Opinion issued October 20, 2011.

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00475-CV

MAURICE OLIVER AND DIONNE C. OLIVER, Appellants

V.

JAMES HILL, Appellee

On Appeal from the County Civil Court No. 4
Harris County, Texas
Trial Court Case No. 908,424

MEMORANDUM OPINION

Maurice and Dionne C. Oliver appeal the trial court summary judgment arising out of a dispute with James Hill over an agreement to lease and transfer real

property located in Spring, Texas.[1] Maurice Oliver claims that the trial court erred in granting summary judgment in favor of Hill on his claims for breach of contract, defamation, fraud in a real estate transaction, and malicious prosecution. The Olivers further challenge the trial court's grant of summary judgment dismissing their counterclaims for breach of contract, money had and received, intentional infliction of emotional distress, and violations of the Property Code. Finding no error, we affirm.

Background

In July 2007, the Hills and the Olivers entered into a lease-to-purchase agreement of a single-family residence owned by the Hills. Under the terms of that agreement, the Olivers agreed to pay the Hills a monthly payment of $2,500.00 for a one-year period. In addition, they would pay $5,000.00 as an advancement of rent and $5,000.00 as a security deposit. The Hills agreed to apply $800.00 of the monthly payment toward equity and the remainder would serve as rent. Once Oliver satisfied other obligations relating to the sale, the security deposit would become the down payment for purchase.

The parties memorialized their agreement on a revised rent-to-buy form contract. All parties signed the agreement, but the Olivers back-dated their

[1] James's wife, Margaret Hill, who was also a party to the transaction and in the proceedings below, has since died.

signatures. Concerned about the validity of the back-dating, Hill asked the Olivers to execute a revised agreement, but the Olivers refused to do so.

When the Olivers failed to make their monthly payments for September and October, Hill sent them notice that they were in default under the agreement and demanded that they surrender the property. The Olivers refused to leave or make payment. The dispute between the Olivers and the Hills escalated, and the Hills instituted an eviction action against the Olivers in a Harris County justice court. The Hills sued for repair costs to repair damage to the property and for defamation relating to the filing of a police report against Hill that resulted in a criminal trespass charge against him. Hill was later acquitted of the charge.

The justice court evicted the Olivers, granted possession to Hill, and awarded $5,000 in unpaid rent. The Olivers appealed that judgment to the county court at law. There, Hill moved for summary judgment on his own claims, including a claim for repairs to damage to the property, and on the Olivers' counterclaims. In March 2009, the trial court granted a take-nothing summary judgment on the Olivers' counterclaims for conversion and money had and received. In April 2010, the trial court granted summary judgment on the remaining claims, awarding Hill $46,200.00 in actual damages for the breach of contract claim, $10,440.00 for repair costs, and $10,000.00 for actual damages for malicious prosecution and defamation, as well as attorney's fees and costs.

Discussion

I. Summary Judgment Standard of Review

We review a trial court's summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005); *Provident Life & Accid. Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). Under the traditional standard for summary judgment, the movant has the burden to show that no genuine issue of material fact exists and that the trial court should grant a judgment as a matter of law. TEX. R. CIV. P. 166a(c); *KPMG Peat Marwick v. Harrison Cnty. Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). When reviewing a summary judgment, we take as true all evidence favorable to the nonmovant and indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Dorsett*, 164 S.W.3d at 661; *Knott*, 128 S.W.3d at 215; *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997).

Traditional summary judgment is proper only if the movant establishes that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). The motion must state the specific grounds relied upon for summary judgment. *Id.* A defendant moving for traditional summary judgment must conclusively negate at least one essential element of each of the plaintiff's causes of action or conclusively establish each element of an affirmative defense. *Sci. Spectrum, Inc.*, 941 S.W.2d at 911.

After adequate time for discovery, a party may move for a no-evidence summary judgment on the ground that no evidence exists to support one or more essential elements of a claim or defense on which the opposing party has the burden of proof. TEX. R. CIV. P. 166a(i). The trial court must grant the motion unless the nonmovant produces summary judgment evidence raising a genuine issue of material fact. *Id.* More than a scintilla of evidence exists if the evidence "would allow reasonable and fair-minded people to differ in their conclusions." *Forbes Inc. v. Granada Bioscis., Inc.*, 124 S.W.3d 167, 172 (Tex. 2003).

