Opinion issued August 18, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00479-CV

PATRICIA MUSKE, Appellant

V.

CHARLES A. MENKE, Appellee

On Appeal from the 506th District Court
Waller County, Texas
Trial Court Case No. 08-11-19577

MEMORANDUM OPINION

Appellant Patricia Muske appeals from a final summary judgment granted in favor of appellee Charles Menke. Muske and Menke are cousins who owned undivided interests in a 626-acre property in Waller County known as the Live

Oaks Section. Muske sold her interest in the property to Menke in February 2006. In November 2007, Menke sold the Live Oaks property to the Katy Prairie Conservancy. When Muske learned of the sale, she sued Menke, contending that he induced her to sell her interest by concealing his intent to resell it at a higher price. Muske brought causes of action for breach of fiduciary duty, negligent misrepresentation, common-law fraud, and fraud in a real estate transaction. The trial court granted Menke's motion for summary judgment on Muske's claims. On appeal, Muske challenges the summary judgment, contending that the trial court erred by holding that Menke did not owe Muske a fiduciary duty as a matter of law, and that the evidence raises a fact issue on her common-law and statutory fraud claims and her claim for negligent misrepresentation.

We affirm the trial court's judgment that Menke owned no fiduciary duty to Muske. We reverse the judgment as to Muske's fraud and misrepresentation claims and remand for further proceedings consistent with this opinion.

Background

Muske and Menke grew up together: their families often spent time together and visited each other's homes. After reaching adulthood, Menke continued to be close to Muske's father, but his relationship with Muske was, at times, strained.

Muske and Menke obtained their separate interests in Live Oaks through inheritance. They did not always agree about how to manage the property, and

they independently managed their respective interests. In his deposition, Menke testified that "[Muske] and I have had extreme difficulty over the years agreeing on anything having to do with [the Live Oaks] property." Muske testified similarly that she and Menke had expressed different opinions about the best way to manage the property. Menke did not represent Muske or handle any business dealings for her, and Muske negotiated separate agreements with parties interested in using or buying the property. She also maintained a separate insurance policy covering her interest in the property.

In 2004, J.R. Tucker expressed an interested in purchasing the property and told Muske that he wanted to buy Live Oaks. Muske conveyed information about the offer to Menke, and he agreed to the deal. They entered into a contract to sell Live Oaks to Tucker for $2,500 per acre. By the spring of 2005, however, Tucker terminated his option to purchase the property, and the parties never completed the sale.

In the fall of 2005, Menke met with Mary Ann Piacentini, the Katy Prairie Conservancy's executive director, concerning its interest in Live Oaks. At the time, Live Oaks was one of approximately 50 properties the Conservancy was interested in acquiring. Menke testified that he and Piancentini discussed land values in the area and the possibility that he might transfer either his undivided interest or seek partition of his interest from Muske's interest and transfer that to

the Conservancy. Piancentini stated that, in their first meeting, her "sense was that [Menke] was interested in selling . . . either his undivided interest or having the whole parcel, if we were interested in it, sold to us. He just wanted to see if there was a way to work a deal."

During her deposition, Piacentini gave conflicting testimony about when she first met with Menke to discuss the Live Oaks property. She initially testified that they did not meet until 2006 or 2007. However, the Conservancy's records of business with Menke date back to 2005. The records reflect that Menke and Piacentini met on October 12, 2005, "to discuss the sale of his undivided interest." The notes state: "[Menke] is interested in selling to [the Conservancy]. He says he can sell . . . an undivided interest or he can partition and get 33% of 640 acres sectioned off. He initially thought of asking his cousin [Menke] for the top 1/3rd . . . ." Piancentini also testified that, at the time of her first meeting with Menke, he still co-owned land with Muske. But Menke did not purchase Muske's interest in Live Oaks until February 2006. When asked about the inconsistencies, Piacentini testified: "My memory [of the dates] could be faulty."

