AFFIRM; and Opinion Filed June 20, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00796-CV

ZANE SKRASTINA, Appellant
V.
BRECKINRIDGE-TAYLOR DESIGN, LLC D/B/A BRECKINRIDGE TAYLOR, JOHN BRECKINRIDGE WOOLSEY, AND CHARLES TAYLOR, Appellees

On Appeal from the County Court at Law No. 5
Dallas County, Texas
Trial Court Cause No. CC-15-04902-E

MEMORANDUM OPINION

Before Justices Francis, Fillmore, and Whitehill
Opinion by Justice Fillmore

After purchasing a house, Zane Skrastina hired Gage Prichard Custom Homes, Inc. (GPCH) as the general contractor and Breckinridge-Taylor Design, LLC d/b/a Breckinridge Taylor (BTD) as the interior designer for an extensive renovation project. Skrastina became dissatisfied with the timeliness and quality of the work and stopped paying draw requests submitted by GPCH. After receiving an adverse decision in an arbitration initiated by GPCH, Skrastina filed this suit against BTD,[1] asserting claims for breach of contract, fraudulent inducement, statutory fraud, negligent misrepresentation, violation of the Texas Deceptive Trade Practices Act (the DTPA), and breach of fiduciary duty.

[1] Skrastina also sued a number of the subcontractors who worked on the project. Those claims were resolved by summary judgment or nonsuit and are not a subject of this appeal.

BTD filed a combined traditional and no-evidence motion for summary judgment. Skrastina then joined John Breckinridge Woolsey and Charles Taylor, the members of BTD, as defendants, asserting they were individually liable for BTD's conduct. After the trial court granted BTD's motion for summary judgment, Woolsey and Taylor filed a combined traditional and no-evidence motion for summary judgment, which the trial court also granted. Skrastina brought this appeal asserting, in five issues, that the trial court erred by sustaining appellees' objections to her summary judgment evidence and by granting summary judgment on her claims for breach of contract, breach of fiduciary duty, and fraudulent inducement. We affirm the trial court's judgment.

Background

Skrastina purchased a house on February 19, 2013, with the intention of doing extensive renovations. Skrastina hired BTD as the interior designer for the project, but did not sign a written contract with BTD. Skrastina also hired GPCH to serve as the general contractor on the project. Skrastina and Gage Prichard, Jr., the president of GPCH, signed a residential remodel contract on March 26, 2013, that stated the estimated total cost for the renovation was $424,070, but the cost was subject to adjustment based on the materials selected by Skrastina. The contract also stated the estimated completion date for the renovation was August 10, 2013. According to Skrastina, both GPCH and BTD were aware the project needed to be finished before her children began school in August and assured her the renovation would be completed on time.

Skrastina told both GPCH and BTD that she intended to spend the summer in Latvia, but would be available to discuss the renovation by email or phone. The parties' working relationship evolved to the point that Skrastina would typically convey her decisions to Woolsey, who would then communicate that information to GPCH.

After it "became clear" to her that she "needed to be physically present to make certain decisions," Skrastina returned to Dallas for a few days at the beginning of July 2013. Skrastina was "shocked" by the lack of progress on the renovation and "alarmed" by "several glaring mistakes." According to Skrastina, appellees assured her the project would be completed on time. Skrastina made the necessary design decisions and returned to Latvia.

In early August 2013, Skrastina emailed Woolsey and asked whether she could move her furniture and other belongings into the house. After conferring with GPCH, Woolsey informed Skrastina the renovation would not be completed for another five weeks. Skrastina alleged she was admitted to a hospital in Latvia due to the severe anxiety and stress she suffered when she learned the project would not be completed on time.

The contract with GPCH required Skrastina to pay draws as submitted by GPCH. Skrastina reviewed the draws and was "shocked" to find that many of the charges were "excessive." Skrastina stopped paying GPCH's draw requests. GPCH then terminated the contract for convenience and instituted an arbitration proceeding against Skrastina. The arbitrator found in favor of GPCH and ordered Skrastina to pay the outstanding draw requests as well as GPCH's attorneys' fees. At the time GPCH terminated the contract, the cost of the project was approximately $200,000 over the estimated price.

