Affirmed in Part and Reversed in Part and Remanded and Memorandum Opinion filed November 15, 2022.

In The

Fourteenth Court of Appeals

NO. 14-21-00365-CV

JAROD DOUET AND JASALYN MOSBEY-DOUET, Appellants

V.

PAPILLON ROMERO AND BOBBY SULLIVAN, Appellees

On Appeal from the 157th District Court
Harris County, Texas
Trial Court Cause No. 2018-38090

MEMORANDUM OPINION

This appeal involves alleged misrepresentations and nondisclosures made during the sale of a residence. Appellants Jarod Douet and Jasalyn Mosbey-Douet (the "Douets") appeal a judgment in favor of appellees Papillon Romero ("Romero") and Bobby Sullivan ("Sullivan"). In nine issues, the Douets argue that the trial court erred when it granted Sullivan's no-evidence summary judgment motion because (1) the motion did not identify the challenged elements of the

causes of action; (2) the motion was actually a traditional motion for summary judgment unsupported by evidence; the Douets raised a fact issue as to their (3) negligence claim and their claim for (4) violations of the Texas Deceptive Trade Practices Act ("DTPA"); and (5) the motion did not address the Douets' claims for common-law fraud and statutory fraud. The Douets also argue that the trial court erred when it granted Romero's traditional summary judgment motion because (6) Romero owed a duty to disclose defects and the Douets raised fact issues as to whether Romero was aware of the alleged defects; (7) the Douets raised a fact issue as to the enforceability of the "as is" provision in the sales contract; (8) Romero failed to conclusively negate one element of each of the Douets' claims; and (9) the equal inference rule is inapplicable. We affirm in part and reverse in part, and we remand for further proceedings.

I. BACKGROUND[1]

On February 26, 2017, the Douets contracted to purchase a house from Romero by executing a contract that contained an "as is" clause. Sullivan was Romero's real estate agent for the sale of the home. Prior to the sale, Romero provided the Douets with a seller's disclosure notice ("SDN"),[2] representing that Romero was unaware of any defects with the home, including any defects or

[1] This appeal is before this Court for the third time after the Douets' second appeal was dismissed for lack of jurisdiction because the judgment was interlocutory. *See Douet v. Romero*, No. 14-21-00103-CV, 2021 WL 2324910, at *1–2 (Tex. App.—Houston [14th Dist.] 2021, no pet.) (per curiam). Because the Douets and Romero refer to filings in the record of the previous appeal, we take judicial notice of the clerk's record therein.

[2] Section 5.008(a) of the Texas Property Code requires a seller of residential real property to give the purchaser a written notice that "contains, at a minimum, all of the items in the notice prescribed by [that] section." Tex. Prop. Code Ann. § 5.008(a). The Seller's Disclosure Notice of Property Condition form must include a statement in capital letters that the notice "is a disclosure of seller's knowledge of the condition of the property as of the date signed by seller and is not a substitute for any inspections or warranties the purchaser may wish to obtain." *Id.* § 5.008(b). The notice "shall be completed to the best of seller's belief and knowledge as of the date the notice is completed and signed by the seller." *Id.* § 5.008(d).

malfunctions with the ceiling, floors, interior walls, plumbing systems, and windows. Romero also represented in the SDN that he was unaware of structural repairs to the home; of any water penetration; or of any repairs or treatments, other than routine maintenance, made to remediate environmental hazards, including mold.

On March 1, 2017, prior to finalizing the purchase, the Douets had the house inspected by Dustin Ferguson d/b/a AACE Inspections ("Ferguson"). In relevant part, Ferguson's inspection report noted a repair to the living room ceiling, that "the stains were dry at the time of the inspection," and that the wooden floors showed signs of water damage. As to the windows of the house, Ferguson's report stated "Window sill need [sic] to be cleaned and repainted. Than [sic] place mortar"; "Had some framing deflection by the kitchen window"; "There was cracked glass at: kitchen breakfast"; "Some of the window screens were missing at the time of the inspection"; "Some of the window screens were damaged at the time of inspection"; and "Some window locks were missing and broken during inspection." The sale of the home was finalized on March 31, 2017.

Within a few months of moving into the house, the Douets began experiencing breathing problems, and they ordered new inspections of the home, which revealed the presence of black mold and water damage that had been previously repaired. The Douets also discovered that structural repairs had been made to one of the bay windows in the kitchen breakfast area. The Douets moved out of the house in early September of 2017.[3]

On June 7, 2018, the Douets filed a lawsuit against Romero.[4] On March 25,

[3] Jasalyn testified in her deposition that the Douets moved out of the home on August 31, 2017.

[4] In their original petition, the Douets also asserted claims against Dustin Ferguson d/b/a AACE Inspections and URA, Houston, LLC, but nonsuited those claims without prejudice prior

2019, the Douets amended their petition and added Bobby Sullivan ("Sullivan") and United Realty Advisors ("URA") as defendants. In their live petition, the Douets alleged that Romero and Sullivan knew or should have known of "severe problems with water damage, electrical, plumbing, and other matters," including mold, a slow leak within the powder room wall, and structural modification to the breakfast area bay window. The Douets further alleged that Romero and Sullivan failed to disclose these facts in the SDN. The Douets asserted claims against Sullivan and Romero for breach of contract, violations of the DTPA, common-law fraud, statutory fraud, and negligence.

