# Fourth Court of Appeals
San Antonio, Texas

## MEMORANDUM OPINION

No. 04-19-00592-CV

In the **ESTATE OF** Harold G. **SCOTT**, Jr., Deceased

From the Probate Court No. 1, Bexar County, Texas
Trial Court No. 2013-PC-4111
Honorable Oscar J. Kazen, Judge Presiding

Opinion by: Rebeca C. Martinez, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Rebeca C. Martinez, Justice
Irene Rios, Justice

Delivered and Filed: May 27, 2020

REVERSED AND RENDERED

Appellant Deborah D. Burge ("Burge") appeals the trial court's order granting Principal Life Insurance Company's motion for summary judgment and denying Burge's competing motion for summary judgment. We reverse the judgment of the trial court and render judgment in favor of Burge.

### BACKGROUND

The underlying facts are undisputed. On May 30, 1992, Harold and Emily Scott invested $209,483.23 in an annuity with Principal Life Insurance Company ("Principal"). Pursuant to the annuity contract, Principal was to pay Emily and Harold $1,783.49 per month for a minimum period of 120 months and as long thereafter as both were alive. Upon the death of either Harold

or Emily, Principal was to pay the surviving spouse $1,783.49 per month through April 30, 2002, and, after April 30, 2002, at the rate of $891.75 for the remainder of the surviving spouse's life.

Emily died on October 12, 2003. However, Principal continued to pay Harold $1,783.49 per month without reduction until Harold's death on December 9, 2013.[1] On January 10, 2014, Principal discovered the overpayments made to Harold and sought reimbursement from Burge, the independent executrix of Harold's estate. Burge refused, and this suit ensued.

On April 19, 2016, Principal filed its original petition, asserting claims for breach of contract and fraud by non-disclosure. On December 11, 2017, Principal amended its petition to add a claim for money had and received. In total, Principal sought to recover $123,826.34, which represents the total amount that was allegedly overpaid to Harold from October 30, 2003 to November 30, 2013.

Principal and Burge filed competing motions for traditional summary judgment. Without specifying the grounds for its ruling, the trial court granted Principal's motion and denied Burge's motion. Subsequently, the trial court signed its final judgment, awarding Principal $123,826.34 in damages and $15,000 in attorneys' fees. Burge appeals.

**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). Summary judgment is proper when the movant has shown there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Id.* at 681. "On cross-motions for summary judgment, each party bears the burden of establishing that it is entitled to judgment as a matter of law." *City of*

[1] According to Principal, on December 7, 2001, the monthly payment amount increased from $1,783.49 to $2,029.93 due to the application of a demutualization credit in the amount of $20,405.50. This demutualization credit added an additional $246.44 to the $1,783.49 monthly payment amount.

*Richardson v. Oncor Elec. Delivery Co.*, 539 S.W.3d 252, 259 (Tex. 2018). "When the trial court grants one motion and denies the other, the reviewing court must determine all questions presented and render the judgment that the trial court should have rendered." *Id.*

## BREACH OF CONTRACT

Burge argues the trial court erred in denying her motion for summary judgment because she negated an element in Principal's claim for breach of contract. *See Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996) (stating a defendant may obtain summary judgment by negating at least one element in the plaintiff's cause of action). Burge argues Principal cannot show Harold breached the annuity contract. We agree.

To prevail on a claim for breach of contract, Principal must establish: (1) the existence of a valid contract; (2) that Principal performed or tendered performance; (3) that Harold breached the contract; and (4) that Principal was damaged as a result of the breach. *See Graves v. Logan*, 404 S.W.3d 582, 584 (Tex. App.—Houston [1st Dist.] 2010, no pet.). The parties dispute whether Harold breached the annuity contract. Principal argues the annuity contract imposed (i) an implied obligation on Harold to notify Principal of Emily's death and (ii) an implied obligation to return money Harold received in excess of the stated contract amount. Principal argues that Harold's failure to comply with these implied obligations amounted to a breach of contract.