Skrastina filed this lawsuit against BTD, asserting claims for breach of contract, fraudulent inducement, statutory fraud, negligent misrepresentation, violation of the DTPA, and breach of fiduciary duty. BTD filed a combined traditional and no-evidence motion for summary judgment on all of Skrastina's claims. Skrastina filed a fifth amended petition, adding Woolsey and Taylor as defendants and asserting they were individually liable for BTD's conduct because BTD was used to perpetrate a fraud for their direct, personal benefit.

In the fifth amended petition, Skrastina alleged appellees represented they (1) had the requisite skill, expertise, experience, and knowledge to handle the design project, (2) would ensure Skrastina was not taken advantage of during the renovation and the renovation would "end up exactly" how she wanted, and (3) would see the project through to completion. Skrastina alleged appellees "failed to complete the job they represented" they could do, "covered up" their poor performance, did not timely inform her the project was behind schedule, and overcharged her for goods and services. Skrastina alleged appellees were acting as her agent during the project and it was their "responsibility to oversee the completion of the renovation project, and ensure that it was completed timely, and according to [her] desires and budget." Skrastina sought to recover actual damages consisting of the "cost of repairs, replacement, temporary housing, loss of use, and amounts overcharged," as well as damages for mental anguish, exemplary damages, and attorneys' fees.

Skrastina responded to BTD's motion for summary judgment, attaching as summary judgment evidence her declaration, the contract with GBCH, the arbitration award, excerpts of testimony from the arbitration and depositions, photographs, emails, and invoices from BTD. BTD objected that portions of Skrastina's declaration were conclusory, not based on personal knowledge, and self-serving and the photographs were hearsay and not properly authenticated. The trial court granted BTD's motion for summary judgment without stating the bases for its ruling and without ruling on BTD's objections to Skrastina's summary judgment evidence.

Woolsey and Taylor subsequently filed a combined traditional and no-evidence motion for summary judgment on all of Skrastina's claims. Skrastina responded to the motion, attaching as summary judgment evidence a more detailed declaration, the evidence supporting her response to BTD's motion for summary judgment, screen shots from various websites, and additional deposition testimony. Woolsey and Taylor objected that portions of Skrastina's declaration were

conclusory, not based on personal knowledge, self-serving, and in violation of the best evidence rule and that the photographs and the screen shots were hearsay and not properly authenticated. The trial court granted Woolsey and Taylor's motion for summary judgment without specifying the bases for its ruling and without ruling on their objections to Skrastina's summary judgment evidence.

Skrastina subsequently filed a response to appellees' objections to her summary judgment evidence. After the trial court sustained all of appellees' objections to Skrastina's summary judgment evidence, Skrastina brought this appeal.

Standard of Review

We review a trial court's grant of summary judgment de novo. *Lujan v. Navistar, Inc.*, No. 16–0588, 2018 WL 1974473, at *3 (Tex. Apr. 27, 2018). To be entitled to a traditional summary judgment, the movant must show no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Lujan*, 2018 WL 1974473, at *3. A defendant moving for traditional summary judgment must either conclusively negate at least one essential element of the plaintiff's cause of action or conclusively establish each element of an affirmative defense. *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 508 (Tex. 2010). If the movant carries this burden, the nonmovant must then raise a genuine issue of material fact precluding summary judgment. *Lujan*, 2018 WL 1974473, at *3.

A party seeking a no-evidence summary judgment must challenge specific elements of the nonmovant's claim or defense on which the nonmovant would have the burden of proof at trial. TEX. R. CIV. P. 166a(i); *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009). To defeat a no-evidence summary judgment, the nonmovant is required to produce evidence that raises a genuine issue of material fact on each challenged element of a claim. TEX. R. CIV. P. 166a(i); *Hamilton v. Wilson*, 249 S.W.3d 425, 426 (Tex. 2008) (per curiam). "A genuine issue of material

fact exists if the evidence 'rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.'" *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 220 (Tex. 2017) (quoting *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)). Evidence that is "'so weak as to do no more than create a mere surmise or suspicion' that the fact exists" does not create an issue of material fact. *Id.* (quoting *Kia Motors Corp. v. Ruiz*, 432 S.W.3d 865, 875 (Tex. 2014)). If the nonmovant brings forward more than a scintilla of probative evidence that raises a genuine issue of material fact on each of the challenged elements, then a no-evidence summary judgment is not proper. *Boerjan v. Rodriguez*, 436 S.W.3d 307, 312 (Tex. 2014) (per curiam).