Sullivan filed a no-evidence motion for summary judgment, arguing there was no evidence of a contract between Sullivan and the Douets; no evidence of any breach of a duty owed by Sullivan to the Douets; and no evidence that Sullivan made a misrepresentation to the Douets or was aware of any defects with the house. On August 14, 2020, the trial court signed an order granting Sullivan's no-evidence motion and dismissing all of the Douets' claims against Sullivan.

Romero filed a traditional motion for summary judgment, arguing that summary judgment was proper because: Romero had no knowledge of the problems and defects complained of by the Douets, the Douets purchased the property "as is," and the home inspection performed at the Douets' revealed two of the three problems complained of by the Douets, and thus, was a condition of which the Douets were aware. In support of his motion, Romero attached copies of the residential contract for the sale of the property, the SDN, and the amendment to the residential contract executed by the parties, noting repairs requested by the Douets before the sale of the property was finalized; a copy of Ferguson's inspection report; the depositions of the Douets, Romero, and Sullivan; the

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to this appeal.

unsworn declaration by Paul Hammond, Romero's handyman; and the unsworn declaration of Adrian Garza, the owner of the home prior to Romero.

The Douets filed a response to Romero's traditional motion for summary judgment.[5] Attached to their response, the Douets provided Jared and Jasalyn's unsworn declarations; copies of prior listings of the home; photographs of the complained-of areas and problems; a declaration by Annie M. Delling, a general contractor hired by the Douets who owns a company "that performs repairs and other attendant services to homes in the greater Houston area"; an unsworn declaration of Domaris Guevara, a manager of Mold Inspection and Testing, a company hired by the Douets to inspect the house for mold, and the results of his inspection report; excerpts from Romero's deposition; and an opinion from an Texas intermediary appellate court. In their response, the Douets state that the problems with the house "fall into three basic categories": (1) pre-existing mold in the house, especially downstairs in the powder room; (2) mold in the upstairs bathroom by the tub; and (3) water penetration at the bay window by the dining room, and water damage to the first and second floors.

The Douets argued that Romero could not rely on the "as is" clause in the residential purchase agreement because: (1) the clause in the subject contract was a boilerplate, non-negotiable term; (2) the evidence raised a fact issue as to whether Romero knew of the presence of mold in the house and tried to conceal it by using Kilz paint; (3) there are fact issues as to the enforceability of the "as is" clause based on the sophistication of the parties, the terms of the "as is" agreement, and

[5] In their motion, the Douets objected to Romero's summary judgment evidence; however, the trial court did not rule on their objections. Thus, we consider all of Romero's summary judgment evidence. *See Vice v. Kasprzak*, 318 S.W.3d 1, 19 n.10 (Tex. App.—Houston [1st Dist.] 2009, pet denied) (noting that, in the absence of a trial court's ruling or order, objections to summary-judgment evidence are waived and allegedly inadmissible summary-judgment evidence remains part of the summary-judgment record).

Romero's knowing misrepresentation or concealment of a material fact; (4) the subject "as is" clause did not disclaim the Douets' reliance because the clause did not exactly match the language present in the "as is" clause analyzed by the Texas Supreme Court's opinion in *Prudential Ins. Co. of Am. v. Jefferson Assocs.*, 896 S.W.2d 156, 161 (Tex. 1995); and (5) the "as is" clause is not dispositive under the DTPA or under a common-law fraud claim and does not bar the Douets' negligence claim or preempt their statutory fraud claim.

On August 20, 2020, the trial court granted Romero's motion for summary judgment. On June 17, 2021, the trial court signed an order granting the Douets' notice of nonsuit without prejudice as to their claims against URA. This appeal followed.

II. CLAIMS AGAINST SULLIVAN

The Douets asserted claims against Sullivan for breach of contract, DTPA violations, common-law fraud, statutory fraud, and negligence. The trial court granted Sullivan's no-evidence motion for summary judgment and dismissed all of the Douets' claims against Sullivan. On appeal, the Douets argue in their first through fifth issues that the trial court erred because: (1) Sullivan's no-evidence summary judgment motion did not identify any challenged elements of the breach of contract cause of action; (2) Sullivan's no-evidence summary judgment was actually a traditional motion for summary judgment unsupported by evidence; (3) the Douets raised an issue of fact on their negligence claim against Sullivan; (4) the Douets raised an issue of fact as to their DTPA claim against Sullivan; and (5) Sullivan did not seek a no-evidence summary judgment as to the Douets' claims for statutory fraud or common-law fraud.

