Opinion issued October 27, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00815-CV

RON CARTER, INC., RON-CARTER FORD, INC., AND WILSON-HALL IMPORTS, INC., Appellants

V.

ROBERT KANE, Appellee

On Appeal from the 412th District Court
Brazoria County, Texas
Trial Court Case No. 56412

MEMORANDUM OPINION

Ron Carter, Inc., Ron-Carter Ford, Inc., and Wilson-Hall Imports, Inc. (collectively "Ron-Carter") appeal the grant of summary judgment in favor of Robert Kane in a lawsuit arising out of a joint promotional contest offered by Ron-

Carter and a company that Kane reportedly represented, Carlisle Homes. Ron-Carter contends that the trial court erred in granting Kane's motion for summary judgment on Ron-Carter's fraudulent inducement claim against Kane. We reverse the trial court's grant of summary judgment for Kane and remand for further proceedings consistent with this opinion.

Background

In early 2007, Carl Mitchell, a representative of the auto dealership, Ron-Carter, approached his longtime friend Robert Kane, who purportedly was a representative of homebuilder Carlisle Homes, to gauge Carlisle Homes' interest in participating in a promotional contest with Ron-Carter. Kane at the time was employed by a local bank that had a financial relationship with Carlisle Homes. Representatives from Carlisle Homes were interested; Perry Thomas, the president of Carlisle Homes, and Kane both sent e-mails to Mitchell expressing excitement and gratitude for Ron-Carter's consideration of Carlisle Homes for the contest. Mitchell, Kane, Thomas, other representatives of Ron-Carter and Carlisle Homes, and counsel representing Ron-Carter and Carlisle Homes then had two meetings in March 2007 to discuss and negotiate the joint promotional contest. In the contest, people visiting Ron-Carter to look at cars could enter into a drawing (which Ron-Carter would promote), and the winner of the drawing would receive a home constructed by Carlisle Homes.

In response to Kane's motion for summary judgment, Mitchell signed an affidavit stating that before signing the agreement, Kane told Mitchell that Carlisle Homes would be able to perform under the agreement and that Kane was a 25% owner of and had personally invested $250,000 in Carlisle Homes. However, Ron-Carter has also presented evidence that Kane was only a 25% owner of a subsidiary company of Carlisle Homes and had never invested $250,000 in the company. In April 2007, Ron-Carter and Carlisle Homes entered into a written agreement to hold the contest.

Carlisle Homes completed construction of the house, and Ron-Carter promoted and conducted the drawing for the contest. Carlisle Homes was scheduled to transfer title of the house to the contest winner, but Ron-Carter then learned the house was subject to a deed of trust of approximately $188,000 and various mechanics' and materialmen's liens of at least $6,400. Carlisle Homes later informed Ron-Carter that it did not have the money to pay off the deed of trust and other liens and therefore could not transfer title to the contest winner. Ron-Carter and the contest winner filed suit against Carlisle Homes for breach of contract and obtained a default judgment for $250,000.[1]

[1] Carlisle Homes has since ceased operations. Franklin Bank, the holder of the deed of trust, eventually foreclosed on the house in question. Franklin Bank later went into receivership and the FDIC now controls the property.

Ron-Carter filed suit against Kane alleging fraudulent inducement and statutory fraud, eventually dropping the statutory fraud claim. Kane promulgated interrogatories asking, inter alia, for Ron-Carter to state "exactly" the representations made by Kane as described in Ron-Carter's original petition. Ron-Carter responded by describing the "exact statements" as contained in e-mails between Ron-Carter representatives and Kane, which Ron-Carter attached.

Kane moved for summary judgment on the fraudulent inducement claim on one of two alternative grounds: (1) Kane did not make any misrepresentation and (2) Ron-Carter could not, as a matter of law, have reasonably and justifiably relied on any representation made during the "adversarial" contract negotiation process. Ron-Carter filed an amendment to its responses to Kane's interrogatories, which stated that during the March 2007 meetings Kane represented to Mitchell, inter alia, that Carlisle Homes would be able to perform under the agreement and that Kane was a 25% owner of and had personally invested $250,000 in Carlisle Homes. Ron-Carter also pointed to deposition testimony that Kane was only a 25% owner of a subsidiary company of Carlisle Homes and that Kane never personally invested $250,000 in the company. On the same day they served amended responses to interrogatories, Ron-Carter also filed an affidavit from Mitchell in which Mitchell described the same representations by Kane as the amended responses to interrogatories described.

