Reversed and Remanded and Memorandum Opinion filed August 9, 2011.

In The

Fourteenth Court of Appeals

NO. 14-10-00244-CV

NARNIA INVESTMENTS, LTD., Appellant

V.

HARVESTONS SECURITIES, INC., Appellee

On Appeal from the 270th District Court
Harris County, Texas
Trial Court Cause No. 2000-39672A

MEMORANDUM OPINION

In this case arising from the alleged sale of unregistered securities, the defendant moved for summary judgment on traditional and no-evidence grounds. The trial court granted the motion without stating the grounds for its ruling. We reverse.

I. FACTUAL AND PROCEDURAL BACKGROUND

On August 3, 2000, appellant Narnia Investments, Ltd. and Jon Ginder, Narnia's sole owner, sued appellee Harvestons Securities, Inc. and a half-dozen other defendants for claims connected with Narnia's 1998 and 1999 purchases of stock in Lexico Energy Exploration, Inc. ("Lexico Energy"). According to Narnia, Clarey Zingler and James Bischofberger (a/k/a James Bisch or James Bish) told Ginder that Lexico Energy had

agreed to sell its assets in exchange for stock in Lexico Resources International Corporation ("Lexico Resources"). Narnia alleges that Bischofberger and Zingler represented that all shareholders would receive a dividend or distribution of 1.85 shares of Lexico Resources for each share of Lexico Energy owned. Allegedly based on these representations, Narnia and Ginder purchased Lexico Energy securities from Zingler and from Lex Dolton, both of whom were officers in the two Lexico entities. Although Lexico Energy transferred its assets to Lexico Resources as agreed, Narnia never received the promised stock in Lexico Resources.

Pleading that Harvestons Securities, acting through its registered representative James Sanderson, was the broker in Narnia's Lexico Energy stock purchases, Narnia asserted claims against Harvestons for deceptive trade practices, gross negligence, fraud, conspiracy, and an assortment of statutory violations. Narnia additionally pleaded that Harvestons was liable for negligently supervising Sanderson. Harvestons initially did not file an answer, and at Narnia's request, the trial court granted default judgment against Harvestons and severed those claims from the remainder of the suit. Harvestons brought a restricted appeal on the ground that service of process was defective, and we reversed the judgment and remanded the case. *Harvestons Sec., Inc. v. Narnia Invs., Inc.*, 218 S.W.3d 126, 128 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (sub. maj. op.).

On remand, Harvestons moved for summary judgment on the ground that there was no evidence that it acted as a broker in any of the transactions. In the same motion, Harvestons sought traditional summary judgment on the grounds that (a) it was not the broker in the stock transactions at issue, (b) Sanderson was not acting within the course and scope of his employment if he performed brokerage services in those transactions, and (c) Harvestons neither was served nor voluntarily appeared in the suit before the applicable statutes of limitations expired.

Narnia filed a single document that combined its response, objections, and special exceptions to the summary-judgment motion. In this document, Narnia objected that

Harvestons improperly based its summary-judgment motion on unpleaded affirmative defenses. In addition, Narnia argued that Harvestons failed to eliminate genuine issues of material fact as to its vicarious liability for Sanderson's acts. In support of this argument, Narnia produced an affidavit in which Ginder attested that Sanderson was employed by Harvestons at the time of the transactions. Ginder added that Sanderson "stated to me that he had received a commission on the sale of the securities to Narnia," but Ginder did not identify the person or entity that allegedly paid the commission. Narnia also produced a document that appears to be a typed, unsigned letter to Ginder from Zingler, who represented that the letter "identifies to the best of my knowledge Lexico Energy stock that was acquired by Jim Bish and/or Jon Ginder." In this letter, Zingler identified Sanderson as the broker in each transaction. Zingler added, "Mr. Sanderson has always advised me that Mr. Bish is his client . . . . For the sale of Mr. Dolton's stock[,] Mr. Sanderson demanded a 10 percent commission from Mr. Dolton. Mr. Bish, at times, allocated stock to Mr. Sanderson to compensate him for his services." Neither Narnia nor Harvestons is mentioned in the letter. Finally, Narnia attached documents from the State Securities Board providing information about Sanderson's employment history and his "other business." In these documents, Sanderson is listed as Harvestons's employee and not as an independent contractor. The entry in which information about Harvestons is listed is followed by an entry providing information about Sanderson's prior employer, Chatfield Dean & Co. That entry is followed by the heading, "Other Business," after which the single word "Lexico" appears.

