

Opinion issued June 6, 2019



In The  
**Court of Appeals**  
For The  
**First District of Texas**

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NO. 01-18-00427-CV

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**IGOR GALPERIN, Appellant**

**V.**

**SMITH PROTECTIVE SERVICES, INC., Appellee**

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**On Appeal from the 164th District Court  
Harris County, Texas  
Trial Court Case No. 2017-32333-B**

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**MEMORANDUM OPINION**

Igor Galperin appeals the dismissal of his negligence claim against Smith Protective Services, Inc. (SPSI) under Texas Rule of Civil Procedure 91a. In two

issues, Galperin contends that the trial court erred in granting SPSI's motion, and that SPSI is not entitled to attorney's fees. We reverse and remand.

### **Background**

Galperin owns a condominium unit at the Marlborough Square Condominiums, located at 594 Wilcrest, in Houston, Texas. While Galperin was out of the country, his condominium was foreclosed upon and the homeowners' association (HOA) purchased it at auction. When Galperin returned home, he discovered that his automobiles, safes, firearms, and business data had been stolen, and that his bank account had been emptied and his credit cards "maxed out."

Galperin sued SPSI, among others, asserting a cause of action for negligence.<sup>1</sup> In his first amended petition, Galperin alleged that SPSI "has a contract to provide security services to the HOA and unit owners," and that, under the contract, SPSI acted as the HOA's agent in providing security for the complex. Galperin alleged that SPSI was negligent in failing to (1) "secure his condo and property to prevent the thefts that occurred"; (2) institute proper processes and procedures to ensure that the HOA and its various agents . . . adequately guarded against theft of property from condos foreclosed on and owned by the HOA during the redemption period"; (3) provide adequate security to prevent the thefts for [his] condo based on what was

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<sup>1</sup> Galperin also asserted claims of conspiracy and breach of fiduciary duty against the HOA, its board members, and various other defendants.

known or should have been known”; and (4) alert the HOA and its management company of suspicious activities surrounding access to his condo during the period it was owned by the HOA in the redemption period.”

SPSI filed a motion to dismiss pursuant to Texas Rule of Civil Procedure 91a, arguing that Galperin’s negligence cause of action has no basis in law or fact. Galperin filed a response to the motion, and SPSI filed a reply. The trial court granted SPSI’s motion, dismissed SPSI from the suit, and awarded attorney’s fees and costs to SPSI. This appeal followed.

### **Discussion**

In his first issue, Galperin contends that the trial court erred in dismissing his negligence claim against SPSI. In his second issue, he argues that SPSI is not entitled to attorney’s fees.

#### **A. Texas Rule of Procedure 91a**

Rule 91a provides that “a party may move to dismiss a cause of action on the grounds that it has no basis in law or fact.” TEX. R. CIV. P. 91a.1. A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the plaintiff to the relief sought. *Id.* Generally, a cause of action has no basis in law under Rule 91a in at least two situations: (1) the petition alleges too few facts to demonstrate a viable, legally cognizable right to relief; and (2) the petition alleges additional facts that, if true, bar

recovery. *Guillory v. Seaton, LLC*, 470 S.W.3d 237, 240 (Tex. App.—Houston [1st Dist.] 2015, pet. denied). “A cause of action has no basis in fact if no reasonable person could believe the facts pleaded.” TEX. R. CIV. P. 91a.1. The trial court must determine the motion “based solely on the pleading of the cause of action, together with any pleading exhibits permitted by” the rules of civil procedure. TEX. R. CIV. P. 91a.6; *Dailey v. Thorpe*, 445 S.W.3d 785, 788 (Tex. App.—Houston [1st Dist.] 2014, no pet.).

We review a trial court’s ruling dismissing a case under Rule 91a de novo. *Walker v. Owens*, 492 S.W.3d 787, 789 (Tex. App.—Houston [1st Dist.] 2016, no pet.). We construe the pleadings liberally in favor of the plaintiff, look to the plaintiff’s intent, and accept as true the factual allegations in the pleadings to determine if the cause of action has a basis in law or fact. *Wooley v. Schaffer*, 447 S.W.3d 71, 76 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). In doing so, we apply the fair notice standard of pleading. *Id.*; *see also* TEX. R. CIV. P. 47(a); *Roark v. Allen*, 633 S.W.2d 804, 810 (Tex. 1982) (“A petition is sufficient if it gives fair and adequate notice of the facts upon which the pleader bases his claim.”). Under this standard, pleadings are sufficient if a cause of action can reasonably be inferred from the facts pleaded. *McNeil v. Nabors Drilling USA, Inc.*, 36 S.W.3d 248, 250 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

## **B. Establishing a Negligence Claim**

A negligence cause of action has three elements: (1) a legal duty owed by one person to another, (2) a breach of that duty, and (3) damages proximately caused by the breach. *D. Hous. Inc. v. Love*, 92 S.W.3d 450, 454 (Tex. 2002). The threshold inquiry in a negligence case is duty. *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995). Whether a duty exists is a question of law for the court. *Humble Sand & Gravel, Inc. v. Gomez*, 146 S.W.3d 170, 181 (Tex. 2004); *Tex. Home Mgmt., Inc. v. Peavy*, 89 S.W.3d 30, 33 (Tex. 2002).