The contract between Principal and the Scotts provides:

> In this Contract—YOU OR YOUR is Harold G. Scott Jr.
> JOINT PAYEE is Emily L. Scott
> WE, OUR OR US means the Principal Mutual Life Insurance Company
>
> The proceeds of Annuity No. [redacted] have been left with us. We will pay you and the Joint Payee monthly payments of $1,783.49 for a minimum period of 120 months and as long thereafter as you both shall live beginning on May 30, 1992. If only one lives, we will pay the survivor $1,783.49 each month through April 30, 2002, and at the rate of $891.75 beginning May 30, 2002 and thereafter for the lifetime of the survivor.

> If you and the Joint Payee both die before the end of the Minimum Period we will pay the commuted value of the remaining payments, calculated as of the date of death of the last to die and at the rate of 6.75 percent compound interest per annum, to the Contingent Payee as provided on the following page.
>
> Payments will stop immediately upon the death of the last survivor of you and the Joint Payee if the death occurs after the Minimum Period.
>
> If we have used the wrong age for either you or the Joint Payee to calculate the payments due under this contract, payments will be adjusted to the correct amount for the correct age.
>
> On each anniversary of the date of issue of this contract, we will pay you the share of our surplus earnings arising from this contract.

Attached to the contract is a "supplementary contract," which provides: "Except as provided in this contract, no one has the right to change or modify any of its provisions . . . ."

Neither party argues the annuity contract is ambiguous. "The construction of an unambiguous contract is a question of law for the court, which we may consider under a de novo standard of review." *Tawes v. Barnes*, 340 S.W.3d 419, 425 (Tex. 2011). When construing an unambiguous contract, our primary concern "is to ascertain the true intentions of the parties as expressed in the instrument." *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). To achieve this objective, we must "examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless." *Id.* (emphasis omitted). "No single provision taken alone will be given controlling effect; rather, all the provisions must be considered with reference to the whole instrument." *Id.* We will enforce an unambiguous contract as written. *Sun Oil Co. v. Madeley*, 626 S.W.2d 726, 728 (Tex. 1981).

As a general rule, we look only to the written contract to discern the obligations of the contracting parties. *Universal Health Servs., Inc. v. Renaissance Women's Grp., P.A.*, 121 S.W.3d 742, 747 (Tex. 2003). Implied covenants are not favored in Texas law and, therefore, courts imply covenants in written contracts only in rare circumstances. *See, e.g.*, *id.* at 748 (advising courts to

be “cautious” when implying covenants); *Danciger Oil & Ref. Co. of Tex. v. Powell*, 154 S.W.2d 632, 635 (Tex. 1941) (“[W]hen parties reduce their agreements to writing, the written instrument is presumed to embody their entire contract . . . .”); *Jones v. Cooper Indus., Inc.*, 938 S.W.2d 118, 124 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (“Implied covenants are not favored, and courts will not lightly imply additional covenants enlarging the terms of a contract.”). A court should not read into the contract additional provisions unless it is necessary to effectuate the parties’ intent as disclosed by the contract as a whole. *Danciger Oil*, 154 S.W.2d at 635. “An implied covenant must rest entirely on the presumed intention of the parties as gathered from the terms as actually expressed in the written instrument itself, and it must appear that it was so clearly within the contemplation of the parties that they deemed it unnecessary to express it . . . .” *Id.* “It is not enough to say that an implied covenant is necessary in order to make the contract fair, or that without such a covenant it would be improvident or unwise, or that the contract would operate unjustly.” *Id.*

In determining whether to imply a term into a written contract, we must examine the contract’s express terms. *See HECI Expl. Co. v. Neel*, 982 S.W.2d 881, 888 (Tex. 1998). The annuity contract’s express terms do not evidence an intent to impose (i) an implied obligation on Harold to notify Principal of Emily’s death or (ii) an implied obligation to return money Harold received in excess of the stated contract amount. In reviewing the entirety of the annuity contract, the only express affirmative obligations in the contract are imposed on Principal. Nowhere in the contract’s express language is an affirmative obligation imposed on the Scotts. *See Kingsley v. W. Nat. Gas Co.*, 393 S.W.2d 345, 353 (Tex. App.—Houston 1965, writ ref’d n.r.e.) (declining to impose an implied covenant where the contract made no reference, suggestion, or otherwise contained any language which could give rise to the implied covenant at issue).

