Opinion issued August 19, 2010

In The
Court of Appeals
For The
First District of Texas

NO. 01-09-00517-CV

DORIS ANN HUFF, Appellant

V.

MICHAEL HIRSCH, Appellee

On Appeal from the 164th District Court
Harris County, Texas
Trial Court Cause No. 2008-33623A

MEMORANDUM OPINION

Appellant, Doris Ann Huff ("Huff"), has filed a motion for rehearing. We

deny appellant's motion for rehearing. *See* TEX. R. APP. P. 49.3. We withdraw our June 17, 2010 opinion, substitute this opinion in its place, and vacate our June 17, 2010 judgment.

Huff challenges the trial court's rendition of summary judgment in favor of appellee, Michael Hirsch, in Huff's suit against Hirsch, Casey Huff, and Margaret Alexander for fraud, conspiracy to commit fraud, and deceptive trade practices.[1] In two issues, Huff contends that the trial court erred in granting summary judgment in favor of Hirsch, who, as an attorney, had represented Casey Huff against Huff in their divorce proceeding.

We affirm.

Background

On April 15, 2008, the trial court dissolved the marriage between Huff, who was represented by Alexander, and Casey Huff, who was represented by Hirsch, and ordered Casey Huff to pay $200,000 to Huff and $32,000 in attorney's fees to Alexander. Casey Huff did not pay, and he then told Huff that he had filed for bankruptcy protection. Based upon this representation, Huff signed a settlement agreement, in which she agreed to reduce her recovery from $200,000 to $70,000 and pay her own attorney's fees. She then sued Casey Huff, Alexander, and Hirsch regarding the settlement agreement.

[1] *See* TEX. BUS. & COM. CODE. ANN. §§ 17.46, 17.50(a)(3) (Vernon Supp. 2009).

In her First Amended Original Petition, the live pleading at the time that the trial court granted summary judgment in favor of Hirsch, Huff alleged that Hirsch intentionally misrepresented to her directly, and through Alexander, that Casey Huff "had declared bankruptcy" to "induce" her to sign the settlement agreement; defrauded her out of her $200,000 judgment; conspired with Alexander to defraud her; "committed deceptive trade practices"; "drafted" the settlement agreement; asked Alexander not to "render any assistance to [Huff]"; and gave the "manufactured" settlement agreement to Casey Huff to present to Huff. Hirsch answered with a general denial and pleaded the affirmative defenses of lack of privity and lack of standing and the defense of attorney immunity or privilege.

In his motion for summary judgment, Hirsch, based on Huff's Original Petition, asserted that he was shielded against Huff's claims by attorney immunity. Hirsch attached to his summary judgment motion Huff's deposition, a May 1, 2008 letter and draft settlement agreement that he had sent to Alexander, a May 1, 2008 letter from Alexander to Huff regarding the draft settlement agreement, and the signed settlement agreement.

In her deposition, Huff testified that she had sued Casey Huff because he, before she signed the settlement agreement, told her that "he had filed bankruptcy, and he lied." After their divorce became final, Casey Huff told Huff "dozens" of times that he was going to file for bankruptcy protection if she did not settle their

divorce for less money. Casey Huff asked Hirsch to draft a settlement agreement, which provided that the Huffs "have reached an agreement, fully compromising and settling objections and disputes" to the final decree of divorce "in lieu of appeal of same," reduced the judgment to $70,000, and required Huff to pay Alexander's attorney's fees. Huff explained that she had sued Alexander because she was dissatisfied with Alexander's representation regarding the settlement agreement, which Huff signed without counsel and without having read it.

Huff further explained that she had sued Hirsch because he "drew up the settlement offer . . . where Casey [Huff] filed for bankruptcy"; stated in court during the divorce proceedings that "his client was filing bankruptcy"; and Hirsch, Casey Huff, and Alexander "ganged up" on her regarding the settlement agreement, which was "wrong" and "falsified." Huff admitted that she had no communications with Hirsch outside of court, Hirsch drew up the settlement agreement "as a part of his job in representing" Casey Huff, and Hirsch never represented Huff.

