

AFFIRMED; Opinion Filed November 2, 2016.



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-15-01200-CV

**GDL MASONRY SUPPLY, INC., Appellant
V.
JOSE LOPEZ AND RAPID MASONRY SUPPLY, INC., Appellees**

**On Appeal from the 192nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-14-03902**

MEMORANDUM OPINION

Before Justices Lang, Myers, and Evans
Opinion by Justice Evans

GDL Masonry Supply Inc. appeals from a summary judgment in favor of Jose Lopez and Rapid Masonry Supply, Inc. (collectively Rapid) that declared GDL materially breached the “Compromise Settlement Agreement” between the parties such that Rapid was excused from further obligation under the agreement. In four issues, GDL asserts the trial court erred in (1) finding GDL materially breached the settlement agreement, (2) concluding the confidentiality provision¹ was a condition precedent to Rapid’s obligation to make payments due under the agreement, (3) determining rescission was the only appropriate remedy, and (4) granting

¹ Although GDL refers to “confidentiality and non-disparagement clauses,” both clauses are included in the same paragraph of the agreement. For ease of reference, we refer to the confidentiality provision generally rather than the individual clauses under that provision as any distinction between the clauses is not necessary for our resolution of the issues presented in this appeal.

summary judgment on Rapid's business disparagement claim. We affirm the trial court's judgment for the reasons that follow.

BACKGROUND

In October 2013, GDL and Rapid signed a "Compromise Settlement Agreement" settling various claims they asserted against one another after GDL brought a lawsuit against Rapid. Among other things, the agreement provided that all claims filed or that could be filed in the lawsuit would be resolved and that Lopez would pay GDL \$60,000 in \$10,000 installments. The agreement also contained a confidentiality provision that provided as follows:

8. Confidentiality: The parties to this Agreement and their representatives shall, upon execution of this Agreement, not disclose, disseminate, publicize, or cause or permit to be disclosed, disseminated or publicized, any of the terms of this Agreement, including any of the events or disputes giving rise to this Agreement and the lawsuit identified herein, to any person, corporation, association, governmental agency, and/or other entity. An exception shall also exist to the extent necessary (1) to report income to appropriate taxing authorities, or (2) to respond to an order or subpoena of a court of governmental agency of competent jurisdiction, provided however, that notice of receipt of such order or subpoena shall be immediately communicated to the other parties telephonically and in writing, so that the other parties shall have an opportunity to intervene and assert what rights it has to nondisclosure prior to the other parties disclosing information in response to such order or subpoena. The parties further agree not to make any statements, written or verbal, or cause or encourage others to make any statements, written or verbal, that defame, disparage or in any way criticize the personal or business reputation, practices, or conduct of any of the Parties, or their employees, directors, and officers. The parties acknowledge and agree that this prohibition extends to statements, written or verbal, made to anyone, including but not limited to, the news media, investors, potential investors, any board of directors or advisory board or directors, industry analysts, competitors, strategic partners, vendors, employees (past and present), and clients. The parties of this Agreement understand and agree that this Paragraph is a material provision of this Agreement and that any breach of the terms and conditions of this Paragraph shall be a material breach of this Agreement, and that each party would be irreparably harmed by violation of this provision[.]

In April 2014, Rapid filed a lawsuit against GDL alleging GDL breached the confidentiality provision of the agreement. Among other things, Rapid sought a judgment declaring it was relieved from further payment obligations under the agreement and requested attorney's fees.

GDL filed an answer and counterclaim to the lawsuit. Rapid then filed a motion for partial summary judgment seeking a declaratory judgment that its continued performance under the agreement be excused because the uncontroverted evidence established GDL materially breached the agreement by disclosing the terms of the settlement and identifying events and disputes giving rise to the agreement to third parties, and defaming, disparaging and criticizing the personal and business reputation, practices and conduct of Rapid to third parties.

GDL filed a response to the motion, but did not attach or submit any summary judgment evidence in support of its response. GDL also filed a cross-motion for summary judgment seeking to enforce the agreement.² The trial court denied GDL's motion and granted Rapid's motion, declaring that GDL's breach of the agreement excused Rapid from any further performance under the agreement.³ After a bench trial on the remaining attorney's fees issue, Rapid was awarded a final judgment of \$15,400 in attorney's fees, plus contingent appellate attorney's fees. GDL filed this appeal.

ANALYSIS

In its first and second issues, GDL complains the trial court erred in concluding it materially breached the contract and the confidentiality provision was a "condition precedent to [Rapid's] obligation to pay." We review a trial court's summary judgment de novo. *See Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 508 (Tex. 2010). The party moving for a traditional summary judgment has the burden of establishing there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *See* TEX. R. CIV. P. 166a(c). In conducting our summary judgment review, we consider all the evidence in the light most

² Additionally, GDL filed a separate motion to enforce the settlement agreement.

³ The trial court order also denied GDL's motion to enforce settlement agreement.

favorable to the non-movant, indulging all reasonable inferences in its favor. *See Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985).

“It is a fundamental principle of contract law that when one party to a contract commits a material breach of that contract, the other party is discharged or excused from further performance. *Mustang Pipeline Co., Inc. v. Driver Pipeline Co., Inc.*, 134 S.W.3d 195, 196 (Tex. 2004) (per curiam) (citing *Hernandez v. Gulf Group Lloyds*, 875 S.W.2d 691, 692 (Tex. 1994)). Consequently, if the summary judgment evidence conclusively establishes that GDL materially breached the agreement, the trial court did not err in declaring that Rapid was excused from further performance under the agreement. *See id.* In support of its motion, Rapid submitted the following evidence: (1) the affidavit of Jose Lopez with attached agreement containing the confidentiality clause, and (2) affidavit of George Lopez. Rapid also included its first amended petition filed on November 10, 2014.