In reviewing both traditional and no-evidence summary judgments, we consider the evidence in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts against the motion. *Schlumberger Tech. Corp. v. Pasko*, 544 S.W.3d 830, 833 (Tex. 2018) (per curiam) (quoting *City of Keller v. Wilson*, 168 S.W.3d 802, 824 (Tex. 2005)); *Boerjan*, 436 S.W.3d at 311–12. We credit evidence favorable to the nonmovant if a reasonable factfinder could, and disregard contrary evidence unless a reasonable factfinder could not. *Samson Exploration, LLC v. T.S. Reed Props., Inc.*, 521 S.W.3d 766, 774 (Tex. 2017); *Boerjan*, 436 S.W.3d at 311–12.

When a party files both traditional and no-evidence motions for summary judgment, we generally address the no-evidence motion first. *Parker*, 514 S.W.3d at 219. If the challenge to the no-evidence summary judgment motion fails, we need not also consider the traditional motion. *Id.*

Claims Not Appealed

Skrastina asserted claims against appellees for breach of contract, fraudulent inducement, statutory fraud, negligent misrepresentation, violation of the DTPA, and breach of fiduciary duty. Skrastina abandoned her claim for statutory fraud in response to BTD's motion for summary

judgment. On appeal, Skrastina has not challenged the trial court's grant of summary judgment on her claims for negligent misrepresentation and violation of the DTPA. We therefore affirm the trial court's grant of summary judgment on Skrastina's claims for statutory fraud, negligent misrepresentation, and violation of the DTPA. *See Richardson v. Potter's House of Dallas, Inc.*, No. 05-16-00646-CV, 2017 WL 745803, at *2 (Tex. App.—Dallas Feb. 27, 2017, pet. denied) (mem. op.); *Carto Props., LLC v. Briar Capital, L.P.*, No. 01-15-01114-CV, 2018 WL 827558, at *5 (Tex. App.—Houston [1st Dist.] Feb. 13, 2018, pet. denied) (mem. op.).

Summary Judgment in Favor of BTD

In both her appellate brief and in oral argument, Skrastina made no distinction between the trial court's ruling on BTD's motion for summary judgment and the trial court's ruling on Woolsey and Taylor's motion for summary judgment. In making her arguments, Skrastina relied on evidence that was attached to her response to Woolsey and Taylor's motion for summary judgment, but not to her response to BTD's motion for summary judgment. Further, with respect to her assertion the trial court erred by granting appellees' no-evidence motions for summary judgment, Skrastina argued she raised a genuine issue of material fact on certain elements of her claims based on summary judgment evidence that she did not specifically rely on in the trial court as to the challenged elements.

When the nonmovant presents summary judgment evidence in response to a no-evidence motion for summary judgment, it must specifically identify the supporting proof it seeks to have considered by the trial court and "explain why it demonstrates a fact issue exists." *B.C. v. Steak N Shake Operations, Inc.*, 532 S.W.3d 547, 552 (Tex. App.—Dallas 2017, pet. filed); *see also In re A.J.L.*, No. 14-16-00834-CV, 2017 WL 4844479, at *4 (Tex. App.—Houston [14th Dist.] Oct. 26, 2017, no pet.) (mem. op.). This Court has concluded:

> The issue is whether the trial court must search through all of the non-movant's evidence to determine if a fact issue exists without any guidance concerning what evidence creates an issue on a particular element. Under the Rules of Civil Procedure, the party seeking to avoid the effects of a well-pleaded no-evidence motion for summary judgment bears the burden to file a written response that raises issues preventing summary judgment, and that points to evidence supporting those issues. Where the nonmovant fails to meet that burden, the trial court is not required to supply the deficiency, but instead must grant the motion.

Chambers v. Allstate Ins. Co., No. 05-15-01076-CV, 2016 WL 3208710, at *12 (Tex. App.—Dallas June 9, 2016, pet. denied) (mem. op.) (quoting *Burns v. Canales*, No. 14-04-00786-CV, 2006 WL 461518, at *6 (Tex. App.—Houston [14th Dist.] Feb. 28, 2006, pet. denied) (mem. op.)).

