Nursery and Tree Farm, Inc. However, after the trial court entered its temporary orders, Gonzalo began having concerns about how Estela was running the business. As a result, Gonzalo spent nearly every day parked a quarter of a mile from the business to see what Estela was doing. Apparently, Gonzalo also tried to approach the property on several occasions, which resulted in Estela telling him to leave and threatening to call the police to have him removed.

Later, the temporary orders were amended to reflect a new agreement between the parties. With respect to the business, the trial court ordered the following:

> IT IS ORDERED that ESTELA SALDANA is awarded the temporary exclusive use, possession of and operation of the business known as Mexia Nursery and Tree Farm, Inc. together with all business and personal property and real property.
>
> . . . .
>
> IT IS FURTHER ORDERED that GONZALO SALDANA shall not enter the business property effective January 6, 2011.

On February 21, 2011, Gonzalo signed a sworn inventory and appraisement, wherein he valued the business at well over two million dollars. Shortly thereafter, Estela filed a sworn inventory indicating that the current market value of the business was "to be supplemented." As indicated in a letter from Estela's attorney dated February 28, 2011, Estela had appraisers valuing the business during this time.

At 4:25 p.m. on April 14, 2011, Estela's attorney received a copy of an appraisal of the business. The appraiser valued the inventory of the business to be $1,521,765, but

noted that a willing buyer would likely purchase the inventory at 30-40% of its market value. As such, the appraiser valued the business at approximately $350,000.

The following day Gonzalo and Estela signed a mediated settlement agreement in their divorce case. Believing that the business was worth more than $2.2 million, Gonzalo voluntarily agreed to pay Estela "a $2.6 million settlement plus additional properties in exchange for Mexia Nursery."[1]

On October 12, 2011, the trial court signed a final divorce decree that incorporated the mediated settlement agreement. Specifically, the divorce decree awarded the business to Gonzalo on the condition that he pay $2.6 million to Estela in two installments. Additionally, a vendor's lien was created against certain real property to secure the remaining balance on the agreed payment.[2]

Subsequently, Gonzalo appealed, which resulted in the First Court of Appeals affirming the final divorce decree. *See, e.g., Saldana v. Saldana*, No. 01-12-00092-CV, 2013 Tex. App. LEXIS 5780 (Tex. App.—Houston [1st Dist.] May 9, 2013, pet. denied) (mem. op.). A couple of months later, Gonzalo filed for Chapter 11 bankruptcy. During the bankruptcy proceeding, Gonzalo took Estela's deposition, during which she stated that she had not seen the appraisal for the business prior to mediation.

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[1] In an affidavit executed later, Gonzalo noted:

> In my inventory . . . , I stated the company was worth $2.2 million based on my knowledge of operating and managing the company for the past 30 years. At this time, I had derived this value not knowing the extent of Estela's mismanagement of the business that would cause irreparable damage to the value of Mexia Nursery.

[2] As of April 18, 2011, Gonzalo had already paid Estela $100,000; therefore, the vendor's lien secured the remaining $2.5 million agreed payment.

However, based on Estela's answers during the deposition, the bankruptcy court stayed the proceeding so the trial court could determine whether Gonzalo had any legitimate fraud-based claims against Estela. On March 18, 2015, Gonzalo filed an original petition for bill of review in the trial court, asserting that Estela: (1) prevented him from asserting his right to a greater share of the marital estate; and (2) committed extrinsic fraud when she misrepresented the value of the business. Estela responded by filing an answer generally denying Gonzalo's allegations and asserting various affirmative defenses, as well as arguing that Gonzalo's "fault or negligence led to the judgment complained of. Plaintiff had an equal ability to assess and determine the value of the nursery business and was represented by legal counsel."

The trial court held a hearing to determine whether Gonzalo met the preliminary requirements for a bill of review. At the conclusion of the hearing, the trial court determined that Gonzalo had presented prima facie proof of a meritorious claim and could move forward with his bill of review.

