Affirmed; Opinion Filed June 13, 2018.

In The

Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01411-CV

STANLEY V. GRAFF, INDEPENDENT EXECUTOR OF THE ESTATE OF ALVIN V. GRAFF, DECEASED, Appellant

V.

2920 PARK GROVE VENTURE, LTD., CAREY PLATT, AND CEC REALTY, INC., Appellees

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On Appeal from the Probate Court No. 2
Dallas County, Texas
Trial Court Cause No. PR-16-3905-2

MEMORANDUM OPINION

Before Justices Bridges, Evans, and Whitehill
Opinion by Justice Evans

This is the second appeal arising from a dispute involving the October 2000 sale of an apartment complex in Irving, Texas to 2920 Park Grove Venture, Ltd.[1] At the time of the sale, the property was part of the estate of Alvin Graff, who died in 1997. Graff's son, appellant Stanley V. Graff, was appointed successor independent executor of the estate in February 2014 after the former independent executor, Richard Hayden, resigned. The lawsuit from which this appeal arises was commenced in probate court by Hayden in 2007 and continued by Stanley after he was appointed executor. In two issues, Stanley generally complains the trial court reversibly erred by

[1] Appellee 2920 Park Grove Venture, LTD was assigned the sales contract by LTS Group, Inc. the entity that originally contracted to buy the property.

granting the traditional and no-evidence summary judgment motions of 2920 Park Grove Venture, Ltd., Carey Platt, and CEC Realty, Inc.[2] For the reasons set forth below, we affirm the trial court's judgment.

BACKGROUND

Upon his death, Graff left most of his estate to his son Stanley. In accordance with Graff's will, Hayden qualified and was appointed independent executor. Hayden hired a law firm to aid him in the administration of the substantial estate, which included a stock and bond portfolio, significant real property, and car dealerships. The estate had a federal and state estate tax liability of almost $12 million among other debts, such as administrative costs and legal fees. Hayden thus determined it was necessary to sell some real estate assets to pay the estate's debts. In January 2000, the law firm obtained appraisals from Jim Harned Appraisal Services, Inc. on the subject apartment complex indicating a fair market value of $6.9 million. The appraisals were signed by appraisers Michael Seifert and Jim Harned.

One or two months *after* the appraisals were completed, Seifert discussed the property with his former employer, Platt, a principal in 2920 Park Grove Venture and CEC Realty. Seifert stated that he had learned the property was available for sale from Jay Nunnaly, who worked for Hayden. Seifert and Nunnaly then worked to facilitate a sale of the property between the estate and Platt. Hayden also agreed to pay Seifert and Nunnaly finders' fees for arranging the deal, to be paid outside of closing.

In June 2000, six months after the appraisals were done, Hayden contracted to sell the apartment complex to LTS Group, Inc., a Platt affiliated company, for $6.9 million. The following month, Stanley objected to the sale, asserting Hayden lacked authority to sell the property. The

[2] Appellee Carey Platt was president of LTS Group and a principal of 2920 Park Grove Venture. Appellee CEC Realty, Inc., a related entity to LTS Group, was the real estate broker for the transaction. We refer to appellees collectively as Park Grove unless context requires specificity.

sales contract was later assigned to 2920 Park Grove Venture and the deal closed in October 2000. Seifert later received a portion of CEC Realty's broker commission on the sale.

In July 2002, Stanley, in his individual capacity, sued Hayden, Park Grove, and others in probate court complaining of multiple actions taken in connection with the administration of the estate, including the sale of the apartment complex. Stanley alleged the complex was worth $9 million but was sold for less than market value (the appraised value of $6.9 million). He sued to rescind the sale and sought damages for civil conspiracy against Hayden and Park Grove in connection with the sale for "knowingly causing and/or allowing a sale of the Apartment Complex contrary to the law, and all for a direct benefit to themselves and contrary to the law." Stanley ultimately non-suited those claims in September 2002.