In his letter, which was attached to the proposed settlement agreement that he sent to Alexander on May 1, 2008, Hirsch stated,

> It is my understanding that Casey and Doris have been negotiating directly between themselves to avoid what Casey believes will be certain, the need for filing bankruptcy based upon the Decree as it was rendered. It is not my desire nor my encouragement to circumvent your professional representation in this regard. However, I am advised by Casey that Doris informs that you no longer represent her.

> Not having anything in writing to this effect, I cautiously provide you with a copy of the written settlement agreement, drafted to reflect what I am informed is the agreement made between Casey and Doris settling the issues of the Decree. I am just this morning advised of Casey's . . . approval of this draft, although as of this writing, Doris has not yet signed.

Alexander immediately forwarded Hirsch's letter and the settlement agreement to Huff along with her own cover letter stating, "Per our telephone conversation, I'm sending the proposed settlement agreement from Mr. Hirsch that I was speaking with you about. Please call us ASAP to discuss further."

Huff attached to her response to Hirsch's summary judgment motion, her own affidavit, excerpts of her deposition testimony, and a letter from Alexander to Huff dated May 7, 2008, the day after Huff had signed the settlement agreement. In her response, Huff argued that this evidence raised a fact issue as to Hirsch's immunity because, under Texas law, she may sue opposing counsel "when [he has] knowingly participated in such wrongful conduct that is a proximate or producing cause of [her] damages."

Standard of Review

To prevail on a summary judgment motion, a movant has the burden of proving that he is entitled to judgment as a matter of law and that there is no genuine issue of material fact. TEX. R. CIV. P. 166a(c); *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995). When a defendant moves for summary judgment, he must either (1) disprove at least one essential element of the plaintiff's cause of

action or (2) plead and conclusively establish each essential element of its affirmative defense, thereby defeating the plaintiff's cause of action. *Cathey*, 900 S.W.2d at 341; *Yazdchi v. Bank One, Tex., N.A.*, 177 S.W.3d 399, 404 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). In deciding whether there is a disputed, material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985). We indulge every reasonable inference in favor of the non-movant and resolve any doubts in her favor. *Id*. at 549. We disregard contrary evidence, unless reasonable jurors could not. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006). A matter is conclusively established if reasonable minds cannot differ as to the conclusion to be drawn from the evidence. *City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005). Once a movant conclusively establishes an affirmative defense, the burden of production shifts to the non-movant to present summary-judgment evidence to defeat the movant's affirmative defense; that is, she must present evidence that raises a fact issue on at least one element of or exception or defense to the movant's affirmative defense. *Palmer v. Enserch Corp.*, 728 S.W.2d 431, 435 (Tex. App.—Austin 1987, writ ref'd n.r.e.).

Summary Judgment

In her first issue, Huff argues that the trial court erred in granting summary

judgment in favor of Hirsch because he is not shielded on the facts of this case "by the doctrines of lack of privity, standing, and/or absolute immunity."

Texas discourages lawsuits against opposing counsel if "based on the fact that counsel represented an opposing party in a judicial proceeding." *Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398, 405 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (citing *Bradt v. Sebek*, 14 S.W.3d 756, 766 (Tex. App.—Houston [1st Dist.] 2000, pet. denied)). An attorney has the right to assert defenses that "he deems necessary and proper, without being subject to liability or damages" and may be "qualifiedly immune" from civil liability to non-clients "for actions taken in connection with representing a client in litigation," even if the "conduct is wrongful in the context of the underlying lawsuit" or is "frivolous or without merit." *Id*. at 405–406 (citing *Bradt v. West*, 892 S.W.2d 56, 71–72 (Tex. App.—Houston [1st Dist.] 1994, writ denied) and *Renfroe v. Jones & Assocs.*, 947 S.W.2d 285, 288 (Tex. App.—Fort Worth 1997, writ denied)).