A. STANDARD OF REVIEW

After an adequate time for discovery, a party may move for a no-evidence summary judgment asserting that no evidence exists to support one or more essential elements of a claim on which the adverse party bears the burden of proof at trial. Tex. R. Civ. P. 166a(i); *see LMB, Ltd. v. Moreno*, 201 S.W.3d 686, 688 (Tex. 2006) (per curiam). The burden then shifts to the nonmovant to produce evidence raising a genuine issue of material fact on the challenged elements of his claim. Tex. R. Civ. P. 166a(i); *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006). A no-evidence summary judgment is improper if the nonmovant brings forth more than a scintilla of probative evidence raising a genuine issue of material fact. *Forbes Inc. v. Granada Bioscis., Inc.*, 124 S.W.3d 167, 172 (Tex. 2003).

"Less than a scintilla of evidence exists when the evidence is 'so weak as to do no more than create a mere surmise or suspicion' of a fact." *Id.* (quoting *King Ranch v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003). More than a scintilla of evidence exists if the evidence would allow reasonable and fair-minded people to differ in their conclusions. *Id.* Unless the nonmovant raises a genuine issue of material fact, the trial court must grant summary judgment. Tex. R. Civ. P. 166a(i).

We review a trial court's ruling on a motion for summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). We view the evidence 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.* at 582 (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005)).

B. ANALYSIS

1. Sullivan's motion

In their first issue, the Douets argue that the trial court erred in granting Sullivan's no-evidence motion because the motion did not identify the elements of the Douets' causes of action challenged by Sullivan. *See* Tex. R. Civ. P. 166a(i). In their second issue, the Douets argue that Sullivan's no-evidence summary judgment was a traditional motion for summary judgment and unsupported by evidence. We address these issues together.

In a traditional motion for summary judgment, a movant must state specific grounds, and a defendant who conclusively negates at least one essential element of a cause of action or conclusively establishes all elements of an affirmative defense is entitled to summary judgment. *KMC Fin. LLC v. Bradshaw*, 457 S.W.3d 70, 79 (Tex. 2015). In a no-evidence summary-judgment motion, the movant asserts that no evidence supports one or more essential elements of a claim or defense for which the nonmovant bears the burden of proof at trial. *Id.* (citing Tex. R. Civ. P. 166a(i)). "We have further explained that '[t]he motion must be specific in challenging the evidentiary support for an element of a claim or defense; paragraph (i) does not authorize conclusory motions or general no-evidence challenges to an opponent's case." *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009) (citing Tex. R. Civ. P. 166a(i) comment-1997). "The underlying purpose of this [specificity] requirement 'is to provide the opposing party with adequate information for opposing the motion, and to define the issues for the purpose of summary judgment." *Id.* The Supreme Court of Texas has analogized this purpose to that of the "fair notice" pleading requirements of Rules 45(b) and 47(a). *Id.* "Fair notice" looks at whether the opposing party can ascertain from the pleading the nature and basic issues of the controversy. *Horizon/CMS Healthcare*

Corp. v. Auld, 34 S.W.3d 887, 896 (Tex. 2000); *see also* Tex. R. Civ. P. 45(b) (stating that action must be stated in plain and concise language); *Low v. Henry*, 221 S.W.3d 609, 612 (Tex. 2007) (noting that "fair notice" is a "relatively liberal standard").

Here, Sullivan's no-evidence motion for summary judgment stated:

> Plaintiffs have brought suit for breach of contract, negligence, and for deceptive trade practices violations. Plaintiffs do not have any evidence of that would support a breach of contract claim against Sullivan, as no contract exists between him and the [Douets]. No evidence exists to support any negligence of Sullivan because he did not breach any duty to the [Douets]. Additionally, Sullivan could not have committed any deceptive trade practice violations because he made no representations to the [Douets].

In addition, Sullivan's no-evidence motion identified the elements of a negligence claim and a DTPA claim.

a. Breach of Contract

The elements of a breach of contract claim are the existence of a valid contract, the breach of performance of the contract, and damages sustained as a result of the breach. *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 501 n.21 (Tex. 2018). Here, Sullivan's motion identifies the existence of a contract as the challenged element. Thus, we reject the Douet's argument that Sullivan's motion failed to identify the elements challenged of their breach of contract claim.

b. Negligence

To maintain an action for negligence, the plaintiff must establish the existence of a legal duty, a breach of that duty, and damages proximately caused by the breach. *Nabors Drilling, U.S.A., Inc. v. Escoto*, 288 S.W.3d 401, 404 (Tex. 2009). Without a legal duty, a defendant cannot be held liable in tort. *Kroger Co. v. Elwood*, 197 S.W.3d 793, 794 (Tex. 2006) (per curiam); *Graff v. Beard*, 858

S.W.2d 918, 919 (Tex. 1993); *Requena v. Otis Elevator Co.*, 305 S.W.3d 156, 163 (Tex. App.—Houston [1st Dist.] 2009, no pet.). A duty is a legal obligation that requires the defendant to conform to a certain standard of conduct to protect others against unreasonable risk. *HNMC, Inc. v. Chan*, 637 S.W.3d 919, 929 (Tex. App.—Houston [14th Dist.] 2020, pet. filed) (en banc). A duty can arise either by statute or by common law. *See Perry v. S.N.*, 973 S.W.2d 301, 306–07 (Tex. 1998).