In responding to BTD's no-evidence motion for summary judgment, Skrastina separately addressed each challenged element of each claim. In doing so, Skrastina relied on specific summary judgment evidence and, therefore, met her burden of "point[ing] out with specificity where in [her] filings" she contended there was evidence on each of the challenged elements of her claims. *See De La Cruz v. Kailer*, 526 S.W.3d 588, 595 (Tex. App.—Dallas 2017, pet denied). On appeal, Skrastina argues that summary judgment evidence she did not specifically point out to the trial court created a genuine issue of material fact on particular elements challenged by BTD. Skrastina, however, may not now rely on summary judgment evidence that she did not direct the trial court to in responding to BTD's no-evidence motion for summary judgment. *See B.C.* 532 S.W.3d at 552 (concluding it was nonmovant's burden under rule 166a(i) to identify evidence and explain to trial court why it demonstrates fact issue exists); *Chambers*, 2016 WL 3208710, at *12 (concluding nonmovant had burden to file written response that raises issues preventing summary judgment and points to evidence supporting those issues). Accordingly, in considering whether the trial court properly granted BTD's no-evidence motion for summary judgment, we will consider only the evidence that Skrastina specifically argued in the trial court created a genuine issue of material fact on each challenged element of her claims. *See White v. Calvache*, No. 05-17-00127-CV, 2018 WL 525684, at *4 (Tex. App.—Dallas Jan. 24, 2018, no pet.) (mem. op.)

(concluding that in reviewing trial court's grant of no-evidence motion for summary judgment, appellate court would consider only evidence for which appellant provided trial court specific reference as to where evidence was located in record); *see also B.C.*, 532 S.W.3d at 552; *Chambers*, 2016 WL 3208710, at *13.

Breach of Fiduciary Duty

In her fourth issue, Skrastina asserts the trial court erred by granting summary judgment on her breach of fiduciary duty claim. Generally, to prove a claim for breach of fiduciary duty, the plaintiff must establish the existence of a fiduciary duty, a breach of the duty, and damages caused by the breach. *Parker*, 514 S.W.3d at 220. BTD moved for no-evidence summary judgment on Skrastina's breach of fiduciary duty claims on grounds there was no evidence of (1) a fiduciary relationship between BTD and Skrastina, (2) a breach of fiduciary duty by BTD, or (3) that any breach caused an injury to Skrastina or benefited BTD. BTD moved for traditional summary judgment on Skrastina's breach of fiduciary duty claim on the ground it did not owe Skrastina a fiduciary duty as a matter of law.

It is undisputed Skrastina hired BTD to be the interior designer on the renovation. Generally, a contractual relationship does not give rise to a fiduciary duty. *Natl'l Plan Adm'rs, Inc. v. Nat'l Health Ins. Co.*, 235 S.W.3d 695, 702 (Tex. 2007). Relying solely on the arbitration award, Skrastina argued BTD was also her agent and, therefore, owed her a fiduciary duty.

Agency is a "special relationship that gives rise to a fiduciary duty." *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 200 (Tex. 2002). However, all aspects of the relationship must be taken into consideration when determining the nature of the fiduciary duties between the parties. *Natl'l Plan Adm'rs, Inc.*, 235 S.W.3d at 700. Unless the parties agree otherwise, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency. *Id*. Factors which must be considered in determining the scope of an agent's fiduciary

duty to his principal include the nature and purpose of the relationship and the agreements between the agent and principal. *Id.*

The arbitrator found the contract between Skrastina and GPCH included a cost estimate of $424,070, but provided that the total contract price would equal the actual cost of construction plus the builder's fee. The arbitrator found Skrastina "hired [BTD] to act as interior designers," Woolsey was the main point of contact at BTD, and BTD "acted as the agent of Skrastina in communicating with [GPCH] concerning the scope of the work and the selection of material to be incorporated into the construction." The arbitrator noted Skrastina did not have a written contract for services with BTD that "creat[ed] an agency relationship," but Skrastina's statements, the emails between the parties, and BTD's and Skrastina's actions "establish[ed] the apparent authority of Breck Woolsey and Charles Taylor to act as agents on her behalf in their dealing with" GPCH.[2]

The arbitrator found that, as a "direct result of actions taken by Skrastina or [BTD], her agents," there were cost overages of (1) $29,842.52 for plumbing fixtures and $9,470.03 for hardware not included in the original cost estimate, (2) $13,654.00 for labor and $71,377.37 for material due to the tile selection for the master bathroom, (3) $9,889.16 due to the necessity of redesigning the route of the air conditioning ducts after it was determined a steel beam, rather than wood trusses, was necessary for structural support, and (4) $11,803.08 for rewiring after Skrastina requested that additional wiring be placed in the contract.