On June 29, 2015, Gonzalo served discovery requests on Estela, seeking documents that were prepared and reviewed for the divorce mediation. Gonzalo and Estela agreed to the due dates for discovery. The trial court signed an order incorporating these agreed dates, which included a final due date of August 1, 2015, for all discovery.

Estela then filed traditional and no-evidence motions for summary judgment, alleging that Gonzalo was not entitled to a bill of review because he failed to establish extrinsic fraud. Estela also moved for an order to protect the documents from the divorce mediation as confidential and shielded from disclosure under the mediation privilege.

On August 3, 2015, Gonzalo filed a response to Estela's motions for summary judgment and moved to continue the hearing on Estela's summary-judgment motions. On the same day, Gonzalo and Estela's adult daughter executed an affidavit stating that prior to mediation, Estela reviewed the appraisal that valued the business at approximately $350,000. Estela responded by filing an amended answer, which added additional affirmative defenses.

After a hearing, the trial court signed an order on November 12, 2015, granting Estela's motions for summary judgment and dismissing Gonzalo's bill of review. It is from this order that Gonzalo now appeals.

II. STANDARD OF REVIEW

The function of a summary judgment is to eliminate patently unmeritorious claims and untenable defenses, not to deprive litigants of the right to a trial by jury. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004). We review the grant or denial of a summary judgment de novo. *See Tex. Mun. Power Agency v. Pub. Util. Comm'n of Tex.*, 253 S.W.3d 184, 192, 199 (Tex. 2007); *see also Provident Life & Accident Ins. Co.*, 128 S.W.3d 211, 215 (Tex. 2003). If the trial court's order granting summary judgment does not specify the ground or grounds relied upon for the ruling, we will affirm the judgment on appeal if any of the theories advanced by the movant are meritorious. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001).

Here, Estela filed traditional and no-evidence motions for summary judgment. When a party moves for both a traditional and a no-evidence summary judgment on the same ground, we first review the trial court's judgment under the standards of rule

166a(i) pertaining to no-evidence motions for summary judgment. *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004); *All Am. Tel., Inc. v. USLD Commc'ns, Inc.*, 291 S.W.3d 518, 526 (Tex. App—Fort Worth 2009, pet. denied); *see* TEX. R. CIV. P. 166a(i). If the non-movant failed to produce more than a scintilla of evidence under that burden, then there is no need to analyze whether the movant's summary-judgment proof satisfied the rule 166a(c) burden for traditional motions for summary judgment. *See Ridgway*, 135 S.W.3d at 600; *see also All Am. Tel., Inc.*, 291 S.W.3d at 526.

We review a no-evidence motion for summary judgment under the same legal sufficiency standard used to review a directed verdict. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 750-51 (Tex. 2003). After an adequate time for discovery has passed, a party without the burden of proof at trial may move for summary judgment on the ground that the nonmoving party lacks supporting evidence for one or more essential elements of its claim. *See* TEX. R. CIV. P. 166a(i); *Espalin v. Children's Med. Ctr. of Dallas*, 27 S.W.3d 675, 682-83 (Tex. App.—Dallas 2000, no pet.). Once a no-evidence motion for summary judgment has been filed, the burden shifts to the nonmoving party to present evidence raising an issue of material fact as to the elements specified in the motion. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 581-82 (Tex. 2006). The trial court should not grant a no-evidence motion for summary judgment if the nonmovant brings forth more than a scintilla of probative evidence to raise a genuine issue of material fact on the challenged element. *Smith v. O'Donnell*, 288 S.W.3d 417, 424 (Tex. 2009). More than a scintilla of evidence exists if the evidence would enable reasonable and fair-minded jurors to differ in their conclusions. *Hamilton v. Wilson*, 249 S.W.3d 425, 426 (Tex. 2008) (per curiam); *see*

Kindred v. Con/Chem, Inc., 650 S.W.2d 61, 63 (Tex. 1983) ("When the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence." (internal citations omitted)). We review the evidence presented by the motion and response in the light most favorable to the party against whom the summary judgment was rendered, crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *Tamez*, 206 S.W.3d at 581-82; *King Ranch, Inc.*, 118 S.W.3d at 750.