Thereafter, Stanley sued Park Grove in state district court re-asserting his allegations that (1) Hayden lacked authority to sell the property, (2) the property was sold for substantially under the market value, and (3) Park Grove conspired to defraud the estate.[3] Park Grove sought and was granted summary judgment in that suit. On appeal, we affirmed the trial court's judgment. *See Graff v. 2920 Park Grove Venture, Ltd.*, No. 05-07-01607-CV, 2009 WL 3260886 (Tex. App.—Dallas Oct. 13, 2009, pet. denied) (mem. op.).

While Stanley's lawsuit was pending in the district court, Hayden, as executor, filed this suit against Park Grove in May 2007 alleging Park Grove conspired with Seifert to defraud the estate based on Seifert's "false undervalued appraisal." In his original petition, Hayden asserted claims for common law fraud, fraud in the sale of real property, and rescission. Hayden alleged he first discovered facts regarding (1) Seifert's association with Platt, (2) conversations Seifert and

[3] Stanley filed this suit in his individual capacity, as beneficiary of the estate (beneficiary lawsuit). In his appellate brief, Stanley states that he filed the beneficiary lawsuit on August 4, 2005. That date is clearly incorrect, however, because Park Grove's summary judgment in the beneficiary lawsuit (part of the clerk's record in this case) was filed on May 6, 2005. In that summary judgment motion, Park Grove asserts the original petition in the beneficiary case, commencing Stanley's claims against Park Grove, was filed on July 22, 2003. Although that summary judgment motion purports to attach a copy of the original petition to the motion, it is not in our appellate record.

Platt had about the property prior to sales contract, and (3) Seifert's receipt of a portion of CEC Realty's commission in July 2004 when depositions were taken in Stanley's beneficiary lawsuit. He further asserted he had no knowledge that Seifert participated in the appraisals of the apartment complex before it was sold.

After Stanley was appointed successor executor for the estate, he filed a first amended petition in July 2014 adding allegations that Hayden lacked authority to sell the apartment complex. Stanley then filed a second amended petition, the live pleading at the time of the summary judgment hearing, asserting causes of action for (1) fraud and conspiracy in the sale of real property, (2) common law fraud and conspiracy, (3) breach of fiduciary duty and aiding and abetting breach of fiduciary duty, (4) negligent misrepresentation, (5) rescission for lack of authority to sell, (6) rescission for fraud and breach of fiduciary duty, (7) constructive trust, (8) attorney's fees, and (9) exemplary damages.

Park Grove moved for traditional motion for summary judgment on the grounds that the sale was authorized and that certain claims were barred by res judicata, quasi estoppel, and limitations. Park Grove filed a separate no-evidence summary judgment motion challenging the elements of each of Stanley's tort claims. After a hearing, the trial court granted both motions and ordered that Stanley take nothing on his claims. Stanley filed this appeal.[4]

ANALYSIS

A. Standard of Review

We review the trial court's grant of summary judgment de novo. *See B.C. v. Steak N Shake Operations, Inc.*, 512 S.W.3d 276, 279 (Tex. 2017). For traditional motions for summary judgment, the movant has the burden to demonstrate no genuine issue of material fact exists and

[4] The summary judgment became a final, appealable order after Park Grove non-suited its counterclaim against Stanley and the trial court signed an order severing Stanley's claims against Park Grove from Stanley's claims against Seifert.

it is entitled to judgment as a matter of law. *See id*. No-evidence motions are reviewed under the same legal sufficiency standard as a directed verdict. *Merriman v. XTO Energy, Inc*., 407 S.W.3d 244, 248 (Tex. 2013). Thus, the non-movant must produce more than a scintilla of evidence to support each challenged element of its claims. *See id*. In our review of both types of summary judgment motions, we view the evidence in the light most favorable to the nomovant, crediting evidence a reasonable jury could credit and disregarding contrary evidence and inferences unless a reasonable jury could not. *Id*. (no evidence); *B.C*., 512 S.W.3d at 279 (traditional).