[2] BTD was not a party to the arbitration and there is no evidence BTD was in privity with any party to the arbitration. Accordingly, on this record, BTD is not bound by any finding of the arbitrator that BTD was Skrastina's agent. *See Sysco Food Servs., Inc. v. Trapnell*, 890 S.W.2d 796, 801 (Tex. 1994) (party asserting bar of collateral estoppel must establish that (1) the facts sought to be litigated in the second action were fully and fairly litigated in the first action; (2) those facts were essential to the judgment in the first action; and (3) the party against whom the doctrine is asserted was a party or in privity with a party to the first action). BTD, however, did not object to Skrastina's reliance on the arbitration award in her response to BTD's no-evidence motion for summary judgment and, therefore, the arbitration award remains part of the summary-judgment evidence that we consider. *See Seaprints, Inc. v. Cadleway Props., Inc.*, 446 S.W.3d 434, 441 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (concluding party waived hearsay objection to summary-judgment evidence by failing to obtain ruling in trial court and evidence remained part of summary-judgment record to be considered on appeal).

Finally, the arbitrator found there was an increase in painting costs of $50,562.60 because "more areas were painted, more colors were painted, and a high gloss paint was used." The arbitrator also found that, although Skrastina's contract with GPCH required a change order to support the additional charges for the expanded scope of painting, Skrastina paid $37,250.00 of the additional charges without objection. The arbitrator gave Skrastina a $7,000.00 credit toward the remaining cost overage related to painting.

Considered in the light most favorable to Skrastina, the arbitrator's award supports only a determination that, because Skrastina gave BTD apparent authority to communicate with GPCH about the renovation project, GPCH could rely on BTD's communication of Skrastina's decisions in working on the project. Based on this apparent authority, the arbitrator determined Skrastina was bound to pay the costs associated with the design selections communicated to GPCH by BTD. *See Stripe-A-Zone, Inc. v. M.J. Scotch Family Ltd. Psh'p*, No. 02-16-00130-CV, 2017 WL 1352099, at *5 (Tex. App.—Fort Worth Apr. 13, 2017, no pet.) (mem. op.) ("An agency relationship may create authority for any agent to bind a principal to a contract."). The arbitration award, therefore, creates a genuine issue of material fact only as to whether BTD was Skrastina's agent for purposes of communicating her decisions regarding the renovation to GPCH.

Skrastina argued there was a genuine issue of material fact as to whether BTD breached its fiduciary duty and she was harmed by the breach because BTD failed to deliver household goods and furnishings, there were extensive cost overages on the renovation, and the arbitrator found the overages were a "direct result of actions taken by Skrastina or [BTD], her agents." As to the household furnishings, Skrastina relied on Woolsey's deposition testimony that he did not know if a "Custom Mirror; Antique Mirror on Fireplace & Walls of Office" was delivered to Skrastina and he would not disagree with Skrastina if she said it was not delivered. Woolsey's lack of knowledge regarding whether the mirror was delivered is, however, no evidence the mirror was

not delivered. Further, Skrastina cited to no summary judgment evidence, and provided no argument, as to how Woolsey's testimony created a genuine issue of fact that failure to deliver the mirror was a breach of any duty BTD had to accurately communicate Skrastina's decisions to GPCH.

To support her argument she was harmed due to the cost overages on the renovation, Skrastina relied only on the arbitrator's award. The arbitrator, however, did not determine the cost overages were due to any conduct by BTD that could constitute a breach of any duty to accurately communicate Skrastina's decisions to GPCH. Accordingly, the arbitration award fails to raise a genuine issue of material fact that Skrastina was harmed by any breach of fiduciary duty by BTD.

We conclude Skrastina failed to produce more than a scintilla of evidence to raise a genuine issue of material fact as to whether BTD breached any duty or that she was harmed by any breach. Accordingly, the trial court did not err by granting BTD's no-evidence motion for summary judgment, and we need not consider whether BTD was entitled to a traditional summary judgment on Skrastina's breach of fiduciary duty claim. We resolve Skrastina's fourth issue against her as it relates to her claims against BTD.

