**AFFIRM in Part, REVERSE in Part, and REMAND; Opinion Filed April 26, 2018.**

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

**No. 05-17-00827-CV**

**RANDY SWAN, Appellant**
**V.**
**GR FABRICATION, LLC, AND GRANT SWARTZWELDER, Appellees**

**On Appeal from the 355th District Court**
**Hood County, Texas**
**Trial Court Cause No. C2015329**

## MEMORANDUM OPINION

Before Justices Lang, Fillmore, and Schenck
Opinion by Justice Schenck

Appellant Randy Swan appeals the trial court's order granting summary judgment in favor of appellees GR Fabrication, LLC and Grant Swarzwelder in a suit appellant initiated in connection with their involvement in various ventures. In a single issue, appellant asserts the trial court erred in granting appellees' motion for no-evidence summary judgment because he presented more than a scintilla of evidence to support each element of his claims. We affirm the trial court's judgment in part, reverse the judgment in part, and remand this case for further proceedings consistent with this opinion. Because all issues are settled in law, we issue this memorandum opinion. TEX. R. APP. P. 47.4.

## FACTUAL AND PROCEDURAL BACKGROUND

Appellant filed suit against appellees claiming they were involved in various joint ventures he calls the Compressor Sales Joint Venture and the Falcon Diesel Services Joint Venture, which were created to buy and sell equipment. Appellant claims appellees owe him the sum of $112,538 in connection with the Compressor Sales Joint Venture, and unspecified profits for the Falcon Diesel Services Joint Venture, under what the parties have treated as breach of fiduciary duty and breach of contract claims. Thereafter, appellant amended his petition to add fraud and shareholder oppression claims. Appellees filed a motion for no-evidence summary judgment on appellant's breach of contract, breach of fiduciary duty, and fraud claims and a motion for traditional summary judgment on appellant's shareholder oppression claim. Appellant thereafter filed an amended petition removing his claims of fraud and shareholder oppression. Appellant filed his response to appellees' motion for no-evidence summary judgment on the breach of contract and breach of fiduciary duty claims, attaching his own declaration with a document attached thereto that appellant describes as Swartzwelder's hand written notes concerning the division of the ventures' funds. The declaration generally describes a series of business arrangements involving appellant and appellees and states appellees failed to disburse funds owed to appellant. The trial court granted appellees' motion for no-evidence summary judgment without specifying the grounds on which it relied.[1] Appellant filed a motion for rehearing. The trial court denied that motion and this appeal followed.

## DISCUSSION

### I. Applicable Law and Standard of Review

A movant seeking a no-evidence summary judgment need only allege that there is no

[1] Appellees asserted counterclaims against appellant and OTA Compression, LLC filed a plea in intervention asserting claims against appellant for alleged misappropriation of confidential information and trade secrets, defamation, and tortious interference with contractual agreements. After the trial court granted summary judgment in favor of appellees on appellant's claims, appellees and OTA Compression, LLC nonsuited their claims making the trial court's order on appellees' motion for no-evidence summary judgment final.

evidence of an essential element of a claim on which a nonmovant would have the burden of proof at trial. TEX. R. CIV. P. 166a(i); *Southwestern Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002). Once that occurs, the burden shifts to the nonmovant to bring forth evidence that raises a fact issue on the challenged elements. TEX. R. CIV. P. 166a(i). The nonmovant will defeat a no-evidence motion by presenting more than a scintilla of evidence to raise a genuine issue of material fact. *Id.* More than a scintilla of evidence exists when the evidence rises to a level that would enable fair-minded people to differ in their conclusions. *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499 (Tex. 1995).

A no evidence summary judgment is the equivalent to a pretrial directed verdict and, in reviewing the granting of a no-evidence summary judgment, this Court applies the same legal sufficiency standard as applied in reviewing directed verdicts. *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013). We will thus sustain a no-evidence summary judgment when (a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a mere scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact. *City of Keller v. Wilson*, 168 S.W.3d 802, 810 (Tex. 2005).

In a single issue, appellant urges the trial court erred in granting appellees' motion for no-evidence summary judgment because he presented more than a scintilla of evidence to support each challenged element of his claims. Appellees respond claiming the trial court did not err in granting them summary judgment because appellant's declaration: (1) is not shown to be made on personal knowledge and (2) contains only conclusory statements concerning appellees' alleged breaches and any damages suffered, and the attachment to the declaration containing hand written notes is not authenticated and cannot be considered as summary judgment evidence.

