

Affirmed and Memorandum Opinion filed March 31, 2016.



In The

Fourteenth Court of Appeals

NO. 14-14-00750-CV

EQUITY INDUSTRIAL LIMITED PARTNERSHIP IV, Appellant

V.

**SOUTHERN WORLDWIDE LOGISTICS, LLC, BEN REYNOLDS, III,
BETH REYNOLDS, SOUTHERN WORLDWIDE WAREHOUSE, INC.,
SOUTHERN WORLDWIDE SOLUTIONS, INC.,
EVERYTHING4WEBSITES, LLC, EMAIL TOUCHDOWN, LLC, AND
MPACT SOURCING, INC., Appellees**

**On Appeal from the 190th District Court
Harris County, Texas
Trial Court Cause No. 2013-15186**

MEMORANDUM OPINION

The landlord under a commercial lease appeals two summary-judgment orders. Finding no basis for appellate relief with respect to either challenge, we affirm the trial court's judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

In April 2003, appellant/plaintiff Equity Industrial Limited Partnership IV, as landlord, entered into a commercial lease with appellee/defendant Southern Worldwide Logistics, LLC n/k/a Littlefield Logistics, LLC (“Southern Logistics”) for an initial term of sixty months. They later agreed to extend the term of the lease through March 31, 2013. In 2013, Equity sued Southern Logistics asserting breach of the lease and other claims. Equity also sued various guarantors and other defendants asserting a variety of claims.

The trial court signed an order in October 2013, granting appellee/defendant Ben Reynolds, III’s summary-judgment motion as to various claims, including Equity’s fraud and negligent-representation claims (the “First Order”). Nine months later, in July 2014, the trial court signed an order granting a no-evidence summary judgment and dismissing Equity’s fraudulent-transfer claims against appellees/defendants Ben Reynolds, III, Beth Reynolds, Southern Worldwide Warehouse, Inc., Southern Worldwide Solutions, Inc., Everything4Websites, LLC, Email Touchdown, LLC, and Mpact Sourcing, Inc. (the “Second Order”). After all the other claims had been adjudicated or nonsuited, the trial court rendered an agreed judgment on Equity’s claim against Southern Logistics for breach of the lease.

On appeal, Equity challenges only the First Order and the Second Order.

II. ISSUES AND ANALYSIS

A. Fraud and Negligent-Misrepresentation Claims Against One Defendant

In its first issue, Equity challenges part of the First Order, asserting that the trial court erred in granting summary judgment dismissing Equity’s fraud and

negligent-misrepresentation claims against Ben.¹ In addressing this challenge, we begin by noting that in the First Order, the trial court granted Ben's summary-judgment motion without specifying the grounds upon which the trial court relied. Therefore, we must affirm the challenged portion of the First Order if any of the independent summary-judgment grounds as to these two claims is meritorious. *See FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000).

In Ben's motion, he sought summary judgment on at least the following independent grounds:

- (1) the economic-loss rule bars these claims;
- (2) as a matter of law, none of Ben's alleged misrepresentations are actionable;
- (3) there is no evidence of any actionable misrepresentation by Ben;
- (4) any alleged misrepresentations were not material as a matter of law;
- (5) there is no evidence of any material misrepresentation by Ben;
- (6) Equity could not reasonably have relied on any alleged material misrepresentation by Ben;
- (7) the damages that Equity seeks to recover based on Ben's alleged misrepresentations are not cognizable;
- (8) there is no evidence of any damages sustained by Equity as a result of Ben's alleged misrepresentations;
- (9) Equity's negligent-misrepresentation claim fails because there was no justifiable reliance on any alleged misrepresentation by Ben; and
- (10) the applicable statute of limitations bars Equity's negligent-misrepresentation claim against Ben.

¹ We refer to Ben Reynolds as Ben because his wife with the same surname is also an appellee/defendant.