Here, Sullivan's motion provides that there is no evidence to establish a breach of a duty. Thus, we reject the Douet's argument that Sullivan's motion failed to identify the elements challenged in regard to their negligence claim.

c. DTPA

The DTPA provides protections for consumers from deceptive trade practices in the purchase and lease of goods and services. *See* Tex. Bus. & Com. Code Ann. §§ 17.46, 17.50; *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 649 (Tex. 1996); *Smith v. Baldwin*, 611 S.W.2d 611, 616 (Tex. 1980). "Services" means "work, labor, or service purchased or leased for use, including services furnished in connection with the sale or repair of goods." Tex. Bus. & Com. Code Ann. § 17.45(2); *Smith*, 611 S.W.2d at 615–16. "Goods" means "tangible chattels or real property purchased or leased for use." Tex. Bus. & Com. Code Ann. § 17.45(1).

We liberally construe and comprehensively apply the provisions of the DTPA to promote its underlying purpose, which is the protection of consumers. *See id.* § 17.44(a). Generally, the elements of a cause of action for violation of the DTPA are that (1) the plaintiff is a consumer, (2) the defendant is subject to suit under the DTPA, (3) the defendant committed a wrongful act under the statute, and (4) the defendant's actions were the producing cause of the plaintiff's damages. *See id.* §§ 17.45, 17.46; *Amstadt*, 919 S.W.2d at 649. In relevant part, a plaintiff

can maintain a DTPA suit by proving a false, misleading, or deceptive act or practice that is included in the "laundry list" of violations in Business Commerce Code § 17.46(b) and by establishing detrimental reliance. Tex. Bus. & Com. Code Ann. § 17.50(a)(1); *Brown & Brown v. Omni Metals, Inc.*, 317 S.W.3d 361, 379–80 (Tex. App.—Houston [1st Dist.] 2010, pet. denied). An act is false, misleading, or deceptive if it could deceive an ordinary person, even if that person may have been ignorant, unthinking, or credulous. *Daugherty v. Jacobs*, 187 S.W.3d 607, 614 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

A person as defined by the DPTA may be exempt under § 17.49 of the Business and Commerce Code under certain conditions. *See* Tex. Bus. & Com. Code Ann. § 17.49. A licensed real estate broker or salesperson is exempt from the DTPA for "an act or omission by the person while acting as a broker or salesperson." *Id.* § 17.49(i). This exemption does not apply to a real estate broker's (1) express misrepresentation of a material fact that cannot be characterized as advice, judgment, or opinion; (2) a failure to disclose information in violation of § 17.46(b)(24); or an unconscionable action or course of action that cannot be characterized as advice, judgment, or opinion. *Id.* § 17.49(i)(1)–(3); *see also id.* § 17.49(b)(24) (providing that "false, deceptive, or misleading acts or practices" includes failing to disclose information about the goods or services that was known at the time of the transaction with the intent to induce the consumer to enter into the transaction).

Here, Sullivan's motion provides that there is no evidence to establish Sullivan made a misrepresentation to the Douets. Thus, Sullivan's motion identified the element challenged as to the Douet's DTPA claim.

d. Summary

We conclude that the Douets' argument that Sullivan's motion failed to

identify the elements challenged as to their causes of action is without merit. *See* Tex. R. Civ. P. 166a(i); *Low*, 221 S.W.3d at 61; *see also, e.g.*, *Miedke v. Metro. Transit Auth.*, No. 14-02-00755-CV, 2003 WL 21230618, at **3 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (mem. op.) ("Because we interpret appellant's petition as asserting that METRO's failure to use flashers was a breach of duty that proximately caused Tyler's injuries, and because it was this element that appellee addressed in its no-evidence motion for summary judgment, we conclude appellee properly satisfied Rule 166a(i)."). Further, because the no-evidence motion identified the elements of causes of action, we reject the argument that it was a traditional motion for summary judgment.

We overrule the Douets' first and second issues.

2. Negligence

In their third issue, the Douets argue that they raised a fact issue as to whether a duty was owed by Sullivan and point to sections in the Texas Occupations Code applicable to real estate brokers and sales agents. *See* Tex. Occ. Code Ann. §§ 1101.51 (defining "intermediary" and "party"), 1101.652 (providing grounds for the suspension or revocation of a real estate inspector's license), 1101.805 (providing for a party and license holder's liability resulting from a misrepresentation or a concealment of a material fact in a real estate transaction). However, the argument advanced by Sullivan in his motion was that he did not breach a duty.

Section 1101.805 imposes a duty on a broker to disclose a misrepresentation or a concealment of a material fact *made by the broker*. *Id.* § 1101.805(d); *see Van Duren*, 569 S.W.3d at 188; *Sherman v. Elkowitz*, 130 S.W.3d 316, 321 (Tex. App.—Houston [14th Dist.] 2004, no pet.); *see also* Tex. Occ. Code Ann. § 1101.803 ("A licensed broker is liable to the commission, the public, and the

broker's clients for any conduct engaged in under this chapter by the broker . . . ."). Section 1101.805 states that a party or a license holder is not liable for a misrepresentation or a concealment of a material fact unless the party or license holder: (1) knew of the falsity of the misrepresentation or concealment; and (2) failed to disclose the knowledge of the falsity of the misrepresentation or concealment. Tex. Occ. Code Ann. § 1101.805(d)–(e).