II. No-evidence summary judgment on counterclaims

The Olivers first challenge the summary judgment, based on no-evidence grounds, that dismissed their counterclaims for breach of contract, money had and received, and intentional infliction of emotional distress. To prevail on a breach of contract claim, a party must establish that: (1) a valid contract existed between the plaintiff and the defendant; (2) the plaintiff tendered performance or was excused from doing so; (3) the defendant breached the terms of the contract; and (4) the plaintiff sustained damages as a result of the defendant's breach. *See Valero Mktg. & Supply Co. v. Kalama Int'l*, 51 S.W.3d 345, 351 (Tex. App.—Houston [1st Dist.] 2001, no pet.). "A breach occurs when a party fails or refuses to do something he has promised to do." *Dorsett v. Cross*, 106 S.W.3d 213, 217 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

Oliver references the affidavit he executed in response to Hill's summary judgment motion, contending that his testimony creates a genuine issue of material fact on the breach of contract counterclaim. In that affidavit, Oliver claims that the Hills failed to supply new appliances and to replace the garage door of the home.

The only reference to appliances in the lease and rent-to buy agreement states that "the eventual purchase price of the home is $220,000 plus cost of refrigerator, washer & dryer." The Olivers do not dispute the validity of this agreement, which contains a merger clause declaring that "[t]his lease constitutes the entire agreement between the landlord and the tenant and can only be modified in writing signed by both parties."

When the parties have concluded a valid, integrated agreement, the parol evidence rule precludes enforcement of a prior or contemporaneous inconsistent agreement. *Ledig v. Duke Energy Corp.*, 193 S.W.3d 167, 178 (Tex. App.—Houston [1st Dist.] 2006, pet. denied); *Baroid Equip., Inc. v. Odeco Drillling, Inc.*, 184 S.W.3d 1, 13 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). A written instrument presumes that all prior agreements relating to the transaction have been merged into it and will be enforced as written and cannot be added to, varied, or contradicted by parol testimony. *Baroid Equip.*, 184 S.W.3d at 13. The parol evidence rule "is particularly applicable when the written contract contains a recital that it contains the entire agreement between the parties or a similarly-worded

merger provision." *Id.* When parol evidence is determined to be inadmissible, it has no legal effect and merely constitutes proof of facts that are immaterial and inoperative. *Id.* Oliver's affidavit does not raise a material fact issue concerning any promise other than those memorialized in the written agreement or allege breach of any promise contained in the written agreement.

The Olivers' money had and received claim also lacks merit. To recover on a claim for money had and received, a plaintiff must show that the defendant holds money, which in equity and good conscience belongs to the plaintiff. *Staats v. Miller*, 243 S.W.2d 686, 687 (Tex. 1951); *Edwards v. Mid-Continent Office Distribs., L.P.*, 252 S.W.3d 833, 837 (Tex. App.—Dallas 2008, pet. denied). A cause of action for money had and received "inquires whether the defendant has received money which rightfully belongs to another." *Everett v. TK-Taito, L.L.C.*, 178 S.W.3d 844, 860 (Tex. App.—Fort Worth 2005, no pet.) (quoting *Amoco Prod. Co. v. Smith*, 946 S.W.2d 162, 164 (Tex. App.—El Paso 1997, no writ)). Essentially, it is an equitable doctrine applied to prevent unjust enrichment. *Hunt v. Baldwin*, 68 S.W.3d 117, 132 (Tex. App.—Houston [14th Dist.] 2001, no pet.); *Phippen v. Deere & Co.*, 965 S.W.2d 713, 725 (Tex. App.—Texarkana 1998, no pet.).

When a valid, express contract covers the subject matter of the parties' dispute, as a general rule, there can be no recovery under a quasi-contract theory,

such as money had and received. *See Fortune Prod. Co. v. Conoco, Inc.*, 52 S.W.3d 671, 684 (Tex. 2000) (involving claim for unjust enrichment); *DeClaire v. G & B McIntosh Family Ltd. P'ship*, 260 S.W.3d 34, 49 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (same). As it addresses the subject in dispute, we hold that the parties' lease agreement precludes a claim based on money had and received.

To prevail on their claim for intentional infliction of emotional distress, the Olivers would have to prove that: (1) Hill acted intentionally or recklessly; (2) his conduct was extreme and outrageous; (3) his actions caused the Olivers emotional distress; and (4) his emotional distress was severe. *See Tex. Farm Bureau Mut. Ins. Cos. v. Sears*, 84 S.W.3d 604, 610 (Tex. 2002). To be extreme and outrageous, a defendant's conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society. *Id.* Conduct that is merely insensitive or rude is not extreme and outrageous. *Id.* Likewise, mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities do not rise to the level of extreme and outrageous conduct. *Id.*

In contending that Hill's conduct was extreme and outrageous, Oliver points to his own affidavit testimony that, following several heated arguments about the Olivers continuing to stay in the home without paying rent, Hill came to the front door and threatened that he "could have [Oliver] killed at any time." Oliver relies

on *Household Credit Services v. Driscol*, 989 S.W.3d 82 (Tex. App.—El Paso 1998, pet. denied), and *Creditwatch, Inc. v. Jackson*, 157 S.W.3d 814 (Tex. 2005). Those cases do not support Oliver's contention.

