Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-21-00285-CV

Alma Maldonado **GONZALEZ**,
Appellant

v.

VANTAGE BANK TEXAS,
Appellee

From the 45th Judicial District Court, Bexar County, Texas
Trial Court No. 2020-CI-23070
Honorable Sid L. Harle, Judge Presiding

Opinion by: Liza A. Rodriguez, Justice

Sitting: Patricia O. Alvarez, Justice
Liza A. Rodriguez, Justice
Lori I. Valenzuela, Justice

Delivered and Filed: October 26, 2022

AFFIRMED

Alma Maldonado Gonzalez ("Gonzalez") brought claims for breach of contract and negligence against Vantage Bank Texas ("Vantage Bank"), alleging the bank improperly transferred funds from her account to another customer's account. The trial court granted summary judgment in favor of Vantage Bank, rendered a take-nothing judgment on Gonzalez's claims, and awarded attorney's fees, costs, and expenses to Vantage Bank. We affirm.[1]

[1]According to appellant's brief, Gonzalez passed away shortly after the trial court signed the final judgment. Attached to appellant's brief is an affidavit from appellant's niece, Maria Gabriela Gonzalez Martinez, stating that Gonzalez

BACKGROUND

On November 30, 2020, Gonzalez sued Vantage Bank, alleging that $1,301,651.21 was improperly transferred from her certificate of deposit ("CD") account to an account belonging to her friend, Lillie Ramirez. Gonzalez alleged that she did not give her permission or instruct the bank to transfer her funds to Ramirez's account. Gonzalez further alleged that the transfer had taken place on March 19, 2009, more than eleven years before she filed suit. According to Gonzalez's second amended petition, the improper transfer of funds constituted a breach of the parties' deposit agreement and negligence.

Vantage Bank filed an answer generally denying Gonzalez's allegations and raising multiple defenses, including limitations. Vantage Bank counterclaimed, alleging Gonzalez "knowingly [brought] time-barred claims" and asking for recovery of its reasonable and necessary attorney's fees, costs, and expenses.

Vantage Bank filed a motion for traditional summary judgment. The trial court denied the motion but indicated it could be re-urged if additional evidence became available. Thereafter, Vantage Bank filed a second motion for traditional summary judgment.[2] In this motion, Vantage Bank presented multiple defenses, including that Gonzalez's claims were barred by limitations and section 4.406 of the Texas Business and Commerce Code. Vantage Bank further argued it was entitled to recover its reasonable and necessary attorney's fees, costs, and expenses. Vantage Bank attached evidence to its summary judgment motion, including affidavits from a bank employee, account statements, deposit agreements, and its attorney's billing records.

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passed away on June 20, 2021. In accordance with the Texas Rules of Appellate Procedure, we adjudicate this appeal as if all parties were alive. *See* TEX. R. APP. P. 7.1(a)(1) (providing that if a party to a civil case dies after the trial court renders judgment but before the case has been finally disposed of on appeal, the appeal can be perfected, and the appellate court will proceed to adjudicate the appeal as if all parties were alive).

[2]Unless otherwise specified, all references to a summary judgment motion are to Vantage Bank's second motion for traditional summary judgment.

Vantage Bank's summary judgment evidence included two affidavits from Diana Alfaro, a Vantage Bank employee and custodian of records. In her second affidavit, Alfaro testified that Gonzalez had opened a certificate of deposit account in March 2008, which "matured and/or was cashed out in March 2009, and the funds were deposited into an account in the name of a different customer"; that Gonzalez was notified that the funds would be paid to an account ending in "4438"; that Gonzalez did not complain about any transactions from 2009 to 2019; that Vantage Bank's predecessor in interest, Inter National Bank, sent periodic account statements to the address listed on Gonzalez's account; that any allegedly unauthorized transaction would have been on the account statements; that if Gonzalez were to claim that she did not receive an account statement, she could have obtained a copy of it by going online, visiting a bank branch in person, calling the bank, or other means; and that Gonzalez did not contact Inter National Bank or Vantage Bank about such issues.

