Dismissed in Part; Affirmed in Part; Reversed and Remanded in Part; and Memorandum Opinion filed March 11, 2010.

In The

Fourteenth Court of Appeals

NO. 14-08-01098-CV

JAMES W. DAVIS, THOMAS B.WILKINSON, IV, KET ENTERPRISES, INCORPORATED, and MELISSA JONES, Appellants

V.

SCOTT FRIEDSON, Appellee

On Appeal from the 80th District Court
Harris County, Texas
Trial Court Cause No. 2005-81808

MEMORANDUM OPINION

This case arises from a dispute involving a real estate broker's commission. Scott Friedson challenges the trial court's (1) order granting James Davis's motion for partial summary judgment on Friedson's breach of contract and fraud claims; and (2) denial of Friedson's motion for continuance.

Davis appeals the trial court's (1) dismissal of certain counterclaims without prejudice for want of prosecution;[1] and (2) denial of his motion to reinstate.

We dismiss in part; affirm in part; and reverse and remand in part.

Background

Friedson is a real estate broker with National Income Property. He alleges that Davis entered a Commercial Buyer/Tenant Representation Agreement with him. Friedson and Davis both signed the agreement. According to Friedson, this agreement gave him the exclusive right to act as Davis's real estate agent and to receive a broker's fee when Davis purchased the Woodlen Place property in Houston. Davis eventually bought the Woodlen Place property directly from KET Enterprises, Inc., a real estate brokerage firm, and Thomas B. Wilkinson IV, the owner's listing broker.

Davis denies that he and Friedson entered an agreement. Davis contends that he added a handwritten notation to the agreement stating that Friedson would look only to the seller for his commission; Davis further contends that this notation amounted to a counteroffer, which Friedson did not accept. Friedson asserts that he accepted the agreement including the notation, and that Davis nonetheless is obligated to pay Friedson's commission under a default provision in the agreement.

Friedson filed an original petition on December 29, 2005 asserting claims against Davis for breach of contract, fraud and fraudulent inducement, and attorneys' fees. Davis filed a general denial; a verified denial claiming Friedson did not have the capacity to sue; several affirmative defenses; and a counterclaim seeking a declaratory judgment that the parties never had a meeting of the minds or, alternatively, that the agreement was void and unenforceable.

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[1] Davis asserted a counterclaim seeking a declaratory judgment, along with counterclaims asserting liability for DTPA violations, breach of contract, fraud, and attorneys' fees. The declaratory judgment counterclaim was dismissed in a summary judgment order, which Davis does not challenge on appeal. Davis's remaining counterclaims were dismissed for want of prosecution, which Davis does challenge on appeal along with the trial court's denial of his motion to reinstate.

On April 29, 2008, Davis filed a combined no-evidence and traditional summary judgment motion. In the no-evidence portion of the combined motion, Davis asserted that Friedson lacked evidence of (1) a binding agreement for Davis to pay a real estate commission to Friedson; and (2) a breach of any such agreement because Davis did not agree to pay Friedson a commission, and Friedson agreed to look solely to the seller for his commission. In the traditional summary judgment portion of the motion, Davis contended that the agreement did not comply with the Real Estate License Act; there was no meeting of the minds on a material term; and there is no cause of action for fraud absent an enforceable agreement. On May 15, 2008, Friedson filed a motion for continuance of the summary judgment hearing and trial date, along with a motion for leave to file an amended complaint and reopen discovery; Friedson contended that he hired new counsel on May 14, 2008 and needed additional time to prepare for the case. The trial court denied Friedson's motion for continuance on May 23, 2008.

Friedson filed a response to Davis's motion for summary judgment on May 19, 2008, arguing that a valid written agreement existed between the parties; the agreement satisfied the Real Estate License Act's requirements for bringing suit to collect commissions; the parties acted under the agreement; and Davis's added term was of no consequence because Davis agreed to pay Friedson's commission in the event of default. Friedson also asserted that Davis committed fraud by allowing Friedson to represent him and then purchasing the property directly from the selling broker.

Friedson filed a first amended petition on June 5, 2008 adding National Income Property as a plaintiff, and Thomas B. Wilkinson, IV, KET Enterprises Inc., and Melissa Jones as defendants. The first amended petition added claims for tortious interference with contract against Wilkinson, KET, and Jones, and claims against all defendants for conspiracy and violations of the Theft Liability Act.

On June 13, 2008, the trial court signed an interlocutory order granting Davis's April 29, 2008 motion for summary judgment in its entirety. The order was interlocutory because (1) Davis's April 29, 2008 motion for summary judgment did not address Friedson's newly added claims in his June 5, 2008 first amended petition; and (2) the order did not address Davis's declaratory judgment counterclaim.