B. Summary Judgment Evidence

We begin our analysis by addressing Stanley's complaint the trial court erred in considering Park Grove's summary judgment evidence. In his response to Park Grove's summary judgment motions, Stanley moved to strike all of the evidence attached to Park Grove's traditional motion, arguing rule 193.6(a) of the Texas Rules of Civil Procedure mandated its exclusion because Park Grove failed to respond to Stanley's requests for disclosure. *See* TEX. R. CIV. P. 193.6(a).

The summary judgment evidence at issue largely consists of pleadings and evidence from Stanley's beneficiary lawsuit against Park Grove. It included Stanley's tenth amended original petition, Park Grove's motion for partial summary judgment with exhibits, order granting partial summary judgment, Stanley's appellate brief, our memorandum opinion affirming the trial court's judgment, and the supreme court's denial of petition for review. The summary judgment evidence also included Stanley's live pleading in this case as well as the special warranty deed conveying the property to Park Grove. Although the record does not contain a written order on Stanley's motion to strike, the trial court impliedly denied the motion when it granted Park Grove's traditional motion for summary judgment. *See Duncan-Hubert v. Mitchell*, 310 S.W.3d 92, 99 (Tex. App.—Dallas 2010, pet. denied).

A party who fails to respond to discovery in a timely manner, may not introduce into evidence material or information not timely disclosed unless the court finds that there was good cause for the failure to respond and the failure will not unfairly surprise or unfairly prejudice the other party. *See* TEX. R. CIV. P. 193.6(a). Based on the record before us, we cannot conclude the trial court erred in failing to exclude Park Grove's summary judgment evidence.

At the summary judgment hearing, Park Grove's attorney denied ever receiving the requests for disclosure, indicating he had received and responded to other discovery propounded by Stanley.[5] Specifically, he stated, "I'm an officer of the court and I'm telling you I never got the request for disclosures. I would have responded to them." Moreover, there was no indication that Park Grove was unfairly surprised or unfairly prejudiced by the summary judgment evidence. Indeed, the majority of the evidence consisted of pleadings and evidence from Stanley's prior lawsuit against Park Grove. It is also unclear what summary judgment evidence, if any, was responsive to Stanley's requests for disclosure. Accordingly, we conclude that the trial court did not err in considering Park Grove's summary judgment evidence attached to its traditional motion for summary judgment.

C. Fraud and Conspiracy to Commit Fraud

Among other things, Park Grove moved for summary judgment on Stanley's claims for fraud and conspiracy to commit fraud on the grounds that they were barred by limitations. Stanley argues summary judgment on this ground constituted error because these causes of action accrued no earlier than July 2004, when depositions in Stanley's beneficiary lawsuit revealed Seifert's relationship to Platt and the commission Seifert received from CEC Realty after the closing. We do not agree.

[5] Our record includes the reporter's record from the October 13, 2016 hearing on Park Grove's summary judgment motions.

A party moving for summary judgment on the defense of limitations bears the burden to prove conclusively when the cause of action accrued and negate any tolling doctrines, such as the discovery rule, when they apply and have been pleaded or otherwise raised. *See Gibson v. Ellis*, 58 S.W.3d 818, 822–23 (Tex. App.—Dallas 2001, no pet.). If the movant establishes limitations bars the claim, the nonmovant must then present evidence raising a fact issue in avoidance of the statute of limitations. *Id*. at 823.

