Opinion issued June 10, 2010

In The

Court of Appeals

For The

First District of Texas

NO. 01-08-00773-CV

HARALD STAUDER AND EUROPEAN MOTORCYCLE CORPORATION, Appellants

V.

JOHN NICHOLS AND NICHOLS LAW, P.L.L.C., Appellees

On Appeal from the 333rd District
Harris County, Texas
Trial Court Case No. 2007-38222

MEMORANDUM OPINION

Appellants, Harald Stauder and European Motorcycle Corporation, sued appellees, John Nichols and the Nichols Law Firm, P.L.L.C. (collectively, "Nichols"), for professional negligence and breach of fiduciary duty. Nichols moved for a no-evidence summary judgment, which the trial court granted.

In what we construe as three issues, appellants contend that the trial court erred by granting summary judgment in favor of Nichols. In their first issue, appellants contend that an adequate time for discovery had not passed. In their second issue, appellants contend that the trial court erred by overruling their motion to "late file" the affidavit of Harald Stauder. In their third issue, appellants contend that the trial court erred by granting summary judgment.

We affirm.

BACKGROUND

In 2003, Gabrielle Stauder-Hipold sued Markus Stauder for divorce in a Nueces County court.[1] Appellee Nichols represented Markus in the suit. Markus's brother, appellant Harald, intervened in the suit, seeking to recover $2.2 million that he had loaned to Gabrielle.[2] Nichols also represented Harald. Gabrielle

---

[1] Gabrielle and Markus are not parties to this appeal. *See In re Gabrielle Stauder-Hipold and Markus Stauder*, No. 03-7257-F (214th Dist. Ct., Nueces County, Tex.).

[2] A creditor may intervene in a divorce suit, subject to being stricken by the trial court for sufficient cause on the motion of any party. *See* TEX. R. CIV. P. 60; *Fletcher v. Nat'l Bank of Commerce*, 825 S.W.2d 176, 179 (Tex. App.—Amarillo

brought into the suit, as a third-party defendant, EMC—a foreign corporation owned by a Liechtenstein trust, of which Markus is the beneficiary. Nichols also represented EMC, at least initially.

Trial was set for May 2005, and a docket control order was issued. At some point, Nichols withdrew as EMC's counsel and another attorney was hired to represent EMC.

The trial court ordered that the parties attend mediation. Gabrielle, Harald, and a representative of EMC attended. EMC was represented by independent counsel.

At the mediation, according to appellants, Nichols advised Harald to abandon his $2.2 million claim, telling him that, if he refused, the divorce court could impose extreme consequences on him, including seizure of his passport, sanctions, and incarceration. In addition, according to appellants, Nichols strongly advised EMC to relinquish its interests in various assets, and EMC agreed.

On May 31, 2005, the parties announced to the trial court that they had settled the case.[3] The settlement agreement was submitted to the court, and a final decree was prepared, reflecting the terms of the agreement.[4]

1992, no writ); *Wileman v. Wade*, 665 S.W.2d 519, 520-21 (Tex. App.—Dallas 1983, no writ).

[3] There is no record of a hearing before us.

Shortly after, however, Harald and EMC notified Nichols that they would not agree to the terms of the decree. According to appellants, the EMC representative who had attended the mediation had no authority to bind the trust and the proper authority had refused to approve the agreement. Nichols appeared before the trial court and signed off on the decree as "approved as to form," on behalf of Markus, Harald, and EMC, and the trial court signed the final decree.

According to appellants, the effect of the decree was that EMC lost the bulk of its assets, and Harald lost his claim for reimbursement of $2.2 million.

On June 22, 2007, appellants sued Nichols in Harris County for negligence and breach of fiduciary duty. Specifically, appellants alleged that Nichols was negligent in

1. advising Harald to abandon his claims for return of his $2.2 million;
2. advising EMC to enter into the "agreement";
3. signing off on the "agreement" without Harald's or EMC's authority;
4. "settling" the case instead of moving forward with trial;
5. failing to resist the trial court's jurisdiction over EMC;
6. failing to pursue the claims against Gabrielle's attorneys for the return of Harald's money;
7. jointly representing Markus, Harald and EMC when their interests were, in part, not consistent with one another;
8. failing to make Harald's "agreement" to abandon his claims conditional upon the occurrence of other events involved in the settlement;
9. failing to obtain the informed consent of Harald and EMC in entering into the "agreement";

---

[4] The decree is not in the record before us.

10. failing to take immediate remedial action to withdraw Harald's and EMC's consent to the "agreement"; [and]
11. failing to properly and timely disclose to Harald and EMC his conflicts or potential conflicts of interest in the joint representation[.]

