Affirmed and Memorandum Opinion filed September 30, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00757-CV

EATON METAL PRODUCTS, L.L.C., Appellant

V.

U.S. DENRO STEELS, INC. D/B/A JINDAL UNITED STEELS CORP.; JINDAL SAW LIMITED; JINDAL ENTERPRISES; SAW PIPES USA INC.; AND JOHN MCLAREN, Appellees

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On Appeal from the 344th District Court
Chambers County, Texas
Trial Court Cause No. 23322

M E M O R A N D U M   O P I N I O N

Eaton Metal Products, L.L.C. appeals from a grant of summary judgment favoring appellees, U.S. Denro Steels, Inc. d/b/a Jindal United Steels Corp.; Jindal Saw Limited; Jindal Enterprises; Saw Pipes USA Inc.; and John McLaren. Eaton sued appellees, alleging breach of two contracts to produce steel plates of certain specifications. Eaton also asserted claims for fraudulent inducement and negligent misrepresentation related to formation of the two alleged contracts. On appeal, Eaton contends that the trial court erred in (1) striking Eaton's Second Amended Petition; (2) striking certain summary

judgment evidence; and (3) granting summary judgment favoring appellees. We affirm.

I. Background

Eaton manufactures pressure vessels for oilfield applications. The appellee corporations manufacture steel. Appellee McLaren is a salesperson employed by Saw Pipes, Ltd. In September 2004, Eaton's purchasing manager, Ryan Falliaux, contacted McLaren regarding the manufacture of steel plates to be used in constructing pressure vessels for a customer named CDI. To meet its contract obligations with CDI, Eaton needed steel of a certain specified grade delivered by a particular date. According to Falliaux, McLaren stated that he had conferred with metallurgists for the corporate appellees, who had told him that they would be able to timely manufacture steel to meet Eaton's requirements. On October 8, 2004, Eaton issued a purchase order to Saw Pipes, Ltd. for six steel plates at $75,881.63, with delivery on November 26, 2004. Saw Pipes, Ltd. then issued a written acceptance of the order.

On December 21, 2004, Falliaux placed an additional order for more steel plates with McLaren, this time to make pressure vessels for Duke Energy. No formal acceptance of this order was issued. On December 28, 2004, McLaren informed Falliaux that the steel plates could not be produced for either order. Eaton then purchased the steel plates from another manufacturer for less than the price that had been quoted by McLaren.

On November 11, 2005, Eaton sued appellees. In its First Amended Petition, Eaton alleged: (1) fraudulent inducement and negligent misrepresentation against McLaren; (2) vicarious liability for McLaren's conduct against U.S. Denro Steels; (3) breach of contract against U.S. Denro Steels; (4) vicarious liability against Jindal SAW Ltd., Jindal Enterprises, and SAW Pipes USA for McLaren's conduct and U.S. Denro Steel's breach of contract; and (5) promissory estoppel against all of the defendants. Eaton further made various allegations aimed at piercing the corporate veils of the corporate appellees.

On March 17, 2009, appellees filed their First Amended Answer, alleging that Eaton had "improperly named defendants" in its petition. On April 28, 2009, the parties entered into a Rule 11 agreement, setting several deadlines in the case, including a June 5, 2009 deadline for pleading amendments. Subsequently, on May 13, 2009, the court granted a motion for continuance, moving the trial date from June 17 to August 10. The court's order, however, did not address whether the Rule 11 agreement would remain in force. Appellees filed a Second Amended Answer on June 5, 2009, the last day to amend pleadings under the Rule 11 agreement. In this pleading, appellees further elaborated on their assertion that Eaton had named the wrong defendants in its petition. Over the next few weeks, the parties entered into three additional Rule 11 agreements to extend deadlines contained in the original Rule 11 agreement; however, at no point did the parties agree to extend the deadline for amending pleadings.