Kane moved to strike Ron-Carter's amended responses to interrogatories and to strike the Mitchell affidavit, arguing that it and the amended responses to interrogatories had been filed to create a fact issue to avoid summary judgment. The trial court denied Kane's motion to strike but granted Kane's motion for summary judgment. The trial court did not state the grounds on which it granted summary judgment. Kane does appeal the denial of his motion to strike the amended responses to interrogatories and the Mitchell affidavit.

Ron-Carter now appeals the grant of summary judgment, raising two issues: (1) there is a genuine issue of material fact regarding whether Kane made false representations to Ron-Carter, and (2) there is a genuine issue of material fact regarding whether Ron-Carter reasonably relied upon Kane's false representations.

Standard of Review

We review de novo the trial court's grant of summary judgment. *Hahn v. Love*, 321 S.W.3d 517, 523 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). Traditional summary judgment is properly granted only when the movant establishes that there are no genuine issues of material fact and that he is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Hahn*, 321 S.W.3d at 523. Summary judgment is proper on claims for which the movant is the defendant only when the movant negates at least one element of each of the plaintiff's causes of action or when the movant conclusively establishes each element of an affirmative

defense. *Hahn*, 321 S.W.3d at 523. If the movant conclusively negates an element of each of the plaintiff's causes of action or conclusively establishes its own cause of action, the burden then shifts to the non-movant to respond with evidence raising a genuine issue of material fact that would preclude summary judgment. *Id*. In deciding whether there is a disputed material fact precluding summary judgment, evidence favorable to the non-movant will be taken as true, every reasonable inference must be indulged in favor of the non-movant, and any doubts must be resolved in favor of the non-movant. *Id.*

As in this case, when a trial court order does not state the grounds on which it granted summary judgment, we may reverse summary judgment only if the nonmovant on appeal shows that each of the grounds in the movant's summary judgment motion is insufficient to support summary judgment. *See Fed. Deposit Ins. Corp. v. Attayi*, 745 S.W.2d 939, 942 (Tex. App.—Houston [1st Dist.] 1988, no writ). Conversely, we may affirm summary judgment only based on grounds presented specifically in movant's motion for summary judgment. *See State Farm Lloyds v. Page*, 315 S.W.3d 525, 532 (Tex. 2010).

Fraudulent Inducement

Fraudulent inducement is a particular species of fraud in which the elements of fraud must be established as they relate to an agreement between the parties. *See Coastal Bank SSB v. Chase Bank of Texas, N.A.*, 135 S.W.3d 840, 843 (Tex.

App.—Houston [1st Dist.] 2004, no pet.). The elements of fraud are: (1) a material misrepresentation was made; (2) it was false; (3) when the representation was made, the speaker knew it was false or the statement was recklessly asserted without any knowledge of its truth; (4) the speaker made the false representation with the intent that it be acted on by the other party; (5) the other party acted in reliance on the misrepresentation; and (6) the party suffered injury as a result. *See DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 688 (Tex. 1990). Reliance on a party's misrepresentation must be justifiable and reasonable. *See Atl. Lloyds Ins. Co. v. Butler*, 137 S.W.3d 199, 226 (Tex. App.—Houston [1st Dist.] 2004, pet. denied) (citing RESTATEMENT (SECOND) OF TORTS § 531 (1977)).

A. Misrepresentation

Ron-Carter's first issue is that that the trial court erred in granting summary judgment on the ground that there is no genuine issue of material fact as to whether Kane made a false statement. Ron-Carter alleges Kane made two false statements to Ron-Carter: (1) that Carlisle Homes was able to perform on the agreement, and (2) that Kane was a 25% owner of and had personally invested $250,000 in Carlisle Homes. Because we hold there is a genuine issue of material fact regarding this second alleged false statement, we sustain Ron-Carter's first issue.