III. ANALYSIS

In his first issue, Gonzalo contends that the trial court erred in granting Estela's no-evidence motion for summary judgment because an adequate time for discovery had not yet passed, and because more than a scintilla of evidence exists of extrinsic fraud.

A. Adequate Time for Discovery

Texas Rule of Civil Procedure 166a(i) provides that, after an adequate time for discovery, a party may move for no-evidence summary judgment. *See* TEX. R. CIV. P. 166a(i); *see also Specialty Retailers, Inc. v. Fuqua*, 29 S.W.3d 140, 145 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); *Espalin*, 27 S.W.3d at 682-83. When a party contends that he has not had an adequate opportunity for discovery before a summary-judgment hearing, he must file either an affidavit explaining the need for further discovery or a verified motion for continuance. *Tenneco Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 647 (Tex. 1996).

However, rule 166a(i) does not require that discovery be completed before a party may move for no-evidence summary judgment; instead, such a motion may be granted after "adequate time" for discovery has passed. *See Madison v. Williamson*, 241 S.W.3d 145, 155 (Tex. App.—Houston [1st Dist.] 2007, pet. denied); *see also In re Mohawk Rubber Co.*, 982 S.W.2d 494, 498 (Tex. App.—Texarkana 1998, orig. proceeding). Whether a nonmovant has had adequate time for discovery under rule 166a(i) is case specific. *Team Int'l, Inc. v. MG Secs. Corp.*, 95 S.W.3d 336, 339 (Tex. App.—Dallas 2002, no pet.); *McClure v. Attebury*, 20 S.W.3d 722, 729 (Tex. App.—Amarillo 1999, no pet.). In determining whether an adequate time for discovery has elapsed, we consider: (1) the nature of the cause of action; (2) the nature of the evidence necessary to controvert the no-evidence motion; (3) the length of time the case has been active in the trial court; (4) the amount of time the no-evidence motion has been on file; (5) whether the movant has requested stricter time deadlines for discovery; (6) the amount of discovery that has already taken place; and (7) whether the discovery deadlines that are in place are specific or vague. *Madison*, 241 S.W.3d at 155; *Fuqua*, 29 S.W.3d at 145; *see Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 161 (Tex. 2004) (considering the following non-exclusive factors when deciding whether the trial court abused its discretion in denying a motion for continuance seeking additional time to conduct discovery: length of time the case has been on file; materiality and purpose of discovery sought; and whether the party seeking the continuance exercised due diligence to obtain the discovery sought).

The record contains an agreed scheduling order, which provided the following, in relevant part:

> Having considered the pleadings on file and the agreement of counsel to the entry of this order, the Court hereby ORDERS that the above referenced matter be governed by the following litigation deadlines and order. IT IS ORDERED that:
>
> 1. The jury trial of this matter is set for August 17, 2015.
>
> 2. The parties shall serve all written discovery requests by June 30, 2015.
>
> 3. The parties shall provide final amended and/or supplemental discovery responses and business records affidavits by August 1, 2015.
>
> 4. The parties shall complete all depositions by July 17, 2015.

Despite the agreed scheduling order, Gonzalo asserts that the fact that Estela requested a protective order after she filed her no-evidence motion for summary judgment shows that discovery was not yet complete. In support of this contention, Gonzalo relies heavily on the *TemPay* decision from the Austin Court of Appeals. *See TemPay, Inc. v. TNT Concrete & Constr., Inc.*, 37 S.W.3d 517, 522-23 (Tex. App.—Austin 2001, pet. denied). We are not persuaded by Gonzalo's reliance on this case.