On July 10, appellees filed their motion for summary judgment, asserting both traditional and no-evidence grounds. A hearing on the motion was set for July 31. Eight days before the hearing, on July 23, Eaton filed its response to the motion for summary judgment and a second amended petition. In the latter pleading, Eaton added SAW Pipes, Ltd. as a defendant, asserting that the failure to previously list that company was a misnomer. Further, Eaton altered its breach of contract allegations to drop them against U.S. Denro Steels and raise them instead against Jindal SAW, Ltd., SAW Pipes USA, Inc., and SAW Pipes, Ltd. Eaton further added claims for common law fraud as well as fraudulent non-disclosure against all of the defendants. Lastly, Eaton added claims for "Contorts (Combinations of Contract and Tort Claims)." In this category, Eaton alleged that the defendants committed negligence and breached duties of good faith and fair dealing, and to perform the contract and its conditions with care.

Appellees responded with a motion to strike the Second Amended Petition as untimely. They also filed another motion to strike portions of two affidavits, one by David Bennett and one by Ryan Falliaux, attached as evidence to Eaton's summary judgment response. The court held a hearing as scheduled on July 31, 2009 and

concluded by granting summary judgment favoring appellees. Although the motions to strike were mentioned at the hearing, the court did not expressly rule on these motions before granting the summary judgment. Thereafter, appellees specifically requested a written ruling on the motions. At an August 27, 2009 hearing, the judge stated that he had read the motions before the summary judgment hearing and had taken them into consideration as part of his ruling. He then expressly granted the motions and issued written rulings striking down the Second Amended Petition and sustaining all but one of the objections to the summary judgment evidence.

II. Striking the Second Amended Petition

In its first issue, Eaton contends that the trial court erred in striking its Second Amended Petition as being untimely. More specifically, Eaton argues that (1) the amended petition was timely filed because the pleading deadline agreed to by the parties did not survive the court's continuance of the trial setting; (2) appellees waived their arguments in their motion to strike by not obtaining a ruling prior to the trial court's grant of summary judgment; and (3) the petition was proper as a trial amendment to conform the issues pleaded with those addressed in the summary judgment proceedings. We will address each argument in turn.

A. Timeliness of the Second Amended Petition

As mentioned above, the parties entered a Rule 11 agreement setting various deadlines in the case, including one to amend pleadings. It is undisputed that Eaton filed its Second Amended Petition well after the Rule 11 deadline for amending pleadings had passed. Eaton maintains, however, that the trial court's granting of a continuance of the trial setting extinguished the deadlines set in the parties' Rule 11 agreement, and because it was filed more than seven days before the summary judgment hearing, its amended petition would have been timely filed under the default time limits contained in Texas Rule of Civil Procedure 63. Tex. R. Civ. P. 63. Generally, we consider a trial court's striking of pleadings under an abuse of discretion standard. *Torres v. GSC Enters., Inc.*, 242 S.W.3d 553, 557 (Tex. App.—El Paso 2007, no pet.). However, a trial court has a

ministerial duty to enforce a valid Rule 11 agreement. *Fortis Benefits v. Cantu*, 234 S.W.3d 642, 651 n.58 (Tex. 2007); *ExxonMobil Corp. v. Valence Operating Co.*, 174 S.W.3d 303, 309 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