Here, the SDN contains a representation that the "brokers have relied on this notice as true and correct and have no reason to believe it to be false or inaccurate." This statement is not an affirmative representation by the broker of the condition of the property. *Sherman*, 130 S.W.3d at 321; *see Van Duren v. Chife*, 569 S.W.3d 176, 188 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (noting that the SDN, "which is a standard form promulgated by the Texas Association of Realtors, makes clear that the representations within it are the sellers' alone"). Instead, it is a statement of the broker's knowledge concerning *the seller's* disclosures. *Sherman*, 130 S.W.3d at 321. Consequently, the broker has a duty to disclose if he has any reason to believe that the SDN contains false or inaccurate representations; thus, he can be held liable for this representation if it is shown that he knew it to be false or misleading. *Van Duren*, 569 S.W.3d at 188; *Sherman*, 130 S.W.3d at 321; *see* Tex. Occ. Code Ann. § 1101.805(e).

The Douets do not argue that Sullivan himself concealed a material fact. *See* Tex. Occ. Code Ann. § 1101.805(d)–(e). Instead, the Douets argue that Sullivan knew of the misrepresentations because (1) Sullivan spent twenty-six to thirty hours in the house in preparation for listing the home for sale; and (2) Delling, the general contractor hired by the Douets to examine and inspect the home after the purchase, provided in her declaration that she observed improper repairs to the frame of the house during her examination and that it appeared to her that water

had been entering the exterior walls over the course of several years.

Sullivan testified in his deposition that he never asked Romero about repairs to the home, and there is no evidence that Sullivan inspected the home in a similar way to Delling when Sullivan was preparing to list the home for sale. Instead, the portions of Sullivan's deposition that the Douets' attached to their response provide that Sullivan spent time inside the home in order to be present while the carpet was cleaned, take photographs, and measure the rooms in the home. Sullivan testified that he did not notice or feel heightened humidity in any of the rooms of the house during the time he was present at the home. Alternatively, Delling provided that she reviewed Ferguson's inspection report, which noted water damage to the wooden floor, and that she inquired as to the cause of that damage as a result. Delling further noted damage caused by water saturation and water entry into the home. We cannot conclude that this evidence raised a fact issue as to whether Sullivan had knowledge of any of the alleged misrepresentations made by Romero in the SDN and failed to disclose them, because this evidence is so weak as to do nothing more than create a mere surmise or suspicion that Sullivan had knowledge of the alleged misrepresentations complained of by the Douets. *See Forbes Inc.*, 124 S.W.3d at 172.

Because the summary judgment evidence in the record establishes that Sullivan did not know of the falsity of Romero's alleged misrepresentations in the SDN, and there is no evidence that creates more than a mere surmise or suspicion that Sullivan made a representation to the Douets or concealed a material fact, we conclude that there is no evidence that Sullivan breached a duty. We conclude that that the trial court did not err when it granted Sullivan's no-evidence motion as to the Douets' negligence claim. *See Nabors Drilling* 288 S.W.3d at 404.

We overrule the Douets' third issue.

3. DTPA

In their fourth issue, the Douets argue that they raised a material fact issue precluding summary judgment as to their DTPA claim. The Douets state that "Sullivan should have been able to visually observe the defects which he had a statutory duty to disclose to the buyers . . . ." However, the DTPA does not hold a real estate broker responsible based on a violation of a statutorily imposed duty. *See* Tex. Bus. & Com. Code Ann. §§ 17.46(b), 17.49(b)(i).

The Douets also argue that Sullivan's no-evidence motion did not challenge "whether Sullivan committed a wrongful act as described by" the DTPA. Contrary to the Douets' argument, Sullivan's motion challenged the existence of a misrepresentation by Sullivan to the Douets, and the existence of Sullivan's knowledge of the misrepresentations; both necessary elements of claims against a realtor or broker under the DTPA. *See id.* §§ 17.46(b)(24), 17.49(i)(2); *see also Martinez v. Martinez*, No. 13-19-00518-CV, 2020 WL 5887587, at *5 (Tex. App.—Corpus Christi–Edinburg Oct. 1, 2020, no pet.) (mem. op.). As previously noted, the only representation Sullivan made to the Douets is in the SDN and provides that the "brokers have relied on this notice as true and correct and have no reason to believe it to be false or inaccurate." There is no evidence that Sullivan knew of the alleged misrepresentations in the SDN by Romero and subsequently failed to disclose the information. Accordingly, we conclude that the trial court did not err when it granted Sullivan's no-evidence motion as to the Douets' claim against Sullivan for violations of the DTPA. *See* Tex. Bus. & Com. Code Ann. §§ 17.46(b)(24), 17.49(i)(2), 17.50(a)(1); *Brown & Brown*, 317 S.W.3d at 379–80.

