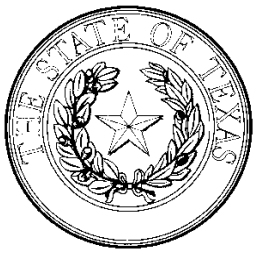
Opinion issued August 25, 2011.



In The

Court of Appeals

For The

First District of Texas

NOS. 01-09-00813-CV;

01-11-00688-CV; &

01-11-00689-CV

ESSEX CRANE RENTAL CORP. AND VINCENT A. MORANO, Appellants

V.

ERIC G. CARTER D/B/A ERIC G. CARTER & ASSOCIATES, Appellee

ESSEX CRANE RENTAL CORP. AND VINCENT A. MORANO, Appellants

V.

DAVID W. FARLEY, Appellee

ESSEX CRANE RENTAL CORP. AND VINCENT A. MORANO, Appellants

V.

KENNETH BEVERLY, Appellee

On Appeal from the 151st District Court
Harris County, Texas
Trial Court Case Nos. 2002-62464-A, 2002-62464-B, & 2002-62464-C

DISSENTING OPINION

Because I would affirm the trial court's granting of Carter's and Farley's no-evidence motions for summary judgment, I respectfully dissent.

To prevail on a no-evidence motion for summary judgment, the movant must establish that there is no evidence to support an essential element of the non-movant's claim. TEX. R. CIV. P. 166a(i); *see Flameout Design & Fabrication, Inc. v. Pennzoil Caspian Corp.*, 994 S.W.2d 830, 834 (Tex. App.—Houston [1st Dist.] 1999, no pet.). Thereafter, the burden shifts to the non-movant to present evidence raising a genuine issue of material fact as to the elements specified in the motion. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006). "The trial court must grant the motion unless the non-movant produces more than a scintilla of evidence raising a genuine issue of material fact on the challenged elements." *Flameout Design & Fabrication*, 994 S.W.2d at 834. More than a scintilla of evidence exists if the evidence "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997). However, "[w]hen the evidence

offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence." *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983). In determining whether a material fact exists, we may consider both direct and circumstantial evidence. *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004). "To raise a genuine issue of material fact, however, the evidence must transcend mere suspicion." *Id.* "Evidence that is so slight as to make any inference a guess is in legal effect no evidence." *Id.*

Is there a genuine issue of material fact that precludes the granting of Carter's and Farley's no-evidence motions for summary judgment?

Carter's and Farley's no-evidence motions for summary judgment contend that there is no evidence of an agreement or meeting of the minds between themselves or anyone else to "fraudulently transfer, hide, secret or otherwise conceal assets with the intent to avoid payment of the debt" to Essex.

Citing to *Chu v. Hong*, 249 S.W.3d 441, 447 (Tex. 2008), Carter and Farley note that they could only be liable for conspiracy if they agreed to the injury to be accomplished. Inferring an agreement as to the ultimate injury, they contend, generally arises "from joint participation in the transactions and from enjoyment of the fruits of the transactions" and in this case, there exists no evidence that they enjoyed the fruits of the transaction or that their legal fees depended upon keeping the assets from Essex or any of the McPherson Entities' other creditors. Essex

contends that the evidence supports the conclusion that Carter and Farley did agree to the injury to be accomplished because the purpose and intent behind their actions was to hide assets from creditors—the exact injury alleged.[1] Essex further contends that genuine issues of material fact exist as to whether Carter and Farley had a "meeting of the minds" with the McPherson Entities to assist in the transfer and shelter of assets from possible seizure by the McPherson Entities' creditors, making a no-evidence summary judgment improper. In support, Essex argues that it can be "logically inferred" from the evidence (which is extensively discussed in the majority opinion and, therefore, need not be repeated here) that Carter and Farley agreed to help the McPherson Entities hide assets from Essex and other creditors.

After reviewing the record in its entirety, it is apparent to me that Essex has failed to set forth any evidence, circumstantial or direct, that Carter and Farley discussed the idea of defrauding the McPherson Entities' creditors, much less that they agreed to it, or that Carter and Farley had the requisite conspiratorial intent to defraud Essex or any of the other creditors. At most, Essex has produced some

[1] Essex also replied that because neither Carter nor Farley raised a no-evidence challenge as to whether they "enjoyed the fruits of the transaction" or agreed to the ultimate injury, they are precluded from relying on these arguments on appeal. Whether Carter or Farley "enjoyed the fruits of the transaction" or agreed to the ultimate injury, however, goes to the issue of conspiratorial intent. Both Carter and Farley challenged Essex's evidence of conspiratorial intent in their respective non-evidence motions for summary judgment.

evidence that Carter and Farley agreed or intended to engage in the *conduct* that resulted in the injury, which is not sufficient to establish a cause of action for civil conspiracy. *See Juhl v. Airington*, 936 S.W.2d 640, 644 (Tex. 1996). While the evidence produced by Essex may give rise to *some suspicion* that Carter and Farley agreed or intended to defraud Essex, such evidence is insufficient to raise a genuine issue of material fact on the vital fact of conspiratorial intent. *See Kindred*, 650 S.W.2d at 63 ("When the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence."); *see also $56,700 in U.S. Currency v. State*, 730 S.W.2d 659,662 (Tex. 1987) (when viewing meager circumstantial evidence, if "circumstances are consistent with either of two facts and nothing shows that one is more probable than the other, neither fact can be inferred"). Without a showing of a meeting of the minds or conspiratorial intent, there is no evidence of civil conspiracy and summary judgment was proper with respect to that claim. *See Odem v. Deloitte & Touche, LLP*, No. 04-09-00747-CV, 2011 WL 381721, at *9 (Tex. App.—San Antonio Feb. 2, 2011, pet. denied) (mem. op.) (affirming grant of no-evidence motion for summary judgment on civil conspiracy claim because plaintiff failed to present scintilla of evidence of conspiratorial intent); *see also Shunta v. Westergren*, No. 01-08-00715-CV, 2010 WL 2307083, at *7–8 (Tex. App.—Houston [1 Dist.] June 10, 2010, no pet.)

(mem. op.) (affirming grant of no-evidence motion for summary judgment on civil conspiracy claim because appellant failed to present evidence of requisite conspiratorial intent; stating that, at most, evidence presented by appellant was some evidence that appellee agreed to conduct, but not to injury).

Although the majority apparently believes that the circumstantial evidence presented by Essex and the inferences to be drawn from such evidence amounts to more than a scintilla of evidence of conspiratorial intent, I do not. On the contrary, vital facts such as conspiratorial intent must not be established "by piling inference upon inference." *See Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp.*, 435 S.W.2d 854, 858 (Tex. 1968) (stating that although proof of conspiracy "may be, and usually must be made by circumstantial evidence, . . . a vital fact may not be established by piling inference upon inference").

For these reasons, I would affirm the trial court's final judgments as to Carter and Farley.

Jim Sharp
Justice

Panel consists of Justices Keyes, Sharp, and Massengale.

Justice Sharp, dissenting.