The focus is on the "type of conduct" engaged in by the attorney. *Alpert*, 178 S.W.3d at 406. If an attorney participates in independently fraudulent activities, his action is "foreign to the duties of an attorney." *Id*. (citing *Likover v. Sunflower Terrace II, Ltd.*, 696 S.W.2d 468, 472 (Tex. App.—Houston [1st Dist.] 1985, no writ)). An attorney "cannot shield his own willful and premeditated fraudulent actions from liability simply on the ground that he is an agent of his

client." *Id*. Moreover, an attorney is liable if his conduct is "fraudulent or malicious" towards a non-client or he enters into a conspiracy to defraud a non-client. *Likover*, 696 S.W.2d at 472.

Indulging all reasonable inferences in favor of Huff and crediting contrary evidence that we cannot disregard, the summary judgment evidence shows that Hirsch's actions in discussing the case with opposing counsel, drafting a settlement agreement for his client, advocating his client's interests to opposing counsel by sending the agreement with an explanation of the proposal, advising the court during the divorce proceedings of potential issues his client would have in paying a judgment, and ensuring that he did not improperly communicate with a person who was represented are all the type of conduct an attorney engages in when representing his client in a lawsuit. *See Bradt*, 892 S.W.2d at 72. Accordingly, we hold that Hirsch has established as a matter of law that immunity shielded him from Huff's claims because his conduct was undertaken regarding pending litigation in furtherance of his representation of Casey Huff and involved the office, professional training, skill, and authority of an attorney. *See id*.; *Miller v. Stonehenge/Fasa-Texas, JDC, L.P.*, 993 F. Supp. 461, 464 (N.D. Tex. 1998).

Huff, then, was required to bring competent summary judgment evidence to raise a fact issue on an element of or an exception to Hirsch's defense of attorney

immunity.[2] *See Palmer*, 728 S.W.2d at 435. Huff first argues that there is a fact issue on Hirsch's immunity because the evidence shows that Hirsch assisted the fraud that Casey Huff "had declared bankruptcy" when Hirsch prepared the settlement agreement, informed Alexander that Casey Huff "had filed bankruptcy," and "sent" Casey Huff with the "fraudulent document" to meet with Huff. Huff asserts that Hirsch was a member of a conspiracy to defraud Huff out of the benefits of the judgment.

In her affidavit, Huff testified that Casey Huff had been telling her since their divorce proceedings began in 2006 that he was going to file for bankruptcy protection. Huff did not discuss the substance of any communications between Hirsch and Alexander as she admitted that she had no contact with Hirsch and none with Alexander after May 1, 2008. Hirsch's letter to Alexander showed that Casey Huff believed that his filing for bankruptcy protection would be "certain," and Hirsch did not state that Casey Huff "was filing" or "had filed" for bankruptcy protection. The settlement agreement does not mention "bankruptcy," despite Huff's assertion that it was "wrong" and "falsified." None of this evidence raises a fact issue that Hirsch knowingly made a false statement of a material fact to Huff

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[2] Huff included in her brief citations to excerpts from Alexander's deposition taken five months after the trial court had entered its order on Hirsch's summary judgment motion. We do not consider materials that were not before the trial court when it ruled on the summary judgment. *See* TEX. R. APP. P. 34.1; *Tanner v. McCarthy*, 274 S.W.3d 311, 323 n.22 (Tex. App.—Houston [1st Dist.] 2008, no pet.).

or Alexander, as required to sustain a fraud claim. *See In re First Merit Bank, N.A.*, 52 S.W.3d 749, 758 (Tex. 2001).