Ron-Carter contends that (1) Mitchell's affidavit in which Mitchell said that Kane told him he was a 25% owner of Carlisle Homes and that he had personally

invested $250,000 in the company, and (2) deposition testimony stating that Kane was only a 25% owner of a subsidiary of Carlisle Homes and that Kane never invested $250,000 of his personal funds in the company, create a genuine issue of material fact about whether Kane made a misrepresentation to Mitchell about Kane's ownership stake and investment in Carlisle Homes. Kane does not specifically dispute that this evidence would create a genuine issue of material fact but argues that the Mitchell affidavit should be disregarded under the sham affidavit doctrine.

In reviewing a summary judgment motion, we must take all of this evidence favorable to Ron-Carter as true. *Hahn*, 321 S.W.3d at 523. However, under the sham affidavit doctrine, a party cannot file an affidavit to contradict his own deposition testimony without any explanation for the change in testimony. *Farroux v. Denny's Rests., Inc.*, 962 S.W.2d 108, 111 (Tex. App.—Houston [1st Dist.] 1997, no pet.) (adopting sham affidavit doctrine from *Bank of Ill. v. Allied Signal Safety Restraint Sys.*, 75 F.3d 1162, 1168–69 (7th Cir. 1996)). The basic rationale behind the sham affidavit doctrine is that the whole purpose of summary judgment—to weed out unfounded claims, specious denials, and sham defenses—would be undercut if a party could fabricate a sham issue of fact and mechanically defeat summary judgment simply by filing another affidavit, even if that affidavit contradicted previous deposition testimony. *See Bank of Ill.*, 75 F.3d at 1168–69.

Unless a party explains why he has filed an affidavit that contradicts his previous deposition (for example, because he was confused or has discovered additional materials), we will assume that the party has filed the affidavit solely to defeat summary judgment and will therefore disregard the affidavit. *Farroux*, 962 S.W.2d at 111.

Kane argues that the Mitchell affidavit contradicts Ron-Carter's initial response to Kane's interrogatories, in which Ron-Carter described the "exact statements" of Kane's representations as contained in several e-mails from Kane, which say nothing about any ownership stake or personal investment by Kane in Carlisle Homes. However, Ron-Carter amended its responses to interrogatories to include Mitchell's statement that Kane had repeated that he was a 25% owner of Carlisle Homes and had personally invested $250,000 in the company. On the same day, Ron-Carter filed the Mitchell affidavit. Therefore, there was no contradiction between the responses to interrogatories and the affidavit.

Kane argued to the trial court, and argues here that Ron-Carter was simply amending its responses to interrogatories to create a fact issue to avoid summary judgment. The trial judge, however, explicitly denied Kane's motion to strike, and Kane has not appealed the denial of his motion. Therefore, the responses to interrogatories at the time of the summary judgment are the amended responses, which the Mitchell affidavit does not contradict. *See State Farm Fire & Cas. Co.*

v. Morua, 979 S.W.2d 616, 618–19 (Tex. 1998) (stating that party should be able to rely on opponent's supplemental interrogatory answers to develop case before and at trial). We can and should affirm summary judgment on any grounds properly stated in a motion for summary judgment, *see State Farm Lloyds*, 315 S.W.3d at 532, but we cannot affirm summary judgment by overruling the denial of a motion to strike when no one has appealed that denial and therefore it is not before us for review. *See* TEX. R. APP. P. 47.1; *Tex. Integrated Conveyor Sys., Inc. v. Innovative Conveyor Concepts, Inc.*, 300 S.W.3d 348, 373 (Tex. App.—Dallas 2009, pet. denied) (refusing on appeal to disregard affidavit because motion at trial to disregard affidavit under sham affidavit doctrine was denied and not appealed).