In late 2005, after seeing a "for sale" sign on another piece of property owned by Muske, Menke called her to determine whether she might sell her interest in Live Oaks to him. Muske testified that before she agreed to sell her interest, she asked Menke, "Do you have a buyer?" According to Muske, Menke

responded, "No." Muske also asked, "What are you going to do with it?" She testified that Menke answered, "I'm going to keep it in the family." Muske considered Menke's offer and called him in early January 2006 to ask if he was still interested in buying the property and if so, to make an offer. Menke offered to buy Muske's share for $2,200 per acre. His offer was $300 less per acre than the previous offer made by J.R. Tucker. Both Muske and Menke testified similarly that the offer was lower because, in contrast to the terms of the option agreement with Tucker, Muske would not have to pay a sales commission or closing costs, and she would retain the mineral and royalty interests in the land. Muske also agreed to extend $600,000 in unsecured credit to Menke without requiring written terms for repayment. The sale was completed in February 2006.

Menke resumed discussions with the Conservancy to sell the property in 2006, and in August 2007 he entered into a contract to sell Live Oaks to the Conservancy for $4,000 per acre. That sale closed in November 2007.

After learning of the subsequent sale, Muske sued Menke for, among other things, breach of fiduciary duty, negligent misrepresentation, and common-law and statutory fraud. The trial court granted Menke's motion for summary judgment, and Muske appealed. On appeal, Muske argues that the trial court erred in holding that Menke did not owe Muske a fiduciary duty as a matter of law and that the

evidence raises a fact issue on her common-law fraud, statutory fraud, fraudulent misrepresentation, and negligent misrepresentation claims.

Analysis

We review a trial court's ruling on a motion for summary judgment de novo. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). A motion for summary judgment must "state the specific grounds" upon which the judgment is sought. TEX. R. CIV. P. 166a(c). The motion must "stand or fall on the grounds expressly presented in the motion." *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 341 (Tex. 1993). To prevail, the movant has the burden of proving that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985); *see* TEX. R. CIV. P. 166a(c). A defendant moving for 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. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997).

Once the defendant produces sufficient evidence conclusively establishing his right to summary judgment, the burden of proof shifts to the plaintiff to present evidence sufficient to raise a fact issue. *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995) (citing *"Moore" Burger, Inc. v. Phillips Petroleum Co.*, 492

S.W.2d 934, 936–37 (Tex. 1972)). In deciding whether there is a disputed issue of material fact precluding summary judgment, "evidence favorable to the non-movant will be taken as true" and "[e]very reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor." *Nixon*, 690 S.W.2d at 548–49.

I. Breach of fiduciary duty claim

In her second and third issues, Muske contends that the trial court erred in granting summary judgment because the evidence raises a fact issue on whether Menke owed her a fiduciary duty. To recover under a cause of action for breach of fiduciary duty, a plaintiff must show that the defendant owed her a fiduciary duty and breached that duty, and that the breach proximately caused her damages. *See, e.g.*, *Plotkin v. Joekel*, 304 S.W.3d 455, 479 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). Muske and Menke do not have the kind of special relationship that gives rise to a fiduciary duty, such as an attorney-client or trustee-beneficiary relationship. *See, e.g.*, *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 199 (Tex. 2002). Absent a special relationship, co-tenants do not owe each other a fiduciary duty. *Scott v Scruggs*, 836 S.W.2d 278, 282 (Tex. App.—Texarkana 1992, writ denied). Muske also alleged that she and Menke were partners, but absent other evidence of an agreement, their joint dealings in leasing their

undivided interests in Live Oaks do not transform their co-tenancy into a partnership. *See* TEX. BUS. ORGS. CODE ANN. § 152.052(b)(2) (West Supp. 2010).