Breach of Contract

In her third issue, Skrastina argues the trial court erred by granting summary judgment on her breach of contract claim. To prove a breach of contract claim, a plaintiff must establish the existence of a valid contract, performance or tendered performance by the plaintiff, breach of the contract by the defendant, and damages sustained as a result of the breach. *Tin Star Dev., LLC v. 360 Residential, LLC*, No. 05-17-00040-CV, 2018 WL 1804891, at *3 (Tex. App.—Dallas Apr. 17, 2018, no pet.) (mem. op.). Parties form a binding contract when there is: (1) an offer, (3) an acceptance in strict compliance with the terms of the offer, (3) a meeting of the minds, (4) each party's consent to the terms, and (5) execution and delivery of the contract with the intent that it

be mutual and binding. *Healey v. Romero*, No. 05-16-00598-CV, 2018 WL 2126903, at *2 (Tex. App.—Dallas May 7, 2018, no pet. h.) (mem. op.). To be enforceable, a contract must be sufficiently certain in its terms to enable a court to determine the rights and responsibilities of the parties. *T.O. Stanley Boot Co., Inc. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex. 1992); *D&R Constructors, Inc. v. Tex. Gulf Energy, Inc.*, No. 01-15-00604-CV, 2016 WL 4536959, at *11 (Tex. App.—Houston [1st Dist.] Aug. 30, 2016, pet. denied) (mem. op.).

BTD moved for summary judgment on Skrastina's breach of contract claim on grounds there was no evidence (1) of a valid and enforceable contract, (2) Skrastina performed under the contract, (3) BTD breached the contract, or (4) Skrastina suffered damages from any breach. BTD moved for traditional summary judgment on Skrastina's breach of contract claim on grounds the alleged contract was indefinite and there was no meeting of the minds.

Skrastina contended there was a genuine issue of material fact as to the existence of a contract based on (1) a February 5, 2013 email from Woolsey to Skrastina in which he stated he enjoyed meeting her, would love to "help out" with the project, looked forward to hearing from her, and that he and Taylor were available to make "it" as stress-free as possible, to make sure "everything goes as smoothly as possible," to be "sure that [Skrastina was] never taken advantage of during the process," and to help make sure the "house turns out exactly the way [Skrastina] would like it"; (2) a September 24, 2013 email in which BTD responded to concerns raised by Skrastina regarding the status of the renovation; (3) the arbitrator's finding that Skrastina hired BTD to be the interior designer and her agent on the renovation; and (4) Woolsey's testimony that Skrastina hired BTD to "select furnishings for the house and finishes, paint colors, hardware, things of that nature" and prepare floor plans. We conclude Skrastina produced more than a scintilla of evidence to raise a genuine issue of material fact concerning the existence of a contract between her and BTD.

As to her performance under the contract, Skrastina relied on Woolsey's testimony that Skrastina paid BTD for its services and did not owe BTD any money. We conclude Skrastina produced more than a scintilla of evidence to raise a genuine issue of material fact as to whether she performed under her contract with BTD.

Skrastina argued BTD breached the contract by failing to provide her with floor plans and by failing to deliver furnishings that she purchased from BTD. As to the floor plans, Skrastina relied on (1) Woolsey's testimony that BTD agreed to "do floor plans," (2) Skrastina and GPCH's stipulation in the arbitration that there were "no drawings or specifications for the remodel," and (3) an email exchange between her and Woolsey in which she inquired about the status of "kitchen plans," Woolsey responded he was having the plans changed and would send the revised plans to Skrastina once he received them, and the subsequent transmission to Skrastina of a preliminary drawing of the kitchen layout. The email exchange shows that Skrastina was provided with at least one floor plan and, therefore, does not support Skrastina's argument that "no drawings or floor plans were ever provided" to her. Further, Skrastina and GPCH's stipulation in the arbitration that there were "no specifications or drawings for the remodel" does not raise a genuine issue of material fact regarding whether BTD provided any "floor plans" required under its contract with Skrastina. We conclude Skrastina failed to produce evidence raising a genuine issue of material fact that BTD breached the contract by failing to provide any floor plans.

Skrastina also argued BTD breached the contract by failing to deliver certain household items. Skrastina supported her argument with Woolsey's testimony that he did not know if the custom mirror was delivered and would not disagree if Skrastina said the mirror was never delivered. However, Woolsey's lack of knowledge regarding whether the mirror was delivered does not raise a genuine issue of material fact that BTD breached the contract by failing to deliver the mirror.