On June 17, 2008, Friedson filed a motion for summary judgment on Davis's declaratory judgment counterclaim. On August 1, 2008, Davis filed his first amended original answer and first amended counterclaim, in which he added a claim against Friedson under the Texas Deceptive Trade Practices-Consumer Protection Act along with claims for common law fraud, fraud in a real estate transaction, breach of contract, and attorney's fees. Davis simultaneously filed his response to Friedson's June 17, 2008 motion for summary judgment. On August 26, 2008, the trial court signed an order granting Friedson's motion for summary judgment and dismissing Davis's declaratory judgment counterclaim.

Other claims were resolved independently of the cross-motions for summary judgment. In a letter dated June 24, 2008, the trial court stated that it intended to dismiss the case for want of prosecution because no service had been had or no answer had been filed in the case. The letter was addressed only to Friedson's attorney; the body of the letter was directed to "All Counsel and Pro Se parties." The letter stated that the case would be dismissed for want of prosecution unless a meritorious default judgment was filed and heard or an answer was filed. If neither occurred, the trial court required the filing of a verified motion to retain showing good cause or diligence in prosecution, along with an appearance at a dismissal hearing scheduled for September 5, 2008.

On September 9, 2008, the trial court signed an order dismissing "the cause of action" for want of prosecution after the parties failed to appear at the September 5 dismissal hearing. It is not clear from the order exactly what "the cause of action" encompasses.

On October 2, 2008, Davis timely filed a verified motion to reinstate his counterclaims after dismissal for want of prosecution under Texas Rule of Civil Procedure 165a, in which he stated that (1) he did not have notice of the dismissal docket setting or order dismissing the case until September 19, 2008; and (2) unspecified new claims had arisen in relation to his counterclaims against Friedson. On October 13, 2008, Friedson filed a response and motion for sanctions, and a motion for rehearing of Davis's second motion for summary judgment subject to reinstatement of the case. The trial court denied the motion to reinstate.[2]

On November 4, 2008, Davis filed a motion asking the trial court to sign a final judgment. On November 14, 2008, the trial court signed a "Final Judgment" denying Davis's motion to reinstate and incorporating (1) the June 13, 2008 summary judgment order dismissing Friedson's claims for breach of contract and fraud; and (2) the August 26, 2008 summary judgment order dismissing Davis's declaratory judgment counterclaim. The "Final Judgment" recited that all remaining claims or counterclaims were dismissed for want of prosecution in the order signed on September 9, 2008.

As of November 14, 2008, therefore, all of the parties' claims had been resolved as follows.

- Friedson's claims against Davis for breach of contract and fraud were resolved when the trial court granted summary judgment in favor of Davis in an interlocutory order signed June 13, 2008. The June 13, 2008 summary judgment order was incorporated in the "Final Judgment" signed on November 14, 2008.
- Davis's declaratory judgment counterclaim against Friedson was resolved when the trial court granted summary judgment in favor of Friedson in an interlocutory order

[2] In a document entitled "Order Granting Partial Motion to Reinstate After Dismissal Without Prejudice of Defendant's Counterclaims Only and Reinstating Prior Granted Summary Judgments," a line is drawn through the proposed order and "Motion to Reinstate Denied" is written across it. The order is dated October 24, 2008 and is signed by the trial court.

signed August 26, 2008. The August 26, 2008 summary judgment order was incorporated in the "Final Judgment" signed on November 14, 2008.

- The November 14, 2008 "Final Judgment" recites that "all other claims or counterclaims, if any, remaining after the prior above mentioned Interlocutory Summary Judgment Orders were granted, were dismissed for want of prosecution on September 9, 2008." This recitation disposed of Friedson's and National Income Property's remaining claims for tortious interference against Wilkinson, KET, and Jones; it also disposed of Friedson's and National Income Property's claims for conspiracy and violations of the Theft Liability Act against Davis, Wilkinson, KET, and Jones, along with National Income Property's fraud and breach of contract claims against Davis. Likewise, this recitation disposed of Davis's remaining counterclaims against Friedson for DTPA violations, common law fraud, fraud in a real estate transaction, breach of contract, and attorney's fees.
- The November 14, 2008 "Final Judgment" is final and appealable because it confirms the trial court's intent to resolve all claims asserted by or against all parties when it states, "This judgment finally disposes of all remaining claims and parties, if any." *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 200 (Tex. 2001).