Muske primarily relies on her lifelong family friendship with Menke as the source of his alleged fiduciary duty to her. "An informal fiduciary duty may arise from a moral, social, domestic or purely personal relationship of trust and confidence, generally called a confidential relationship." *Assoc. Indem. Corp. v. CAT Contracting, Inc.*, 964 S.W.2d 276, 287 (Tex. 1998). This duty is not lightly created. *Id.* at 288. "To impose an informal fiduciary duty in a business transaction, the special relationship of trust and confidence must exist prior to, and apart from, the agreement made the basis of the suit." *Id*. "[M]ere subjective trust does not . . . transform arm's-length dealing into fiduciary relationship." *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 177 (Tex. 1997). "Although . . . the existence of a confidential relationship is ordinarily a question of fact, when the issue is one of no evidence, it becomes a question of law." *Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 594 (Tex. 1992).

The evidence before the trial court shows that Muske and Menke, though cousins, did not have a close relationship during adulthood and that Muske managed her business affairs without input or guidance from Menke. She made independent decisions with respect to Live Oaks, often in conflict with Menke.

These facts belie any suggestion that Muske has the kind of trust and confidence in Menke that demonstrates the existence of a fiduciary relationship. Further, despite Muske's profession of continued familial affection, her willingness to extend generous credit terms, and Menke's close relationship with her father, the evidence shows that their relationship is not the kind of "close family relationship" that gives rise to a fiduciary duty. *See Consolidated Gas & Equip. Co. v. Thompson*, 405 S.W. 2d 333, 336–37 (Tex. 1966) ("The usual cases of fiduciary relationship have been attorney-and-client, partners, close family relationships such as that of parent-and-child, and joint adventurers, particularly when there is an agreement . . . to share gains and losses."). Muske's expressed love for and trust in Menke, including her trust that he would repay an unsecured loan, "is not enough to transform arms-length dealing into a fiduciary relationship." *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962). Therefore, the trial court correctly granted summary judgment on the breach of fiduciary duty claim. Muske's second and third issues are overruled.

II. Fraud and misrepresentation claims

In her remaining issues, Muske challenges the propriety of summary judgment on her claims for common-law fraud, statutory fraud in a real estate transaction, and negligent misrepresentation. Menke moved for summary judgment based on his assertion that the facts are undisputed that he told the truth

and that in fact he had no buyer at the time of his alleged misrepresentation to that effect. In response, Muske contends that a fact issue exists concerning the veracity of Menke's statement that he had no buyer.

To establish fraud or misrepresentation, a plaintiff must show, among other things, that the defendant made a false statement concerning a past or existing material fact. *Ins. Co. of N. Am. v. Morris*, 981 S.W.2d 667, 674 (Tex. 1998). This element requires proof that when Menke made the representation, he "knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion." *Id.* A false representation may consist of a deceptive answer or any other indirect or misleading language, and a statement that is literally true may be actionable if used to create an impression that is substantially false. *See Nelson v. Najm*, 127 S.W.3d 170, 175 (Tex. App.—Houston [1st Dist.] 2003, pet. denied); *Blanton v. Sherman Compress Co.*, 256 S.W.2d 884, 887 (Tex. App.—Dallas 1953, no writ).

Muske argues that the evidence of Menke's meeting with the Conservancy in October 2005 raises a fact issue concerning whether Menke had a buyer at the time he offered to buy her interest in Live Oaks, and therefore whether he misrepresented the facts to her by saying he did not. Indulging all reasonable inferences in favor of Muske, the non-movant, the evidence shows that Menke approached Piacentini in 2005 to discuss the sale of Live Oak to the Conservancy.

Piancentini testified that the Conservancy was interested in acquiring the land, and the Conservancy's records show that Menke was interested in selling his interest. The records also show that Menke "initially thought of asking [Muske] for the top 1/3rd." Although serious negotiations to sell Live Oaks did not resume until after Menke obtained control over the property, there is evidence that Menke was aware that the Conservancy was interested in purchasing Live Oaks and that its interest extended to Muske's ownership interest in the property. Piacentini further testified that she discussed a possible purchase price with Menke. Although Piacentini could not directly recall the price discussed, she said it could have been around $3,000 per acre.