Appellants alleged that Nichols breached his fiduciary duties by charging unreasonable fees; representing the interests of appellants jointly with that of other clients; failing to make complete and adequate disclosure of all material facts; acting without appellants' authority or informed consent; and acting contrary to the instruction of his clients.

On August 7, 2007, Nichols moved to transfer the suit, for convenience, to Nueces County. Nichols answered the suit, subject to the motion to transfer. Nichols did not request a hearing on the motion to transfer.

On June 12, 2008, Nichols served on appellants a Request for Disclosure, which states that it was "made subject to and without waiving [Nichols'] motion to transfer venue." On July 14, 2008, appellants served their responses.

On July 14, 2008, appellants moved for the entry of a new scheduling order, asserting that, because Nichols had failed to diligently request a hearing or to obtain a ruling on his motion to transfer, the deadlines in the scheduling order had become "unworkable" and should be amended. Appellants also filed a "Motion to Overrule [Nichols's] Motion to Transfer Venue." The trial court did not expressly rule on appellants' motions.

On July 18, 2008, Nichols filed a motion for a no-evidence summary judgment, pursuant to Rule of Civil Procedure 166a(i), on appellants' negligence and breach of fiduciary duty claims. Nichols listed the elements of appellants' claims and alleged that "[n]o evidence exist[ed] as to one or more of these elements." The motion was set for submission on August 11, 2008.

On August 4, 2008, appellants' counsel moved for a continuance, asserting that Harald resided in Austria, was currently overseas, and that counsel had not been able to reach Harald to obtain his affidavit in response to the motion for summary judgment.

Also on August 4, 2008, appellants responded to the motion for summary judgment, subject to their motion to continue. Appellants contended that a no-evidence summary judgment was "impermissible" on a breach of fiduciary duty claim because Nichols, and not appellants, bore the burden of proof. In addition, appellants contended an adequate time for discovery had not passed, namely, because Nichols had failed to diligently request a hearing or to obtain a ruling on his motion to transfer venue. Appellants argued that Nichols had "lain behind the transfer log for ten months" and, having filed a motion for summary judgment "subject to their motion to transfer venue" only days before, Nichols could not now allege that adequate time for discovery had passed.

As evidentiary support for their negligence and breach of fiduciary duty claims, appellants appended a series of correspondence between the parties regarding the motion to transfer; appellants' responses to Nichols's Request for Disclosure; a piece of unsigned, undated correspondence from Markus to Nichols; and a letter, dated June 28, 2005, from Nichols to Harald and Markus. The details of these items are discussed in more detail below.

On August 6, 2008, Harald's affidavit was executed and appellants sought leave to untimely file the affidavit. Appellants submitted Harald's affidavit to the trial court and requested that the trial court consider it, in spite of the restrictions imposed by Rule of Civil Procedure 166a(c),[5] because counsel had been unable to reach Harald until August 5, 2008; because the affidavit did "not substantively change the basis of or support for" the motion for summary judgment; because the affidavit "merely verifie[d] that which [appellants] said in their responses" to Nichols's Request for Disclosure; and because "no surprise [wa]s occasioned upon [Nichols] by the contents of the affidavit."

The trial court did not expressly rule on the motion for continuance or the motion for leave to untimely file the affidavit. On August 13, 2008, the trial court

---

[5] *See* TEX. R. CIV. P. 166a(c) ("Except on leave of court, the adverse party, not later than seven days prior to the day of hearing may file and serve opposing affidavits or other written response.").

granted summary judgment in favor of Nichols and ordered that appellants take nothing.

No-Evidence Summary Judgment

A. Standard of Review and Guiding Legal Principles

After an adequate time for discovery, the party without the burden of proof may move for a no-evidence summary judgment, with or without presenting evidence, on the basis that there is no evidence to support an essential element of the non-moving party's claim. TEX. R. CIV. P. 166a(i). A no-evidence motion for summary judgment is essentially a motion for a pre-trial directed verdict. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 581-82 (Tex. 2006). Once the motion is filed, the burden shifts to the nonmoving party to present evidence raising a genuine issue of material fact as to the elements specified in the motion. *Id.* at 582. "We review the evidence presented by the motion and response in the light most favorable to the party against whom summary judgment was rendered, crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not." *Id.* "The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact." TEX. R. CIV. P. 166a(i). If the non-movant brings forward more than a scintilla of evidence that raises a genuine issue of material fact, then summary judgment is not proper. *Flameout Design & Fabrication, Inc.*

v. Pennzoil Caspian Corp., 994 S.W.2d 830, 834 (Tex. App.— Houston [1st Dist.] 1999, no pet.). More than a scintilla exists when the evidence rises to a level that would enable reasonable and fair-minded people to differ in their conclusions. *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997).