Vantage Bank's summary judgment evidence also included two account statements from Gonzalez's CD account. The first account statement, dated February 27, 2009, listed the account's maturity date as "03/19/09." The second account statement, dated March 3, 2009, stated: "Below is a summary of your certificate(s) of deposit . . . that will mature on March 19, 2009. You had requested that the principal and interest be transferred to your account 404438[3] at maturity. Please call us prior to 4:00 P.M. (local time) two business days before maturity if you wish to amend these instructions." The subject line of this statement stated it was a "Maturity Notice."

Finally, Vantage Bank's summary judgment evidence included Gonzalez's answers to requests for admissions, in which Gonzalez admitted that Vantage Bank did not prevent her from reviewing her account statements, and that "if a check or other transaction had been improperly

[3]The evidence showed that account 404438 belonged to Gonzalez's friend, Ramirez.

debited from [her] account for an improper amount, [she] could have detected it and notified Vantage Bank."

Gonzalez filed a response to the summary judgment motion, challenging Vantage Bank's defenses, but not challenging Vantage Bank's claim for attorney's fees, costs, and expenses. In an affidavit attached to her response, Gonzalez testified that she did not have access to the Internet and did not use the Internet to access her bank accounts; that when she opened her account with the bank, she "gave it instructions to hold [her] statements"; that the last account statement she received from the bank was the "Maturity Notice" dated March 3, 2009; that she understood this statement to mean that funds from her CD would be transferred into her checking account with the bank; and that she "never saw an April 2009 checking account statement, so [she] had no knowledge that [her] checking account never received the funds."

The trial court granted the summary judgment motion without specifying the ground or grounds for its ruling. In its final judgment, the trial court: (1) ordered Gonzalez to take nothing on her claims; (2) rendered judgment in favor of Vantage Bank on its counterclaims; (3) awarded Vantage Bank $38,745.30 for its reasonable and necessary attorney's fees, costs, and expenses; and (4) awarded Vantage Bank conditional post-judgment and appellate attorney's fees.

On appeal, Gonzalez presents six issues. In issues one through five, Gonzalez challenges each of the defenses presented in the summary judgment motion. In issue six, Gonzalez challenges the $38,745.30 awarded to Vantage Bank for its attorney's fees, costs, and expenses.

STANDARD OF REVIEW

We review an order granting summary judgment de novo. *Lightning Oil Co. v. Anadarko E&P Onshore, LLC*, 520 S.W.3d 39, 45 (Tex. 2017). When reviewing a traditional summary judgment motion, we review the evidence in the light most favorable to the nonmovant, indulge every reasonable inference in favor of the nonmovant, and resolve any doubts against the motion.

Lightning Oil Co., 520 S.W.3d at 45. "Undisputed evidence may be conclusive of the absence of a material fact issue, but only if reasonable people could not differ in their conclusions as to that evidence." *Schlumberger Tech. Corp. v. Pasko*, 544 S.W.3d 830, 833 (Tex. 2018). When, as here, the order granting summary judgment does not specify the basis of the trial court's ruling, we affirm if any of the grounds presented in the summary judgment motion is meritorious. *Lightning Oil Co.*, 520 S.W.3d at 45.

To prevail on a traditional summary judgment motion, the movant must show no genuine issue of material fact exists and it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Lujan v. Navistar, Inc.*, 555 S.W.3d 79, 84 (Tex. 2018). A defendant moving for summary judgment on the defense of limitations bears the burden of conclusively establishing the elements of that defense, which includes conclusively establishing when the cause of action accrued. *Pasko*, 544 S.W.3d at 833-34. When the plaintiff pleads the discovery rule, the defendant moving for summary judgment based on limitations bears the additional burden of negating the rule. *Id*. at 834. "Defendants may do this by either conclusively establishing that (1) the discovery rule does not apply, or (2) if the rule applies, the summary judgment evidence negates it." *Id*.