A notice of appeal was filed on December 1, 2008 by Davis, Wilkinson, KET, and Jones. Friedson filed a notice of appeal on December 2, 2008. The notices of appeal filed on December 1 and December 2, 2008 were timely regardless of whether the date of the final judgment is deemed to be September 9, 2008 (when the ambiguous order dismissing "the cause of action" for want of prosecution was signed) or November 14, 2008 (when the document denominated as the "Final Judgment" was signed). After the September 9, 2008 dismissal order was signed, Davis timely filed a motion to reinstate on October 2, 2008. The filing of this motion to reinstate extended the time for Davis to file a notice of appeal until December 8, 2008. *See* Tex. R. App. P. 26.1(a)(3). If November 14, 2008 is deemed to be the operative date, then Davis had until December 15, 2008 to file

his notice of appeal. *See* Tex. R. App. P. 26.1. Davis's notice of appeal filed on December 1, 2008 was timely regardless of which deadline applies. Because Davis timely filed his notice of appeal on December 1, 2008, Friedson's notice of appeal filed on December 2, 2008 also was timely. *See* Tex. R. App. P. 26.1(d).

On appeal, we address only Davis and Friedson individually.[3]

Analysis

A. Summary Judgment on Friedson's Claims for Breach of Contract and Fraud Against Davis

In his first issue, Friedson contends the trial court erred by granting Davis's motion for partial summary judgment on Friedson's breach of contract claim because Friedson presented some evidence that (1) he accepted Davis's changes to the agreement; (2) Davis breached the agreement by buying the property without Friedson's assistance; and (3) the written agreement complied with the Real Estate License Act. Friedson also argues the trial court erred by granting summary judgment on his fraud claim because the written agreement complied with the Real Estate License Act.

1. No-Evidence Motion for Summary Judgment

Davis sought a no-evidence motion for summary judgment with respect to (1) the existence of a contract; and (2) breach of the asserted contract.

The movant must specifically state the elements as to which there is no evidence. *Walker v. Thomasson Lumber Co.*, 203 S.W.3d 470, 473-74 (Tex. App.—Houston [14th

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[3] Wilkinson, KET, and Jones did not file briefs or otherwise pursue their respective appeals. Therefore, we dismiss their appeals for want of prosecution. Tex. R. App. P. 42.3(b); *Physio GP, Inc. v. Naifeh*, No. 14-08-00017-CV, 2010 WL 374515, at *1 n.1 (Tex. App.—Houston [14th Dist.] 2010, no pet. h.). National Income Property did not file a notice of appeal; is not listed in Friedson's notice of appeal; and is not a party to this appeal. *See Mortland v. Dripping Springs I.S.D.*, Nos. 03-02-00331-CV, 03-03-00003-CV, 2003 WL 21705258, at *2 (Tex. App.—Austin 2003, no pet.) (mem. op.) (appellant could not add other appellants by listing their names in his brief when those appellants did not file or join notice of appeal).

Dist.] 2006, no pet.). The trial court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact. Tex. R. Civ. P. 166a(i). However, the respondent is "not required to marshal its proof; its response need only point out evidence that raises a fact issue on the challenged elements." *Hamilton v. Wilson*, 249 S.W.3d 425, 426 (Tex. 2008) (quoting Tex. R. Civ. P. 166a(i) cmt. 1997).

A no-evidence summary judgment is essentially a pretrial directed verdict, and we apply the same legal sufficiency standard in reviewing a no-evidence summary judgment as we apply in reviewing a directed verdict. *Mathis v. Restoration Builders, Inc.*, 231 S.W.3d 47, 50 (Tex. App.—Houston [14th Dist.] 2007, no pet.)(maj. op.). We review the entire record in the light most favorable to the non-movant, indulging every reasonable inference and resolving any doubts against the motion. *City of Keller v. Wilson*, 168 S.W.3d 802, 824 (Tex. 2005).

We sustain a no-evidence summary judgment when (1) there is a complete absence of proof of a vital fact; (2) rules of law or evidence bar the court from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a scintilla; or (4) the evidence conclusively establishes the opposite of a vital fact. *Walker*, 203 S.W.3d at 474. Less than a scintilla of evidence exists 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, and in legal effect is no evidence. *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004). More than a scintilla of evidence exists when the evidence rises to a level that would enable reasonable and fair-minded people to differ in their conclusions as to the existence of the vital fact. *Id.*

a. Existence of a valid contract

The essential elements of a breach of contract claim are (1) the existence of a valid contract, (2) the plaintiff performed or tendered performance, (3) the defendant breached the contract, and (4) the plaintiff was damaged as a result of the breach. *Winchek v. Am. Express Travel Related Servs. Co.*, 232 S.W.3d 197, 202 (Tex. App.—Houston [1st Dist.]

2007, no pet.). Parties form a binding contract when there is (1) an offer, (2) an acceptance in strict compliance with the terms of the offer, (3) a meeting of the minds, (4) consent by each party to the terms, and (5) execution and delivery of the contract with the intent that it be mutual and binding. *Wal-Mart Stores, Inc. v. Lopez*, 93 S.W.3d 548, 555-56 (Tex. App.—Houston [14th Dist.] 2002, no pet.). For an agreement to be enforceable, there must be a meeting of the minds with respect to its subject matter and essential terms. *Id*. at 556. A "meeting of the minds" is a mutual understanding and assent to the expression of the parties' agreement. *See Weynand v. Weynand*, 990 S.W.2d 843, 846 (Tex. App.—Dallas 1999, pet. denied). To determine whether there was an offer and acceptance, and therefore a "meeting of the minds," courts use an objective standard; they consider what the parties did and said, not the parties' subjective states of mind. *See Komet v. Graves*, 40 S.W.3d 596, 601 (Tex. App.—San Antonio 2001, no pet.).

