

Reversed and Remanded and Memorandum Opinion filed January 11, 2011.



In The

Fourteenth Court of Appeals

NO. 14-09-00940-CV

SUZANNE CORNWELL, Appellant

V.

**DICK WOODWARD & ASSOCIATES, INC. D/B/A CORNWELL &
WOODWARD CO., Appellee**

**On Appeal from the 334th District Court
Harris County, Texas
Trial Court Cause No. 2004-40396**

MEMORANDUM OPINION

Suzanne Cornwell appeals from the grant of a no-evidence motion for summary judgment in her lawsuit against Dick Woodward & Associates, Inc. d/b/a Cornwell & Woodward Co. In her sole issue on appeal, Cornwell contends that the trial court erred in granting the motion because (1) the motion was insufficient on its face, and (2) her response to the motion presented more than a scintilla of evidence on each of her causes of action. We reverse and remand.

Background

Dick Woodward & Associates, Inc. (“DWA”) initially filed suit against Cornwell alleging conversion of property and breach of fiduciary duty, as well as seeking to have Cornwell expelled from a partnership, “Cornwell & Woodward Co.,” that she had formed along with Richard “Dick” Woodward.¹ DWA further contended that it owned the d/b/a “Cornwell & Woodward Co.” Cornwell filed a counter-petition against DWA and Woodward, alleging a number of causes of action, including: theft of services, conversion, quantum meruit, business disparagement, misuse of legal process, fraud, and theft, and seeking actual and punitive damages as well as injunctive relief. The trial court subsequently severed, into a separate action, the claims Cornwell raised against Woodward in his individual capacity.

DWA then filed a no-evidence motion for summary judgment. In this motion, DWA suggested that Cornwell’s live counterclaim pleading continued to state claims against Woodward in his individual capacity even though such claims had been severed. DWA did not specify in the motion which claims it believed had been severed that were still being included in Cornwell’s pleadings. Regarding the claims against itself, DWA stated as follows:

Plaintiff Woodward Corporation moves for no-evidence summary judgment based on Cornwell’s lack of evidence to support any of her counterclaims against the Plaintiff. Specifically, Defendant Cornwell has no evidence to support her alleged counter-claims of theft of services, conversion of personal property, quantum meruit, business disparagement, misuse of legal process and wrongful sequestration, fraud, theft, theft liability act, and claims for exemplary damages, injunctive relief against the present defendant corporation.

¹ One additional plaintiff and two additional defendants were also named in DWA’s petition; however, because they play no part in this appeal, we need not discuss their role in the case below. We offer no conclusions regarding the merit or propriety of the allegations in DWA’s petition but present the allegations as background information helpful to understanding the appeal.

At no point in the motion does DWA specify any particular element or elements of the claims on which it alleged Cornwell could produce no evidence. Although DWA further suggests in the motion that Cornwell's allegations against Woodward in his individual capacity could not support her claims against DWA, it does not mention any particular cause of action or element in this regard.

Cornwell filed a response to the motion and attached a lengthy affidavit thereto. After the trial court granted the no-evidence motion for summary judgment², DWA moved to nonsuit its claims for affirmative relief. In its final judgment, the trial court granted the nonsuit and noted the prior granting of the no-evidence motion.

Discussion

As stated above, under her single appellate issue, Cornwell initially contends that the trial court erred in granting summary judgment against her claims because DWA's motion was insufficient on its face. A no-evidence motion for summary judgment under Texas Rule of Civil Procedure 166a(i) is essentially a motion for a pretrial directed verdict. Tex. R. Civ. P. 166a(i); *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 581-82 (Tex. 2006). Once a proper no-evidence motion is filed, the burden shifts to the nonmoving party to present evidence raising an issue of material fact as to the elements specified in the motion. *See Tamez*, 206 S.W.3d at 582. However, a no-evidence motion that merely challenges the sufficiency of the nonmovant's case and fails to specifically state the elements for which there is no evidence is fundamentally defective and insufficient to support summary judgment as a matter of law. *E.g., Fieldtech Avionics & Instruments, Inc. v. Component Control.Com, Inc.*, 262 S.W.3d 813, 824 (Tex. App.—Fort Worth 2008, no pet.); *Johnson v. Felts*, 140 S.W.3d 702, 706 (Tex. App.—Houston [14th Dist.] 2004, pet. denied).

² Although the record on appeal does not contain an order granting the motion, the trial court did state in its final judgment that the summary judgment had previously been granted.

Here, DWA failed to cite any elements of Cornwell's causes of action in its motion, much less assert that Cornwell was unable to produce evidence on any particular element or elements. Consequently, DWA's motion was insufficient as a matter of law. *See* Tex. R. Civ. P. 166a(i); *Fieldtech Avionics*, 262 S.W.3d at 824; *Johnson*, 140 S.W.3d at 706. We therefore sustain Cornwell's first issue.

We reverse the trial court's judgment and remand for further proceedings in accordance with this opinion.

/s/ Martha Hill Jamison
Justice

Panel consists of Chief Justice Hedges, Justice Jamison, and Senior Justice Hudson.³

³ Senior Justice J. Harvey Hudson sitting by assignment.