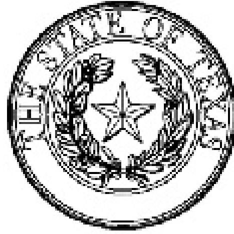
Opinion issued June 19, 2008



In The

Court of Appeals

For The

First District of Texas

NO. 01-07-00438-CV

STANLEY RUSSELL COLEMAN, Appellant

V.

LYNN A. REVAK, REVAK TURBOMACHINERY SERVICES, INC., REVAK ETNERPRISES, INC., L-MART INTERNATIONAL CORPORATION, REVAK CONTROLS CORPORATION, TURBO STORAGE SERVICE COMPANY, AND REVAK ENERGY, INC., Appellees

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On Appeal from the 11th District Court
Harris County, Texas
Trial Court Cause No. 2006-35477

MEMORANDUM OPINION

This appeal arises from the termination of appellant Stanley Russell Coleman's ("Coleman") employment with appellees, Lynn A. Revak, Revak Turbomachinery Services, Inc., Revak Enterprises, Inc., L-Mart International Corporation, Revak Controls Corporation, Turbo Storage Service Company, and Revak Energy, Inc. (collectively, "Revak"). Coleman sued Revak for breach of contract and common law fraud. The trial court granted Revak's motion for summary judgment. In two issues, Coleman argues that the trial court erred in granting summary judgment in favor of Revak because (1) the motion for summary judgment did not set forth the grounds for granting the motion and/or the grounds set forth lacked the specificity required as a matter of law and (2) there were genuine issues of material fact created by Coleman's affidavit that precludes summary judgment on his breach of contract and common law fraud claims. We affirm.

Factual Background [1]

Prior to being employed by Revak, Coleman was a consultant based in Nederland, Texas who occasionally performed consulting services for Revak. Eventually, Revak offered Coleman a full-time employment position in Houston. Revak assured Coleman that, if he accepted the job offer, Coleman could only be

[1] For purposes of this appeal, we accept as true the facts alleged in Coleman's affidavit, which is attached to his response to Revak's motion for summary judgment.

terminated for cause and that it would not be an at will position. Revak repeated this assurance more than once. In reliance on these representations, Coleman accepted the job offer, shut down his business in Nederland, and relocated with his wife to Houston.

Shortly after beginning his employment with Revak, Coleman completed an employment application. In the application Coleman put his initials by the following acknowledgment:

> I understand that nothing contained in the application or conveyed to me during any interview that may be granted is intended to create an employment contract, implied or explicit, between the Revak Companies and me. In addition, I understand and agree that if I am employed, my employment relationship with the Revak Companies is strictly voluntary and at our mutual will. I understand that if employed, my employment is for no definite period and may be terminated at any time, with or without prior notice, with or without cause or reason, at the option of either me or the Revak Companies, and that no promises or representations contrary to the foregoing are binding on the Revak Companies unless made in writing and signed jointly by the President/CEO and me.

After Coleman was hired, Revak continued to represent to Coleman that his position was not at will. After 40 months of employment, Revak eventually terminated Coleman without cause.

Coleman sued Revak for breach of contract and common law fraud. Revak moved for summary judgment based upon the statute of frauds, the statute of limitations, and the fact that Coleman was an at will employee as evidenced by his

acknowledgment in the employment application. Without stating its reasons, the trial court granted Revak's motion for summary judgment. This appeal timely followed.

Standard of Review

Our review of a trial court's decision to grant summary judgment is de novo. *Valence Operating Co. v. Dorsett,* 164 S.W.3d 656, 661 (Tex. 2005). In a traditional summary judgment motion, the movant must show that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. TEX R. CIV. P. 166a(c); *Pustejovsky v. Rapid-Am. Corp.,* 35 S.W.3d 643, 645–46 (Tex. 2000). When a defendant moves for traditional summary judgment, the summary judgment evidence must either (1) disprove at least one element of the plaintiff's cause of action or (2) conclusively establish each essential element of its affirmative defense, thereby defeating the plaintiff's cause of action. *Cathey v. Booth,* 900 S.W.2d 339, 341 (Tex. 1995). In deciding whether a disputed material fact issue precludes summary judgment, we take evidence favorable to the nonmovant as true, and indulge every reasonable inference and resolve any doubts in favor of the nonmovant. *Provident Life & Accid. Ins. Co. v. Knott,* 128 S.W.3d 211, 215 (Tex. 2003). When, as here, the trial court does not specify the grounds upon which it ruled, the summary judgment may be affirmed if any of the grounds