## II. Application of the Law to the Facts

### A. Personal Knowledge

In his declaration, appellant states "I have personal knowledge of the facts set forth in this Declaration, and said facts are true and correct." Simply stating that the affiant has personal knowledge of the statements in the affidavit is inadequate unless the affidavit contains other statements that affirmatively reveal how the affiant has personal knowledge. *Washington DC Party Shuttle, LLC v. IGuide Tours*, 406 S.W.3d 723, 745 (Tex. App.—Houston [14th Dist.] 2013, pet. denied). In his declaration, appellant reveals he has personal knowledge of some of his statements by virtue of his personal involvement in the business ventures he describes. Therefore, we will determine whether the declaration contains admissible evidence of the challenged elements of appellant's claims.

### B. Attachment to the Declaration

Appellees urge on appeal that the attachment to the declaration is unauthenticated and thus cannot serve as competent summary judgment evidence. Texas Rules of Evidence require as a predicate to admissibility that evidence be properly authenticated. TEX. R. EVID. 901. "A piece of evidence's authenticity is a prerequisite to admissibility." *United Rentals, Inc. v. Smith*, 445 S.W.3d 808, 813 (Tex. App.—El Paso 2014, no pet.). The authentication requirement "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." *Id.*; TEX. R. EVID. 901(a). "[T]he predicate for admissibility under rule 901 may be proven by circumstantial evidence." *Sanchez v. Tex. State Bd. of Med. Examiners*, 229 S.W.3d 498, 509 (Tex. App.—Austin 2007, no pet.). "A document is considered authentic if a sponsoring witness vouches for its authenticity or if the document meets the requirements of self-authentication" set out in Texas Rule of Evidence 902. *Castro v. Sebesta*, 808 S.W.2d 189, 195 (Tex. App.—Houston [1st Dist.] 1991, no writ) (op. on reh'g). The absence of authentication is a

substantive defect that need not be objected to in the trial court to be raised on appeal. *HighMount Expl. & Prod. LLC v. Harrison Interests, Ltd.*, 503 S.W.3d 557, 567 (Tex. App.—Houston [14th Dist.] 2016, no pet.). Thus, the authentication issue is properly before this Court.

Appellant did not authenticate the hand written notes attached to his declaration. Because there was a complete absence of authentication, appellant cannot rely on the hand written notes to supply evidence of the challenged elements of his claims. Thus, in considering whether appellant presented evidence concerning the challenged elements of his claims, we do not consider the hand written notes.

**C. Breach of Fiduciary Duty Claim**

Appellees' motion for no-evidence summary judgment asserted that no evidence supported appellant's claimed existence of a fiduciary relationship between appellant and GR Fabrication, LLC,[2] breach, or any injury suffered as a result.[3]

There are two types of fiduciary relationships, formal and informal. A formal fiduciary relationship includes the relationships between attorney and client, principal and agent, partners, and joint venturers. *Ins. Co. of N. Am. v. Morris*, 981 S.W.2d 667, 674 (Tex. 1998). In his declaration, appellant relies on the purported existence of a joint venture to support his breach of fiduciary duty claim.[4] A joint venture has four elements: (1) a community of interest in the venture, (2) an agreement to share profits, (3) an agreement to share losses, and (4) a mutual right of control or management of the enterprise. *Ayco Dev. Corp. v. G.E.T. Serv. Co.*, 616 S.W.2d 184, 186 (Tex. 1981). Appellant asserts the breach of fiduciary duty claim as to the Falcon Diesel Services Joint

[2] Appellees' did not raise a no-evidence challenge to the existence of a fiduciary relationship between appellant and Swartzwelder.

[3] The essential elements of a breach of fiduciary duty claim are: a fiduciary relationship between the plaintiff and defendant; a breach by the defendant of his fiduciary duty to the plaintiff; and an injury to the plaintiff or benefit to the defendant as a result of the defendant's breach. *Lindley v. McKnight*, 349 S.W.3d 113, 124 (Tex. App.—Fort Worth 2011, no pet.).

[4] Specifically, appellant states "I, as one party, entered into a joint venture with GR Fabrication, LLC, and its member Grant Swartzwelder, as the other party, in Hood County, Texas, to buy and sell oil field equipment."

Venture. Appellant failed to present evidence of a mutual right of control or management of the alleged venture, and, in fact, states that the inventory purchased had been in the sole possession and control of Swartzwelder. Accordingly, appellant failed to meet his burden of establishing the existence of a fiduciary relationship between appellant and GR Fabrications.