We overrule the Douets' fourth issue.

4. Common-Law Fraud & Statutory Fraud

In their fifth issue, the Douets argue that the trial court erred when it granted Sullivan's no-evidence motion as to their common-law fraud and statutory fraud claim because the motion did not seek summary judgment as to these claims.

An action for common-law fraud requires the plaintiff to establish the defendant was responsible for a material and false representation. *See Barrow-Shaver Res. v. Carrizo Oil & Gas, Inc.*, 590 S.W.3d 471, 496 (Tex. 2019); *Exxon Corp. v. Emerald Oil & Gas Co.*, 348 S.W.3d 194, 217 (Tex. 2011); *Italian Cowboy Partners v. Prudential Ins.*, 341 S.W.3d 323, 337 (Tex. 2011). A false representation is material if it is important to the plaintiff making a decision—that is, if a reasonable person would attach importance to and be induced to act on the information in determining whether to enter into a transaction. *Barrow-Shaver Res.*, 590 S.W.3d at 496. To prove an action for statutory fraud, the plaintiff must establish the false representation or promise caused his injury. *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 47 (Tex. 1998).

A plaintiff may prove an action for statutory fraud by establishing that the defendant made a material and false representation in a real estate transaction for the purpose of inducing the plaintiff to enter into a contract. Tex. Bus. & Com. Code Ann. § 27.01(a), (d). In order to do so, the plaintiff must establish the false representation or promise caused his injury. *Cf. Formosa Plastics Corp. USA*, 960 S.W.2d at 47.

Here, the Douets argue that the trial court erred when it granted Sullivan's no-evidence summary judgment motion as to their claims for common law and statutory fraud because Sullivan failed to challenge any element of either claim in his motion. We agree with the Douets. Sullivan's motion is silent as to the Douets' claims for statutory fraud and common-law fraud. Thus, we conclude that the trial

court erred when it granted Sullivan's no-evidence motion for summary judgment as to these two claims by the Douets. *See* Tex. R. Civ. P. 166a(i).

We sustain the Douets' fifth issue.

III. CLAIMS AGAINST ROMERO

In their sixth, seventh, eight, and ninth issues, the Douets argue that the trial court erred when it granted Romero's traditional motion for summary judgment because (6) the Douets raised a fact issue as to whether Romero failed to disclose the defects in the property; (7) the Douets raised a fact issue as to the enforceability of the "as is" provision in the residential sales contract; (8) Romero failed to conclusively negate at least one element of the Douets' claims for breach of contract, violations of the DTPA, common-law fraud, statutory fraud, and negligence; and (9) the equal inference rule is inapplicable to the facts of this case.

A. STANDARD OF REVIEW

A traditional summary judgment is proper only when the movant establishes that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c). A defendant who conclusively negates a single essential element of a cause of action or conclusively establishes an affirmative defense is entitled to summary judgment on that claim. *Frost Nat. Bank v. Fernandez*, 315 S.W.3d 494, 508 (Tex. 2010). Unlike a no-evidence motion, a traditional motion for summary judgment must stand on its own merits; there is no right to a traditional summary judgment by default. *See City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979). In determining whether the non-movant has raised a genuine issue of material fact, we review the evidence presented by the motion and response in the light most favorable to the non-movant, crediting evidence favorable to that party if

reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *Timpte Indus., Inc.*, 286 S.W.3d at 310.

B. ANALYSIS

Romero's traditional summary judgment motion advanced two bases for the granting of the motion: (1) Romero had no knowledge of the problems with the house; and (2) the sales contract contained an "as is" provision, which Romero argued negated the causation and reliance elements of the Douets' fraud, negligence, and DTPA claims.

1. Fact Issue Exists as to Romero's Knowledge of the Defects

Romero argues that he unequivocally testified at his deposition that he had no knowledge of the complained-of problems and defects with the home and that there is no evidence controverting his testimony. Thus, according to Romero, he established as a matter of law that he did not know of the defects inside the home. The Douets argue that there is circumstantial evidence supporting an inference that Romero knew of the defects to the home.

"[A] seller of real estate is under a duty of disclosing material facts which would not be discoverable by the exercise of ordinary care and diligence on the part of the purchaser, or which a reasonable investigation and inquiry would not uncover." *Smith v. Nat'l Resort Cmties., Inc.*, 585 S.W.2d 655, 658 (Tex. 1979). A seller, however, has no duty to disclose facts he does not know. *Prudential Ins. Co. of Am. v. Jefferson Assocs.*, 896 S.W.2d 156, 161 (Tex. 1995) (citing *Robinson v. Preston Chrysler–Plymouth, Inc.*, 633 S.W.2d 500, 502 (Tex. 1982)). Nor is a seller liable for failing to disclose what he only should have known. *Id.* (citing *Ozuna v. Delaney Realty, Inc.*, 600 S.W.2d 780, 782 (Tex.1980) (per curiam)). Even under the DTPA, a seller is not liable for failing to disclose information he

did not actually know. Tex. Bus. & Com. Code Ann. § 17.46(b)(23).