In *Household Credit Services*, Driscol fell behind on her credit card payments and began to receive dunning calls from a collection agency. *Id.* at 78. Over several months, the agency called Driscol at least four or five times per day, using threatening, profane and abusive language in exhorting Driscol to pay her bill. *Id.* Driscol spoke with supervisors at the agency in an effort to stop the abusive language and also requested that she not receive calls at work. *Id.* Instead of complying, the abuse escalated. *Id.* The collection agent began to call Driscol incessantly at work to scream at her and threaten her. *Id.* On one occasion, the agent placed 26 calls to Driscol in a two-hour period. *Id.* at 79. On another occasion, the agent called in a bomb threat to Driscol's workplace, and a man who identified himself as the agent's supervisor called Driscol and told her, "I just wanted to let you know that I put a contract out on you . . . you better be careful leaving your house and coming home, because we're going to get you." *Id.* The court of appeals held that the entire course of conduct supported Driscol's intentional infliction of emotional distress claim:

> With the possible exceptions of the bomb and death threats, no single action of Household or Allied alone, including name-calling, foul language, any single ill-timed phone call, multiple calls at home on any single day, repeated calls to Ms. Driscol's place of employment

> after she asked them to stop, or even the threat to make Ms. Driscol's life miserable, rises to the level of intentional infliction of emotional distress. But all of these acts taken together amount to such harassment of a woman who simply could not pay her VISA bill as to be more than petty oppression. Together, they rise to the level of behavior beyond all possible bounds of decency, and utterly intolerable in a civilized community.

Id. Oliver's allegations do not involve a despicable and disruptive course of conduct like that in *Household Credit Services*.

In *Creditwatch*, a former supervisor made lewd advances toward a woman whose employment had been terminated. 157 S.W.3d at 816. When she rebuffed his advances, the supervisor refused to give her a reference letter. *Id.* The supervisor also required a current employee—who had invited her financially strapped former co-worker to live in her home—to evict the woman if the employee wanted to keep her job. *Id.* The court of appeals had held that this post-termination treatment raised a fact issue on the extreme and outrageous conduct element of the woman's intentional infliction of emotional distress claim, but the Supreme Court reversed, finding it legally insufficient. *Id.* at 817.

Here, Oliver alleges a single, verbal threat that occurred in the context of a contentious legal and financial dispute among the parties. Without more, it does not rise to the legal threshold required to create a fact issue of extreme and outrageous conduct to form a basis for intentional infliction of emotional distress. *See Sears*, 84 S.W.3d at 610. Because the Olivers failed to raise a material fact

issue on each element of their counterclaims, we do not disturb the trial court's summary judgment dismissing them.

II. Summary judgment on Hill's claims

In challenging the propriety of summary judgment on Hill's claims, Oliver complains generally about the amount of damages awarded to Hill, asserting that "[t]he basis for this request for summary judgment was a series of sworn statements from affidavits and excerpts from discovery responses. Many of these sworn statements were refuted by Oliver in his point by point refutation of Hill's self-serving affidavit." Texas Rule of Appellate Procedure 38.1(h) requires that an appellant's brief "must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(h). "Rule 38 requires [a party] to provide us with such discussion of the facts and the authorities relied upon as may be requisite to maintain the point at issue." *Tesoro Petroleum Corp. v. Nabors Drilling USA, Inc.*, 106 S.W.3d 118, 128 (Tex. App.—Houston [1st Dist.] 2002, pet. denied), *quoted in Morrill v. Cisek*, 226 S.W.3d 545, 548 (Tex. App.—Houston [1st Dist.] 2006, no pet.). "This is not done by merely uttering brief conclusory statements, unsupported by legal citations." *Id.* "Issues on appeal are waived if an appellant fails to support his contention by citations to appropriate authority or cites only to a single non-controlling case." *Abdelnour v. Mid Nat'l Holdings, Inc.*, 190 S.W.3d 237, 241 (Tex. App.—Houston

[1st Dist.] 2006, no pet.); *Daniel v. Falcon Interest Realty Corp.*, 190 S.W.3d 177, 189 (Tex. App.—Houston [1st Dist.] 2005, no pet.). The Olivers do not cite any substantive authority relating to the Hills' claims, nor do they identify any specific error in determining the amount of damages awarded to Hill. We note that the trial court offset the damages amount by $15,000—the amounts the Olivers had paid to the Hills in rent and security deposits. We hold that the Olivers waived any complaint concerning the propriety of summary judgment or amount of damages awarded on Hill's claims.

Conclusion

We hold that the trial court did not err in granting summary judgment dismissing the Olivers' counterclaims, and the Olivers waived any challenge to the summary judgment on Hill's claims. We therefore affirm the judgment of the trial court. All pending motions are denied as moot.

Jane Bland
Justice

Panel consists of Chief Justice Radack and Justices Bland and Huddle.