In conflict with her deposition, in which Huff testified that only Casey Huff had told her that he "had filed" for bankruptcy protection, Huff, in her affidavit, testified, "I believe [Hirsch] [after he sent Alexander the settlement agreement] subsequently told Ms. Alexander's office that [Casey] had declared bankruptcy." In his appellee's brief, Hirsch objects for the first time that Huff's statement of her belief is a substantive defect in her affidavit and is "no evidence in a summary judgment context."[3]

A statement of subjective belief, which is not supported by other summary judgment proof, is not sufficient to raise a fact issue. *Kerlin v. Arias*, 274 S.W.3d 666, 668 (Tex. 2008) ("An affiant's *belief* about the facts is legally insufficient."). Nonetheless, merely using the phrase "I believe" does not make an affidavit insufficient, if other evidence demonstrates the affiant's personal knowledge. *See Moya v. O'Brien*, 618 S.W.2d 890, 893 (Tex. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.); *Noriega v. Mireles*, 925 S.W.2d 261, 264 (Tex. App.—Corpus Christi 1996, writ denied) (court looks at entire affidavit to determine whether facts

[3] "[A]ffidavits containing factual conclusions and subjective beliefs that are not supported by evidence are defects in substance, and no objection is necessary to preserve error." *Rivera v. White*, 234 S.W.3d 802, 808 (Tex. App.—Texarkana 2007, no pet.) (citing *Rizkallah v. Conner*, 952 S.W.2d 580, 586 (Tex. App.—Houston [1st Dist.] 1997, no writ)). Thus, Hirsch has not waived his objection by raising it for the first time on appeal.

asserted are based on affiant's personal knowledge).

Nothing in Huff's affidavit demonstrates that she had personal knowledge that Hirsch had told Alexander that Casey Huff had filed for bankruptcy protection. Hirsch's May 1, 2008 letter to Alexander does not say that Casey "had filed" for bankruptcy protection, and Huff admitted that she had no contact with Hirsch or Alexander. Thus, Huff could not have had personal knowledge about any conversation between Hirsch and Alexander. We conclude that the evidence does not show that Huff had personal knowledge of any facts that support her belief that Hirsch had told Alexander that Casey Huff "had declared bankruptcy." Accordingly, we hold that the summary judgment evidence does not raise a fact issue regarding an exception to Hirsch's immunity to Huff's fraud, conspiracy to defraud, and aiding or assisting fraud claims.

Huff next argues that a fact issue exists regarding whether Hirsch is entitled to immunity because he "rendered services to [Casey Huff] in drawing up the settlement agreement that [she] subsequently acquired by signing the settlement agreement under the false pretense." While privity is not required to maintain a claim under the deceptive trade practices act ("DTPA"), sections 17.46(b)(5), (7), (12) and (24) and 17.50(a)(3) of the DTPA, pleaded by Huff, require consumer status. *See* TEX. BUS. & COM. CODE. ANN. §§ 17.46(b)(5), (7) and (24), 17.50(a)(3) (Vernon Supp. 2009); *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378,

387 (Tex. 2000). A third-party beneficiary may qualify as a consumer where the transaction was specifically intended to benefit the third-party and the good or service was rendered to benefit the third party. *Kennedy v. Sale*, 689 S.W.2d 890, 892–93 (Tex. 1985); *Lukasik v. San Antonio Blue Haven Pools, Inc.*, 21 S.W.3d 394, 401 (Tex. App.—San Antonio 2000, no pet.).

Here, however, Huff and Casey Huff were adverse parties on the issue of settlement, which grew out of their divorce. Huff admitted that Hirsch drew up the settlement agreement "as a part of his job in representing" Casey Huff, she had no contact with Hirsch, and Hirsch had never represented her. Hirsch, at Casey Huff's direction, drafted the agreement with terms that were clearly adverse to Huff. Because Casey Huff did not acquire Hirsch's services for Huff's benefit, we conclude that she was not a consumer of his services and has not raised a fact issue on her DTPA claims so as to create an exception to Hirsch's immunity.

Huff has not raised a fact issue on any element of or exception to Hirsch's affirmative defense of attorney immunity. Accordingly, we hold that the trial court did not err in granting Hirsch's summary judgment motion.

We overrule Huff's first issue.

Conclusion

Having overruled Huff's first issue, we do not address her second issue in which she argues that her affidavit and deposition testimony raised genuine issues

of material fact on her claims.

We affirm the judgment of the trial court.

Terry Jennings
Justice

Panel consists of Justices Jennings, Hanks, and Bland.