Generally, a cause of action accrues when a party has been injured by actions or omissions of another. *See Barker v. Eckman*, 213 S.W.3d 306, 311 (Tex. 2006). The discovery rule is a very limited exception to the general rule, deferring the accrual of a cause of action until the plaintiff knew or, exercising reasonable diligence, should have known of the facts giving rise to the cause of action. *See Computer Assocs. Int'l, Inc. v. Altai, Inc*., 918 S.W.2d 453, 455 (Tex. 1996). We apply the discovery rule only when the nature of plaintiff's injury is inherently undiscoverable and the evidence of injury objectively verifiable. *See id.* at 456. An injury is inherently undiscoverable if it is, by its nature, unlikely to be discovered within the prescribed limitations period despite due diligence. *Wagner & Brown, Ltd. v. Horwood*, 58 S.W.3d 732, 734–35 (Tex. 2001). Whether an injury is inherently undiscoverable is a legal question "decided on a categorical rather than case-specific basis; the focus is on whether a *type* of injury rather than a *particular* injury was discoverable." *Via Net v. TIG Ins. Co*., 211 S.W.3d 310, 314 (Tex. 2006) (per curiam). When the discovery rule applies, limitations begins to run when a party has actual knowledge of a wrongful injury, even when he does not yet know the specific cause of, the party responsible for, or the full extent of, the injury. *Exxon Corp. v. Emerald Oil and Gas Co.*, 348 S.W.3d 194, 207 (Tex. 2011). Similarly, when fraud is alleged, limitations starts to run from the time the fraud is discovered or could have been discovered by the defrauded party by the exercise of reasonable diligence. *Altai, Inc*., 918 S.W.2d at 456.

The parties agree that fraud is governed by a four-year statute of limitations. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.004(a)(4) (West 2002); *Williams v. Khalaf*, 802 S.W.2d 651, 657 (Tex. 1990). With respect to the conspiracy claim, Stanley argues a four-year limitations should apply while Park Grove asserts the conspiracy claim is governed by a two-year limitations.[6] We need not decide which limitations period controls because we have determined the claim is barred even if we apply the four-year statute of limitations advocated by Stanley.

Here, the alleged injury to the estate is that it sold the apartment complex in October 2000 for less than it was worth based on an allegedly false January 2000 appraisal. Assuming without deciding the accrual of the estate's fraud claims are tolled by either the discovery rule or the discovery of the alleged fraud, we conclude the summary judgment evidence conclusively established the estate's cause of action for fraud and conspiracy reasonably should have been discoverable, exercising due diligence, no later than August 2002.

The record reveals that by August 2002, Stanley had sued Hayden in probate court alleging the property was sold for $2.1 million less than what it was worth and Hayden was aware that Siefert participated in the 2000 appraisal. Although Stanley asserts the accrual should be tolled until July 2004 because that is when Hayden actually learned of Seifert's connection to Platt and the alleged kickback, those facts are not controlling here because the estate's injury and alleged fraud could have been discovered had reasonable diligence been exercised. By August 2002, representatives of the estate exercising reasonable diligence should have been aware that (1) Seifert appraised the apartment complex because his name was on the 2000 appraisals, (2) Seifert

[6] Stanley argues because conspiracy is a derivative tort, conspiracy to defraud should be governed by the four-year limitation that applies to fraud. Park Grove cites our decision in *Prostok v. Browning*, 112 S.W.3d 876, 899 (Tex. App.—Dallas 2003), *affirmed in part and reversed and rendered in part,* 165 S.W.3d 336 (Tex. 2005), as well as *Navarro v. Grant Thornton, LLP*, 316 S.W.3d 715, 719 (Tex. App.—Houston [14th Dist.] 2010, no pet.), for the proposition that a two-year limitations period applies to a conspiracy to defraud claim. If a two-year limitations applies, Stanley's conspiracy to defraud claims are barred because Hayden asserted he learned about Siefert and Platt's relationship as well as Seifert's commission from CEC in July 2004, but did not file this suit until May 2007.

introduced the buyers to the estate representatives, and the (3) the appraisal may have undervalued the fair market value of the apartment complex. Indeed, the summary judgment evidence contains an affidavit by Hayden stating that had he known Seifert participated in the apartment complex appraisals and Seifert's relationship with Platt, he "would have investigated further and not entered into the [letter of intent] at that time for the price offered by LTS." Had representatives of the estate exercised reasonable diligence, however, they would have discovered the facts giving rise to their alleged fraud and conspiracy claims no later than August 2002. Because the fraud claims were filed May 17, 2007 and the conspiracy to commit fraud claims were not filed until July 2014, they are barred by limitations and the trial court did not err in granting summary judgment on these claims.