However,

> [i]t is the general rule that the testimony of an interested witness, such as a party to the suit, though not contradicted, does no more than raise a fact issue to be determined by the jury. But there is an exception to this rule, which is that where the testimony of an interested witness is not contradicted by any other witness, or attendant circumstances, and the same is clear, direct and positive, and free from contradiction, inaccuracies, and circumstances tending to cast suspicion thereon, it is taken as true, as a matter of law.

Ragsdale v. Progressive Voter's League, 801 S.W.2d 880, 882 (Tex. 1990).

Romero argues that his deposition testimony denying knowledge of the defects complained of by the Douets is clear and unequivocal and could have been easily controverted. Here, Romero's credibility is a dispositive factor in the resolution of the Douets' claims against him.

> "[C]ould have been readily controverted" does not simply mean that the movant's summary judgment proof could have been easily and conveniently rebutted. Rather, it means that testimony at issue is of a nature which can be effectively countered by opposing evidence. If the credibility of the affiant or deponent is likely to be a dispositive factor in the resolution of the case, then summary judgment is inappropriate. On the other hand, if the non-movant must, in all likelihood, come forth with independent evidence to prevail, then summary judgment may well be proper in the absence of such controverting proof.

Casso v. Brand, 776 S.W.2d 551, 558 (Tex. 1989); *see Frias v. Atlantic Richfield Co.*, 999 S.W.2d 97, 106 (Tex. App.—Houston [14th Dist.] pet. denied).

Here, the attendant circumstances, taken together, raise an inference that Romero knew of some or all of the issues but was untruthful in his deposition testimony. *See Ragsdale*, 801 S.W.2d at 882. In particular, the length of time Romero owned the home, coupled with the extent of the humidity, mold, and water

penetration issues throughout the house; the extent of the repairs to the powder room and the windowsill by the kitchen; and the use of Kilz paint throughout the house, support an inference that Romero knew of some or all of the complained of issues. We conclude that a fact issue exists regarding whether Romero, an interested witness, knew of the problems with the home. *See Casso*, 776 S.W.2d at 558; *Frias*, 999 S.W.2d at 106.

The summary judgment evidence establishes that the home was built in 1979, Romero first occupied the home through a lease to own agreement in 2001 and purchased the home in 2003, Romero moved out of the house in 2005 and leased out the home in 2006, Romero moved back into the home in 2006, and Romero moved out of the house in 2009 and leased it out until 2016. Jasalyn stated in her unsworn declaration that she knows "that Kilz is used to kill and restrain mold" and that "the majority of the Home had been painted with Kilz paint as it presented a thick, glossy tacky like finish on the wall and wood detailing." In her deposition, Jasalyn stated "the entire interior of the home except for the powder room, only the wood around the door and the door itself, were painted with white Kilz paint" and explained that Kilz paint "is a nonporous paint once it settles" and "pretty much kills the elimination of any mold exposure, wet condition." Jared testified in his deposition that he thought "the whole house was painted with Kilz" and that Romero had left a can of Kilz paint in the garage and also under a sink.

The summary judgment evidence raises an inference that Romero knew of water damage to the home, water penetration issues, the repairs to the bay window in the kitchen area, and of the presence of mold. The summary judgment evidence concerning the attendant circumstances calls into question the credibility of Romero's testimony that he had no knowledge of the issues with the home. Because a fact issue exists as to whether Romero knew of the defects, summary

judgment as to all of the Douets' claims was improper unless the "as is" clause in the contract is enforceable or unless Ferguson's inspection report informed the Douets of all the alleged misrepresentations by Romero.

2. "As is" clause

"A buyer who purchases property 'as is' chooses 'to rely entirely upon his own determination' of the property's value and condition without any assurances from the seller." *Williams v. Dardenne*, 345 S.W.3d 118, 123 (Tex. App.—Houston [1st Dist.] 2011, pet. denied) (quoting *Prudential Ins.*, 896 S.W.2d at 161). An "as is" clause generally is enforceable if it was a significant part of the basis of the bargain, rather than an incidental or boilerplate provision, and was entered into by parties of relatively equal bargaining position. *Prudential Ins.*, 896 S.W.2d at 162; *Bynum v. Prudential Residential Servs. Ltd. P'ship*, 129 S.W.3d 781, 789 (Tex. App.—Houston [1st Dist.] 2004, pet. denied). An "as is" clause is not valid and enforceable if it is a product of fraudulent representation or fraudulent concealment by the seller or the seller obstructs the buyer's ability to inspect the property. *Juda v. Marinemax, Inc.*, No. 01-08-00138-CV, 2018 WL 6693586, at *5 (Tex. App.—Houston [1st Dist.] Dec. 20, 2018, no pet.) (mem. op.); *see also Prudential Ins.*, 896 S.W.2d at 161–62 ("A seller cannot have it both ways: he cannot assure the buyer of the condition of a thing to obtain the buyer's agreement to purchase 'as is,' and then disavow the assurance which procured the 'as is' agreement."); *Bynum*, 129 S.W.3d at 788-89; *Pairett v. Gutierrez*, 969 S.W.2d 512, 517 (Tex. App.—Austin 1998, pet. denied) (reversing summary judgment on basis of "as is" clause when there was evidence that seller knew of home's foundation problems but affirmatively represented to buyer that they were not aware of any foundation problems).