Davis challenged the existence of a valid contract in his motion for summary judgment, arguing there was no meeting of the minds that Davis would be responsible for Friedson's commission because Davis made a handwritten notation that Friedson would look to the seller for his commission. Davis contended that the handwritten notation amounted to a counteroffer that Friedson did not accept. If Friedson accepted the notation, Davis argued that he was not contractually obligated to pay Friedson's commission. The copy of the agreement attached to Friedson's original petition and Davis's motion for summary judgment contains the handwritten notation, Davis's initials next to the notation, and both parties' initials at the bottom of each page. Signatures for Friedson and Davis appear at the end of the document.

In response, Friedson argued that there was a valid written agreement between the parties. He contended that even though he did not specifically initial the language added by Davis, he initialed at the bottom of the page, signed the agreement, and then performed

under the contract. Friedson attached his affidavit, a letter of intent to purchase the Woodlen Place property, and an unsigned copy of the agreement at issue.[4]

According to Friedson's affidavit, he signed the agreement faxed by Davis, which included the handwritten notation stating that the broker would receive payment directly from the seller. Friedson stated that he called the listing brokers, KET and Houston Income Properties, to verify the co-broker fee; he told Davis that KET agreed to pay the commission, and that they would work out the details in the earnest money contract. Friedson also attached to the response an unsigned letter of intent to KET outlining Davis's offer, which he stated he faxed to KET. The letter of intent indicated that the seller was to pay Friedson's commission. Friedson stated in his affidavit that after the agreement between Friedson and Davis was signed, Friedson called to arrange a tour of the property for Davis and they exchanged emails to arrange a time for doing so. Friedson said he received a call from Jones, Davis's girlfriend and business partner, in which she stated she was upset that Friedson had another potential buyer looking at the property; she insisted Friedson close the deal for Davis and Jones. Friedson assured her he would do everything he could. According to Friedson's affidavit, Friedson did not speak to Davis again before the showing and Davis did not attend the scheduled tour of the property.

On this record, Friedson has produced summary judgment evidence raising a genuine issue of material fact as to whether the parties had an agreement. *See Insignia Capital Advisors, Inc. v. Stockbridge Corp.*, No. 05-99-01126-CV, 2000 WL 267495, at *2-3 (Tex. App.—Dallas 2000, no pet.) (not designated for publication) (genuine issue of material fact existed as to whether parties formed contract in broker sharing deal when Robertson faxed agreement to DuPree, DuPree made handwritten changes and faxed back,

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[4] While Friedson does not list the unsigned letter of intent to purchase the property or the unsigned copy of the representation agreement under the heading "Summary Judgment Evidence" in his summary judgment response, the record reflects that Friedson attached both to his summary judgment response. Davis does not challenge the authenticity or admissibility of these documents.

and there was evidence that Robertson had signed after DuPree's fax). We hold that a no-evidence motion for summary judgment could not be predicated on the absence of evidence of the existence of a valid contract.

b. Existence of a breach

Davis also contended in his no-evidence motion for summary judgment that there was no evidence of a breach because Davis did not agree to pay Friedson's commission, and Friedson agreed to look solely to the seller for his commission.

Friedson argues that when Davis stopped using his services after signing the agreement, Davis defaulted on the agreement and is liable for the cost of his commissions under a default provision in the agreement. Friedson stated in his affidavit that after the agreement was signed, he called to arrange a tour of the property and exchanged emails with Davis about the time of the tour. According to the affidavit, Jones called Friedson and was upset that Friedson had another potential buyer looking at the same property. Friedson stated that he did not hear from Davis after the call from Jones and did not see Davis at the property tour. Friedson later learned that Davis bought the property directly from KET. Friedson did not receive a commission from KET or Davis.

Friedson also attached to his response an unsigned copy of the representation agreement. Under the heading "Client's Obligations," paragraph 6A of the agreement requires Davis to "work exclusively through Broker when acquiring property in the market area and negotiate the acquisition of property in the market area only through Broker." The default provision states: "If either party fails to comply with this agreement . . . the non-complying party is in default. If Client is in default, Client will be liable for the amount of compensation that Broker would have received under this agreement if Client was not in default." Friedson is the "Broker" and Davis is the "Client."