LIMITATIONS DEFENSE

In her second issue, Gonzalez argues the trial court could not have properly granted summary judgment based on limitations because Vantage Bank failed to conclusively establish that the discovery rule did not apply or, if it applied, that the summary judgment evidence negated it. Gonzalez further argues that the "absence of evidence of account statements from [her] CD account after March 19, 2009" "prevents the conclusion as a matter of law that her claim against the Bank is barred by limitations."

"Statutes of limitations are intended to compel plaintiffs to assert their claims within a reasonable period while the evidence is fresh in the minds of the parties and the witnesses."

Wagner & Brown, Ltd. v. Horwood, 58 S.W.3d 732, 734 (Tex. 2001). The limitations period begins to run when a cause of action accrues. *Barker v. Eckman*, 213 S.W.3d 306, 311 (Tex. 2006). Ordinarily, a cause of action accrues when a party has been injured by another's actions or omissions. *Id*.

To establish a limitations defense, a defendant must: (1) conclusively establish when the cause of action accrued, and (2) negate the discovery rule if it applies, and has been pleaded or otherwise raised, by proving there is no genuine issue of material fact about when the plaintiff discovered, or in the exercise of reasonable diligence should have discovered the nature of her injury. *KPMG Peat Marwick v. Harrison Cty. Housing Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). "The discovery rule is a limited exception to strict compliance with the statute of limitations." *Computer Assoc. Int'l v. Altai, Inc.*, 918 S.W.2d 453, 457 (Tex. 1996). When applicable, the discovery rule defers the accrual of a cause of action until the injury was or could have reasonably been discovered. *Valdez v. Hollenbeck*, 465 S.W.3d 217, 229 (Tex. 2015).

Determining whether the discovery rule applies to defer the accrual of a cause of action calls for a categorial, rather than a fact-specific, approach. *See id.* The inquiry is whether the injury in question is the type of injury that generally is discoverable by the exercise of reasonable diligence. *HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 886 (Tex. 1998).

Did Gonzalez waive her discovery rule complaint?

According to Vantage Bank, Gonzalez has waived her discovery rule complaint because she did not allege the application of the discovery rule in her petition. It is well-established that a defendant moving for summary judgment based on limitations is only required to negate the discovery rule when the plaintiff has pleaded it. *See Via Net v. TIG Ins. Co.*, 211 S.W.3d 310, 313 (Tex. 2006). Notwithstanding this rule, when a plaintiff asserts the discovery rule for the first time in her summary judgment response, the defendant must object to the plaintiff's failure to plead the

discovery rule in order to preserve any error. *See id*. Furthermore, when the defendant does not object and argues that the discovery rule does not apply, the application of the discovery rule is tried by consent. *See id*.

Here, the record shows that Vantage Bank did not object to Gonzalez's failure to plead the discovery rule in her petition. In addition, the record shows that the application of the discovery rule was tried by consent. Gonzalez filed responses to both of Vantage Bank's summary judgment motions. In each response, Gonzalez argued the discovery rule applied to defer the accrual of her claims. In turn, Vantage Bank argued in its summary judgment motion and a reply that the discovery rule did not apply to Gonzalez's claims. We conclude Gonzalez's discovery rule complaint was preserved for appellate review.

Did the discovery rule apply to Gonzalez's claims?

To determine if the discovery rule applies to a plaintiff's claims, courts apply a two-prong test: (1) the nature of the injury must be inherently undiscoverable, and (2) the evidence of the injury must be objectively verifiable. *S.V. v. R.V.*, 933 S.W.2d 1, 6 (Tex. 1996). If either prong of the test fails, the discovery rule does not apply. *See id*. at 6-7. "Inherently undiscoverable does not mean that a particular plaintiff did not discover his or her particular injury within the applicable limitations period." *Horwood*, 58 S.W.3d at 735. "Inherently undiscoverable" means "the existence of the injury is not ordinarily discoverable, even though due diligence has been used." *Altai*, 918 S.W.2d at 456.