Finally, Skrastina argued she was damaged by BDT's breach because (1) her summary judgment evidence "supports that certain home furnishings were paid for by [Skrastina] to [BDT], but never delivered to [Skrastina] from [BDT]," and (2) the arbitrator's finding the cost overages on the renovation project were due to Skrastina's or BTD's actions. However, the only summary judgment evidence relied upon by Skrastina to establish she was damaged by BTD's failure to deliver household furnishings was Woolsey's testimony that he did not know if the custom mirror was delivered and would not disagree if Skrastina said it was not delivered. Woolsey's lack of knowledge of whether the mirror was delivered is no evidence that Skrastina was damaged by any failure of BTD to deliver household furnishings. As to the cost overages on the renovation, Skrastina provided no argument or evidentiary support to establish the overages were due to BTD breaching the parties' contract by failing to provide floor plans or deliver household furnishings. Finally, Skrastina's response contained no argument or evidentiary support that any failure by BTD to provide floor plans caused her to incur any damages.

We conclude Skrastina failed to produce more than a scintilla of evidence to raise a genuine issue of material fact on whether BTD breached its contract with Skrastina or that she was harmed by any breach. The trial court, therefore, did not err by granting BTD's no-evidence motion for summary judgment, and we need not consider whether BTD was entitled to a traditional summary judgment on Skrastina's breach of contract claim. We resolve Skrastina's third issue against her as it relates to her claims against BTD.

Fraudulent Inducement

In her fifth issue, Skrastina contends the trial court erred by granting summary judgment on her fraudulent inducement claim. The elements of a common-law fraud claim are (1) a material representation, (2) the representation was false and was either known to be false when made or was asserted without knowledge of its truth, (4) the representation was intended to be acted upon,

5) the representation was relied upon, and (6) the reliance caused injury. *Zorrilla v Aypco Constr. II, LLC*, 469 S.W.3d 143, 153 (Tex. 2015). "Fraudulent inducement . . . is a particular species of fraud that arises only in the context of a contract and requires the existence of a contract as part of its proof." *Haase v. Glazner*, 62 S.W.3d 795, 798 (Tex. 2001); *see also Nat'l Prop. Holdings, L.P. v. Westergren*, 453 S.W.3d 419, 423 (Tex. 2015) (per curiam). Although fraudulent inducement shares the same elements as common-law fraud, it "involves a promise of future performance made with no intention of performing at the time it was made." *Zorrilla*, 469 S.W.3d at 153.

BTD moved for summary judgment on Skrastina's fraudulent inducement claim on grounds there was no evidence (1) of a valid and enforceable contract, (2) that BTD made any misrepresentation, (3) BTD knew any misrepresentation was false and intended to induce Skrastina to enter into a contract as a result of that misrepresentation, (4) Skrastina actually relied on any misrepresentation to enter into a contract, or (5) Skrastina's reliance caused her to suffer an injury through entering a contract. BTD moved for traditional summary judgment on Skrastina's fraudulent inducement claim on grounds each of the alleged misrepresentations concerned future events, were not statements of existing fact, and constituted expression of opinion, judgment, probability, and expectation.

In her response to BTD's motion for no-evidence summary judgment, Skrastina argued there was more than a scintilla of evidence to support each element of her claim because (1) she established in response to BTD's no-evidence motion for summary judgment on her breach of contract claim that there was a valid and enforceable contract, (2) BTD misrepresented that it would provide Skrastina with floor plans of the renovation and deliver a "Custom Mirror; Antique Mirror on Fireplace & Walls of Office," and (3) BTD never delivered the floor plans or the mirror. In support of her arguments, Skrastina relied on Woolsey's testimony in which he stated BTD agreed to prepare floor plans for Skrastina and that he would not disagree if Skrastina said the

mirror was never delivered, Skrastina and GPCH's stipulation in the arbitration that there were "no specification or drawings for the remodel," and the email exchange between Skrastina and Woolsey regarding the kitchen plans.

