

Affirmed and Memorandum Opinion filed September 28, 2017.



In The

Fourteenth Court of Appeals

NO. 14-16-00747-CV

MANUEL AL FRIAS, Appellant

V.

DAVID MIRELES, Appellee

**On Appeal from the County Civil Court at Law No. 1
Harris County, Texas
Trial Court Cause No. 1063190**

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

Appellant Manuel Al Frias sued appellee David Mireles for breach of contract, fraud, and conversion arising out of a contract to purchase real property. After Frias obtained a default judgment, Mireles successfully moved for a new trial. Mireles then filed a motion for summary judgment, which the trial court granted. On appeal, Frias challenges the trial court's order granting a new trial and the order granting summary judgment based on statutes of limitation. We affirm.

FACTUAL BACKGROUND

In July 2007, David Mireles agreed to sell the real property located at 613 W. Parker in Harris County (the Property) to Manuel Al Frias for \$60,000.00. The parties executed a written agreement on July 3, 2007, which provided that the full purchase price would be due on September 3, 2007. Frias made two payments totaling \$18,000.00 in July and August of 2007, but made no more payments on the Property. The parties did not communicate again until 2014.

Frias filed suit against Mireles on June 3, 2015, asserting claims for breach of contract, fraud, and conversion. In his petition, Frias alleged that he tendered full payment of \$42,000.00 to Mireles, but Mireles refused to accept it or transfer the property. According to Frias, Mireles might have either never owned the property or transferred it. Frias estimated the current value of the property to be \$100,000.00. Mireles was served with the lawsuit, but failed to file an answer.

Frias was granted a default judgment on September 21, 2015. Mireles timely filed a motion for new trial. In a supporting affidavit, Mireles stated that he had contacted his attorney in pursuit of representation and believed that his attorney would file an answer even though Mireles had not yet paid the agreed-upon retainer. The trial court granted the motion for new trial. Mireles then filed an answer that included several affirmative defenses, including the applicable statutes of limitations.

In June 2016, Mireles filed a motion for traditional and no-evidence summary judgment. Mireles asserted that all of Frias's claims were barred by the statutes of limitations, neither the discovery rule nor any other tolling doctrine applied, and Frias had no evidence that Mireles made a material misrepresentation concerning the Property. Frias filed a response, and both parties submitted supplemental briefs.

On July 7, 2016, the trial court granted Mireles's motion for traditional and no-evidence summary judgment, dismissing with prejudice Frias's claims for breach of contract, fraud, and conversion. The trial court's order reflected that the trial court granted summary judgment "on the affirmative defense of statutes of limitations."

ISSUES AND ANALYSIS

On appeal, Frias raises two issues. In the first, Frias contends that the trial court erred in granting Mireles's motion for new trial because the record contains no facts to show that Mireles's failure to timely answer was "not intentional or the result of conscious indifference on his part." In the second, Frias contends that the trial court erred in granting Mireles's hybrid motion for traditional and no-evidence summary judgment because the motion did not clearly set forth the standards on which the summary judgment was sought and the no-evidence motion improperly sought summary judgment on an affirmative defense on which Mireles had the burden of proof. We address each issue in turn.

I. The Motion for New Trial

In his first issue, Frias contends that Mireles's affidavit is insufficient to support the grant of a new trial. Frias argues that the affidavit fails to demonstrate that Mireles's failure to answer the lawsuit was not intentional or the result of conscious indifference, but was due to mistake or accident, as required by *Craddock v. Sunshine Bus Lines*, 133 S.W.2d 124, 126 (Tex. 1939).

Generally, an order granting a new trial within the trial court's plenary power is not subject to review either by direct appeal from that order or from a final judgment rendered after further proceedings in the trial court. *See Cummins v. Paisan Constr. Co.*, 682 S.W.2d 235, 236 (Tex. 1984) (per curiam) (holding that it was unnecessary for the appellate court to examine the evidence supporting the trial

court's grant of a motion for new trial after a default judgment because the order was not reviewable on appeal from the subsequent trial); *Nelson v. Gulf Coast Cancer & Diagnostic Ctr. at Se., Inc.*, No. 14-16-00589-CV, 2017 WL 3090012, at *3 (Tex. App.—Houston [14th Dist.] July 20, 2017, no pet. h.) (holding that order granting motion for new trial after no-evidence summary judgment was not reviewable on direct appeal from subsequent summary judgment proceeding); *Rebector v. Angleton Danbury Hosp. Dist.*, No. 14-08-2010-CV, 2010 WL 2681721, at *1–2 (Tex. App.—Houston [14th Dist.] July 8, 2010, pet. denied) (mem. op.) (declining to consider whether *Craddock* factors supported trial court's grant of motion for new trial after default judgment on direct appeal of subsequent order dismissing malpractice suit for failure to comply with expert report requirements); *see also In re Columbia Med. Ctr. of Las Colinas, Subsidiary, L.P.*, 290 S.W.3d 204, 209 (Tex. 2009) (orig. proceeding) (reaffirming that an order granting a new trial is not reviewable on direct appeal, while allowing mandamus review of an order granting a new trial under certain circumstances).