When, as here, a trial court does not state the basis for its decision in its summary judgment order, we must uphold the order if any of the theories advanced is meritorious. *State Farm Fire & Cas. Co. v. S.S.*, 858 S.W.2d 374, 380 (Tex. 1993).

B. Adequate Time for Discovery

In their first issue, appellants contend that Nichols moved for summary judgment before an adequate time for discovery had passed.

The commentary to Rule of Civil Procedure 166a(i) provides: "A discovery period set by pretrial order should be adequate opportunity for discovery unless there is a showing to the contrary, and ordinarily a motion under paragraph (i) would be permitted after the period but not before." *See* TEX. R. CIV. P. 166a(i) cmt. The specific factors to consider in determining whether an adequate time for discovery has passed are (a) the nature of the case; (b) the nature of the evidence necessary to controvert the no-evidence motion; (c) the length of time the case was active; (d) whether the movant had requested stricter deadlines; (e) the amount of discovery already completed; and (f) whether the discovery deadlines in place were

specific or vague. *Madison v. Williamson*, 241 S.W.3d 145, 155 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).

Here, the record reflects that appellants filed their original petition on June 22, 2007, and that the trial court granted summary judgment in favor of Nichols on August 13, 2008. Hence, the suit had been on file for over a year before the trial court granted summary judgment. It is undisputed that appellants did not conduct any discovery during that period. The trial court's docket control order provided specific deadlines—that the discovery period was to end October 10, 2008, and that a motion for no-evidence summary judgment could not be heard before August 11, 2008. The record reflects that the trial court heard the motion on August 11, 2008.

Under these circumstances, we conclude that the trial court did not abuse its discretion by determining that adequate time for discovery had elapsed on appellants' claims. *See Williamson*, 241 S.W.3d at 155-56 (holding that trial court did not abuse its discretion when suit had been on file for over one year before summary judgment was granted); *McMahan v. Greenwood*, 108 S.W.3d 467, 498-99 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (same).

1. Transfer of Venue

In a sub-issue that bears on whether an adequate time for discovery had passed, appellants contend that they could not conduct discovery because Nichols's

motion to transfer venue remained pending. As Nichols contends, however, Rule of Civil Procedure 88 provides, "Discovery shall not be abated or otherwise affected by pendency of a motion to transfer venue." *See* TEX. R. CIV. P. 88.

2. Motion for Continuance

In another sub-issue that bears on whether an adequate time for discovery had passed, appellants contend that the trial court erred by overruling their motion for continuance.

A party contending that it has not had an adequate opportunity for discovery before a summary judgment hearing must either file an affidavit explaining the need for further discovery or file a verified motion for continuance. *See Tenneco Inc. v. Enter. Prods. Co*., 925 S.W.2d 640, 647 (Tex. 1996).

Here, appellants filed a verified motion for continuance. It is undisputed that the trial court did not expressly rule on the motion and that appellants did not object to the lack of ruling. Generally, such failure to obtain a ruling on a motion for continuance waives the issue on appeal. *See* TEX. R. APP. P. 33.1; *Sw. Country Enters., Inc. v. Lucky Lady Oil Co.*, 991 S.W.2d 490, 492-93 (Tex App.—Fort Worth 1999, pet. denied). Appellants contend, rather, that the trial court erred by "tacitly" failing or refusing to grant appellants' motion for continuance.

Rule 33.1 provides that an implicit ruling may be sufficient to present an issue for appellate review. *See* TEX. R. APP. P. 33.1; *In re Z.L.T.*, 124 S.W.3d 163,

165 (Tex. 2003). Here, by proceeding to submission of the motion for summary judgment as scheduled, the trial court necessarily implicitly denied appellants' request for a continuance. Hence, we review the ruling.

We review a trial court's denial of a motion for continuance for a clear abuse of discretion. *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 161 (Tex. 2004). A trial court abuses its discretion when it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. *Id*.

Appellants' counsel moved for a continuance on the basis that appellants reside in Austria, were traveling overseas, and that counsel had been unable, since the time the motion for summary judgment was filed and set for submission, to obtain an affidavit from Harald in response.

