Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00789-CV

Robert **TYSON**, Carl and Kathy Taylor, Linda and Ron Tetrick, and Ruthie Nilson,
Appellants

v.

Robert N. **FREEMAN** II, as Principal of Medina Livestock Sales Company, Ltd.; Las Aves; Corcat Enterprises, LC; Mary Freeman; and Listo Development, Ltd.,
Appellees

From the 198th Judicial District Court, Bandera County, Texas
Trial Court No. CV-13-0000356
Honorable M. Rex Emerson, Judge Presiding

Opinion by: Patricia O. Alvarez, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Karen Angelini, Justice
Patricia O. Alvarez, Justice

Delivered and Filed: December 6, 2017

AFFIRMED IN PART; REVERSED IN PART AND REMANDED

Appellants appeal several orders granting motions for summary judgment which dispose of all remaining parties and claims in the underlying cause. Appellants generally contend the trial court erred in granting summary judgment in favor of each of the appellees because the appellants raised genuine issues of material fact sufficient to defeat the appellees' motions. Appellants also contend the trial court erred in relying on this court's prior opinion in *Tyson v. Boren*, Nos. 04-14-00824-CV & 04-15-00006-CV, 2015 WL 10382908 (Tex. App.—San Antonio Mar. 2, 2015, no pet.) (mem. op.), to grant summary judgment in favor of Robert N. Freeman II, in his capacity as

principal of Medina Livestock Sales Company, Ltd. Finally, Appellants complain the trial court erred in denying their request for findings of fact and conclusions of law. We reverse the trial court's order granting summary judgment in favor of Robert N. Freeman II, in his capacity as principal of Medina Livestock Sales Company, Ltd., and affirm the orders granting summary judgment in favor of the other appellees.

BACKGROUND[1]

Appellants filed the underlying petition alleging they are leaseholders who signed lifetime leases of lots in a senior citizen retirement community originally called "Las Aves Retreat," where they could park an RV or motor home. They entered into the leases with Medina Livestock Sales Co., Ltd., a Texas limited partnership. Medina Ltd. sold Las Aves Retreat to El Viaje Retreat, LLC, which took over the leases. El Viaje LLC subsequently declared bankruptcy, and a bankruptcy judge ruled the appellants' leases were not enforceable and that El Viaje LLC could terminate the leases. Based on this ruling, El Viaje LLC sent the appellants letters terminating their leases.

Appellants initially sued Robert N. Freeman II, both individually and as principal of Medina Ltd. They also sued two other individuals involved in the "initial management" of Las Aves Retreat. Robert and the two individuals filed motions for summary judgment, which the trial court granted. The orders were subsequently severed from the original cause and affirmed by this court on appeal. *Id.* at *1. Our prior opinion noted, however, that Robert "moved for summary judgment on the individual claims against him." *Id.* We alternately described the only pending claims remaining in the original cause as "those against Freeman in his capacity as 'principal' of [Medina Ltd.]" and as the "claims against Medina Ltd." *Id.* at *1, *5 n.2.

[1] The general factual background is taken from this court's prior opinion in *Tyson*, 2015 WL 10382908, at *1–2.

After our opinion issued, the appellants amended their pleading to add additional defendants, including Las Aves (the limited partner of Medina Ltd.), Corcat Enterprises, LC (the general partner of Medina Ltd.), Mary Freeman (Robert's wife), and Listo Corporation, Ltd. (an entity to which Medina Ltd. transferred the note it received from its sale of the Las Aves Retreat to El Viaje LLC). In their amended pleading, the appellants asserted claims for DTPA violations, common law fraud, statutory fraud, fraudulent inducement, negligent misrepresentation, negligence, gross negligence, and fraudulent transfer. The amended pleading also contained alter ego allegations.[2]

Robert filed a second motion for summary judgment asserting the appellants' claims against him were barred as a matter of law by the doctrines of (1) law of the case, (2) res judicata, and (3) collateral estoppel. The other appellees filed no evidence motions for summary judgment specifically challenging each separate element of each of the appellants' claims. The trial court signed separate orders granting each Appellees' motion. Each order contained identical language stating, "Defendant [individual name]'s No-Evidence Motion for Summary Judgment is hereby GRANTED." The appellants appeal.

STANDARD OF REVIEW

"We review a trial court's order granting summary judgment de novo . . . ." *Cmty. Health Sys. Prof'l Servs. Corp. v. Hansen*, 525 S.W.3d 671, 680 (Tex. 2017). "A [no evidence] motion for summary judgment must be granted if: (1) the moving party asserts that there is no evidence of one or more specified elements of a claim or defense on which the adverse party would have the burden of proof at trial; and (2) the respondent [fails to produce more than a scintilla of]

[2] "Alter ego, or piercing the corporate veil, is not an independent cause of action, but is instead a means of imposing liability for an underlying cause of action." *Dodd v. Savino*, 426 S.W.3d 275, 291 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

summary judgment evidence raising a genuine issue of material fact on those elements." *Sudan v. Sudan*, 199 S.W.3d 291, 292 (Tex. 2006); *accord Medistar Corp. v. Schmidt*, 267 S.W.3d 150, 157 (Tex. App.—San Antonio 2008, pet. denied). To prevail on a traditional motion for summary judgment, the movant must show "there is no genuine issue as to any material fact and the [movant] is entitled to judgment as a matter of law." TEX. R. CIV. P. 166a(c); *accord Nixon v. Mr. Prop. Mgmt. Co., Inc.*, 690 S.W.2d 546, 548 (Tex. 1985). In reviewing a summary judgment, we take as true all evidence favorable to the nonmovant and indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Cmty. Health Sys. Prof'l Servs. Corp.*, 525 S.W.3d at 680.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