To maintain a claim for fraudulent representation, the plaintiff buyer must

show that "the defendant made a material misrepresentation; the defendant was either aware that the representation was false or that he lacked knowledge of its truth; the defendant intended for the plaintiff to rely on the misrepresentation; the plaintiff relied on the misrepresentation; and the plaintiff's reliance caused injury." *Pogue v. Williamson*, 605 S.W.3d 656, 665–66 (Tex. App.—Houston [1st Dist.] 2020, no pet.) (citing *Int'l Bus. Mach. Corp. v. Lufkin Indus., LLC*, 573 S.W.3d 224, 228 (Tex. 2019)). An enforceable "as is" clause negates causation as a matter of law. *Id.* at 665 (citing *Prudential Ins.*, 896 S.W.2d at 161); *see also Williams*, 345 S.W.3d at 124.

The Douets first argue that the "as is" clause in the subject contract is not enforceable because it does not contain "such unambiguous language" as the "as is" clause in the Texas Supreme Court's opinion in *Prudential*. The Douets argue that the "as is" clause here is silent on the issue of reliance. Here, the contract provides that the Douets accept the home as is and the "as is" clause states:

> "As is" means the present condition of the Property with any and all defects and without warranty except for the warranties of title and the warranties in this contract. Buyer's agreement to accept the Property as is under Paragraph 7D(1) or (2) does not preclude the Buyer from inspecting Property under Paragraph 7A, from negotiating repairs or treatments in a subsequent amendment, or from terminating this contract during the Option Period, if any.

Because the clause provides that the Douets accept the home with any and all defects and are not precluded from inspecting the property, we reject the Douets' argument that the clause is silent on the issue of reliance and thus does not conclusively disprove causation.

As concluded above, the summary judgment evidence raises a fact issue as to whether Romero had knowledge of the complained of defects, and thus, that Romero made a false representation. Romero did not argue at the trial court that

the Douets did not rely on his alleged misrepresentations or that he did not intend for the Douets to rely on the alleged misrepresentations. *See Pogue*, 605 S.W.3d at 665–66. Because a fact issue exists as to whether Romero misrepresented the defects and issues with the home, we cannot conclude that the "as is" clause is enforceable as a matter of law. *See id.*

Nevertheless, Romero is entitled to summary judgment if Ferguson's home inspection report appraised the Douets of the issues with the home. Ferguson's inspection report identified "a repair to the living room ceiling"; that the "general condition of the floors appeared to be serviceable at the time of the inspection"; that Ferguson "did not observe any leakage"; and that the "[f]loors showed sign of water damage on wood floors." However, Ferguson's report did not inform the Douets of the presence of mold or of mold remediation, water damage to the powder room/bathroom, water penetration into the home, and the repairs to the kitchen bay window. Because the Douets conducted their own inspection of the property, which informed the Douets of prior water damage to the floors and ceilings of the home, we conclude that summary judgment was proper on the claims asserted by the Douets to the extent they rely on misrepresentations in the SDN concerning defects to the floors and ceilings. *See Birnbaum v. Atwell*, No. 01-14-00556-CV, 2015 WL 4967057, at *8 (Tex. App.—Houston [1st Dist.] Aug. 20, 2015, pet. denied) (mem. op.) ("Texas courts consistently have concluded that a buyer's independent inspection precludes a showing of causation and reliance if it reveals to the buyer the information that the seller allegedly failed to disclose."). Furthermore, while Ferguson's report noted water damage to the floors, it did not note that this damage was caused by water penetration to the home. Thus, we conclude that the trial court erred when it granted summary judgment in favor of Romero on the Douets' causes of action to the extent they are based on Romero's

representations that he was unaware of water penetration; structural repairs to the house; defects to the interior walls, electrical system, and plumbing system; or of any repairs or treatments, made to remediate environmental hazards, including mold, other than routine maintenance.

We sustain the Douets' sixth, seventh, and ninth issues. We also sustain the Douets' eighth issue in part as to all their causes of actions against Romero to the extent they are based on Romero's representations that he was unaware of water penetration; structural repairs to the house; defects to the interior walls, electrical system, and plumbing system; or of any repairs or treatments made to remediate environmental hazards, including mold, other than routine maintenance. We overrule the Douets' eighth issue in part to the extent that the Douets' causes of actions rely on Romero's misrepresentation in the SDN concerning water damage to the first and second floors.

IV. CONCLUSION

The trial court's judgment is affirmed in part and reversed in part, and we remand to the trial court for further proceedings.

/s/ Margaret "Meg" Poissant
Justice

Panel consists of Justices Wise, Poissant, and Wilson.