Menke did not argue that the issue of whether he intended to resell the property was immaterial, nor did he argue that Muske's claimed reliance on his statements was unreasonable. His sole argument relies on a distinction of semantics—that his oral denial that he had a "buyer" was technically truthful. Specifically, he argued that the word "buyer" connotes an actual sale, including a signed writing because a contract for the sale of land is not enforceable unless it is in writing and signed by the party seeking to enforce it. *See* TEX. BUS. & COM. CODE ANN. § 26.01 (West 2009) (statute offFrauds). Menke thus argued that he did not have a "buyer" when he talked to Muske, and that the Conservancy did not become a "buyer" until it agreed to purchase Live Oaks in 2007.

Muske contends, however, that her question about a "buyer" inquired more generally about whether Menke had identified someone who was interested in the land. She testified: "It does not mean the deal is closed. It does not mean there's been a commitment. It simply means they are interested in that particular piece of property at that time." She testified that this meaning was "tacit within the question," and that Menke "perfectly well knew what that question meant."

"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*, 690 S.W.2d at 548–49. "Every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor." *Id.* Menke's word-parsing argument based on a narrow definition of the word "buyer" violates these principles. In the context of a material ambiguity in a contract, "the granting of a motion for summary judgment is improper because the interpretation of the instrument becomes a fact issue." *Coker v. Coker*, 650 S.W.2d 391, 394 (Tex. 1983). The same logic holds true for the disputed interpretation of an alleged oral misrepresentation to the extent that the defendant claims truth as his legal defense. *See id.*; *see also Nelson*, 127 S.W.3d at 175 (finding an affirmative misrepresentation when defendant's statements created false impression of facts).

Resolving any doubts about the evidence in Muske's favor, the summary judgment cannot be supported on the sole basis argued by Menke in the trial

court, i.e., that the evidence affirmatively disproves any misrepresentation. *See Nelson*, 127 S.W.3d at 175; *see also Chandler v. Butler*, 284 S.W.2d 388, 394–95 (Tex. App.—Texarkana 1955, no writ) ("Whenever issues of fraud and good faith are raised, the evidence must take a rather wide range and may embrace all the facts and circumstances which go to make up the transaction, disclose its true character, explain the acts of the parties, and throw light on their objects and intentions.") (quoting *Blanton*, 256 S.W.2d at 888). The word "buyer" is commonly used to connote not only a person who has already bought or agreed to buy something, but also a person who contemplates a purchase. Moreover, it is not unusual to use the word "buyer" in a subjunctive context when speaking about a contingent, hypothetical, or prospective circumstance in which a person may buy or agree to buy in the future. There is no evidence that Muske used or that Menke understood the word "buyer" in the narrow sense advanced in Menke's summary-judgment motion. Indeed, the only evidence of the parties' understanding in regard to the communications at issue is Muske's testimony that a buyer "means someone who's interested in [the land]," and that Menke "perfectly well knew what that question meant." Muske's understanding of a "buyer" as a person "interested in [a] particular piece of property" is plausible in the context of the communication and could be credited by reasonable jurors.

Because the pleadings and evidence on file raise a genuine issue of material fact as to whether Menke made a misrepresentation to Muske, we hold that the trial court erred in granting summary judgment with respect to those claims. *See Nelson*, 127 S.W.3d at 175. We sustain Muske's fourth, fifth, and sixth issues on appeal.

Conclusion

We reverse the trial court's judgment on Muske's fraud and negligent misrepresentation claims and remand for further proceedings consistent with this opinion. The judgment of the trial court is otherwise affirmed.

Michael Massengale
Justice

Panel consists of Chief Justice Radack and Justice Massengale.[*]

[*] This case was submitted on April 12, 2011 before a panel consisting of Chief Justice Radack and Justices Alcala and Massengale. After submission, Justice Alcala left the Court to become a judge on the Court of Criminal Appeals. The case is therefore being decided by the two remaining justices. *See* TEX. R. APP. P. 41.1(b).