Because the trial court did not specify the grounds on which it relied in granting summary judgment, to successfully challenge the summary judgment on appeal, Equity had to attack all possible bases for the trial court's ruling. *See In re A.M.P.*, 368 S.W.3d 842, 845 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

In its appellate brief, Equity presents argument challenging the first summary-judgment ground based on the economic-loss rule. Equity also states in a conclusory manner that Ben is liable for fraud or negligent misrepresentation for his handling of the lease and that Equity suffered damages as a direct result of and in reliance on Ben's conduct and representations. Equity cites two summary-judgment affidavits in support of this proposition. But, in this part of its brief, Equity does not challenge the second through sixth or the ninth or tenth summary-judgment grounds listed above. We presume without deciding that this part of Equity's brief is sufficient to challenge the seventh and eighth summary-judgment grounds. Even so, Equity has not presented appellate briefing in which it challenges the other seven summary-judgment grounds. Instead, Equity states in its brief that its summary-judgment response in the trial court sets out nine pages of analysis explaining why Ben's summary-judgment motion is not supported by the law or the facts and that its response analyzes all of the elements and issues. Equity states that, to save time and space, Equity does not set forth this analysis in its appellate brief but instead refers this court to the response in the trial court. Ben argues that Equity has waived its first issue by not challenging all of the independent grounds upon which the trial court granted summary judgment in the First Order.

The appellate rules require Equity to file an appellate brief that contains sufficient briefing, and Equity may not satisfy this requirement by incorporating by reference into its appellate brief argument and analysis presented in the trial court

or by citing such argument and analysis and referring this court to it. *See Khan v. Safeco Surplus Lines*, No. 14-13-00024-CV, 2014 WL 3907976, at *5–6 (Tex. App.—Houston [14th Dist.] Aug. 12, 2014, pet. denied) (holding that appellant’s briefing was insufficient and not allowing appellant to incorporate by reference into his appellate brief argument and authorities from his summary-judgment response in the trial court) (mem. op.); *Karaali v. Petroleum Wholesale, L.P.*, No. 14-11-00577-CV, 2013 WL 6198349, at *6 & n.11 (Tex. App.—Houston [14th Dist.] Nov. 26, 2013, no pet.) (holding that appellant’s briefing was insufficient and not allowing appellant to incorporate by reference into his appellate brief argument and authorities from a response filed in the trial court) (mem. op.).

Even construing Equity’s appellate brief liberally, we cannot conclude that Equity has briefed adequately arguments challenging each of the independent summary-judgment grounds as to Equity’s fraud and negligent-misrepresentation claims against Ben. *See Khan*, 2014 WL 3907976, at *5–6; *Karaali*, 2013 WL 6198349, at *6 & n.11. Because Equity has not challenged all of the independent summary-judgment grounds upon which the trial court granted summary judgment as to these claims in the First Order, we overrule the first issue and affirm the First Order. *See In re A.M.P.*, 368 S.W.3d at 845 (affirming summarily trial court’s summary judgment as to one claim because appellant did not challenge on appeal all independent summary-judgment grounds as to that claim).

B. Fraudulent-Transfer Claims

In its second issue, Equity asserts that the trial court erred in granting summary judgment in the Second Order as to its fraudulent-transfer claims. The Uniform Fraudulent Transfer Act is designed to protect creditors from being defrauded or left without recourse due to the actions of unscrupulous debtors. *KCM Financial LLC v. Bradshaw*, 457 S.W.3d 70, 89 (Tex. 2015). The purpose of

this statute is to prevent debtors from defrauding creditors by placing assets beyond their reach. *Id.* At a trial on its fraudulent-transfer claims, Equity, as the judgment creditor, would have the burden of proving by a preponderance of the evidence that each alleged fraudulent transfer occurred. *See Doyle v. Kontemporary Builders, Inc.*, 370 S.W.3d 448, 453 (Tex. App.—Dallas 2012, pet. denied). As to each alleged fraudulent transfer, Equity would have to prove the essential elements of the fraudulent-transfer claim. *See id.*; *Owens v. Hawkins*, No. 10-11-00297-CV, 2012 WL 1366577, at *1 (Tex. App.—Waco Apr. 18, 2012, pet. denied) (mem. op.).