Davis's handwritten alteration on the signed copy attached to Davis's motion states that "[n]otwithstanding paragraph 11, broker will receive all commissions directly from Seller." Paragraph 11 is titled "Broker's Fees." The default provision is paragraph 13.[5]

Davis's argument that the handwritten notation means he did not agree to pay Friedson's commission under paragraph 11 does not address the agreement's separate default provision in paragraph 13, which purports to make Davis liable for the commission if Davis defaults by failing to use Friedson's services. Friedson has produced summary judgment evidence raising a genuine issue of material fact as to whether Davis defaulted on the agreement by failing to use Friedson's services. *See Fieldtech Avionics & Instruments, Inc. v. Component Control.Com, Inc.*, 262 S.W.3d 813, 828 (Tex. App.—Fort Worth 2008, no pet.) (party's affidavit stating opposing party promised software product would meet needs and it failed to meet needs enough to create fact issue on breach of agreement); *Oliver v. Rogers*, 976 S.W.2d 792, 803 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) (language in restrictive covenant did not support assertion that there was no breach, and therefore, was not valid ground for granting of summary judgment). We hold that a no-evidence motion for summary judgment could not be predicated on the absence of evidence of a breach.

2. Traditional Motion for Summary Judgment

Under the "traditional motion for summary judgment" heading, Davis argued that Friedson's breach of contract and fraud claims failed because (1) the agreement violated the statute of frauds under the Real Estate License Act; (2) no enforceable agreement was formed because there was no meeting of the minds on the material term of whether

[5] The copy attached to Davis's motion is signed by Friedson and Davis and is missing what appears to be every other line of the default provision, but tracks the language of the provision contained in the unsigned copy. No party argues that a change was made to the default provision.

Friedson would look to the seller or buyer for his commission;[6] and (3) there is no cause of action for fraud in failing to pay a commission absent an enforceable agreement.

We review a traditional summary judgment *de novo*. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). A defendant who conclusively negates at least one essential element of a cause of action is entitled to summary judgment on that claim. *IHS Cedars Treatment Ctr. Of DeSoto, Tex., Inc. v. Mason*, 143 S.W.3d 794, 798 (Tex. 2004). A defendant is entitled to summary judgment on an affirmative defense if the defendant conclusively proves all the elements of the affirmative defense. *KPMG Peat Marwick v. Harrison County Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999); *see* Tex. R. Civ. P. 94 (statute of frauds is affirmative defense). Once the defendant produces sufficient evidence to establish the right to summary judgment, the burden shifts to the plaintiff to come forward with competent controverting evidence raising a genuine issue of material fact. *Harrison County Hous. Fin. Corp.*, 988 S.W.3d at 748; *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995). We examine the entire record in the light most favorable to the non-movant, indulging every reasonable inference and resolving any doubts against the motion in the non-movant's favor. *Wilson*, 168 S.W.3d at 824-25.

Davis contended below that the agreement did not comply with subsection (c) of the Real Estate License Act. That subsection states:

> A person may not maintain an action in this state to recover a commission for the sale or purchase of real estate unless the promise or agreement on which the action is based, or a memorandum, is in writing and signed by the party

[6] While Davis asserted in his motion that no enforceable agreement was formed because there was no meeting of the minds on a material term, his argument under the traditional summary judgment heading in his motion speaks only to the Real Estate License Act and the absence of a fraud claim if no contract exists. On appeal, Davis refers to Friedson's deposition excerpts as evidence to support his contention that the parties did not have a meeting of the minds. However, the record does not contain the deposition excerpts. We cannot consider documents that are not included in the appellate record. *U.S. Bank Nat'l Ass'n v. Stanley*, 297 S.W.3d 815, 821 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

against whom the action is brought or by a person authorized by that party to sign the document.

Tex. Occ. Code Ann. § 1101.806(c) (Vernon 2004). Davis contended that the agreement does not comply with this provision because the party to be charged with paying commission was the seller, whose signature does not appear on the agreement. In support of his traditional motion for summary judgment, Davis attached a copy of the "Commercial Buyer/Tenant Representation Agreement," signed by Davis, his own supplemental affidavit, and the affidavit of Thomas B. Wilkinson, IV.[7] Friedson asserted in response that there was a writing signed by Davis, the party against whom the action was brought; Friedson argues that the statute was satisfied and Davis was liable under the default provision.

We agree with Friedson that section 1101.806(c) does not preclude enforcement of the contract. Friedson is seeking his commission under the agreement's default provision in paragraph 13, which states: "If Client is in default, Client will be liable for the amount of compensation that Broker would have received under this agreement if Client was not in default." Davis is the "Client," and Davis signed the agreement. Therefore, the agreement has been signed by the party against whom the action is brought.[8]

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[7] Davis also refers to Friedson's deposition excerpts attached to Davis's first motion for summary judgment. The record does not contain the first motion for summary judgment or the deposition excerpts. Davis has included deposition excerpts in the appendix attached to his brief; however the court cannot consider documents that are not properly included in the appellate record. *Stanley*, 297 S.W.3d at 821. If the pertinent summary judgment evidence considered by the trial court is not in the appellate record, we presume the omitted evidence supports the trial court's judgment. *See Enter. Leasing Co. v. Barrios*, 156 S.W.3d 547, 550 (Tex. 2004) (per curiam).