Since the Mitchell affidavit presents no contradiction with the amended responses to interrogatories and therefore cannot be disregarded under the sham affidavit doctrine, we hold that Ron-Carter presented evidence to establish a genuine issue of material fact as to whether Kane made a misrepresentation to Mitchell about his ownership interest and personal investment in Carlisle Homes. Therefore, summary judgment was inappropriate on the ground that Kane did not make a misrepresentation. We sustain Ron-Carter's first issue.

B. Justifiable Reliance on the Misrepresentation

Ron-Carter cannot prevail by simply establishing a genuine issue of material fact as to whether Kane made a misrepresentation; it must also demonstrate that the

trial court erred in granting summary judgment on the ground that there is no genuine issue of material fact regarding whether Ron-Carter justifiably relied on Kane's false representations. Because we hold there is a genuine issue of material fact as to whether Ron-Carter justifiably relied on Kane's false representations, we sustain Ron-Carter's second issue.

Fraudulent inducement requires a showing that the plaintiff reasonably and justifiably relied on the defendant's misrepresentation. *DeSantis*, 793 S.W.2d at 688; *Butler*, 137 S.W.3d at 226. Generally, reliance on representations made in a business or commercial transaction is not justified when the representation takes place in an adversarial context or relationship. *Coastal Bank SSB*, 135 S.W.3d at 843 (citing *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 794 (Tex. 1999)). In *McCamish*, the Texas Supreme Court articulated the test for determining if a relationship is adversarial:

> In determining whether [the] justifiable reliance element is met, one must consider the nature of the relationship between the [parties] . . . . Because not every situation is clearly defined as "adversarial" or "nonadversarial," the characterization of the inter-party relationship should be guided, at least in part, by "the extent to which the interests of the [parties] are consistent with each other."

991 S.W.2d at 794 (citing Jay M. Feinman, *Attorney Liability to Nonclients*, 31 Tort & Ins. L.J. 735, 750 (1996)).

This test originated in a case alleging negligent misrepresentation by an attorney to a third party, *McCamish*, 991 S.W.2d at 794, which, like fraudulent inducement, requires a showing of justifiable reliance. *See Grant Thornton LLP v. Prospect High Income Fund*, 314 S.W.3d 913, 923 (Tex. 2010). The basic rationale for the *McCamish* test is that an attorney, hired by a client for the benefit and protection of the client's interests, must pursue those interests with undivided loyalty (within the confines of the Texas Disciplinary Rules of Professional Conduct), without the imposition of a conflicting duty to a nonclient whose interests are adverse to the client. *Id.* Even though its origins are in litigation, the *McCamish* test may apply in non-litigation contexts such as "adversarial" business or commercial transactions. *Id*.

Kane cites to several cases for the proposition that all business relationships are adversarial in nature, but these cases are distinguishable.[2] More importantly,

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[2] *See McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 794 (Tex. 1999) (involving representations made by attorney in litigation context); *Spethmann v. Anderson*, 171 S.W.3d 680, 690 (Tex. App.—Dallas 2005, no pet.) (concluding that there was no evidence that parties were adversaries in merger; noting that at time of misrepresentation, the two companies had worked as partners on projects for over a year, and their corporate offices and functions had been combined for over eight months); *Coastal Bank SSB v. Chase Bank of Texas, N.A.*, 135 S.W.3d 840, 843 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (concluding party could not prove it justifiably relied on other party's representation or silence when the two parties' contract contained express waiver of reliance); *Swank v. Sverdkin*, 121 S.W.3d 785, 803 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (holding trial court did not err in disregarding jury's finding of negligent misrepresentation because representations, which were made in context of contract negotiations, conflicted with contract; "The fact that

the *McCamish* test for determining if a relationship is adversarial (and therefore reliance is not reasonable) is not categorical, but fact-specific. For example, in a case applying the *McCamish* test, this Court held that a relationship of two sophisticated parties who were both represented by counsel is not, standing alone, dispositive of the issue of whether reliance is reasonable, but only a factor to be considered. *See Coastal Bank SSB*, 135 S.W.3d at 843. Otherwise, any two people who are sophisticated and have hired lawyers could knowingly make misrepresentations in business transactions, however friendly or cooperative their joint venture might appear, without ever being held accountable for their fraud.