In support of its position, Eaton cites *H.B. Zachry Co. v. Gonzales*, 847 S.W.2d 246, 246 (Tex. 1993), and *J.G. v. Murray*, 915 S.W.2d 548, 550 (Tex. App.—Corpus Christi 1995, orig. proceeding). The opinion in *J.G.* is primarily based on an interpretation of the *H.B. Zachry* case. *See J.G.*, 915 S.W.2d at 550. These cases, however, are distinguishable from the circumstances presented here. In *H.B. Zachry*, the Texas Supreme Court dealt with the automatic exclusion of witnesses for failure to identify them more than thirty days before the date of trial, as provided under former Rule 215(5) of the Texas Rules of Civil Procedure (see now Rule 193.6). 847 S.W.2d at 246. The court explained that the automatic exclusion does not survive beyond the resetting of the trial date if the new date is more than thirty days past the original date. *Id.* In *J.G.*, the Corpus Christi court also dealt with the automatic exclusion of witnesses under former Rule 215(5); however, the missed deadline in that case was not established by Rule but by the trial court's docket control order. 915 S.W.2d at 550. In holding that the trial court erred in excluding witnesses based on the original order's deadline after trial was reset, the Corpus Christi court stated broadly that "a trial resetting has the effect of nullifying a discovery deadline set by a docket control order." *Id.*

The present case involves deadlines set by the parties' Rule 11 agreement, not deadlines established by rule or by the court's own docket control order. Where parties have entered into a Rule 11 agreement respecting pre-trial deadlines, courts view them as controlling. *See, e.g., EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 91 (Tex. 1996); *Dallas County v. Rischon Dev. Corp.*, 242 S.W.3d 90, 93-94 (Tex. App.—Dallas 2007, pet. denied); *Valence Operating*, 174 S.W.3d at 309-11; *Gammill v. Jack Williams Chevrolet, Inc.*, 983 S.W.2d 1, 13 (Tex. App.—Fort Worth 1996, no pet.); *Beamon v. O'Neill*, 865 S.W.2d 583, 585 (Tex. App.—Houston [14th Dist.] 1993, no pet.). Furthermore, the deadline established by the Rule 11 agreement in this case was a

specific date, not a calculation of time based on the ultimate trial date; thus, the changing of the scheduled trial date did not alter the pleading amendment deadline, as it did in *H.B. Zachry*. *See In re Carpenter*, No. 05-08-00083-CV, 2008 WL 384569, at *1-2 (Tex. App.—Dallas April 14, 2008, orig. proceeding) (distinguishing *H.B. Zachry* on the ground that trial court's scheduling order set pleading deadline based on date of pretrial hearing and thus was not affected by rescheduling of trial date).[1] Based on the foregoing, we find Eaton's assertion that the trial court's granting of a continuance extinguished the deadlines contained in the Rule 11 agreement to be without merit.[2]

B. Ruling on the Motion to Strike

Eaton next argues that appellees waived their motion to strike Eaton's Second Amended Petition by not obtaining a ruling on the motion prior to the trial court's grant of summary judgment. In support of this argument, Eaton makes repeated citation to two cases: *Goswami v. Metropolitan Savings and Loan Association*, 751 S.W.2d 487, 490 (Tex. 1988), and *Cluett v. Medical Protective Co.*, 829 S.W.2d 822, 825-26 (Tex. App.—Dallas 1992, writ denied).

In *Goswami*, the plaintiff filed an amended petition just four days before the hearing date on the defendant's motion for summary judgment. 51 S.W.2d at 490. The plaintiff did not request or obtain leave of court to do so, and the defendant did not move to strike the pleading. *Id.* The Texas Supreme Court held that where the trial court indicates in its judgment that it considered all pleadings on file, and the record otherwise does not indicate that the court did not consider the late-filed pleading, leave of court is presumed. *Id.* Here, there was a motion to strike on file, and in a hearing subsequent to

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[1] The *J.G.* case is distinguishable from the present case because it involves a deadline established by the court's docket control order and not, as here, by Rule 11 agreement. 915 S.W.2d at 550. We further question the broad interpretation of *H.B. Zachary* by the *J.G.* court, and instead favor the more limited reading given by the Dallas Court of Appeals in *Carpenter*. *See Carpenter*, 2008 WL 384569, at *1-2.