The annuity contract did no more than require Principal to pay the Scotts varying amounts of money each month under a variety of specifically enumerated circumstances. *See Hull v. Freedman*, 383 S.W.2d 236, 238 (Tex. App.—Fort Worth 1964, writ ref'd n.r.e.) (finding the "contract in question placed no duty upon the appellants" because it "did no more than provide the explanation for the payments to the appellants"); *see also Mobil Producing Tex. & N.M., Inc. v. Cantor*, 93 S.W.3d 916, 919–20 (Tex. App.—Corpus Christi 2002, no pet.) (finding that, although the contract set forth appellants' revenue share, that alone did not impose an obligation on appellants to take any action to suspend or return payments received in excess of the contract amount). No contract term expressly required the Scotts to act, while at least one provision terminated payments without the Scotts giving any notice. The contract's third paragraph provides that, after the minimum payout period, "payments will stop immediately upon the death of the last survivor of you or the Joint Payee." Because the contract provided that payments would stop immediately upon death, an implied term requiring notification was unnecessary to effectuate the contract's payment terms. *Cf. Rice v. Metro. Life Ins. Co.*, 324 S.W.3d 660, 669–70 (Tex. App.—Fort Worth 2010, no pet.) (concluding an insurance company did not have an implied obligation to notify the insured when its insurance coverage ended because the contract explicitly described when the insured's coverage would terminate; thus, the implied term was not necessary to effectuate the contract's purpose).

Further, the contract expressly allowed Principal to correct prior payouts made in error. Paragraph four of the contract provides, "If we have used the wrong age for either you or the Joint Payee to calculate the payments due under this contract, payments will be adjusted to the correct amount for the correct age." This language would not have imparted on the Scotts the impression that they had any role to play—let alone an implied, affirmative obligation to detect and to notify Principal—of any payment errors. *See Neel*, 982 S.W.2d at 888 ("A covenant will not be implied

unless it appears from the express terms of the contract that 'it was so clearly within the contemplation of the parties that they deemed it unnecessary to express it' . . . ." (quoting *Danciger Oil*, 154 S.W.2d at 635)).

Finally, the provision in the supplementary contract that neither Principal nor the Scotts have "the right to change or modify any of [the contract's] provisions" expresses the parties' intent to hew to the precise language of the contract. *See Birnbaum v. Swepi LP*, 48 S.W.3d 254, 257 (Tex. App.—San Antonio 2001, pet. denied) (giving contract terms their plain, ordinary, and generally accepted meaning); *Montoya v. Nichirin-Flex, U.S.A., Inc.*, 417 S.W.3d 507, 512 (Tex. App.—El Paso 2013, no pet.) (defining "modify" to mean "to change somewhat the form or qualities of; alter partially" (quoting WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 1236 (2003))). Inserting the additional terms at issue into the annuity contract would "change or modify" the contract's provisions and, thus, contradict this express provision. *See Rice*, 324 S.W.3d at 669 ("[I]t is typically not proper for [the court] to imply terms that contradict a contract's express language." (citing *Universal Health Servs.*, 121 S.W.3d at 747)).