Mere absence of a party does not automatically entitle him to a continuance. *See Vickery v. Vickery*, 999 S.W.2d 342, 363 (Tex. 1999). The trial court may order a continuance of a summary-judgment hearing if it appears "from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition." TEX. R. CIV. P. 166a(g). The motion must be supported by an affidavit showing: the length of time the case has been on file, the materiality and purpose of the discovery sought, and whether the party seeking the continuance has exercised due diligence to obtain the discovery sought. *See id*.; TEX. R. CIV. P. 252; *Vickery*, 999 S.W.2d at 363; *Perrotta v.*

Farmers Ins. Exch., 47 S.W.3d 569, 576 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

Appellants' counsel's motion states that, "[i]n an abundance of caution, [appellants] thus request a continuance of the submission date in order to allow [appellants] to submit affidavit evidence in response." The motion is not supported by an affidavit showing any of the requisite information regarding materiality of the testimony or diligence in attempting to procure such testimony. Generally, when a movant fails to include an affidavit in support of his motion, the appellate court presumes the trial court did not abuse its discretion in denying the continuance. *See Villegas v. Carter*, 711 S.W.2d 624, 626 (Tex. 1986). We cannot conclude that the trial court abused its discretion by implicitly overruling appellants' motion for continuance.

Accordingly, we overrule appellants' first issue.[6]

C. Harald's Affidavit

In their second issue, appellants contend that the trial court erred by overruling their motion to "late file" the affidavit of Harald.

[6] Appellants also contend that the trial court erred by overruling their request for a new scheduling order. This point is not briefed. Hence, nothing is presented for our review. *See* TEX. R. APP. P. 38.1(i).

Rule of Civil Procedure 166a(c) provides that, "[e]xcept on leave of court, the adverse party" may file and serve opposing affidavits or other written response "not later than seven days prior to the day of hearing." TEX. R. CIV. P. 166a(c).

Here, appellants moved for leave to untimely file Harald's affidavit on August 6, 2008, five days prior to the trial court's scheduled submission of the summary judgment. It is undisputed that the trial court did not expressly rule on the motion and that appellants did not object to the lack of ruling. *See* TEX. R. APP. P. 33.1. Appellants contend, rather, that the trial court "tacitly" overruled their motion to untimely file the affidavit.

To the contrary, however, the order granting summary judgment in this case, which states that the trial court considered "the briefing, the arguments, the pleadings, motion, any response to the motion for summary judgment, and any evidence," does not indicate an implied ruling on appellants' motion for leave to file the affidavit. *See Delfino v. Perry Homes*, 223 S.W.3d 32, 34-35 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *see also Lewis v. Marina Bay Trucks, Inc.*, No. 14-02-00053-CV, 2007 WL 900785, at *3-4 (Tex. App.—Houston [14th Dist.] Mar. 27, 2007, no pet.) (mem. op.). The trial court's order granting summary judgment is equally consistent with having made no ruling on the motion, having granted the motion, and having denied the motion. *See Lewis*, 2007 WL 900785, at *4.

We hold that appellants have not preserved this issue for review. *See* TEX. R. APP. P. 33.1.

Accordingly, appellants' second issue is overruled.

D. Summary Judgment in Favor of Nichols

In their third issue, appellants contend that the trial court erred by granting summary judgment in favor of Nichols.

1. Negligence

Appellants alleged that Nichols committed various acts of professional negligence. To prevail on a professional negligence claim against a lawyer, appellants were required to show that (1) Nichols owed a duty to appellants; (2) Nichols breached that duty; (3) the breach proximately caused appellants' injuries; and (4) damages occurred. *See Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. and Research Corp*., 299 S.W.3d 106, 112 (Tex. 2009).

In his motion for no-evidence summary judgment, Nichols contended that no evidence exists to support any of the elements of this claim.

The burden then shifted to appellants to produce evidence that raises a genuine issue of material fact on the challenged elements. *See Tamez*, 206 S.W.3d at 582 ("Once such a motion is filed, the burden shifts to the nonmoving party to present evidence raising an issue of material fact as to the elements specified in the motion."). If appellants brought forward more than a scintilla of probative

evidence to raise a genuine issue of material fact, then summary judgment was not proper. *See Flameout Design & Fabrication, Inc.*, 994 S.W.2d at 834. More than a scintilla exists when the evidence "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499 (Tex. 1995). If the evidence does nothing more than create mere surmise or suspicion of fact, less than a scintilla exists. *See Havner*, 953 S.W.2d at 711–12. We review the evidence in the light most favorable to appellants and make all inferences in appellants' favor. *See Morgan v. Anthony*, 27 S.W.3d 928, 929 (Tex. 2000); *Flameout Design & Fabrication, Inc.*, 994 S.W.2d at 834. To defeat a motion for no-evidence summary judgment, the respondent is not required to marshal its proof; its response need only point out evidence that raises a fact issue on the challenged elements. TEX. R. CIV. P. 166a(i) cmt.

