Reverse and Remand; Opinion Filed April 3, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00142-CV

LAKSHMI REALTY, LLC D/B/A DFW REALTIES, Appellant
V.
FIREWHEEL BROKERAGE PLLC, DALLAS LOCAL REALTY GROUP, INC., TRIANGLE GROUP GP, LLC, JALEH KAFTOUSIAN, AND EDITH LEON KELLY, Appellees

On Appeal from the 401st Judicial District Court
Collin County, Texas
Trial Court Cause No. 401-00196-2017

MEMORANDUM OPINION

Before Justices Francis, Brown, and Stoddart
Opinion by Justice Stoddart

Appellant Lakshmi Realty, LLC d/b/a DFW Realties appeals a summary judgment in favor of appellees Firewheel Brokerage PLLC,[1] Dallas Local Realty Group, Inc., Triangle Group GP, LLC, Jaleh Kaftousian, and Edith Leon Kelly. Appellant sued appellees for tortious interference with a contract. In two issues, appellant argues the trial court erred by granting appellees' motions for summary judgment. We reverse the trial court's judgment and remand the cause for further proceedings.

[1] The first amended original petition states Firewheel Brokerage PLLC does business as Keller Williams Lake Cities. We will refer to Firewheel Brokerage PLLC as "Keller Williams."

FACTUAL BACKGROUND

In January 2015, John Vann, as Seller, entered into a "Residential Real Estate Listing Agreement Exclusive Right to Sell" with appellant, a Broker, to sell his home ("Original Agreement"). The Original Agreement states: "Seller appoints Broker as Seller's sole and exclusive real estate agent and grants Broker the exclusive right to sell the Property" for the term January 31, 2015 through July 31, 2015. Vann agreed to "not enter into a listing agreement with another broker for the sale, exchange, lease, or management of the Property to become effective during this Listing without Broker's prior written approval."

In April 2015, Jaleh Kaftousian, a real estate agent working for Keller Williams, noticed the Multiple Listing Services ("MLS") listing for the Vann's home had been canceled. Kaftousian asked her supervisor and fellow agent, Edith Kelly,[2] whether she should discuss the canceled listing with the Vanns and Kelly said she should. When Kaftousian went to the Vann's house to talk about selling their property, she noticed a "For Sale" sign in the yard and a lock box on the door. She called Kelly to tell her about the "For Sale" sign and lock box. Kelly told her to go home and put on professional clothing, including her Keller Williams name badge, before returning to the Vann's house. Kaftousian followed the directions.

Kaftousian met John Vann and introduced herself as an agent with Keller Williams. Vann told Kaftousian he was not happy with his current broker, appellant. Kaftousian talked with John Vann and his wife, Dessi, and said Kelly would call them the following day, which Kelly did. Kelly made an appointment to meet the Vanns at their house.

John and Dessi Vann, as Sellers, and Keller Williams, as Broker, entered into a "Residential Real Estate Listing Agreement Exclusive Right to Sell" ("Keller Williams Agreement"). In the agreement, the Vanns appointed Keller Williams as their "sole and exclusive

[2] The first amended original petition states Kelly is a licensed real estate agent who is associated with appellee Triangle Group.

real estate agent and grant[ed] to Broker the exclusive right to sell the Property" for the term April 19, 2015 through September 1, 2015. The Keller Williams Agreement includes a hand-written provision stating: "This listing is subject to release of previous listing agreement." On April 19, 2015, John Vann emailed appellant and stated: "I am the one to deliver the bad news. I'm sorry but I must cancel the listing. Please confirm."

Keller Williams posted the property on MLS and listed Kaftousian as the agent and Kelly as her supervisor. The MLS listing is included in the summary judgment record.

Appellant sued appellees alleging tortious interference with an existing contract. Appellees Dallas Local Realty Group, Triangle Group, and Kelly filed a traditional motion for summary judgment in which they argued that even if appellant's allegations are true, their actions were permissible under title 22 section 535.153 of the Texas Administrative Code. The only evidence attached to their motion was a copy of appellant's first amended original petition. Appellees Keller Williams and Kaftousian filed a nearly identical motion asserting the same argument with the same supporting evidence. The trial court granted appellees' motions. This appeal followed.

LAW & ANALYSIS

We review a grant of summary judgment de novo. *Exxon Corp. v. Emerald Oil & Gas Co., L.C.*, 331 S.W.3d 419, 422 (Tex. 2010). A party moving for traditional summary judgment has the burden to prove that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). "When reviewing a summary judgment, we take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor." *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). A movant seeking traditional summary judgment on an affirmative defense has the initial burden of establishing entitlement to judgment as a matter of law by conclusively establishing each

element of the affirmative defense. *Lam v. Phuong Nguyen*, 335 S.W.3d 786, 789 (Tex. App.—Dallas 2011, pet. denied). A matter is conclusively established if reasonable people could not differ as to the conclusion to be drawn from the evidence. *Id.* If the movant meets its burden, the burden then shifts to the nonmovant to present evidence raising a genuine issue of material fact as to one or more elements of the affirmative defense, precluding summary judgment. *Id*. The evidence raises a genuine issue of material fact if reasonable and fair-minded jurors could differ in their conclusions in light of all the summary judgment evidence. *Id*.