Two exceptions to the general rule have been recognized: (1) when the trial court's order is void; and (2) when the trial court erroneously concluded that the jury's answers to special issues were irreconcilably in conflict. *Wilkins v. Methodist Health Care Sys.*, 160 S.W.3d 559, 563 (Tex. 2005); *Nelson*, 2017 WL 3090012, at *3. Frias does not contend that either of these exceptions apply. We therefore overrule Frias's first issue.

II. The Motion for Traditional and No-Evidence Summary Judgment

In his second issue, Frias contends that the trial court erred in granting Mireles's hybrid traditional and no-evidence motion for summary judgment. Frias argues that the portion of the motion addressing Frias's fraud claim is unclear as to the standards on which summary judgment is sought; fails to cite or make argument

under Texas Rule of Civil Procedure 166a(c); and provides no evidence from Mireles concerning the statute of limitations. Consequently, Frias asserts, the motion should be analyzed as a no-evidence motion. And, because Mireles bears the burden of proof on the affirmative defense of limitations in response to a fraud claim, a no-evidence summary judgment motion is improper and therefore the motion must fail as to Frias's fraud claim.

Frias's complaint is directed to the section of Mireles's motion for summary judgment addressing the application of the four-year statute of limitations to Frias's fraud claim. Under the subheading "Fraud," Mireles cites the applicable statute and a case holding that a fraud claim accrues when the defendants make false representations or omissions. Mireles argues that although Frias alleges that Mireles fraudulently stated in 2007 that he had title to the Property, Frias admitted in his own affidavit that he knew or at least believed that Mireles did not yet have title to the Property in 2007. Mireles also cites to Frias's affidavit and attaches it as an exhibit to the motion. Mireles further argues that whatever the basis for the alleged misrepresentation, Frias's claim is based on alleged misrepresentations made in 2007 or 2008, "followed by over seven years of silence."

Additionally, in the introductory portion of Mireles's motion, Mireles informs the reader that "[a]ll of [Frias's] claims are barred by [Mireles's] affirmative defense of the statute of limitations." Mireles goes on to state that he "also seeks summary judgment on [Frias's] claim for fraud because there is no evidence of a material misrepresentation." Mireles then sets out the summary judgment evidence and the "undisputed facts," followed by Sections A, B, and C of the motion for traditional summary judgment. Section A provides the summary judgment standard for the affirmative defense of limitations. Section B applies the appropriate statute of limitations to each of Frias's claims, including the fraud claim. Section C addresses

the non-applicability of tolling doctrines, the discovery rule, fraudulent concealment, and absence from the state. The motion is supported by several attached exhibits.

In Section D, titled “Defendant is Entitled to Summary Judgment on Plaintiff’s Claim for Fraud Because Plaintiff has no Evidence of Misrepresentation,” Mireles identifies the elements of fraud, cites applicable case law, and argues that Frias has no evidence that Mireles misrepresented his intent to gain record title to the Property in 2007. Thus, Frias’s fraud claim is addressed twice: once in the traditional summary judgment section concerning the application of the statute of limitations to each of Frias’s claims (with supporting evidence), and again in a separate section identifying Mireles’s intention to seek a no-evidence summary judgment on the ground that Frias had no evidence of an actionable misrepresentation concerning the Property.

Mireles’s motion for summary judgment gives ample notice of the grounds on which he seeks summary judgment. The mere fact that the motion does not specifically cite to rules 166a(c) or 166a(i) does not render it unclear. Moreover, because the trial court specifically granted summary judgment on the affirmative defense of the statute of limitations, the trial court intended to grant the traditional summary judgment motion as to all of Frias’s claims. Frias does not otherwise challenge the court’s grant of summary judgment in favor of Mireles. Therefore, the trial court did not err in granting the summary judgment. We overrule Frias’s second issue.

CONCLUSION

We overrule Frias's issues and affirm the trial court's judgment.

/s/ Ken Wise
Justice

Panel consists of Justices Christopher, Brown, and Wise.