In reaching this conclusion, we necessarily reject Stanley's contention that his July 2002 lawsuit against Hayden and Park Grove cannot be used to establish the accrual date for the estate's claims of fraud and conspiracy based on the sale of the property below market value. In support of this position, Stanley relies on the adverse domination rule articulated in *Allen v. Wilkerson*, 396 S.W.2d 493 (Tex. Civ. App.—Austin 1965, writ ref'd n.r.e.) to defeat Park Grove's limitations defense. Stanley first raised the adverse domination tolling doctrine in a letter brief after the submission of this appeal. Because Stanley did not present this tolling doctrine argument or issue to the trial court in response to Park Grove's motion for summary judgment, it is not a proper basis to reverse the trial court's judgment and we will not consider it. *See* TEX. R. CIV. P. 166a(c) ("Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal.").

Nevertheless, we note that in *Allen*, the court applied the adverse domination rule to toll limitations while wrongdoer defendants dominated the plaintiff corporation. *Id*. at 500–01. Here, unlike in *Allen*, there is no evidence that Hayden was involved in the wrongful conduct forming

the fraud and conspiracy claims based the sale of the property at allegedly below market value. Instead, the summary judgment record reflects Hayden most likely would not have sold the property to Park Grove for $6.9 million had he (1) been aware that Seifert participated in the appraisals, (2) knew of Seifert's relationship with Platt or (3) knew Seifert would receive a portion CEC Realty's commission on the sale. Hayden did in fact file fraud claims against Park Grove on behalf of the estate based on the sale of the property allegedly below market value. However, as we have concluded above, these claims were filed after limitations had run.

D. Rescission for lack of Authority

Stanley also argues that the trial court erred in granting traditional summary judgment on his rescission claim based on the executor's lack of authority because (1) Graff's will did not authorize the sale of real property and (2) no conditions existed that would have authorized the probate court to order the sale. We do not agree.

It is undisputed that the will did not expressly state the executor had the authority to sell the estate's real property. However, under Texas law, independent executors like Hayden have authority to do any act which an ordinary executor may do under an order of the probate court without the need for an order. *See Dallas Servs. For Visually Impaired Children, Inc., v. Broadmoor II*, 635 S.W.2d 572, 576 (Tex. App.—Dallas 1982, writ ref'd n.r.e.). Where the will contains no restrictive terms upon his authority, an independent executor may incur reasonable expenses in the management of the estate, adjust and pay debts against the estate and for that purpose may sell property of the estate, although the will does not expressly grant that power. *See Rowland v. Moore*, 174 S.W.2d 248, 250 (Tex. 1943).

The existence of debts against the estate is sufficient to authorize the independent executor to sell real property. *Broadmoor II*, 635 S.W.2d at 576. Stanley does not dispute that the estate had certain outstanding debts at the time of the sale. In fact, the summary judgment record reveals

at the time Hayden decided to sell the apartment complex, the estate had limited cash and several outstanding debts, including federal estate taxes of over $3 million, a mortgage on the apartment complex, executor's fees of about $800,000, as well as outstanding attorney's fees incurred in the administration of the estate. Accordingly, Hayden had authority to sell real property to satisfy the outstanding debts of the estate. *See id*.