stated in the motion is meritorious. *W. Invs., Inc. v. Urena,* 162 S.W.3d 547, 550 (Tex. 2005); *Mayes v. Goodyear Tire & Rubber Co.*, 144 S.W.3d 50, 55 (Tex. App.—Houston [1st Dist.] 2004, no pet.).

Discussion

Grounds for Summary Judgment

In his first issue, Coleman contends that the court erred in granting Revak's motion for summary judgment because the motion did not expressly present the grounds for summary judgment in its motion. Coleman argues that the motion was "so vague and incomplete that the bases for dismissing [his] causes of action were indecipherable." Coleman argues that the motion was required to specify "how each conclusion is reached or supported by the evidence." We disagree.

Rule 166a(c) of the Texas Rules of Civil Procedure provides that a motion for summary judgment must "state the specific grounds therefor." TEX. R. CIV. P. 166a(c); *Stiles v. Resolution Trust Corp.*, 867 S.W.2d 24, 26 (Tex. 1993). While the grounds "must at least be listed in the motion," they "may be stated concisely, without detail and argument." *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 340 (Tex. 1993). A movant is not required to specifically describe how evidence in support of the motion justifies a summary judgment; merely identifying a theory of liability or defense will suffice. *See, e.g., Conquistador*

Petroleum, Inc. v. Chatham, 899 S.W.2d 439, 441–42 (Tex. App.—Eastland 1995, writ denied) (Court found that the following statement alone regarding an affirmative defense was sufficient to satisfy the requirements of Rule 166a(c): "[Defendant] moves for summary judgment against [Plaintiff] on the affirmative defense of unenforceability pursuant to the Rule against Perpetuities.").

Grounds are sufficiently specific if they give "fair notice" to the nonmovant of the claim involved. *City of Roanoke v. Town of Westlake*, 111 S.W.3d 617, 633 (Tex. App.—Ft. Worth 2003, pet. denied). Where the grounds are ambiguous, unclear or otherwise lacking in specificity, the nonmovant must specially except to the form of the motion and give the movant an opportunity to amend before the nonmovant can complain about this issue on appeal. *McConnell,* 858 S.W.2d at 341. The failure to specially except will result in the waiver of this issue on appeal. *Conquistador Petroleum, Inc.*, 899 S.W.2d at 442.

Here, Revak's motion complies with the mandates of Rule 166a(c) by expressly setting forth the specific grounds for summary judgment. The motion gives Coleman notice that the motion addresses all claims asserted in this action and states that "Coleman's claims are barred and denied by the Statute of Frauds [Business & Commerce Code Sec. 26.01(b)(6)] and by the Statute of Limitations and especially by the above cited paragraph 4 of the Employment Application

signed May 22, 2000." Specifically, Coleman had fair notice that his at will status was being asserted as defense to his claims. The cited paragraph refers to the initialed acknowledgement that Coleman has no employment contract with Revak and is an at will employee. Coleman did not file a special exception to the grounds for summary judgment stated in the motion as "vague," "incomplete," "indecipherable," or otherwise lacking in specificity. Accordingly, Coleman has waived his right to argue on appeal that the grounds in the motion lacked sufficient specificity. *See McConnell,* 858 S.W.2d at 342–43; *Conquistador Petroleum, Inc.*, 899 S.W.2d at 442.

As part of his first issue, Coleman also asserts that the trial court erred in considering his employment application as summary judgment evidence because he objected to its admissibility on grounds that Revak did not establish "a proper predicate for its authenticity." To raise this issue on appeal, Coleman was required not only to make this objection, but to secure a ruling on his objection by the trial court. *Hou-Tex, Inc. v. Landmark Graphics*, 26 S.W.3d 103, 112 (Tex. App.—Houston [14th Dist.] 2000, no pet.). The record does not demonstrate that Coleman secured a ruling on his objection to the employment application. Therefore, Coleman has waived any complaint on appeal.