[8] In *Trammel Crow Co. No. 60 v. Harkinson*, 944 S.W.2d 631, 633-34 (Tex. 1997), the Texas Supreme Court held that an exclusive representation agreement providing for the buyers' real estate broker to look to the seller for his commission did not satisfy the statute because no terms of the exclusive representation agreement charged the buyers with any obligation to pay the commission. *See id.* (construing version of the Real Estate License Act before Act's repeal and recodification in the Occupations Code; current version materially identical to old version). This case is distinguishable because the exclusive representation agreement here contains a default provision in paragraph 13 charging Davis, in the event of a default on the agreement, with an obligation to pay the compensation Friedson would have received under the agreement.

On appeal, Friedson and Davis also argue about whether the agreement (1) promises a definite commission will be paid; and (2) specifies the land to be conveyed with reasonable certainty. Courts construing section 1101.806(c) have stated that compliance with this provision requires an agreement that (1) is in writing and signed by the person to be charged with the commission; (2) promises a definite commission will be paid, or refers to a written commission schedule; (3) states the name of the broker to whom the commission is to be paid; and (4) identifies with reasonable certainty the land to be conveyed, either itself or by reference to some other existing writing. *See LA & N Interests, Inc. v. Fish*, 864 S.W.2d 745, 749-50 (Tex. App.—Houston [14th Dist.] 1993, no writ), *disapproved of on other grounds by Trammell Crow Co. No. 60 v. Harkinson*, 944 S.W.2d 631, 634 (Tex. 1997). These grounds were not raised in the motion for summary judgment. Therefore, summary judgment cannot be affirmed on these grounds. *See City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979).

In any event, the agreement satisfies the Real Estate License Act. The agreement stated that the broker would receive one percent of the gross sales price if the client purchased the property. It also listed "Houston, TX" as the market area with a notation under the heading "Special Provisions" that the agreement was limited to "210 Unit Apartment Complex Known As Woodlen Place." This information suffices. *See James v. Baron Indus., Inc.*, 605 S.W.2d 330, 332 (Tex. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.) (description "Willowick Place patio homes and the five (5) townhomes on Nantucket" with dateline of "City of Houston, Harris County, Texas" sufficient to satisfy statute).[9]

[9] Davis also asserts for the first time on appeal that the agreement is unenforceable because it does not contain a definite ending term, citing to a former version of Texas Administrative Code section 535.148. This court already has rejected this argument. *See Northborough Corporate Ltd. v. Cushman & Wakefield of Tex., Inc.*, 162 S.W.3d 816, 820-21 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (commission agreement not void for lack of termination date).

The trial court erred in granting traditional summary judgment on the ground that the agreement did not comply with the Real Estate License Act. Consequently, the trial court also erred in granting traditional summary judgment on Friedson's fraud claim on the ground that the agreement did not comply with the Real Estate License Act.

We sustain Friedson's first issue on appeal.

B. Motion for Continuance

In his second issue, Friedson contends the trial court erred by denying his motion for continuance because his new attorney, hired five days before the response to the motion for summary judgment was due, did not have adequate time to prepare and almost no discovery had been conducted by the previous attorney.

Because we sustain Friedson's first issue and reverse the granting of the motion for summary judgment, we need not address whether the trial court abused its discretion by not allowing Friedson's newly hired attorney more time to conduct discovery and respond to the motion. *See Sipes v. Gen. Motors Corp.*, 946 S.W.2d 143, 161 (Tex. App.—Texarkana 1997, writ denied) (declining to address motion for continuance which requested more time to take testimony of experts because on remand the Sipeses would have opportunity to do so).

We now turn to Davis's appeal, in which Davis argues that the trial court erred by (1) dismissing his counterclaims for want of prosecution, and (2) denying his motion to reinstate.

C. Dismissal of Davis's Counterclaims for Want of Prosecution

In his first issue, Davis contends the trial court erred when it dismissed his counterclaims for DTPA violations, common law fraud, fraud in a real estate transaction,

breach of contract, and attorney's fees for want of prosecution because Davis did not receive notice of the dismissal hearing.[10]

We apply an abuse of discretion standard of review to a trial court's dismissal for want of prosecution and denial of a motion to reinstate. *MacGregor v. Rich*, 941 S.W.2d 74, 75 (Tex. 1997) (per curiam) (dismissal for want of prosecution); *Smith v. Babcock & Wilcox Const. Co.*, 913 S.W.2d 467, 467 (Tex. 1995) (per curiam) (denial of motion to reinstate). A trial court abuses its discretion if it acts without reference to any guiding rules or principles or acts in an arbitrary or unreasonable manner. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985). In reviewing a trial court's dismissal order, we look at the entire history of the case and perform a fact intensive, case-by-case determination. *See Olin Corp. v. Coastal Water Auth.*, 849 S.W.2d 852, 856-58 (Tex. App.—Houston [1st Dist.] 1993, no writ).