As for his contention with respect to probate court authorization, Stanley argues that because the record does not conclusively establish that Hayden needed to sell the property in order to satisfy the estate's outstanding debts, Park Grove has not shown the probate court would have authorized the sale. According to Stanley, because he put forth evidence of an alternative way to satisfy the outstanding debt without the sale, Park Grove was not entitled to summary judgment on this rescission claim for lack of authority. However, Stanley cites no cases to support his position. To the contrary, the cases upon which he relies suggest that all that is required to authorize a sale is to show the existence of such facts as would authorize the probate court to order a sale, such as outstanding estate debts. *See e.g, Rowland,* 174 S.W.2d at 250; *Haring v. Shelton*, 122 S.W. 13, 14 (Tex. 1909); *Gatesville Redi-Mix, Inc., v. Jones*, 787 S.W.2d 443, 445 (Tex. App.—Waco 1990, writ denied). Accordingly, we conclude the trial court did not err in granting summary judgment on this rescission claim.

E. Breach of Fiduciary Duty/Aiding and Abetting Breach of Fiduciary Duty

In its no-evidence summary judgment motion, Park Grove challenged Stanley's breach of fiduciary duty claim asserting, among other things, there was no evidence that Park Grove had a fiduciary relationship with the estate or its executors. The elements of a breach of fiduciary duty claim include (1) a fiduciary relationship between the plaintiff and the defendant, (2) a breach of the fiduciary duty owed to plaintiff, and (3) injury to plaintiff or benefit to defendant as a result of the breach. *Jones v. Blume*, 196 S.W.3d 440, 447 (Tex. App.—Dallas 2006, pet. denied).

On appeal, Stanley argues there was evidence that created a genuine issue of material fact as to whether Seifert, as an appraiser of estate property, owed a fiduciary duty to the estate. In the trial court and on appeal, however, Stanley has not challenged or presented any evidence to create a fact issue as to whether Park Grove had a fiduciary duty to the estate. Because Stanley failed to present any evidence to raise a fact issue on whether Park Grove had a fiduciary duty to the estate, the no-evidence summary judgment was proper with respect to the breach of fiduciary claim against Park Grove.

The elements of an aiding and abetting claim are (1) the primary actor's activity accomplished a tortious result, (2) the defendant knows the primary actor's conduct constituted a tort, (3) the defendant provided substantial assistance to the primary actor in accomplishing the result, (4) the defendant's own conduct, separate from the primary actor's conduct, was a breach of duty to the plaintiff, and (5) the defendant's participation was a substantial factor in causing the tort. *See Juhl v. Airington*, 936 S.W.2d 640, 644 (Tex. 1996). One of the grounds upon which Park Grove moved for summary judgment was that there was no evidence that Park Grove provided substantial assistance to Seifert in accomplishing the alleged breach of fiduciary duty. Stanley bases his aiding and abetting claim against Park Grove on Seifert's alleged fiduciary duty as the property appraiser for the estate. He argues there is evidence Park Grove communicated with Seifert about the property and its value, that Platt indicated in an investment summary that the contract price was substantially below comparable sales of similar properties in the market, and that Seifert received a portion of the sales commission. Viewing this evidence in the light most favorable to Stanley, however, we cannot agree it constitutes more than a scintilla of evidence that Park Grove provided substantial assistance to Seifert in breaching his alleged fiduciary duty to the estate. The breach in question is the intentional undervaluing of the property in January 2000 so the property could then be sold at substantially less than fair market value to Park Grove.

Stanley has provided no evidence that Seifert even spoke with Park Grove about the apartment complex until February or March 2000, months *after* the appraisals were completed. That Seifert was a former employee and business associate of Platt, that Park Grove acknowledged the contract price for the apartment complex was a good investment, or even that Seifert received a portion of the sales commission, is no evidence that Park Grove provided substantial assistance to Seifert in allegedly undervaluing the property in the 2000 appraisals. Accordingly, the trial court properly granted summary judgment on Stanley's breach of fiduciary duty/aiding and abetting claims.