## **C. Dismissal of Galperin's Negligence Claim**

The question before us is whether Galperin's pleaded allegations, taken as true, together with inferences reasonably drawn from them, entitle him to the relief sought. *See* TEX. R. CIV. P. 91a.1. SPSI contends, as it did in its rule 91a motion, that Galperin's negligence claim is baseless because his allegations fail to demonstrate that SPSI owed any duty to Galperin. SPSI argues that, at best, Galperin has alleged contractual duties owed by SPSI to the HOA.

SPSI relies on *Banzhaf v. ADT Security Systems Southwest, Inc.*, 28 S.W.3d 180 (Tex. App.—Eastland 2000, pet. denied) in support of its argument that it owed no duty to Galperin. In that case, Herman's Sporting Goods, Inc, its employee, and the parents of another employee killed during a robbery of the store filed a negligence action against ADT, the security system company which had provided

the store's security alarm system. *See id.* at 183. In determining whether ADT owed a duty to plaintiffs under the contract, the court explained:

Plaintiffs' claim of a contractual legal duty is premised on an assumption that ADT's being in the security business required it to protect Herman's employees. That premise is too broad. ADT is in the business of providing security services for both property and employees, but it provides those services only pursuant to contracts with its customers. The customer selects the services for which it will pay.

*Id.* at 185.

*Banzhaf*, however, was an appeal from the grant of summary judgment. *See id.* at 183. In concluding that ADT owed no duty, the trial court had before it uncontroverted evidence that, by written contract, Herman's had selected an alarm system to protect Herman's property and merchandise after closing when no employees were in the store. *See id.* at 185. Here, by contrast, the trial court had to determine SPSI's rule 91a motion based solely on Galperin's first amended petition. *See* TEX. R. CIV. P. 91a.6; *Dailey*, 445 S.W.3d at 790 (noting "Rule 91a.6 expressly provides that "court *may not consider evidence* in ruling on the [Rule 91a] motion and *must decide the motion based solely on the pleading of the cause of action*, together with any pleading exhibits permitted by Rule 59.") (emphasis in original); *see also In re TPCO Am. Corp.*, No. 13-17-00294-CV, 2018 WL 1737075, at \*6 (Tex. App.—Corpus Christi Apr. 11, 2018, orig. proceeding) (mem. op.) ("[W]e reject a general concept that a Rule 91a proceeding should function, in effect, as a

summary judgment proceeding. Rather, the Rule 91a proceeding regarding the dismissal of baseless actions is more akin to a threshold test.”).

In his first amended petition, Galperin alleged that “[SPSI] has a contract to provide security services to the HOA and unit owners.” Galperin asserts that “this pleading is adequate to give [SPSI] fair notice that a contract with the owners, including Galperin, is being alleged.” At this stage of the proceedings, the court did not have before it evidence of either the duties undertaken by SPSI or of Galperin’s relationship to the condominium association. However, Galperin’s allegations, if taken as true, support the existence of a duty owed by SPSI to Galperin. *See Wooley*, 447 SW.3d at 76. We conclude that Galperin has pleaded a claim for negligence against SPSI that has a basis in law and fact. The trial court erred in granting SPSI’s rule 91a motion to dismiss. We sustain Galperin’s first issue.

#### **D. Attorney’s Fees**

In his second issue, Galperin contends that SPSI is not entitled to attorney’s fees.

Rule 91a provides, with exceptions not relevant here, that “the court must award the prevailing party on the motion all costs and reasonable and necessary attorney fees incurred with respect to the challenged caused of action in the trial court.” TEX. R. CIV. P. 91a.7. In addition to granting SPSI’s rule 91a motion, the trial court awarded \$983.24 in attorney’s fees and costs to SPSI. Because we

conclude that the trial court erred in granting SPSI's rule 91a motion to dismiss, SPSI is not the prevailing party and is therefore not entitled to an award of attorney's fees and costs with respect to Galperin's negligence claim. Accordingly, we sustain Galperin's second issue.

### **Conclusion**

We reverse the trial court's judgment granting SPSI's Rule 91a motion to dismiss and awarding attorney's fees and costs to SPSI as the prevailing party on the motion and remand the case for further proceedings consistent with this opinion.

Russell Lloyd  
Justice

Panel consists of Justices Lloyd, Kelly, and Hightower.