As their evidentiary support, appellants appended (1) their responses to Nichols's Request for Disclosure; (2) undated correspondence from Markus to Nichols; and (3) a letter, dated June 28, 2005, from Nichols to Harald and Markus, in which Nichols states, as follows, in pertinent part:

> Please forgive me, but I had little or no communication from or with you before the entry of the decree. . . . I had to operate in a vacuum, and try to determine your wishes and directions. . . . Not hearing from you, I had to use my best professional judgment, which I did, to protect your interests. . . . The drafts were sent to you by fax and e-mail on each occasion but I heard nothing from you on the drafts or

> the e-mails. . . . I have previously explained to you that signature "as to form only" does not mean that you agreed to the substance and content but that you only agree that [the] form of the decree is proper. . . . When the 6-22-05 hearing came I felt that it would have been professionally inappropriate not to show up for the hearing since you did not respond to my request. With the attitude of Judge Longoria being what it is toward you, he would have received the wrong "message" from my not being there and could have entered whatever decree presented to him. [sic]

As Nichols contends, appellants' own responses to Nichols's request for disclosure do not constitute summary judgment proof. *See* TEX. R. CIV. P. 197.3 (stating answers to interrogatories may only be used against responding party); *Yates v. Fisher*, 988 S.W.2d 730, 731 (Tex. 1998) (same); *Jeffrey v. Larry Plotnick Co.*, 532 S.W.2d 99, 102 (Tex. Civ. App.—Dallas 1975, no writ) (stating answers to requests for admissions and interrogatories can be used only against responding party).

Even if we conclude that the undated and unsigned correspondence purporting to be from Markus to Nichols and the letter from Nichols to Harald, dated June 28, 2005, constitute proper summary judgment evidence, neither addresses any duty of Nichols with regard to EMC or the elements of causation and damages with regard to either appellant.

We cannot conclude that appellants have met their burden to produce some summary judgment evidence on each of the challenged elements of their negligence claim. We hold that the trial court did not err by granting summary

judgment in favor of Nichols on appellants' negligence claim. *See* TEX. R. CIV. P. 166a(i). ("The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact.").

2. Breach of Fiduciary Duty

Appellants next contend that a no-evidence summary judgment is not appropriate on their breach of fiduciary duty claim because they, as plaintiffs, do not bear the burden; rather, "it is the Defendant's burden to prove that they complied with their fiduciary duties to Plaintiffs."

To the contrary, to prevail on their breach-of-fiduciary-duty claim, *appellants* (as plaintiffs) were required to show (1) that appellants and Nichols had a fiduciary relationship; (2) that Nichols breached his fiduciary duty; and (3) that the breach resulted in injury to appellants or in a benefit to Nichols. *See Abetter Trucking Co. v. Arizpe*, 113 S.W.3d 503, 508 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

In his motion for no-evidence summary judgment, Nichols contended that no evidence exists to support any of the elements of this claim.

Appellants relied on the same evidence discussed above, under their negligence claim. As above, we conclude that appellants' own answers to Nichols's request for disclosure cannot constitute competent summary judgment evidence.

Here, again, even if we conclude that the undated and unsigned correspondence purporting to be from Markus to Nichols and the letter from Nichols to Harald, dated June 28, 2005, constitute proper summary judgment evidence, neither addresses any fiduciary relationship between Nichols and EMC or addresses any resulting injury to appellants or benefit to Nichols.[7]

We cannot conclude that appellants have met their burden to produce some summary judgment evidence on each of the challenged elements of their breach-of-fiduciary-duty claim. We hold that the trial court did not err by granting summary judgment in favor of Nichols on appellants' negligence and breach-of-fiduciary-duty claim. *See* TEX. R. CIV. P. 166a(i).

Accordingly, we overrule appellants' third issue.

Conclusion

We affirm the trial court's judgment.

Laura C. Higley
Justice

Panel consists of Justices Keyes, Hanks, and Higley.

---

[7] We recognize that when a client seeks the remedy of equitable fee forfeiture and proves a breach of fiduciary duty by the attorney, the client may obtain that remedy upon certain findings by the trial court, without the need to prove causation or damages. *See Burrow v. Arce*, 997 S.W.2d 229, 246 (Tex. 1999). Here, however, appellants sought actual and consequential damages and not equitable fee forfeiture.