A trial court's authority to dismiss for want of prosecution stems from two sources: (1) Rule 165a of the Texas Rules of Civil Procedure; and (2) the court's inherent power. *See Villarreal v. San Antonio Truck & Equip.*, 994 S.W.2d 628, 630 (Tex. 1999). A trial court may dismiss under Rule 165a on "failure of any party seeking affirmative relief to appear for any hearing or trial of which the party had notice," or when a case is "not disposed of within time standards promulgated by the Supreme Court." Tex. R. Civ. P.

[10] As a threshold matter, we reject Friedson's contention that Davis waived any complaint about the final judgment because Davis asked the trial court to enter final judgment. Davis filed a motion to enter final judgment because the parties disputed whether the trial court's August 26, 2008 interlocutory summary judgment order disposing of Davis's counterclaim for declaratory judgment disposed of all of Davis's counterclaims. Contrary to Friedson's assertion, Davis's motion to enter final judgment states that the "final order is submitted without waiver of any objections or rulings previously made by this Court, including but not limited to this Court's denial of defendant's motion to reinstate." It also states that the judgment is submitted by Davis solely as to form. Therefore, Davis has not waived the right to complain on appeal about the dismissal for want of prosecution and denial of the motion to reinstate. *See First Nat'l Bank of Beeville v. Fojtik*, 775 S.W.2d 632, 633 (Tex. 1989) (per curiam).

165a(1)-(2).[11] In addition, the common law vests the trial court with the inherent power to dismiss independently of the rules of procedure when a plaintiff fails to prosecute his or her case with due diligence. Tex. R. Civ. P. 165a(4); *Villarreal*, 994 S.W.2d at 630.[12]

A trial court generally must provide notice and a hearing before dismissing a case under Rule 165a or its inherent power. *See* Tex. R. Civ. P. 165a(1); *Villarreal*, 994 S.W.2d at 630. The notice and hearing requirements ensure that the dismissed claimant has received due process. *Smith v. McKee*, 145 S.W.3d 299, 302 (Tex. App.—Fort Worth 2004, no pet.); *Tex. Sting Ltd. v. R.B. Foods, Inc.*, 82 S.W.3d 644, 648 (Tex. App.—San Antonio 2002, pet. denied); *Franklin v. Sherman Indep. Sch. Dist.*, 53 S.W.3d 398, 401 (Tex. App.—Dallas 2001, pet. denied). The failure to provide adequate notice of the trial court's intent to dismiss for want of prosecution requires reversal. *Villarreal*, 994 S.W.2d at 630-31. However, a lack of notice can be cured when the trial court holds a hearing on the appellant's motion to reinstate. *Jimenez v. Transwestern Prop. Co.*, 999 S.W.2d 125, 129 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (maj. op.).

Here, the June 24, 2008 Notice of Intent to Dismiss was addressed only to Friedson's attorney even though the body of the notice refers to "All Counsel and Pro Se parties." Davis contends his due process rights were violated because he did not receive notice of the trial court's intent to dismiss. Davis learned of the dismissal order in time to file a motion to reinstate. Davis was afforded his due process rights because he received actual notice of the dismissal order in time to file a motion to reinstate, and a hearing was

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[11] The Rules of Judicial Administration provide that civil jury cases must be disposed of within 18 months from the appearance date, and civil nonjury cases within twelve months from the appearance date. Tex. R. Jud. Admin. 6b(1)-(2), *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. F app. (Vernon Supp. 2009).

[12] Davis also cites Harris County Local Rule 3.6 as a source of authority for dismissal. Under Local Rule 3.6, the following cases are eligible for dismissal for want of prosecution pursuant to Texas Rule of Civil Procedure 165a: (a) cases on file for more than 120 days in which no answer has been filed or is required by law; (b) cases which have been on file for more than eighteen months and are not set for trial; and (c) cases in which a party or his attorney has failed to take any action specified by the court. Houston (Tex.) Civ. Dist. Ct. Loc. R. 3.6(a)-(c).

held on that motion. *Id.* The hearing was held at a time when the trial court had full control of the judgment. *Id.* There is no indication that Davis was denied an opportunity to be heard at the hearing. *Keough v. Cyrus USA, Inc.*, 204 S.W.3d 1, 6 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (maj. op.). Thus, if the trial court failed to notify Davis of its intent to dismiss the case, the error was cured.[13] *Id.*

Therefore, Davis's first issue is overruled.