In sum, the annuity contract, taken as a whole, does not evidence an intent to impose an implied obligation on Harold to notify Principal of Emily's death or an implied obligation to return money Harold received in excess of the stated contract amount. *See Danciger Oil*, 154 S.W.2d at 635 ("An implied covenant must rest entirely on the presumed intention of the parties as gathered from the terms as actually expressed in the written instrument itself . . . ."). Moreover, it is undisputed that this was Principal's contract. "In Texas, a writing is generally construed most strictly against its author and in such a manner as to reach a reasonable result consistent with the apparent intent of the parties." *ASI Techs., Inc. v. Johnson Equip. Co.*, 75 S.W.3d 545, 548 (Tex. App.—San Antonio 2002, pet. denied) (citation omitted). Principal, a sophisticated commercial enterprise, did not include express provisions requiring Harold to notify Principal of Emily's death

or to return money received in excess of the stated contract amount. The annuity contract, as written, does not evidence an intent to imply these obligations. *See Tenneco Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 646 (Tex. 1996) ("We have long held that courts [may] not rewrite agreements to insert provisions parties could have included or to imply restraints for which they have not bargained.").

Because we conclude the annuity contract, taken as a whole, does not support imposition of an implied obligation on Harold to notify Principal of Emily's death or an implied obligation to return money Harold received in excess of the stated contract amount, Principal cannot show Harold breached the annuity contract. *See Mobil Producing*, 93 S.W.3d at 922 ("The mere receipt of money they were not entitled to does not constitute a breach [of contract]."). Thus, Principal's breach of contract claim fails as a matter of law, and the trial court erred in granting Principal's motion for summary judgment and in denying Burge's motion for summary judgment on this claim.

**MONEY HAD AND RECEIVED**

Burge argues the trial court erred in denying her motion for summary judgment because she conclusively proved Principal's claim for money had and received is barred by limitations. *See Walker*, 924 S.W.2d at 377 (stating a defendant may obtain summary judgment by conclusively proving an affirmative defense). We agree.

Money had and received is an equitable doctrine designed to prevent unjust enrichment. *London v. London*, 192 S.W.3d 6, 13 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). To prevail on a claim for money had and received, the plaintiff need only prove that the defendant holds money which in equity and good conscience belongs to the plaintiff. *Id.*

While Principal argues this claim is governed by a four-year statute of limitations, several of our sister courts have held that a two-year statute of limitations under section 16.003 of the

Texas Civil Practice and Remedies Code applies. *See, e.g.*, *Cooke v. Karlseng*, No. 05-18-00206-CV, 2019 WL 3812060, at *5 n.7 (Tex. App.—Dallas Aug. 14, 2019, pet. filed) (mem. op.); *Peregrine Oil & Gas, LP v. HRB Oil & Gas, Ltd.*, No. 01-17-00180-CV, 2018 WL 4137026, at *9 (Tex. App.—Houston [1st Dist.] Aug. 30, 2018, pet. denied) (mem. op.); *Friddle v. Fisher*, 378 S.W.3d 475, 483 (Tex. App.—Texarkana 2012, pet. denied); *Merry Homes, Inc. v. Luc Dao*, 359 S.W.3d 881, 884 (Tex. App.—Houston [14th Dist.] 2012, no pet.); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a). Supporting these decisions, the Texas Supreme Court "categorically" held that unjust enrichment claims are governed by a two-year statute of limitations under section 16.003 of the Texas Civil Practice and Remedies Code. *See Elledge v. Friberg–Cooper Water Supply Corp.*, 240 S.W.3d 869, 870–71 (Tex. 2007) (per curiam) (applying the two-year statute of limitations under section 16.003 "to actions for 'taking or detaining the personal property of another' as applicable to extra-contractual actions"). Because money had and received is an equitable doctrine designed to prevent unjust enrichment, we follow the lead of our sister courts and hold the proper statute of limitations for such a claim is the two-year statute of limitations applicable to claims for unjust enrichment. *See, e.g.*, *Merry Homes*, 359 S.W.3d at 884.