In *TemPay*, a temporary employment agency sued an employer to recover on an unpaid account. *Id.* at 519. The employment agency asked to depose a corporate representative of the employer, but the employer failed to comply. *Id.* at 522. When the employment agency moved to compel the deposition, the employer moved for summary judgment and sought a protective order. *Id.* The employment agency requested a continuance of the summary-judgment hearing to complete discovery and made numerous other attempts to depose a corporate representative of the employer. *Id.* The

trial court proceeded with the hearing and granted the employer's summary-judgment motion. *Id.*

In concluding that the employment agency had not been provided with an adequate opportunity to conduct discovery, the *TemPay* Court noted that the employer provided no reason why the employee "with whom [the employment agency] actually did business" could not have been made available upon the first request for deposition. *Id.* at 523. The *TemPay* Court also stated:

> [T]hat the 'offer' of a corporate representative came only after [the employment agency] has sought an order of the district court compelling the production of such a witness and, within a few days, [the employer] moved for a protective order to prevent [the employment agency's] requested deposition altogether.
>
> Under these particular circumstances, [the employment agency] has not been provided an adequate opportunity to conduct discovery.

Id. Our reading of *TemPay* reveals that the Austin Court of Appeals did not conclude that the employment agency had not been afforded an adequate opportunity to conduct discovery merely because a protective order had been requested. *See id.* at 522-23.

In any event, the record reflects that Gonzalo filed his original petition for bill of review on March 18, 2015, and that the parties agreed for all discovery to end by August 1, 2015—almost five months after Gonzalo filed his original petition. Moreover, the record shows that Estela filed her summary-judgment motions on July 15, 2015; however, the trial court did not sign the order granting summary judgment in favor of Estela until November 12, 2015—almost four months after Estela filed her summary-judgment motions and almost eight months from the date of Gonzalo's filing of his original petition.

Additionally, in arguing that he was not afforded adequate time for discovery, Gonzalo failed to address the relevant factors outlined in *Madison*, *Fuqua*, and *Two Thirty Nine Joint Venture*. *See Two Thirty Nine Joint Venture*, 145 S.W.3d at 161; *see also Madison*, 241 S.W.3d at 155; *Fuqua*, 29 S.W.3d at 145. Rather, he simply makes generalized statements that he needed more information "to further buttress the extrinsic-fraud and no-fault elements of his bill of review." This is not enough to show that there had not been an adequate time for discovery. *See Madison*, 241 S.W.3d at 155 (considering the fact that appellant "made no effort to specify the additional evidence she needed to respond to the motion, or the reason she could not obtain it during the discovery period" when determining whether appellant had an adequate time for discovery); *Robertson v. Sw. Bell Yellow Pages, Inc.*, 190 S.W.3d 899, 903 (Tex. App.—Dallas 2006, no pet.) ("[A]ppellant has made no effort to discuss any of the relevant factors. She does not state how much time she had for discovery, what discovery was completed, what further discovery was needed or otherwise argue why the time was not adequate. We will not make appellant's arguments for her.").

Therefore, based on the foregoing, we conclude that Gonzalo had adequate time for discovery before the summary-judgment hearing. *See* TEX. R. CIV. P. 166a(i); *Madison*, 241 S.W.3d at 155; *Fuqua*, 29 S.W.3d at 145; *Two Thirty Nine Joint Venture*, 145 S.W.3d at 161.

B. Extrinsic Fraud

Next, Gonzalo argues that a genuine issue of material fact exists that he was prevented from asserting his meritorious defense because of Estela's extrinsic fraud, which was unmixed with any fault or negligence of his own.