In the agreement, the parties specifically agree that the confidentiality paragraph “is a material provision of this Agreement and that any breach of the terms and conditions of [the paragraph] shall be a material breach of this Agreement, and that each party would be irreparably harmed by violation of this provision[.]” In his affidavit, George Lopez states in relevant part that on April 1, 2014, Jaime Huerta, owner of GDL told him that Rapid and Jose Lopez had stolen materials and checks from GDL. Huerta also told him that Jose had cashed the checks down the street and that is why he sued Jose. Huerta further stated that he won the lawsuit, that Jose owed him money because of the lawsuit, and that Jose had not paid him yet. George averred that same day he went to Rapid and told Jose what Huerta had told him.

Jose Lopez confirmed in his affidavit that on April 1, 2014, George Lopez came to Rapid and informed him about what Huerta had told George earlier that day. Jose indicated that Huerta’s statements constituted violations and material breaches of the settlement agreement and

also defamed, disparaged, and criticized his personal and business reputation, as well as the reputation of Rapid.

In GDL's response to Rapid's motion, it did not dispute that Huerta had made the statements recounted in the affidavits. GDL argued only that the confidentiality clause was not material despite the plain language of the agreement to the contrary, and that, even assuming a material breach, rescission was not an appropriate remedy. As noted above, the response did not contain any controverting evidence.⁴ In support of the two-page motion, GDL cited a case for the proposition that a party may not unilaterally repudiate a settlement agreement and argued only that Rapid's current lawsuit was an impermissible collateral attack on the final judgment.

The summary judgment evidence established that the confidentiality clause was a material term of the parties' agreement and that GDL had violated the clause. GDL presented no evidence that the parties did not intend violation of the confidentiality clause to be a material breach nor did GDL provide any evidence controverting Rapid's evidence that GDL had violated the confidentiality provision. In light of the undisputed evidence of GDL's material breach, Rapid's continued performance under the agreement was excused. *See id.* Based on the evidence before us, we conclude Rapid conclusively established its entitlement to summary judgment and the trial court did not err in granting Rapid the relief it requested.

In reaching our conclusion, we necessarily reject GDL's contention that the confidentiality clause is not a material provision of the agreement despite the agreement's express language to the contrary. GDL provides no legal support for its position that we should overlook the intent of the parties as expressed in the plain language of the agreement itself to conclude that the materiality of the confidentiality clause was a question of fact. Citing *Deep*

⁴ GDL's cross-motion for summary judgment attached only the settlement agreement and the agreed take-nothing final judgment in the underlying lawsuit.

Nines, Inc. v. McAfee, Inc., 246 S.W.3d 842 (Tex. App.—Dallas 2008, no pet.), GDL contends we should not decide cases on the inclusion or exclusion of “magic words.” Its reliance on *Deep Nines*, however, is misplaced. In that case, Deep Nines argued that because the settlement agreement did not contain an express provision stating that “time is of the essence,” the issue of whether timely performance was a material contract term was a question of fact. *See id.* at 846. We concluded the absence of that specific phrase was not controlling nor did it create a fact issue as to materiality in light of the other contract provisions setting specific times for performance, providing a specific cure period and default provisions. *Id.* (“The language of the contract clearly makes time of the essence and Deep Nine’s failure to pay in a timely manner was a material breach.”). Here, like *Deep Nines*, the language of the contract clearly makes the confidentiality provision a material term such that its violation was a material breach. We therefore resolve GDL’s first issue against it. In light of our resolution of GDL’s first issue, we need not address its second issue. *See TEX. R. APP. P. 47.1.*

In its third issue, GDL contends the trial court erred in concluding that there was no adequate remedy at law and that rescission was the only appropriate remedy. Our review of the record reflects that that the trial court made no such determination. A rescission “amounts to the unmaking of a contract, or undoing of it from the beginning, and not merely termination. BLACK’S LAW DICTIONARY 1174 (5th ed. 1983). Nothing in Rapid’s petition or summary judgment motion suggests that Rapid sought such relief. Instead, as noted above, the trial court granted Rapid’s request to be excused from further performance under the agreement in light of GDL’s material breach. Because the trial court did not grant Rapid rescission, we resolve GDL’s third issue against it.

In its fourth issue, GDL asserts the trial court erroneously granted summary judgment because Rapid failed to prove the elements of a business disparagement claim. Once again, our

review of the record and trial court's judgment does not support GDL's assertions. We note Rapid's live pleading at the time of the summary judgment hearing did not include a cause of action for business disparagement and, more importantly, Rapid did not move for summary judgment on a business disparagement claim. Likewise, the trial court did not grant summary judgment on a business disparagement claim. Accordingly, we resolve GDL's fourth issue against it.

We affirm the trial court's judgment.

/David Evans/

DAVID EVANS
JUSTICE

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

GDL MASONRY SUPPLY, INC.,
Appellant

No. 05-15-01200-CV V.

JOSE LOPEZ AND RAPID MASONRY
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Opinion delivered by Justice Evans, Justices
Lang and Myers participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is
AFFIRMED.

It is **ORDERED** that appellees Jose Lopez and Rapid Masonry Supply, Inc. recover their
costs of this appeal from appellant GDL Masonry Supply, Inc.

Judgment entered this 2nd day of November, 2016.