Equity pleaded fraudulent-transfer claims against Ben Reynolds, III, the President of Southern Logistics, Beth Reynolds (Ben’s wife), Southern Worldwide Warehouse, Inc., Southern Worldwide Solutions, Inc., Everything4Websites, LLC, Email Touchdown, LLC, and Mpact Sourcing, Inc. (collectively the “Movants”) based on alleged transfers of Southern Logistics’s assets. The Movants sought summary judgment on the following grounds:

- (1) there is no evidence of any transfer of assets;
- (2) there is no evidence that Equity is a creditor of any of the Movants or that Equity has a claim against any of the Movants;
- (3) there is no evidence of any actual intent to hinder, delay, or defraud Equity;
- (4) there is no evidence of receipt of less than reasonably equivalent value; and
- (5) there is no evidence of any antecedent debt.

The trial court granted summary judgment without specifying the grounds upon which the trial court relied.

In reviewing a no-evidence summary judgment, we ascertain whether the nonmovant pointed out summary-judgment evidence raising a genuine issue of fact as to the essential elements attacked in the no-evidence motion. *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 206–08 (Tex. 2002). In our de novo review of a trial court’s summary judgment, we consider all the evidence in the light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006). The evidence raises a genuine issue of fact if reasonable and fair-minded jurors could find the fact in favor of the nonmovant in light of all of the summary-judgment evidence. *See Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007); *Lampasas v. Spring Center, Inc.*, 988 S.W.2d 428, 433 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

Equity asserted fraudulent-transfer claims against the Movants under sections 24.005(a) and 24.006 of the Texas Business and Commerce Code, based upon alleged transfers of Southern Logistics’s assets. *See* Tex. Bus. & Comm. Code Ann. §§ 24.002(12), 24.005(a), 24.006 (West, Westlaw through 2015 R.S.). Equity has not alleged a fraudulent transfer based upon any alleged obligation incurred by Southern Logistics. In this context, an essential element of each of Equity’s fraudulent-transfer claims is a transfer of one or more of Southern Logistics’s assets. *See* Tex. Bus. & Comm. Code Ann. §§ 24.002(12), 24.005(a), 24.006; *Retamco Operating, Inc. v. Republic Drilling Co.*, 278 S.W.3d 333, 341 (Tex. 2009) (stating that fraudulent-transfer claim would fail without proof that assets were transferred and an assessment of the value of the assets).

Under the Uniform Fraudulent Transfer Act, “transfer” means “every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of

or parting with an asset or an interest in an asset.” Tex. Bus. & Comm. Code Ann. § 24.002(12). “Asset” means “property of a debtor, but the term does not include: (A) property to the extent it is encumbered by a valid lien; (B) property to the extent it is generally exempt under nonbankruptcy law; or (C) an interest in property held in tenancy by the entirety to the extent it is not subject to process by a creditor holding a claim against only one tenant, under the law of another jurisdiction.”² *Id.* § 24.002(2). Thus, without an “asset,” as defined in the Uniform Fraudulent Transfer Act, there is no transfer under the Uniform Fraudulent Transfer Act. *See id.* § 24.002(12); *Retamco Operating, Inc.*, 278 S.W.3d at 341 (citing the Uniform Fraudulent Transfer Act’s definition of “transfer” and stating that “[w]ithout an asset, no fraudulent transfer can occur under the [Uniform Fraudulent Transfer Act]”).