After Narnia filed its response, Harvestons filed an answer to the suit in which it asserted the affirmative defense of limitations, and objected to Narnia's summary-judgment evidence. Harvestons asserted that Ginder's affidavit was conclusory, lacked a proper foundation, and was not based on personal knowledge "insofar as it purports to aver that James Sanderson was involved in the stock transactions at issue, that he received a commission, and that he was affiliated with Harvestons or dealt with Plaintiff." The trial court sustained these objections, but overruled Harvestons's

objections to Zingler's letter and to the records from the State Securities Board. The record contains no ruling on Narnia's special exceptions and objections.

The trial court granted Harvestons's motion without stating the grounds, and Narnia timely appealed.

II. ISSUES PRESENTED

In five issues, Narnia challenges the trial court's summary judgment in favor of Harvestons. In its first issue, Narnia contends that the trial court granted Harvestons more relief than it was entitled to receive. In its second issue, Narnia asserts that there are genuine issues of material fact as to whether Harvestons acted as a "broker" as that term is defined under the Texas Securities Act. Narnia argues in its third issue that the trial court erred if it granted summary judgment on the ground that Sanderson was not acting in the course and scope of his employment with Harvestons when he participated in these transactions. In its fourth issue, Narnia contends that the trial court erred if it based summary judgment on Harvestons's argument that Narnia's claims are time-barred. Narnia asserts in its fifth issue that the trial court erred if it granted summary judgment on no-evidence grounds.

III. STANDARD OF REVIEW

We review summary judgments de novo. *Ferguson v. Bldg. Materials Corp. of Am.*, 295 S.W.3d 642, 644 (Tex. 2009) (per curiam) (citing *Tex. Mun. Power Agency v. Pub. Util. Comm'n of Tex.*, 253 S.W.3d 184, 192 (Tex. 2007)). We consider the summary-judgment record in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts against the movant. *See City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex. 2005). We must affirm the summary judgment if any ground in the motion that would support that judgment is meritorious. *Progressive Cty. Mut. Ins. Co. v. Kelley*, 284 S.W.3d 805, 806 (Tex. 2009).

The movant for traditional summary judgment has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). A defendant who moves for traditional summary judgment must conclusively negate at least one essential element of each of the plaintiff's causes of action or conclusively establish each element of an affirmative defense. *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 508 (Tex. 2010). Evidence is conclusive only if reasonable people could not differ in their conclusions. *City of Keller*, 168 S.W.3d at 816. Once the defendant establishes its right to summary judgment as a matter of law, the burden shifts to the plaintiff to present evidence raising a genuine issue of material fact. *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995).

In a no-evidence motion for summary judgment, the movant represents that there is no evidence of one or more essential elements of the claims for which the nonmovant bears the burden of proof at trial. TEX. R. CIV. P. 166a(i); *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009). The burden then shifts to the nonmovant to present evidence raising a genuine issue of material fact as to the elements specified in the motion. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006). We sustain a no-evidence summary judgment when (a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a mere scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact. *City of Keller*, 168 S.W.3d at 810. The evidence is insufficient if "it is 'so weak as to do no more than create a mere surmise or suspicion'" that the challenged fact exists. *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp.*, 299 S.W.3d 106, 115 (Tex. 2009) (quoting *Kroger Tex. L.P. v. Suberu*, 216 S.W.3d 788, 793 (Tex. 2006)).