Gonzalez's suit complains about the alleged improper transfer of funds from her bank account to another customer's bank account. Texas appellate courts have held that the unauthorized withdrawal of funds from a customer's bank account is not the type of injury that is unlikely to be discovered during the prescribed limitations period. *See Ahmed v. Bank of Whittier, N.A.*, No. 05-21-00058-CV, 2022 WL 1401432, at *5 (Tex. App.—Dallas May 4, 2022, pet. filed)

(concluding defendant bank conclusively negated the discovery rule when plaintiffs' tortious interference and legal malpractice claims were grounded in a commercial paper context and, thus, absent fraud by the bank, the discovery rule did not apply); *Okonkwo v. Washington Mut. Bank, FA*, No. 14-05-00925-CV, 2007 WL 763821, at *7 (Tex. App.—Houston [14th Dist.] March 15, 2007, no pet.) (holding the discovery rule did not apply to excuse a bank customer from performing his duty to discover and report unauthorized transactions involving his bank accounts); *Sw. Bank & Trust Co. v. Bankers Commercial Life Ins. Co.*, 563 S.W.2d 329, 331-32 (Tex. App.—Dallas 1978, writ ref'd n.r.e.) (holding discovery rule did not apply when bank was sued for conversion on a forged endorsement because the bank's negligence was reasonably susceptible to discovery within the prescribed limitations period).

In this case, the evidence showed that the alleged improper transfer of funds occurred on March 19, 2009. In her affidavit, Alfaro testified that Inter National Bank prepared periodic account statements for Gonzalez's CD account and that any unauthorized transactions would have appeared on these account statements. Alfaro also testified that Inter National Bank mailed Gonzalez's account statements to the address listed on her account. In her affidavit, Gonzalez testified that she had received some of these account statements. Gonzalez also testified that she had asked the bank to "hold" her account statements. However, according to Alfaro's affidavit, even if Gonzalez did not receive her account statements in the mail, she had access to them by other means, such as viewing them online, visiting a bank branch, or calling the bank. In her answers to requests for admissions, Gonzalez admitted that the bank did not prevent her from reviewing her account statements, and that from these statements, she could have detected an improper withdrawal of funds from her account. In sum, the undisputed evidence showed that Vantage Bank maintained account statements, that Gonzalez had access to these account statements, and that from these account statements, Gonzalez could have detected an unauthorized

transaction involving her account. Based on the undisputed evidence, reasonable minds could not disagree that had Gonzalez "exercised due diligence, [s]he would certainly have discovered the allegedly unauthorized [transaction] during the statutorily prescribed time frame." *See Okonkwo*, 2007 WL 763821, at *7. Simply put, Gonzalez's injury was the type of injury that was discoverable within the timeframes provided by the statute of limitations.

We conclude that Gonzalez's injury was not, by its nature, inherently undiscoverable. *See Ahmed*, 2022 WL 1401432, at *5; *Okonkwo*, 2007 WL 763821, at *7; *Sw. Bank & Trust Co.*, 563 S.W.2d at 331-32. Therefore, Vantage Bank met its burden to conclusively establish that the discovery rule did not apply to Gonzalez's claims. *See Pasko*, 544 S.W.3d at 834.

Did the evidence conclusively establish that Gonzalez's claims were barred by limitations?

Having determined that Vantage Bank conclusively established that the discovery rule did not apply, we next determine if it conclusively established when Gonzalez's cause of action accrued.