As part of its burden of proving at trial a transfer of one or more of Southern Logistics’s assets, Equity would have the obligation to prove the transfer of Southern Logistics’s property that was unencumbered by a valid lien and not generally exempt under nonbankruptcy law. *See* Tex. Bus. & Comm. Code Ann. § 24.002(2), (12); *Owens*, 2012 WL 1366577, at *1–3. Thus, for the trial court to have erred in granting summary judgment on the ground that there is no evidence of any transfer of assets, the summary-judgment evidence must raise a genuine fact issue as to the existence of one or more transfers of Southern Logistics’s property that was unencumbered by a valid lien and not generally exempt under nonbankruptcy law. *See* Tex. Bus. & Comm. Code Ann. § 24.002(2), (12); *Johnson*, 73 S.W.3d at 206–08; *Owens*, 2012 WL 1366577, at *1–3.

² In this definition, “‘valid lien’ means a lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings.” Tex. Bus. & Comm. Code Ann. § 24.002(13).

In its summary-judgment response in the trial court, Equity asserted that in January 2012, Southern Logistics began transferring its personal property to a new building. Equity cited Exhibit “G” in support of this proposition, but attached no Exhibit “G” to the summary-judgment response. In another part of the response, Equity stated that it intentionally omitted Exhibit “G.” On appeal, Equity cites the summary-judgment affidavit of Robert T. Berry as evidence establishing that Southern Logistics transferred property from the leased premises before the end of the lease’s term. But, in this affidavit, Berry does not mention any transfer of Southern Logistics’s property from the leased premises. The Berry affidavit would not enable reasonable and fair-minded jurors to find that Southern Logistics transferred property from the leased premises before the end of the lease’s term. *See Goodyear Tire & Rubber Co.*, 236 S.W.3d at 755; *Lampasas*, 988 S.W.2d at 433.

Presuming for the sake of argument that a fraudulent-transfer claim otherwise could be based on a transfer of Southern Logistics’s personal property to a new building or a transfer of Southern Logistics property from the leased premises before the end of the lease’s term, under the applicable standard of review, the summary-judgment evidence does not raise any genuine fact issue as to whether any such transfer occurred. *See Goodyear Tire & Rubber Co.*, 236 S.W.3d at 755; *Lampasas*, 988 S.W.2d at 433.

In the trial court and on appeal, Equity has asserted that assets were transferred from Southern Logistics’s accounts to fund the Movants’ debts, Ben’s personal projects, and the purchase of the new building. Equity also has asserted that Southern Logistics’s money was used to pay the Movants’ debts without any exchange of value to Southern Logistics. Equity has cited the affidavit of Roland T. Luce in support of this proposition.

Luce, the Chief Financial Officer for Southern Logistics from 2009 through late 2011, testified that Southern Logistics, Southern Worldwide Warehouse, Inc., Everything4Websites, LLC, Email Touchdown, LLC, and Mpact Sourcing, Inc. (hereinafter collectively the “Companies”) “all had the same management, the same accounting systems, the same officers, the same financials, co-mingled funds, cross-billed [sic] each other’s customers and clients, used the same bank and had the same accounts and deposited income from the Companies into a single Treasury Management Account (‘TMA’).” According to Luce, the bank “would sweep the TMA each night and deposit the funds into various operational accounts for the Companies depending on the need for that entity.” Luce stated that the Companies “were run as a single business unit” and that “one could not easily distinguish between the business and operation of one entity compared to the other.” In this part of Luce’s affidavit, Luce does not state that funds or any other asset belonging to Southern Logistics was ever deposited into the operational account of another entity.

In another part of Luce’s affidavit, Luce states that “money paid to Southern Logistics for its warehousing activities [was] occasionally transferred from Logistics to pay for other endeavors of [Ben] and the Companies.” Luce does not identify the “endeavors” to which he refers. Luce’s testimony is general and lacks many key details. Luce does not state (1) who caused Southern Logistics’s money to be transferred; (2) how many times this type of transfer allegedly occurred, (3) the amount of any money involved in any such transfer, (4) the date of any transfer, or (5) the party to whom any such transfer was made. Luce does not attach any documents to his affidavit in support of this testimony.³ Luce does not