IV. ANALYSIS

A. Overbreadth of Summary-Judgment Relief

We will discuss issues one, two, three and five together. On appeal, Narnia contends that the trial court granted Harvestons "more relief than it was entitled to under its Motion for Summary Judgment which only raised three issues with respect to the allegations contained in Appellant's Original Petition." Narnia argues and cites authority that a trial court errs if it grants more relief than requested or grants summary judgment on issues that were not raised in the summary-judgment motion. *See, e.g.*, TEX. R. CIV. P. 166a(c) (issues must be expressly set forth in the summary-judgment motion, answer, or any other response); *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 339 (Tex. 1993) (same). Narnia further states, "None of the other causes of action alleged by Appellant were addressed by Appellee's motion for summary judgment."

We agree. In the no-evidence portion of the summary-judgment motion, Harvestons did not address Narnia's claims for deceptive trade practices, gross negligence, fraud, or conspiracy. Instead, it addressed a single factual allegation with respect to its alleged violation of securities statutes—without addressing any of the causes of action Narnia asserted in connection with the alleged violations. In the traditional portion of the summary-judgment motion, Harvestons similarly failed to specifically address Narnia's claims for deceptive trade practices, gross negligence, fraud, conspiracy, and the claims under the Texas Securities Act. Harvestons instead sought traditional summary judgment on the grounds that (a) it was not the broker in the stock transactions at issue, and (b) Sanderson was not acting within the course and scope of his employment if he performed brokerage services in those transactions. Although Narnia presented some evidence that Sanderson was an employee and not an independent contractor, it presented no evidence to contradict Harvestons's proof that any role Sanderson played in the

securities transactions at issue was performed outside the course and scope of his employment.

Harvestons maintains that all of Narnia's causes of action are based on representations and actions taken by Sanderson, and if Sanderson's involvement in the transactions at issue was outside the course and scope of his employment, then all of Narnia's causes of action fail. Narnia's pleading, however, is not so narrowly drawn. Narnia alleged that Harvestons was the agent for Sanderson and the other defendants, a control person over them, and aided and abetted them. Narnia also alleged that Harvestons was negligent in supervising Sanderson. These claims were not addressed in the motion for summary judgment.

Proof that Sanderson was acting outside the course and scope of his employment at the time of the transaction does not eliminate potential liability under the Texas Securities Act's control-person provision. That section provides as follows:

> A person who directly or indirectly controls a seller, buyer or issuer of a security is liable under Section 33A, 33B, or 33C jointly and severally with the seller, buyer, or issuer, and to the same extent as if he were the seller, buyer, or issuer, unless the controlling person sustains the burden of proof that he did not know and in the exercise of reasonable care could not have known, of the existence of facts by reason of which liability is alleged to exist.

TEX. REV. CIV. STAT. ANN. art. 581-33F(1) (West 2010).

Liability under this theory does not depend on whether the controlled person acted within the course and scope of his employment. Liability attaches to a "control person," who "directly or indirectly controls a seller, buyer, or issuer of a security." *See id*.; *Sterling Trust Co. v. Adderley*, 168 S.W.3d 835, 839 (Tex. 2005). If a person is shown to be a "control person," then that person is vicariously liable for the securities violation of the person whom they control. *See Sterling Trust Co.*, 168 S.W.3d at 839. Most courts

that have addressed the issue have concluded that the plaintiff need not prove that the alleged control person culpably participated in the primary securities violation. *See, e.g.*, *Fernea v. Merrrill Lynch Pierce Fenner & Smith, Inc*., No. 03-09-00566-CV, 2011 WL 2769838, at *15 (Tex. App.—Austin July 12, 2011, no pet. h.); *Metge v. Baehler*, 762 F.2d 621, 630–31 (8th Cir. 1985); *G.A. Thompson & Co. v. Partridge*, 636 F.2d 945, 957–58 (5th Cir. 1981). We need not and do not address in this opinion what a plaintiff is required to prove to establish control-person liability, including whether the plaintiff must show culpable participation.[1] Narnia sufficiently alleged control-person liability in its petition, and Harvestons asserted no grounds in its summary-judgment motion to negate such liability. Even if Harvestons was not the broker in the transactions in question and even if Sanderson was acting outside the course and scope of his employment at Harvestons at all material times, these facts would not conclusively establish that Harvestons has no liability as a control person. *See generally Fernea*, 2011 WL 2769838, at *15.