A cause of action accrues when a wrongful act causes some legal injury, even if the fact of injury is not discovered until later and even if all resulting damages have not yet occurred. *Murphy v. Campbell*, 964 S.W.2d 265, 270 (Tex. 1997). The limitations period for breach of contract claims is four years. *Cosgrove v. Cade*, 468 S.W.3d 32, 40 (Tex. 2018); *see* TEX. CIV. PRAC. & REM. CODE § 16.051. The limitations period for negligence claims is two years. *KPMG Peat Marwick*, 988 S.W.2d at 750; *see* TEX. CIV. PRAC. & REM. CODE § 16.003.

Contrary to Gonzalez's argument, the "absence of evidence of account statements from [her] CD account after March 19, 2009" did not prevent Vantage Bank from conclusively establishing its limitations defense. The undisputed evidence established that the wrongful act that caused the legal injury in this case—the alleged unauthorized transfer of funds from Gonzalez's account to another customer's account—occurred on March 19, 2009. Thus, Gonzalez's causes of

action accrued on March 19, 2009. *See Murphy*, 964 S.W.2d at 270 (stating that a cause of action accrues when a wrongful act causes some legal injury, even if the fact of injury is not discovered until later). Nevertheless, Gonzalez waited more than eleven years, until November 30, 2020, to file suit on her claims. We conclude that Vantage Bank conclusively established that Gonzalez's claims were barred by limitations and the trial court properly granted summary judgment on this ground.[4] Issue two is overruled.

Having concluded that summary judgment was proper based on the statute of limitations, we need not address issues one, three, four, and five, which challenge Vantage Bank's other defenses. *See Lightning Oil Co.*, 520 S.W.3d at 45; TEX. R. APP. P. 47.1.

AWARD OF ATTORNEY'S FEES, COSTS, AND EXPENSES

In issue six, Gonzalez argues the trial court erred in awarding Vantage Bank $38,745.30 for its reasonable and necessary attorney's fees, costs, and expenses because there was no legal basis for awarding such fees.

Did Gonzalez waive her attorney's fees complaint by not raising it in her response?

Vantage Bank argues Gonzalez has waived this complaint because she failed to address its request for attorney's fees, costs, and expenses in her summary judgment response.

A nonmovant has no burden to respond to a summary judgment motion unless the movant conclusively establishes its claim or defense. *Amedisys, Inc., v. Kingwood Home Health Care*, LLC, 437 S.W.3d 507, 512 (Tex. 2014). "[S]ummary judgments must stand or fall on their own

[4]Gonzalez did not rely on fraudulent concealment to avoid Vantage Bank's statute of limitations defense. *See Draughon v. Johnson*, 631 S.W.3d 81, 93 (Tex. 2021) (providing that when a statute of limitations defense is established by the record as a matter of law, and a plaintiff is relying on fraudulent concealment to avoid that defense, it is the plaintiff's burden to come forward with proof raising a fact issue with respect to fraudulent concealment to defeat the defendant's right to a summary judgment); *KPMG Peat Marwick*, 988 S.W.2d at 749 ("[A] party asserting fraudulent concealment as an affirmative defense to the statute of limitations has the burden to raise it in response to the summary judgment motion and to come forward with summary judgment evidence raising a fact issue on each element of the fraudulent concealment defense.").

merits." *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.3d 337, 342 (Tex. 1993). "The trial court may not grant summary judgment by default because the nonmovant did not respond to the summary judgment motion when the summary judgment movant's proof is legally insufficient." *Amedisys, Inc.*, 437 S.W.3d at 512. Thus, the law provides that "a non-movant who fails to raise any issues in response to a summary judgment motion may still challenge, on appeal, the legal sufficiency of the grounds presented by the movant." *Amedisys, Inc.*, 437 S.W.3d at 512; *McConnell*, 858 S.W.3d at 343 ("The effect of such a failure is that the non-movant is limited on appeal to arguing the legal sufficiency of the grounds presented by the movant.").