F. Negligent Misrepresentation

Stanley contends the trial court erred in granting summary judgment on his negligent misrepresentation claim because he provided evidence that Park Grove provided false information regarding the payment of the commission to Seifert, the valuation of the apartment complex, and Park Grove's relationship with Seifert. The elements of a negligent misrepresentation claim are: (1) a representation made by defendant in a transaction in which he has a pecuniary interest, (2) false information supplied by defendant for the guidance of others in their business, (3) the defendant's lack of reasonable care or competence in obtaining or communicating the information, and (4) the plaintiff suffered pecuniary loss by justifiably relying on the representation. *See Federal Land Bank Ass'n of Tyler v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1991).

Park Grove moved for summary judgment on this cause of action asserting, among things, there was no evidence that Park Grove made a representation to or supplied false information for the guidance of the executor or the estate in connection with the sale of the apartment complex. As evidence to support the false information element, Stanley relies on (1) Seifert's 2000 appraisal, (2) a 2002 appraisal performed for 2920 Park Grove Venture almost two years after the sale, (3) Seifert's deposition where he admitted he received a portion of the sales commission on the property after the closing, and (4) Hayden's affidavit stating that he was unaware that Seifert was

a former employee and business associate of Platt. None of this evidence creates a fact issue on whether Park Grove supplied false information for Hayden's guidance in the sales transaction. Initially, we note the record before us is devoid of any suggestion that Park Grove had anything to do with Seifert's 2000 appraisal. Moreover Seifert, whose name appeared on the 2000 appraisal upon which Hayden relied, introduced Platt to Hayden and there is no indication he, 2920 Park Grove, or CEC Realty misrepresented their relationship with Seifert to either Hayden or the estate. Likewise, there is no evidence in the record that Park Grove made any misrepresentation to Hayden about the fair market value of the property that they were purchasing from him. To the extent Stanley complains about the failure to disclose Seifert's post-closing commission from CEC Realty, Stanley has not demonstrated how he was damaged by this alleged negligent misrepresentation.[7] We therefore conclude the trial court did not err in granting summary judgment on Stanley's negligent misrepresentation claim.

G. Constructive Trust, Rescission, and Equitable Disgorgement

As Stanley acknowledges, a constructive trust is not an independent cause of action but an equitable remedy designed to prevent unjust enrichment. *See Anderton v. Cawley*, 378 S.W.3d 38, 54 n.4 (Tex. App.—Dallas 2012, no pet.). Similarly, in addition to Stanley's claim for rescission for lack of authority discussed above, Stanley also sought rescission and alternatively equitable disgorgement in a separate count of his live pleading as his primary remedy for his causes of action for fraud/conspiracy to commit fraud and breach of fiduciary duty/aiding and abetting breach of fiduciary duty. Having already concluded that the trial court properly granted summary judgment on all of Stanley's causes of action that could arguably support these remedies, summary judgment

[7] Park Grove also moved for summary judgment on this claim on the ground that there was "no evidence that Plaintiff suffered any damages due to any alleged negligent misrepresentation by any of the Park Grove Defendants." The only injury alleged by Stanley is the sale of the property for less than fair market value. Stanley provides no evidence how this alleged misrepresentation caused him damage.

was also proper with respect to Stanley's request for a constructive trust, rescission, and equitable disgorgement.

CONCLUSION

On the record of this case, we conclude the trial court did not err in granting Park Grove summary judgment on all of Stanley's claims. 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

STANLEY V. GRAFF, INDEPENDENT EXECUTOR OF THE ESTATE OF ALVIN V. GRAFF, DECEASED, Appellant

No. 05-16-01411-CV V.

2920 PARK GROVE VENTURE, LTD., CAREY PLATT, CEC REALTY, INC., Appellees

On Appeal from the Probate Court No. 2, Dallas County, Texas
Trial Court Cause No. PR-16-3905-2.
Opinion delivered by Justice Evans, Justices Bridges and Whitehill participating.

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

It is **ORDERED** that appellee 2920 Park Grove Venture, Ltd., Carey Platt, CEC Realty, Inc. recover their costs of this appeal from appellant Stanley V. Graff, Independent Executor Of The Estate Of Alvin V. Graff, Deceased.

Judgment entered this 13th day of June, 2018.