[2] It is also interesting to note that after the trial court granted the continuance, the parties themselves entered into three more Rule 11 agreements to extend pretrial deadlines contained in the first agreement. Thus, in the trial court, Eaton itself treated the Rule 11 agreement as still in force after the continuance was granted.

the grant of summary judgment, the trial judge stated that he had read the motion to strike prior to the summary judgment hearing, took it into consideration during the hearing, and in granting the motion to strike was "just memorializing what the Court thought at that particular time." Thus, the record before us clearly indicates that the trial court did not, in fact, consider the Second Amended Petition in ruling on the motion for summary judgment. Consequently, the rule in *Goswami* does not apply in this case.

In *Cluett*, the Dallas Court of Appeals held that the trial court did not err in considering claims in an amended pleading as the basis for a grant of summary judgment, where the amended pleading was filed after the motion for summary judgment was filed but several months before the motion was actually considered by the court. 829 S.W.2d at 825-26. Eaton provides no explanation regarding how the analysis in *Cluett* supports its position in the present case, and we can discern no basis for applying *Cluett* here.

Without citation to authority, Eaton further argues that it was prejudiced by appellees' failure to obtain a timely ruling on the motion to strike because Eaton was not placed on notice of the potential untimeliness of its Second Amended Petition in time to correct the problem, *e.g.*, by requesting leave to file the petition. However, it is undisputed that appellees filed their motion to strike before the summary judgment hearing and, obviously, before the trial court's ruling on the motion for summary judgment. Thus, Eaton was clearly placed on notice that appellees were challenging the timeliness of the amended petition. We find no merit in Eaton's arguments respecting the timing of the trial court's ruling on appellees' motion to strike.

C. Trial Amendment

Lastly, regarding the Second Amended Petition, Eaton contends that the trial court erred in not permitting the petition as a trial amendment under Texas Rule of Civil Procedure 66. Tex. R. Civ. P. 66.[3] However, Eaton does not point to any place in the

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[3] Rule 66 reads as follows:

> If evidence is objected to at the trial on the ground that it is not within the issues made by the pleading, or if during the trial any defect, fault or omission in a pleading, either of

record where it timely requested a trial amendment or argued that the Second Amended Petition should be treated as such.[4] Consequently, Eaton has not preserved this argument for appellate review. *See* Tex. R. App. P. 33.1; *Krishnan v. Ramirez*, 42 S.W.3d 205, 225 (Tex. App.—Corpus Christi 2001, pet. denied); *Hunt v. Baldwin*, 68 S.W.3d 117, 134 (Tex. App.—Houston [14th Dist.] 2001, no pet.); *Fincher v. B & D Air Conditioning & Heating Co.*, 816 S.W.2d 509, 514 (Tex. App.—Houston [1st Dist.] 1991, writ denied). For the foregoing reasons, we overrule Eaton's first issue.

III. Striking Certain Summary Judgment Evidence

In its second issue, Eaton contends that appellees waived their objections to the Bennett and Falliaux affidavits—filed as summary judgment evidence by Eaton—by failing to present their objections and obtain a ruling on them before the trial court granted summary judgment. Eaton further contends, therefore, that the trial court erred in striking portions of the affidavits as summary judgment evidence.

Appellees actually did file objections to the affidavits before the summary judgment hearing, but the court did not expressly rule on the objections until after the hearing. As with the motion to strike the Second Amended Petition, the trial judge noted in open court that he had taken the objections into consideration at the summary judgment hearing and in signing a written order on the objections was merely "memorializing what the Court thought" during the earlier hearing.

> form or substance, is called to the attention of the court, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the allowance of such amendment would prejudice him in maintaining his action or defense upon the merits. The court may grant a postponement to enable the objecting party to meet such evidence.

Tex. R. Civ. P. 66.

[4] In a document filed almost four weeks after the summary judgment hearing, Eaton suggested that it had complied with Rules 63, 64, 65, and 66 in filing the Second Amended Petition. However, this document neither requests leave to file a trial amendment nor explains how Eaton previously complied with Rule 66.