Proving only that Sanderson acted outside the course and scope of employment also does not eliminate a cause of action for aiding and abetting. This cause of action is addressed in the Texas Securities Act as follows:

> A person who directly or indirectly with intent to deceive or defraud or with reckless disregard for the truth or the law materially aids a seller, buyer, or issuer of a security is liable under Section 33A, 33B, or 33C jointly and severally with the seller, buyer, or issuer, and to the same extent as if he were the seller, buyer, or issuer.

TEX. REV. CIV. STAT. ANN. art. 581-33F(2). To prove aider-and-abettor liability, the plaintiff must demonstrate that (1) a primary violation of the securities laws occurred, (2) the alleged aider had "general awareness" of its role in this violation, (3) the alleged aider rendered "substantial assistance" in the violation, and (4) the alleged aider either intended to deceive the plaintiff or acted with reckless disregard for the truth of the

[1] Research reveals no holdings from the Supreme Court of Texas or this court addressing these issues.

representations made by the primary violator. *Navarro v. Grant Thornton, LLP*, 316 S.W.3d 715, 720–21 (Tex. App.—Houston [14th Dist.] 2010, no pet. h.); *Frank v. Bear, Stearns & Co.*, 11 S.W.3d 380, 384 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). Proof that the primary violator acted within the course and scope of employment is not an element of this cause of action. *Cf. Fernea*, 2011 WL 2769838, at *14 (affirming summary judgment as to this claim because evidence that the employer was aware of salesperson's intent to perform an outside sale was insufficient to show knowledge of illegality).[2]

Similarly, proof that any role Sanderson played in the Lexico transactions was performed outside the course and scope of his employment does not eliminate a cause of action for negligent supervision. *See Houser v. Smith*, 968 S.W.2d 542, 544 (Tex. App.—Austin 1998, no pet.) ("While the employee need not be acting in the scope of his employment to impose liability on the employer, the theory of negligent hiring and supervision does require that a plaintiff's harm be the result of the employment."); *Dieter v. Baker Serv. Tools*, 739 S.W.2d 405, 408 (Tex. App.—Corpus Christi 1987, writ denied) ("If course and scope was a required element of a negligent hiring and supervision claim, negligent hiring and supervision as a unique cause of action would be rendered superfluous by the *respondeat superior* doctrine."); *cf. Knight v. City Streets, L.L.C.*, 167 S.W.3d 580, 584 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (to prevail in a negligent-supervision claim, the plaintiff must prove that the employer had a duty to the plaintiff to supervise the employee, breached the duty, and the breach proximately caused the plaintiff's injuries).

In sum, Harvestons's summary-judgment motion neither conclusively disproves any element of Narnia's causes of action, nor challenges the existence of evidence of any

[2] To impose liability for aiding and abetting a securities violation, the plaintiff must prove that the defendant intended to deceive the plaintiff or was aware of the primary violator's improper activities. *See Frank*, 11 S.W.3d at 384. Although Harvestons produced evidence that it was unaware of Sanderson's alleged activities, Harvestons did not move for summary judgment on this basis.

element supporting Narnia's causes of action. We therefore sustain Narnia's first, second, third, and fifth issues.

B. Limitations

Harvestons also moved for summary judgment on the affirmative defense of limitations but did not contest Narnia's point of error in its brief on appeal. Harvestons premised its motion for summary judgment on its assertion that, although the suit was timely filed, it had never been served. It argued that because we reversed the default judgment against it due to lack of service, Harvestons had not been served at all. In fact, we did not hold that Harvestons had not been served but that the return of service was deficient. 218 S.W.3d at 134–35. Given the facts and procedural history of this case, we decline to conclude that Narnia's claims are time-barred. We therefore sustain Narnia's fourth issue.

V. CONCLUSION

Because the trial court erred in granting a final summary judgment dismissing Narnia's claims, we reverse the judgment and remand this case to the trial court for further proceedings.

/s/ Tracy Christopher
Justice

Panel consists of Chief Justice Hedges and Justices Frost and Christopher.