We hold that the grounds for summary judgment set forth in the motion are

sufficient to satisfy the requirements of Rule 166a(c) and Coleman has waived his right to complain on appeal the lack of specificity of those grounds. We overrule Coleman's first issue.

Issue of Material Fact

In his second issue, Coleman contends that the affidavit attached to his response to Revak's motion for summary judgment raises issues of material fact that preclude summary judgment on his breach of contract and common law fraud claims. Coleman argues that the affidavit sets forth facts showing that he was not an at will employee and that Revak continued to make material misrepresentations to him regarding his tenure both before and after he accepted the job offer and that these facts defeat the motion. We disagree.

Assuming, as we must, all of the facts in Coleman's affidavit concerning his employment status and the representations Revak made to him are true, Revak was entitled to summary judgment on Coleman's breach of contract and fraud claims. *Nixon v. Mr. Prop. Mgmt. Co., Inc.*, 690 S.W.2d 546, 548–49 (Tex. 1985). To establish a claim for breach of contract, Coleman must first establish the existence of a valid contract. *Williams v. First Tenn. Nat'l Corp.*, 97 S.W.3d 798, 802–03 (Tex. App.—Dallas 2003, no pet.). Coleman asserts that, based on the oral representations made by Revak, Coleman had an oral contract with Revak that he

would not be fired except for cause. However, Revak's assurances and representations to Coleman were too indefinite to constitute an employment contract limiting Revak's right to terminate Coleman. *See Montgomery County Hosp. Dist. v. Brown*, 965 S.W.2d 501, 502–03 (Tex. 1998).

For more than a century, the general rule in Texas has been that, absent a specific agreement to the contrary, employment may be terminated by the employer or the employee at will, for good cause, bad cause, or no cause at all. *Fed. Express Corp. v. Dutschmann*, 846 S.W.2d 282, 283 (Tex. 1993); *East Line & R.R.R. Co. v. Scott*, 72 Tex. 70, 75, 10 S.W. 99, 102 (1888). A promise, acceptance of which will form a contract, "is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." RESTATEMENT (SECOND) OF CONTRACTS § 2(1) (1981). General statements like those allegedly made by Revak simply do not justify the conclusion that the speaker intends to make a binding contract of employment. *See Brown*, 965 S.W.2d at 502. For such a contract to exist, the employer must unequivocally indicate a definite intent to be bound not to terminate the employee except under clearly specified circumstances. *Id.* General comments that an employee will not be discharged as long as his work is satisfactory do not in themselves manifest such intent. *Id.* Neither do statements

that an employee will be discharged only for "good reason" or "good cause" when there is no agreement on what those terms encompass. *Id.* Without such agreement the employee cannot reasonably expect to limit the employer's right to terminate him. *Id*. Accordingly, Coleman cannot establish an essential element of his breach of contract claim, the existence of a valid contract, and the trial court did not err in granting summary judgment on this claim. *Id.* The basis of Coleman's fraud claim is that Revak terminated him without cause after making repeated misrepresentations to Coleman that he could be terminated only for cause. As discussed above, the summary judgment evidence establishes that there was no contract between Revak and Coleman altering Coleman's at will status with Revak. *See Brown,* 965 S.W.2d at 502 (holding employment is presumed to be at will absent specific contrary agreement). We have held that an "at will" employee is barred from bringing a cause of action for fraud against his employer based upon the employer's decision to discharge the employee. *Miller v. Raytheon Aircraft Co.*, 229 S.W.3d. 358, 381 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *see also Brown v. Swett & Crawford of Tex., Inc*., 178 S.W.3d 373, 379–80 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (holding that status as at will employee precludes claim for fraudulent inducement as matter of law). Accordingly, Coleman's fraud claim is precluded as a matter of law because Coleman's

employment was at will. The trial court did not err in granting summary judgment on this claim.

We hold that the affidavit does not raise a genuine issue as to any material fact that would defeat summary judgment. We overrule issue two.

Conclusion

We affirm the judgment of the trial court.

George C. Hanks, Jr.
Justice

Panel consists of Justices Nuchia, Alcala, and Hanks