In support of their argument that appellees waived their objections, Eaton cites Texas Rule of Appellate Procedure 33.1(a) as well as several cases from this court. Rule 33.1(a) provides that

> [a]s a prerequisite to presenting a complaint for appellate review, the record must show that: (1) the complaint was made to the trial court by a timely request, objection, or motion . . . ; and (2) the trial court: (A) ruled on the request, objection, or motion, either expressly or implicitly; or (B) refused to [so] rule . . . .

Furthermore, each case Eaton cites involved circumstances wherein the party complaining on appeal failed to preserve its complaint by making it, or obtaining a ruling on it, in the trial court. *1001 McKinney Ltd. v. Credit Suisse 1st Boston Mortgage Capital*, 192 S.W.3d 20, 31-32 (Tex. App.—Houston [14th Dist.] 2005, pet. denied); *Chapman Children's Trust v. Porter & Hedges, L.L.P.*, 32 S.W.3d 429, 435-36 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); *Dolcefino v. Randolph*, 19 S.W.3d 906, 925-26 (Tex. App.—Houston [14th Dist.] 2000, no pet.); *Blan v. Ali*, 7 S.W.3d 741, 748 n.6 (Tex. App.—Houston [14th Dist.] 1999, no pet.). None of these authorities apply to the circumstances here, where appellees made objections in the trial court, obtained a favorable ruling thereon from the trial court, and make no complaints on appeal. In its brief, Eaton offered no other argument or authority to support its contention that the trial court erred in sustaining the objections to the summary judgment evidence.[5]

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[5] In its reply brief, Eaton provides additional authority that is likewise inapplicable to the case at hand. *See, e.g., McConnell v. Southside I.S.D.*, 858 S.W.2d 337, 343 & n.7 (Tex. 1993) (holding that a nonmovant must present in writing any issue that would defeat movant's right to summary judgment, and indicating in dicta that to preserve error, the nonmovant must obtain a ruling on any exception prior to or at the hearing on the motion); *Utils. Pipeline Co. v. Am. Petrofina Mktg.*, 760 S.W.2d 719, 723 (Tex. App.—Dallas 1988, no writ) (holding that a docket sheet entry indicating that an objection to a summary judgment affidavit was sustained was not sufficient to exclude the affidavit from consideration on appeal).

Also in the reply brief, Eaton argues that an appellate court's review of a summary judgment is limited to "the evidence that was before the trial court when it ruled, absent an indication that the trial court did not consider certain evidence for purposes of that ruling," citing *Plotkin v. Joekel*, 304 S.W.3d 455, 485-86 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). As explained in the text above, in signing the written order regarding the affidavits, the trial judge here expressly indicated that he had considered the objections to the affidavits at the time of the hearing and in sustaining the objections was merely memorializing what had occurred at the prior hearing. This is a clear indication that in granting the motion for summary judgment, the court did not consider the affidavits, and thus, this court should not

Accordingly, we overrule Eaton's second issue.

IV. Grant of Summary Judgment

In its third issue, Eaton contends that the trial court erred in granting summary judgment favoring appellees because genuine issues of material fact exist. Appellees moved for summary judgment on both traditional and no-evidence grounds. *See* Tex. R. Civ. P. 166a(c), (i). We will begin by addressing the no-evidence grounds on each of Eaton's asserted causes of action or forms of liability: breach of contract, fraudulent misrepresentation, negligent misrepresentation, and vicarious liability. To defeat a no-evidence motion for summary judgment, the responding party must present evidence raising a genuine issue of material fact supporting each element contested in the motion. *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009). When reviewing a trial court's grant of such motion, we consider the evidence presented in the light most favorable to the party against whom summary judgment was rendered, crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *Id.*

A. Breach of Contract

In order to establish breach of a contract, a plaintiff must provide evidence of the following elements: (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages sustained as a result of the breach. *Valero Mktg. & Supply Co. v. Kalama Int'l*, 51 S.W.3d 345, 351 (Tex. App.—Houston [1st Dist.] 2001, no pet.). Appellees asserted in their motion that Eaton could produce no evidence of either the existence of a contract between Eaton and Jindal United Steel (as alleged in Eaton's First Amended Petition) or that Jindal United Steel breached such a contract. In response, Eaton made several arguments but ultimately failed to cite to any specific evidence to prove either existence of the contract or breach thereof.