In its first issue, appellant argues the trial court erred by granting summary judgment based on appellees' contention that section 535.153 of the Texas Administrative Code alters or abrogates a common-law claim for tortious interference. Section 535.153 is titled "Violating an Exclusive Agency" and states:

> Although a license holder, including one acting as agent for a prospective buyer or prospective tenant, may not attempt to negotiate a sale, exchange, lease, or rental of property under exclusive listing with another broker, the Act does not prohibit a license holder from soliciting a listing from the owner while the owner's property is subject to an exclusive listing with another broker.

22 TEX. ADMIN. CODE §535.153.

In the trial court, appellees moved for summary judgment on the sole basis that even if appellant's allegations are true, any attempt by appellees to solicit the Vann's listing cannot be considered interference because the conduct was permissible under section 535.153. If we assume without deciding that section 535.153 may be an affirmative defense to a cause of action for tortious interference against appellees, we conclude appellees failed to meet their burden to establish summary judgment was proper based on this affirmative defense. Appellees asserted in their motions that the first amended original petition alleges they attempted to solicit a listing subject to an exclusive listing with another broker. They argue section 535.153 permits such action. *See id.* However, section 535.153 requires they prove they did "not attempt to negotiate

a sale, exchange, lease, or rental of property under exclusive listing with another broker." *Id.* Appellees presented no evidence on this point. Therefore, we conclude they did not meet their initial burden to show entitlement to judgment as a matter of law by conclusively establishing each element of the affirmative defense. *See Lam*, 335 S.W.3d at 789. Even if appellees had met their initial burden, appellant presented evidence raising a genuine issue of material fact as to whether appellees attempted to negotiate a sale of the Vann's property that was under an exclusive listing with appellant, thus precluding summary judgment. *See id.*

Appellant's evidence shows John Vann entered into the Original Agreement with appellant in which he appointed appellant as his "sole and exclusive real estate agent and [granted] Broker the exclusive right to sell the Property" for the term January 31, 2015 through July 31, 2015. Vann agreed he would not "enter into a listing agreement with another broker for the sale, exchange, lease, or management of the Property to become effective during this Listing without Broker's prior written approval." No written approval from appellant appears in the record.

However, during the term of the Original Agreement, the Vanns signed the Keller Williams Agreement, which appointed Keller Williams as their sole and exclusive agents with an exclusive right to sell the same property. There is conflicting evidence about whether the Keller Williams Agreement became effective during the term of the Original Agreement. However, on April 28, 2015, the Property appeared on MLS and Keller Williams was listed as the broker, Kaftousian as the agent, and Kelly as her supervisor.

In light of the summary judgment evidence, reasonable and fair-minded jurors could differ in their conclusions about whether appellees attempted to negotiate the sale of the Vann's property while it was under exclusive listing with appellant. Reasonable and fair-minded jurors could conclude that during the time period when the Vann's house was the subject of the Original Agreement, appellees placed a listing for the house on the MLS in an attempt to sell the property.

We conclude even if appellees met their summary judgment burden, appellant met its burden to raise a genuine issue of material fact on one or more elements of the asserted affirmative defense. Therefore, the trial court erred by granting appellees' motions for summary judgment on this ground. We sustain appellant's first issue.

In light of our resolution of appellant's first issue, we need not consider its second issue in which it argues the summary judgment evidence raises a fact issue as to each element of its claim for tortious interference. Appellees only sought summary judgment on the ground that section 535.153 governs the relevant conduct. Therefore, no other grounds for summary judgment is before us. *See Parillo v. Kofahl Sheet Metal Works, Inc*., No. 05-15-01037-CV, 2016 WL 3547965, at *2 (Tex. App.—Dallas June 28, 2016, no pet.) ("an appellate court can affirm a summary judgment only on grounds expressly set out in the motion."); *see also Stiles v. Resolution Trust Corp*., 867 S.W.2d 24, 26 (Tex.1993). We do not address appellant's second issue.

CONCLUSION

We reverse the trial court's judgement and we remand this cause for further proceedings.

/Craig Stoddart/
CRAIG STODDART
JUSTICE

170142F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

LAKSHMI REALTY, LLC D/B/A DFW REALTIES, Appellant

No. 05-17-00142-CV V.

FIREWHEEL BROKERAGE PLLC, DALLAS LOCAL REALTY GROUP, INC., TRIANGLE GROUP GP, LLC, JALEH KAFTOUSIAN, AND EDITH LEON KELLY, Appellees

On Appeal from the 401st Judicial District Court, Collin County, Texas
Trial Court Cause No. 401-00196-2017.
Opinion delivered by Justice Stoddart.
Justices Francis and Brown participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** and this cause is **REMANDED** to the trial court for further proceedings.

It is **ORDERED** that appellant LAKSHMI REALTY, LLC D/B/A DFW REALTIES recover its costs of this appeal from appellees FIREWHEEL BROKERAGE PLLC, DALLAS LOCAL REALTY GROUP, INC., TRIANGLE GROUP GP, LLC, JALEH KAFTOUSIAN, AND EDITH LEON KELLY.

Judgment entered this 3rd day of April, 2018.