D. Davis's Motion to Reinstate

In his second issue, Davis argues that the trial court erred when it denied his motion to reinstate after the dismissal. Davis contends he demonstrated in the motion to reinstate that (1) he did not have notice of the trial court's intent to dismiss; (2) the June 24, 2008 notice was addressed only to Friedson's attorney and indicated only Friedson's claims would be dismissed; and (3) Davis had diligently pursued his counterclaims and was ready for trial.

On October 2, 2008, Davis filed a motion to reinstate his counterclaims after dismissal for want of prosecution, verified by his attorney.[14] In the verified motion, Davis stated that his attorney did not receive notice of the court setting the case on the dismissal docket. Davis further stated that his attorney discovered the dismissal when Davis let him know that, around the time of Hurricane Ike, Davis personally received a mailed notice from the clerk of the court postmarked September 8, 2008, reflecting that a motion for summary judgment had been granted in the case. On September 19, 2008, while on the court's website, Davis's attorney discovered the case had been dismissed for want of

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[13] Davis argues that even if he had received notice of the dismissal hearing, the notice was inadequate because it did not indicate under what authority the court intended to dismiss. Davis did not raise the issue of inadequate notice in his motion to reinstate. Because this argument was not presented to the trial court, we do not consider it on appeal. Tex. R. App. P. 33.1; *Keough*, 204 S.W.3d at 5.

[14] Davis's motion to reinstate includes a notice of hearing for October 24, 2008. There is no reporter's record of the hearing; however, the parties agree that the hearing took place.

prosecution on September 9, 2008. Davis attached to the motion to reinstate a certified copy of the notice of intent to dismiss addressed only to Friedson's counsel.

On a party's motion, the trial court shall reinstate a case if it finds after a hearing that the failure of the party or his attorney was not intentional or the result of conscious indifference but was due to an accident or mistake or that the failure has been otherwise reasonably explained. Tex. R. Civ. P. 165a(3). A failure to appear is not intentional or due to conscious indifference within the meaning of the rule merely because it is deliberate; it also must be without adequate justification. *Smith*, 913 S.W.2d at 468. Proof of such justification—accident, mistake or other reasonable explanation—negates the intent or conscious indifference for which reinstatement can be denied. *Id.*

Because the certified copy of the notice of intent to dismiss addressed only to Friedson's attorney reasonably explained why Davis and his attorney failed to appear at the dismissal hearing, and because the record in this case contains no evidence that the failure was intentional or the result of conscious indifference, the trial court abused its discretion when it denied the motion for reinstatement. *See Rava Square Homeowners Ass'n. v. Swan*, No. 14-07-00521-CV, 2008 WL 4390437, at *2-3 (Tex. App.—Houston [14th Dist.] Sept. 30, 2008, no pet.) (mem. op.) (explanation reasonable and no evidence of intentional failure or conscious indifference); *Jackson v. Thurahan, Inc.*, No. 14-02-00308-CV, 2003 WL 1566386, at *3 (Tex. App.—Houston [14th Dist.] Mar. 27, 2003, no pet.) (mem. op.) (same). Davis's second issue is sustained.[15] Davis's claims for DTPA violations, common

[15] Friedson contends Davis cannot request that only his counterclaims be reinstated because Texas Rule of Civil Procedure 165a speaks to "cases" being reinstated and not "claims." Friedson does not cite any authority construing Rule 165a in this manner. Friedson also claims Davis's remaining counterclaims depended entirely on a contract for which no money had changed hands, and which Davis had successfully attacked as unenforceable. Rule 165a does not require that the party seeking to reinstate the case establish a "meritorious" claim or defense. Tex. R. Civ. P. 165a; *Sellers v. Foster*, 199 S.W.3d 385, 397 (Tex. App.—Fort Worth 2006, no pet.); *Jackson*, 2003 WL 1566386, at *4.

law fraud, fraud in a real estate transaction, breach of contract, and attorney's fees against Friedson are remanded for further proceedings.

III. Conclusion

We reverse the trial court's judgment granting summary judgment on Friedson's claims for breach of contract and fraud and remand. The trial court also erred in denying the motion to reinstate Davis's counterclaims. We therefore reverse the trial court's judgment dismissing Davis's counterclaims; we remand Davis's counterclaims for DTPA violations, common law fraud, fraud in a real estate transaction, breach of contract, and attorney's fees against Friedson. The remainder of the judgment was not challenged on appeal and is affirmed. The appeal is dismissed for want of prosecution as to Wilkinson, KET, and Jones.

Accordingly, we dismiss the appeal in part; affirm the trial court's judgment in part; reverse in part; and remand for further proceedings consistent with this opinion.

/s/ William J. Boyce
Justice

Panel consists of Chief Justice Hedges and Justices Anderson and Boyce.