One of the issues the appellants raise on appeal is that the trial court erred in denying their request for findings of fact and conclusions of law. The Texas Supreme Court, however, has held "'findings of fact and conclusions of law have no place in a summary judgment proceeding.'" *IKB Indus. (Nigeria) Ltd. v. Pro-Line Corp.*, 938 S.W.2d 440, 441 (Tex. 1997) (quoting *Linwood v. NCNB Tex.*, 885 S.W.2d 102, 103 (Tex. 1994)). "The reason findings and conclusions 'have no place' in a summary judgment proceeding is that for summary judgment to be rendered, there cannot be a 'genuine issue as to any material fact,' and the legal grounds are limited to those stated in the motion and response." *Id*. (citation omitted). "In other words, if summary judgment is proper, there are no facts to find, and the legal conclusions have already been stated in the motion and response." *Id*. Accordingly, the trial court did not err in denying Appellants' request for findings of fact and conclusions of law. *See id.*

TRADITIONAL SUMMARY JUDGMENT IN FAVOR OF ROBERT

As previously noted, unlike the no-evidence motions filed by the other appellees, Robert filed a traditional motion for summary judgment asserting the appellants' claims against him were barred as a matter of law by the doctrines of (1) law of the case, (2) res judicata, and (3) collateral

estoppel. *Cf.* TEX. R. CIV. P. 166a(i) (providing a no-evidence motion "must state the elements as to which there is no evidence"). Although the trial court's order references the "Second Motion for Summary Judgment" filed by Robert, the decretal portion of the order states in pertinent part as follows:

> It is therefore, **ORDERED** that –
>
> (1) Defendant Robert N. Freeman, II's No-Evidence Motion for Summary Judgment is hereby **GRANTED.**

Thus, the trial court's order grants a no-evidence motion for summary judgment in favor of Robert but does not address Robert's traditional motion. Because Robert did not file a no-evidence motion for summary judgment, however, the trial court erred in granting summary judgment in Robert's favor on that ground. *See Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 204 (Tex. 2002) (reiterating that a trial court may not grant summary judgment on a ground that was not presented to the trial court); *Stiles v. Resolution Trust Corp.*, 867 S.W.2d 24, 26 (Tex. 1993) ("[A] summary judgment cannot be affirmed on grounds not expressly set out in the motion or response."); *City of Hous. v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 677 (Tex. 1979) (stating that the grounds for summary judgment must be presented in the motion for summary judgment).

NO-EVIDENCE SUMMARY JUDGMENTS IN FAVOR OF REMAINING APPELLEES

The remaining appellees filed no-evidence motions for summary judgment specifically listing and challenging each element of each of the appellants' claims.

In response to the appellees' no-evidence motions for summary judgment, the appellants, as the nonmovants, had the "burden to specifically identify the summary judgment evidence that supported their claims." *See BP Am. Prod. Co. v. Zaffirini*, 419 S.W.3d 485, 513 (Tex. App.—San Antonio 2013, pet. denied). General references to evidence attached to a response that do not specifically identify the element of the claim to which that evidence relates and how it raises a

genuine issue of material fact are insufficient. *See id.* at 512 (noting response must "specifically identif[y] the portion or portions of the generally referenced exhibits that provide[] supporting evidence" and must provide an "explanation of how the evidence within [a] listed exhibit raise[s] a genuine issue of material fact"); *Arredondo v. Rodriguez*, 198 S.W.3d 236, 238–39 (Tex. App.—San Antonio 2006, no pet.) ("Attaching entire documents and depositions to a . . . response and referencing them only generally does not relieve the party of pointing out to the trial court where in the documents the issues set forth in the . . . response are raised."); *San Saba Energy, L.P. v. Crawford*, 171 S.W.3d 323, 330 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (noting a "summary-judgment response needs to point out evidence that raises a genuine issue of fact as to the challenged elements").

In this case, the appellants' response with regard to their claims for common law fraud, statutory fraud, fraudulent inducement, negligent misrepresentation, negligence, and gross negligence contains no references to any of the evidence attached to the response. As a result, the response does not "specifically identify the summary judgment evidence that supported [those] claims." *See Zaffirini*, 419 S.W.3d at 513. In addition, with regard to appellants' DTPA and fraudulent transfer claims, the response contains only general references to evidence and does not specifically identify the elements of those claims to which the evidence relates.[3] *See id.* at 512; *Arredondo*, 198 S.W.3d at 238–39. Accordingly, the appellants failed to meet their burden to raise a genuine issue of material fact on each element of each of their claims. *See Zaffirini*, 419 S.W.3d at 513; *Arredondo*, 198 S.W.3d at 238–39. Therefore, the trial court properly granted the no evidence motions in favor of the remaining appellees.

[3] The response with regard to the fraudulent transfer claim also contains many allegations and factual statements that are not supported by any of the evidence attached to the response. "A mere . . . response to the summary judgment motion does not satisfy [a party's] burden of coming forward with sufficient evidence to prevent summary judgment." *Am. Petrofina, Inc. v. Allen*, 887 S.W.2d 829, 830 (Tex. 1994).

CONCLUSION

The order granting a no-evidence motion for summary judgment in favor of Robert in his capacity as principal of Medina Ltd. is reversed, and the claims against him in that capacity are remanded for further proceedings. The orders granting no evidence motions for summary judgment in favor of the remaining appellees are affirmed.

Patricia O. Alvarez, Justice