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consider the affidavits in its review of that order.

First, Eaton referred to additional breach of contract allegations contained in its Second Amended Petition, which, as explained above, was not properly filed with the court. Second, without citation, explanation, or context, Eaton referred to a supposed stipulation made during the course of a deposition that "we can call it Jindal." Third, Eaton cited appellees' motion, in which appellees refer to themselves in places as "collectively, the Jindal Defendants." However, both Eaton's live petition and appellee's motion are specific in regard to the defendant against whom breach of contract was alleged—Jindal United Steel. Fourth, Eaton revived complaints made earlier in the response that appellees had abused the spirit of the discovery rules; a claim which appellees appear to have abandoned on appeal. And lastly, Eaton states: "The depositions and Exhibits attached hereto clearly establish there was a contract between Plaintiff Eaton and the Defendants." Attached to the response were approximately 700 pages of undifferentiated documentation. Blanket citation to voluminous records is not a proper response to a no-evidence motion for summary judgment. *See, e.g., Kashif Bros., Inc. v. Diamond Shamrock Ref. & Mktg. Co.*, No. 14-01-00202-CV, 2002 WL 1954852, at *3-5 (Tex. App.—Houston [14th Dist.] August 22, 2002, pet. denied); *Guthrie v. Suiter*, 934 S.W.2d 820, 825-26 (Tex. App.—Houston [1st Dist.] 1996, no writ).[6] The trial court did not err in granting summary judgment against Eaton's breach of contract cause of action.

B. Misrepresentations

In its First Amended Petition, Eaton alleged causes of action against McLaren for fraudulent inducement and negligent misrepresentation.[7] In order to prevail on a claim of fraudulent inducement, a plaintiff must demonstrate that the defendant made a material misrepresentation that (1) was either known to be false when made or was asserted

[6] It is further worth noting that during the hearing on the motion, both the trial judge and appellees' counsel questioned the propriety of blanket citation such as offered by Eaton in its response to the motion.

[7] At various places in its pleadings, Eaton referred to its fraud claim as either "fraudulent inducement" or "fraudulent misrepresentation." There is no indication, however, that in doing so it intended to raise any cause of action other than that described by the elements listed herein.

without knowledge of its truth, (2) was intended for the plaintiff to act upon, (3) was relied upon by the plaintiff, and (4) caused injury to the plaintiff. *Formosa Plastics Corp. USA v. Presidio Eng'rs and Contractors, Inc.*, 960 S.W.2d 41, 47 (Tex. 1998). In their motion for summary judgment, appellees asserted that Eaton could produce no evidence on any of the elements of fraudulent inducement. To prevail on a negligent misrepresentation claim, a plaintiff must show that (1) the representation in question was made by the defendant in the course of his business or in a transaction in which he had a pecuniary interest; (2) the defendant supplied false information for the guidance of others in their business; (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information; and (4) the plaintiff suffered pecuniary loss by justifiably relying on the representation. *Fed. Land Bank Ass'n of Tyler v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1991). In their motion, appellees alleged that Eaton could produce no evidence that McLaren supplied false information regarding *existing fact* for Eaton's guidance or that McLaren failed to exercise reasonable care or competence in making his representations. *See, e.g., Roof Sys., Inc. v. Johns Manville Corp.*, 130 S.W.3d 430, 439 (Tex. App.—Houston [14th Dist.] 2004, no pet.) ("The 'false information' contemplated in a negligent misrepresentation case is a misstatement of existing fact, not a promise of future conduct.").