³ In describing the nature of Luce’s testimony, we do not suggest that documentary proof or testimony as to the foregoing matters is necessarily required to avoid summary judgment. Rather, we note that Luce’s testimony is silent on these points.

address the extent to which any such money was unencumbered by a valid lien or the extent to which any such money was not generally exempt under nonbankruptcy law. For the trial court to have erred in granting summary judgment on the ground that there is no evidence of any transfer of assets, the summary-judgment evidence must raise a genuine fact issue as to the existence of one or more transfers of Southern Logistics's property that was unencumbered by a valid lien and not generally exempt under nonbankruptcy law. *See* Tex. Bus. & Comm. Code Ann. § 24.002(2), (12); *Johnson*, 73 S.W.3d at 206–08; *Owens*, 2012 WL 1366577, at *1–3.

Luce refers in his affidavit to conduct by Ben that Luce says includes “the transfer of commingled assets” and Ben’s alleged self-dealing in placing Southern Logistics’s available funds “into [Ben’s] personal investments.” Luce does not state (1) how many times any such transfer occurred, (2) the value of the assets or funds involved in any such transfer, (3) the date of any transfer, or (4) the party to whom any such transfer was made.⁴ Luce does not address the extent to which any such money was unencumbered by a valid lien or the extent to which any such money was not generally exempt under nonbankruptcy law.

For the trial court to have erred in granting summary judgment on the ground that there is no evidence of any transfer of assets, the summary-judgment evidence must raise a genuine fact issue as to the existence of one or more transfers of Southern Logistics’s property that was unencumbered by a valid lien and not generally exempt under nonbankruptcy law. *See* Tex. Bus. & Comm. Code Ann. § 24.002(2), (12); *Johnson*, 73 S.W.3d at 206–08; *Owens*, 2012 WL 1366577, at *1–

⁴ As indicated elsewhere, in describing Luce’s testimony, we do not suggest that documentary proof or testimony as to the foregoing matters is necessarily required to avoid summary judgment.

3. Under the applicable standard of review, the summary-judgment evidence would not enable reasonable and fair-minded jurors to find that there was a transfer of Southern Logistics's property that was unencumbered by a valid lien and not generally exempt under nonbankruptcy law. *See Owens*, 2012 WL 1366577, at *1–3.

After reviewing all the summary-judgment evidence under the applicable standard of review, we conclude that the trial court did not err in granting summary judgment on the ground that there is no evidence of any transfer of assets. *See id.* (holding trial court did not err in granting no-evidence summary judgment because there was no evidence that any of the property the debtor transferred was an “asset” under Texas Business and Commerce Code section 24.002(2) in light of lack of evidence that the property was not generally exempt under nonbankruptcy law). Accordingly, we overrule Equity's second issue.⁵

III. CONCLUSION

Because Equity has not challenged all of the independent summary-judgment grounds upon which the trial court granted summary judgment as to Equity's fraud and negligent-misrepresentation claims in the First Order, we overrule the first issue and affirm the First Order. The trial court did not err in granting summary judgment on the ground that there is no evidence of any transfer

⁵ We need not and do not address whether the trial court's judgment may be affirmed based on another summary-judgment ground. In addition, we need not address the Movants' arguments on appeal that (1) Equity has waived its challenge to the Second Order by failing to adequately brief this challenge on appeal; (2) Equity waived its appellate challenge to the Second Order by not contesting the summary judgment dismissing Equity's fraudulent-transfer claims against Stephen Schneidau, Southern Hempstead, Ltd., and Southern Hempstead, GP, LLC. The trial court granted these three defendants' summary-judgment motion, dismissed Equity's fraudulent-transfer claims against these three parties, and severed Equity's claims into a different case to create a final judgment.

of assets. Therefore, we affirm the Second Order. Having overruled both of Equity's issues, we affirm the trial court's judgment.

/s/ Kem Thompson Frost
 Chief Justice

Panel consists of Chief Justice Frost and Justices Jamison and Busby.