Skrastina cited to no summary judgment evidence showing that any representation the mirror would be provided was made before she entered into any agreement with BTD for interior design services, BTD knew any representations the floor plans or mirror would be delivered were false when made and intended to induce Skrastina to enter into the agreement through the misrepresentations, she relied on the statements in deciding to enter into the agreement, or that she was harmed by the reliance. Accordingly, Skrastina failed to produce more than a scintilla of evidence to raise a genuine issue of material fact on each of the challenged elements of her fraudulent inducement claim. We conclude the trial court did not err by granting BTD's no-evidence motion for summary judgment, and we need not consider whether BTD was entitled to a traditional summary judgment on Skrastina's fraudulent inducement claim. We resolve Skrastina's fifth issue against her as it relates to her claims against BTD.

Summary Judgment in Favor of Woolsey and Thomas

Skrastina alleged Woolsey and Thomas were individually liable for BTD's acts under principles of veil piercing. Although recognizing that under section 101.114 of the business organizations code, members of a limited liability company are not personally liable for the company's debts, obligations, or liabilities,[3] Skrastina alleged those statutory protections "give way" when it can be shown the limited liability company was used for the purpose of perpetrating a fraud for the member's personal benefit and that there was a "dishonesty of purpose or intent to deceive." Woolsey and Taylor moved for summary judgment on grounds there was no evidence

[3] Section 101.114 provides that, "[e]xcept as and to the extent the company agreement specifically provides otherwise, a member or manager is not liable for a debt, obligation, or liability of a limited liability company, including a debt, obligation, or liability under a judgment, decree, or order of a court." TEX. BUS. ORGS. CODE ANN. § 101.114 (West 2012).

of any underlying cause of action, that they were BTD's alter ego, or of dishonesty of purpose or intent to deceive. Woolsey and Thomas also incorporated into their motion the arguments in BTD's combined traditional and no-evidence motion for summary judgment.

Veil-piercing doctrines are not substantive causes of action. *Crooks v. M1 Real Estate Partners, Ltd.*, 238 S.W.3d 474, 488 (Tex. App.—Dallas 2007, pet. denied). Rather, they are a means of imposing on an individual a corporation's liability for an underlying cause of action. *Id.* "Without an underlying cause of action creating corporate liability, evidence of an abuse of the corporate form is immaterial." *Cox v. S. Garrett, L.L.C.*, 245 S.W.3d 574, 582 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (quoting *Specialty Retailers, Inc. v. Fuqua*, 29 S.W.3d 140, 147 (Tex. App.—Houston [14th Dist.] 2000, pet. denied)). We have concluded the trial court did not err by granting summary judgment in favor of BTD on all of Skrastina's claims. Because Skrastina failed to produce evidence supporting the underlying causes of action, the trial court also properly granted summary judgment for Woolsey and Taylor on Skrastina's veil-piercing theories. *See Cox*, 245 S.W.3d at 582. To the extent Skrastina's third, fourth, and fifth issues relate to her claims against Woolsey and Taylor, we resolve those issues against her.

Remaining Issues

In her first issue, Skrastina complains the trial court erred by granting appellees' objections to her summary judgment evidence. However, as to each element of Skrastina's breach of contract, fraudulent inducement, and breach of fiduciary duty claims that BTD challenged in its no-evidence motion for summary judgment, we have considered all the summary judgment evidence specifically pointed out by Skrastina to the trial court. Accordingly, we need not address whether the trial court erred by sustaining appellees' objections to portions of Skrastina's summary judgment evidence that she did not rely on in responding to BTD's no-evidence motion for summary judgment on those claims. *See* TEX. R. APP. P. 47.1.

In her second issue, Skrastina argues the trial court erred by granting summary judgment in favor of appellees based on their affirmative defense of collateral estoppel. Because we have affirmed the trial court's judgment on other grounds, we need not consider whether appellees were also entitled to summary judgment based on the affirmative defense of collateral estoppel. *See id.*

We affirm the trial court's judgment.

/Robert M. Fillmore/
ROBERT M. FILLMORE
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

ZANE SKRASTINA, Appellant

No. 05-17-00796-CV V.

BRECKINRIDGE-TAYLOR DESIGN, LLC D/B/A BRECKINRIDGE TAYLOR, Appellee

On Appeal from the County Court at Law No. 5, Dallas County, Texas,
Trial Court Cause No. CC-15-04902-E.
Opinion delivered by Justice Fillmore,
Justices Francis 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 Breckinridge-Taylor Design, LLC d/b/a Breckinridge-Taylor recover its costs of this appeal from appellant Zane Skrastina.

Judgment entered this 20th day of June, 2018.