Ron-Carter points to *McMahan v. Greenwood*, 108 S.W.3d 467 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) as a case more strongly on-point with this case. In *McMahan*, the plaintiff and a business partner established a business selling and refurbishing classic cars. *Id.* at 476. In creating the business, the parties signed a stock option agreement drafted by the defendant, an attorney. *Id*. Contemporaneously (the plaintiff later alleged), the defendant told the plaintiff that the plaintiff was a shareholder in the business. *Id.* The relationship between the plaintiff and his business partner eventually soured, and the parties signed a

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> Sverdlin failed to read the contracts and simply chose to sign them does not amount to a ground of recovery for negligent misrepresentation.").

settlement agreement to wind down the business. *Id*. at 477. A few years later, the plaintiff asked the former business partner for documents to allow him to take tax credits on losses in their business, but the former business partner claimed the plaintiff had never owned stock in their business and therefore was not entitled to the necessary tax documents to claim the tax credits. *Id.* The plaintiff sued the defendant for fraudulent inducement. *Id*. at 494–95. The defendant moved for summary judgment, claiming that the plaintiff could not have justifiably relied on any statements the defendant made about the plaintiff's stock ownership because those statements would have been made in an adversarial context of negotiating, drafting, and executing the settlement agreement. *Id*. at 497.

The *McMahan* court held that while statements made during the settlement negotiations were likely made in an adversarial context, the statements made during the formation and operation of the business likely were not. *Id.* at 497. Applying the test of *McCamish*, the court noted that the plaintiff and his business partner were ostensibly working towards the same goal of a successful business venture. *Id.* Whether their relationship was adversarial was not established as a matter of law but would be a fact question; therefore summary judgment was inappropriate as to whether the plaintiff justifiably relied on the defendant's statements. *Id*.

McMahan is on-point to this case. Like *McMahan*, Ron-Carter and Carlisle Homes were working towards the same goal of a successful business venture in which Carlisle Homes contributed a house in exchange for the promotional benefits of being associated with Ron-Carter's auto dealership. The *McCamish* test requires us to consider the nature of the relationship between the parties and the extent to which their interests were consistent. Aside from the fact that the parties had lawyers (like *McMahan*) and were sophisticated businessmen, Kane points to no evidence suggesting that the interests of the parties were not aligned or inconsistent. In contrast, Ron-Carter points to several e-mails in which the parties expressed gratitude and excitement that they were working with each other, as well as the fact that Kane and Mitchell were long-time personal friends. We hold that it is a fact question as to whether the relationship between the parties was adversarial and summary judgment was inappropriate on the ground that Ron-Carter could not have reasonably relied on Kane's statements.[3] We therefore sustain Ron-Carter's second issue.

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[3] Kane also argues that Ron-Carter's admitted failure to exercise reasonable diligence and investigate the truthfulness of Kane's representations negates the element of reasonable reliance on Kane's statements. However, we have only articulated the rule that a party cannot reasonably rely on a representation when that representation "with reasonable diligence, *could easily have been refuted*." *Butler*, 137 S.W.3d at 226 (emphasis added). Kane has not identified any evidence that, had Ron-Carter been more diligent and investigated Kane's statements, Ron-Carter would have discovered they were false. Since Kane has the burden to produce such evidence to negate the element of reasonable reliance

Conclusion

Ron-Carter has established that there is a genuine issue of material fact as to (1) whether Kane made a false representation and (2) whether Ron-Carter justifiably relied on Kane's false representation. These were the only grounds raised by Kane in his motion for summary judgment. Therefore Ron-Carter has satisfied its burden to defeat summary judgment and require reversal. *See Hahn*, 321 S.W.3d at 523; *Attayi*, 745 S.W.2d at 942.

Accordingly, we reverse the grant of summary judgment for appellee Robert Kane and remand for proceedings consistent with this opinion.

Jim Sharp
Justice

Panel consists of Justices Jennings, Sharp and Brown.

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on a motion for summary judgment, *Hahn*, 321 S.W.3d at 523, we cannot affirm summary judgment on this ground.