Moreover, appellant had the burden to produce evidence of a breach of the duty to act in good faith and in due regard for the interests of appellant. Acts of contracting parties may breach duties in tort or contract, and it is the nature of the injury that often determines which duty or duties are breached. *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986). In its brief, appellant asserts Swatzwelder breached his fiduciary duty by failing to account for inventory acquired by the Falcon Diesel Services Joint Venture. There is no allegation or evidence regarding any conduct of appellees other than their alleged failure to remit payment of profits. When the claimed injury is only the economic loss to the subject of an agreement itself the action sounds in contract alone. *Id.* Because appellant's claim for breach of fiduciary duty is based on appellees' alleged failure to pay him his share of the profits, summary judgment on appellant's breach of fiduciary duty claim was proper. Accordingly, we overrule appellant's issue concerning summary judgment on his breach of fiduciary duty claim.

**D. Breach of Contract Claim**

Appellees asserted appellant had no evidence to raise a genuine issue of material fact as to the existence of a contract between appellant and appellees, a breach by appellees, or any injury suffered by appellant.[5]

In his brief, appellant argues that he is owed money for two transactions under the Compressor Sales Joint Venture agreement. The first transaction concerned the venture's sale of

[5] The essential elements of a breach of contract claim are: 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. *City of The Colony v. N. Tex. Mun. Water Dist.*, 272 S.W.3d 699, 739 (Tex. App.—Fort Worth 2008, pet. dism'd).

a compressor package for which he was to receive 50% of the profits. The second transaction involved the sale of two booster compressor units that appellant owned, for which he was to receive 75% of the profits.

To defeat a no-evidence summary judgment motion, the nonmovant need only produce more than a scintilla of evidence raising a genuine issue of material fact on each of the challenged elements. When reviewing a no-evidence summary judgment, we consider all of the evidence in the light most favorable to the party against whom the judgment was rendered; every reasonable inference must be indulged in favor of the nonmovant, and any doubts resolved in its favor. *See Qantel Bus. Systems, Inc. v. Custom Controls Co.*, 761 S.W.2d 302, 303–04 (Tex. 1988). Appellant was not required to marshal his proof on damages, but to "point out evidence that raises a fact issue" on the challenged damages element of his causes of action. *See* TEX. R. CIV. P. 166a(i) (comment).

In his declaration, appellant states he entered into a venture with appellees to buy and sell oil field equipment. This is some evidence of the existence of an agreement. Regarding the sale of equipment in the first transaction, appellant states the business venture sold the equipment to Archer and Associates for $120,000 and that he and Swartzwelder were to split the profit on that sale. As to the second transaction involving the sale of two booster compressor units that appellant personally owned, appellant states he and Swartzwelder agreed that Swartzwelder's split of the profits would be 25% insisted of 50% because this transaction involved equipment appellant owned personally and did not require any up-front capital. Appellant states his cost for the equipment was $110,000, he sold it to GR Fabrication for $120,000, and he believed the fair market value of the equipment was $130,000. Appellant states that despite the sale of the equipment to Archer and Associates and the sale of the two booster compressor units, appellees have refused to pay him his share of the profits. This is more than a scintilla of evidence of a breach of an

agreement and damages. *See e.g., Jones v. Star Houston, Inc.*, 45 S.W.3d 350, 355 (Tex. App.—Houston [1st Dist.] 2001, no pet.). Accordingly, the trial court's grant of a no-evidence summary judgment on appellant's breach of contract claim was improper. We sustain appellant's issue as to his breach of contract claim.

## CONCLUSION

We affirm in part the summary judgment for appellees on appellant's breach of fiduciary duty claim, and reverse in part the summary judgment granted to appellees on appellant's breach of contract claim. We remand this cause to the trial court for further proceedings consistent with this opinion.

/David J. Schenck/
DAVID J. SCHENCK
JUSTICE

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# Court of Appeals
# Fifth District of Texas at Dallas

## JUDGMENT

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| RANDY SWAN, Appellant | On Appeal from the 355th District Court, Hood County, Texas |
| No. 05-17-00827-CV V. | Trial Court Cause No. C2015329. Opinion delivered by Justice Schenck. |
| GR FABRICATION, LLC, AND GRANT SWARTZWELDER, Appellees | Justices Lang and Fillmore participating. |

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED** in part and **REVERSED** in part. We **REVERSE** that portion of the trial court's judgment granting summary judgment on appellant Randy Swan's breach of contract claim. In all other respects, the trial court's judgment is **AFFIRMED**. We **REMAND** this cause to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment entered this 26th day of April, 2018.