Principal argues that, under the discovery rule, its claim for money had and received accrued on January 10, 2014, which is the date Principal alleges it first discovered the overpayments made to Harold. Assuming without deciding the discovery rule applied to toll the limitations period until January 10, 2014, we hold that Principal's action is barred because it is undisputed Principal failed to file its claim within two years of that date. Therefore, the trial court erred in granting Principal's motion for summary judgment and in denying Burge's motion for summary judgment on Principal's claim for money had and received.

**FRAUD BY NON-DISCLOSURE**

Burge argues the trial court erred in denying her motion for summary judgment because she negated certain elements of Principal's claim of fraud by non-disclosure. Specifically, Burge argues Principal cannot show Harold had a duty to disclose Emily's death and that Principal did not have an equal opportunity to discover Emily's death.

To establish fraud by non-disclosure, Principal must prove: (1) Harold deliberately failed to disclose material facts; (2) Harold had a duty to disclose such facts to Principal; (3) Principal was ignorant of the facts and did not have an equal opportunity to discover them; (4) by failing to disclose the facts, Harold intended to induce Principal to act or refrain from acting; and (5) Principal relied on the non-disclosure, which resulted in injury. *See Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC*, 572 S.W.3d 213, 219–20 (Tex. 2019); *E-Learning LLC v. AT&T Corp.*, 517 S.W.3d 849, 862 (Tex. App.—San Antonio 2017, no pet.).

Principal had an equal opportunity to discover Emily's death. Principal had internal procedures in place to discover this very type of information. Angela Essick, Principal's corporate representative, testified that between 2001 and the present, Principal utilized a third-party company and the Social Security Master Index to provide it with a list of names and social security numbers of the deceased on a quarterly basis. Principal would compare these names and social security numbers with those of its annuitants. Principal failed to discover Emily's death through these channels because it never obtained Emily's social security number. Principal cannot rely on its internal oversight to claim it did not have an equal opportunity to discover Emily's death. *Cf. Bradford v. Vento*, 48 S.W.3d 749, 756 (Tex. 2001) (determining a party had an equal opportunity to discover the alleged non-disclosed information because it was the type of information the party was expected to discover through inquiry). Moreover, as summary judgment evidence, Burge provided the City of San Antonio's public vital records index, which included Emily's death

record; Emily's obituary, which was published in the San Antonio Express News on October 17, 2003; and court records that indicated Emily's will was admitted for probate on November 17, 2003. These documents were publicly available and readily accessible to Principal. *See Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC*, 565 S.W.3d 280, 293–94 (Tex. App.—Dallas 2017) (considering whether a party could have discovered the non-disclosed information by reviewing readily available documents), *aff'd in part, rev'd in part on other grounds*, 572 S.W.3d 213 (Tex. 2019). Because the allegedly non-disclosed information was publicly available and readily accessible to Principal, Principal had an equal opportunity to discover it. *See Holland v. Thompson*, 338 S.W.3d 586, 598 (Tex. App.—El Paso 2010, pet. denied) (Texas Railroad Commission's public records); *see also Rawhide Mesa-Partners, Ltd. v. Brown McCarroll, L.L.P.*, 344 S.W.3d 56, 62 (Tex. App.—Eastland 2011, no pet.) (bankruptcy filing).

Because Burge negated at least one element of Principal's fraud by non-disclosure claim, the claim fails as a matter of law. *See Walker*, 924 S.W.2d at 377 (a defendant may obtain summary judgment by negating at least one element in the plaintiff's cause of action). Accordingly, the trial court erred in granting Principal's motion for summary judgment and in denying Burge's motion for summary judgment on this claim.

## CONCLUSION

Having sustained Burges's three issues on appeal, we reverse the trial court's judgment and render judgment that Principal Life Insurance Company take nothing on its claims for breach of contract, money had and received, and fraud by non-disclosure.[2]

Rebeca C. Martinez, Justice

[2] In a fourth issue, Burge contends the trial court erred in denying its motion for summary judgment because it conclusively established accord and satisfaction as an affirmative defense. We need not address this issue because Burge's first three issues are dispositive. *See* TEX. R. APP. P. 47.1.