1. Applicable Law

As noted earlier, Gonzalo filed an original petition for bill of review in this case. A bill of review is an equitable proceeding brought by a party seeking to set aside a prior judgment that is no longer subject to challenge by a motion for new trial or appeal. *Caldwell v. Barnes*, 154 S.W.3d 93, 96 (Tex. 2004) (per curiam). A bill-of-review plaintiff must ordinarily prove (1) a meritorious claim or defense with regard to the underlying cause of action, (2) which the bill-of-review plaintiff was prevented from making by the fraud, accident, or wrongful act of the opposing party, or by official mistake, and (3) unmixed with any fault or negligence on the bill-of-review plaintiff's own part. *Id.*

Only extrinsic fraud will support the fraud element required for a bill of review to be successful. *See Tice v. City of Pasadena*, 767 S.W.2d 700, 702 (Tex. 1989). Extrinsic fraud is wrongful conduct practiced outside of the adversary trial that affects the manner in which the judgment was procured and prevents a litigant from having a fair opportunity to assert his rights at trial. *See Browning v. Prostok*, 165 S.W.3d 336, 347 (Tex. 2005); *Tice*, 767 S.W.2d at 702; *see also Nelson v. Chaney*, 193 S.W.3d 161, 165 (Tex. App.—Houston [1st Dist.] 2006, no pet.). Extrinsic fraud is considered to be collateral in nature because it involves something that was not actually or potentially in issue in the trial. *Montgomery*

v. Kennedy, 669 S.W.2d 309, 312 (Tex. 1984). Intrinsic fraud, on the other hand, "relates to the merits of the issues which were presented and presumably were or should have been settled in the former action." *Tice*, 767 S.W.2d at 702. Intrinsic fraud includes fraudulent instruments, perjured testimony, or any other matter presented to and considered by the trial court in rendering judgment. *Browning*, 165 S.W.3d at 348 (citing *Tice*, 767 S.W.2d at 702).

2. Discussion

On appeal, Estela counters Gonzalo's extrinsic-fraud assertion by arguing that any potential misrepresentation about the value of the business constitutes intrinsic fraud, which is insufficient to support a petition for bill of review. We agree.

In *Rathmell v. Morrison*, the Fourteenth Court of Appeals addressed a settlement agreement between a divorcing husband and wife regarding community-owned shares of stock in two corporations. 732 S.W.2d 6, 9 (Tex. App.—Houston [14th Dist.] 1987, no writ). A few years after the divorce, the husband sold his shares for substantially more than the value assessed at the time of the divorce. *Id.* The wife filed a bill of review, alleging that the husband had misrepresented the value of the stock, threatened to destroy the companies if she had the corporations appraised, failed to disclose negotiations for the sale of the corporations during the divorce, and threatened her into signing the settlement agreement. *Id.* at 9, 14. The *Rathmell* Court noted that a bill of review cannot be granted "merely because it may appear in some particular case that an injustice has been done." *Id.* at 13 (internal citation omitted). The Court further noted that: "As a matter of law, misrepresentation with respect to the value of known

community assets does not alone constitute extrinsic fraud." *Id.* at 13-14 (Tex. App.—Houston [14th Dist.] 1987, no writ) (citing *Bankston v. Bankston*, 251 S.W.2d 768, 772 (Tex. Civ. App.—Dallas 1952, no writ)). And though the *Rathmell* Court ultimately concluded that the husband's actions constituted extrinsic fraud, the extrinsic-fraud finding was premised on the husband's threats that prevented the wife from seeking her own independent appraisal and fully asserting her claims. *Id.* at 14 ("John did not have a right to prevent Mary Ann from having the companies appraised; and threatening to destroy the value of the companies if she insisted on an appraisal was not something he had a legal right to do. On the contrary, it was a wrongful act that, coupled with misrepresentation of the value of the companies, amounts to more than intrinsic fraud.").

In the instant case, Gonzalo complained that Estela should have informed him about the $350,000 appraisal prior to signing the mediated settlement agreement and that the non-disclosure resulted in a disproportionate settlement in Estela's favor. A review of the record does not show that Estela made any of the threats made in *Rathmell*. With regard to her disclosure of the value of the business, she merely indicated that the value would be supplemented later, though no supplementation was made between 4:25 p.m. on April 14, 2015 and April 15, 2015, when mediation began. Nevertheless, nothing in the record indicates that Gonzalo, a sophisticated businessman and the operator of the business for many years, could not have obtained his own appraisal of the business. In fact, the record shows that the parties relied on Gonzalo's own personal appraisal of the value of the business.