In response to the no evidence grounds on these two causes of action, Eaton stated that: "Based on the deposition of Defendant McLaren (Exhibit 'D'), David Bennett's deposition (Exhibit 'K') and Ryan Falliaux's deposition (Exhibit 'L'), there is ample admissible evidence that fact issues are present in order to support Eaton's fraudulent inducement claims." The cited exhibits contain a total of 637 pages (deposition testimony plus attached exhibits). As stated above, general citation to voluminous records is not a proper response to a no-evidence motion for summary judgment. *See, e.g., Kashif Bros.*, 2002 WL 1954852, at *3-5; *Guthrie*, 934 S.W.2d at 825-26.

In contrast to Eaton's response regarding the breach of contract cause of action—wherein it failed to even discuss what the cited evidence allegedly showed—Eaton has

additionally made specific factual arguments regarding the fraudulent inducement and negligent misrepresentation claims. However, most of these statements are not accompanied by citation to the record. The majority of factual statements that include a record citation refer to the entirety of McLaren's deposition (155 pages, of which 78 are testimonial and 77 are attached exhibits). The remaining factual assertion, which includes a record citation, cites "the Exhibits to the depositions of John McLaren (Exhibit 'D'), and David Bennett (Exhibit 'K'), and the business records of Plaintiff Eaton and the Defendants attached hereto."[8] Again, these general citations were not sufficient to apprise the trial court of the evidence on which Eaton relied. *See, e.g., Kashif Bros.*, 2002 WL 1954852, at *3-5; *Guthrie*, 934 S.W.2d at 825-26.[9] Consequently, the trial court did not err in granting summary judgment against Eaton's fraudulent inducement and negligent misrepresentation causes of action.

C. Vicarious Liability

In its First Amended Petition, Eaton alleged liability against the corporate defendants for McLaren's conduct through various forms of vicarious liability and piercing the corporate veil. As Eaton acknowledges, however, these forms of liability are not separate, independent causes of action but depend on the underlying tortfeasor being found liable for the underlying tort. In this case the underlying torts are fraudulent inducement and negligent misrepresentation allegedly committed by McLaren. *See Cox v. S. Garrett, L.L.C.*, 245 S.W.3d 574, 582 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *Crooks v. Moses*, 138 S.W.3d 629, 637-38 (Tex. App.—Dallas 2004, no pet.); *Specialty Retailers, Inc. v. Fuqua*, 29 S.W.3d 140, 147 (Tex. App.—Houston [14th Dist.]

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[8] It is not entirely clear which documents Eaton intended to cite. Fairly extensive business records were attached as exhibits to the two referenced depositions, which were themselves attached to the response.

[9] Interestingly, in its response in the trial court, Eaton did not cite or even refer to Falliaux's or Bennett's affidavit in response to the no-evidence grounds on either breach of contract, fraudulent inducement, or negligent misrepresentation. Furthermore, in its appellate briefing, Eaton does not contend that the affidavits themselves were sufficient to defeat summary judgment on these causes of action, either in their original form or in their redacted form taking into consideration the sustaining of appellees' objections thereto.

2000, pet. denied). Because, as discussed above, Eaton has failed to establish that there was a material issue of fact concerning McLaren's liability, Eaton cannot establish that a material issue of fact exists regarding its theories of recovery against the corporate defendants on the fraudulent inducement and negligent misrepresentation causes of action.

Furthermore, in response to appellees' specific no-evidence grounds on these theories of recovery, Eaton (1) again questioned whether appellees had violated the spirit of the discovery rules (an allegation apparently abandoned on appeal), and (2) again cited to the entirety of the depositions of McLaren, Bennett, and Falliaux. As discussed previously, these responses were insufficient to defeat the grant of summary judgment. We overrule Eaton's third issue.

We affirm the trial court's judgment.

/s/ Adele Hedges
Chief Justice

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