Based on the record before us, we cannot say that the actions of Estela rose to the level of that in *Rathmell*. At best, Estela's non-disclosure of the $350,000 appraisal amounts to a misrepresentation that is within the realm of intrinsic fraud that does not support fraud in a bill of review. *See Browning*, 165 S.W.3d at 348; *Tice*, 767 S.W.2d at 702; *Rathmell*, 732 S.W.2d at 13-14; *see also In re K.P.*, No. 10-13-00108-CV, 2014 Tex. App. LEXIS 1922, at *7 (Tex. App.—Waco Feb. 20, 2014, no pet.) (mem. op.) ("Fraud may be committed through active misrepresentation or passive silence and is an act, omission, or concealment in breach of a legal duty, trust, or confidence justly imposed, when the breach causes injury to another or the taking of an undue and unconscionable advantage. A misrepresentation is a falsehood or untruth with the intent to deceive." (internal citations omitted)). This is especially true considering the value of the business was central to the division of the community property in the underlying divorce action and should have been settled then. *See Tice*, 767 S.W.2d at 702.

Moreover, we note that the complaints made by Gonzalo are remarkably similar to those made in *Bankston*. *See* 251 S.W.2d at 772. In *Bankston*, the former wife sought to set aside the property settlement agreement provisions of a divorce decree, arguing that the former husband misrepresented the market value of certain properties to induce her to make the property settlement agreement. *Id.* The former wife complained that as a result of the former husband's misrepresentation regarding the market value of the properties, she did not receive a fair settlement. *Id.* The trial court granted the former

husband's motion for summary judgment, and the court of civil appeals affirmed, on the basis that the allegations of the former wife, if true, only constituted intrinsic fraud. *Id.*[3]

Therefore, based on our review, we cannot say that the record contains more than a scintilla of evidence demonstrating Estela's actions amounted to extrinsic fraud. *See Browning*, 165 S.W.3d at 347; *Tice*, 767 S.W.2d at 702; *Montgomery*, 669 S.W.2d at 312; *Nelson*, 193 S.W.3d at 165; *see also Hamilton*, 249 S.W.3d at 426; *Kindred*, 650 S.W.2d at 63. If anything, her actions, at best, constitute intrinsic fraud that do not support Gonzalo's bill of review. *See Browning*, 165 S.W.3d at 348; *see also Tice*, 767 S.W.2d at 702. Because the record indicates that more than an adequate time for discovery passed, and because the record is devoid of evidence creating an issue of material fact regarding extrinsic fraud on the part of Estela, we conclude that the trial court did not err in granting Estela's no-evidence motion for summary judgment. *See Tamez*, 206 S.W.3d at 581-82; *King Ranch, Inc.*, 118 S.W.3d at 750-51. We overrule Gonzalo's first issue on appeal.[4]

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[3] More specifically, the Dallas Court of Civil Appeals stated:

> The fraud at most relates to untruths which misled both plaintiff and counsel into acquiescence and approval of an unjust division of property. If misrepresentations were made and appellant relied thereon, they bore either actually or potentially on the matters at issue in the former trial and thus tantamount to no more than intrinsic fraud. The rule supported by the overwhelming weight of authority is that fraud as a ground for vacating a judgment must be what is known as extrinsic fraud, that is fraud in the means whereby the judgment was procured, and not fraud in the cause of action or matter put in issue and presented for adjudication.

Bankston v. Bankston, 251 S.W.2d 768, 772 (Tex. Civ. App.—Dallas 1952, no writ).

[4] Because we have overruled Gonzalo's first issue on appeal, we need not address his second issue. *See* TEX. R. APP. P. 47.1.

IV. CONCLUSION

We affirm the judgment of the trial court.

AL SCOGGINS
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
Affirmed
Opinion delivered and filed March 24, 2016
[CV06]