Here, Vantage Bank argued in its summary judgment motion that it was entitled to recover its attorney's fees on three separate grounds: (1) the "baseless" nature of Gonzalez's claims; (2) section 38.001(8) of the Civil Practice and Remedies Code; and (3) the deposit agreements. On appeal, Gonzalez challenges each of these grounds, arguing that none of them authorized the award of $38,745.30 in attorney's fees, costs, and expenses.

Because Gonzalez challenges the sufficiency of the grounds presented by Vantage Bank, we conclude she has not waived her complaint by not presenting it in her summary judgment response. *See Amedisys, Inc.*, 437 S.W.3d at 512; *McConnell*, 858 S.W.3d at 343.

Was the award of attorney's fees, costs, and expenses supported by any of the summary judgment grounds asserted?

"As a general rule, litigants in Texas are responsible for their own attorney's fees and expenses in litigation." *Ashford Partners, Ltd. v. ECO Res., Inc.*, 401 S.W.3d 35, 41 (Tex. 2012). Under Texas law, an award of attorney's fees is permitted only when authorized by statute or by the parties' contract. *MBM Fin. Corp. v. Woodlands Operating Co.*, 292 S.W.3d 660, 669 (Tex. 2009).

On appeal, Gonzalez argues that none of the grounds asserted in the summary judgment motion supported the award of $38,745.30 in attorney's fees, costs, and expenses. We first determine if the award was supported by either of the deposit agreements. One of the deposit agreements, which we will refer to as the Vantage deposit agreement, states: "You will be liable for our costs as well as for our reasonable attorneys' fees, to the extent permitted by law, whether incurred as a result of collection or in any other dispute involving your account."

In her opening appellant's brief, Gonzalez does not dispute that the above-quoted provision authorizes the recovery of attorney's fees or that it governs this dispute. Instead, Gonzalez's sole complaint is that the Vantage deposit agreement cannot support the award of $38,745.30 in attorney's fees, costs, and expenses because Vantage Bank failed to specifically identify the agreement in its summary judgment motion.

The Texas Supreme Court has stated that "a general reference to a voluminous record which does not direct the trial court and parties to the evidence on which the movant relies is insufficient." *Rogers v. Ricane Enters., Inc.*, 772 S.W.2d 76, 81 (Tex. 1989). This court has recognized that "neither this court nor the trial court is required to wade through a voluminous record" to determine if a summary judgment party has carried its burden of proof. *Gonzales v. Shing Wai Brass and Metal Wares Factory, Ltd.*, 190 S.W.3d 742, 746 (Tex. App.—San Antonio 2005, no pet.). "[W]hen presenting summary-judgment proof, a party must specifically identify the supporting proof on file that it seeks to have considered by the trial court." *Id*.

Here, Gonzalez mistakenly suggests that the only evidence cited in the attorney's fees section of the summary judgment motion was "Exhibit A, Tab 1," which was the CD deposit agreement. An examination of the motion shows otherwise. In the attorney's fees section of the summary judgment motion, Vantage Bank also cited to "Exhibit A," which was an affidavit from Alfaro. In her affidavit, Alfaro testified that the parties' relationship was governed by the CD

deposit agreement, or alternatively, the Vantage deposit agreement. Alfaro further testified that the CD deposit agreement was attached at "Tab 1," and the Vantage deposit agreement was attached at "Tab 2." The Vantage deposit agreement was in fact attached at "Tab 2." Based on this record, we conclude that the summary judgment motion sufficiently directed the trial court and Gonzalez to the Vantage deposit agreement, which stated that Gonzalez would be liable for Vantage Bank's costs and reasonable attorney's fees in any dispute involving her account.

To the extent Gonzalez argues for the first time in her reply brief that the Vantage deposit agreement does not govern this dispute, we conclude she has waived her complaint. The appellate rules do not allow Gonzalez, "through a reply brief, to amend [her] issue to add a claim of error." *See Boze v. Cartright*, No. 01-19-00892-CV, 2020 WL 7776018, at *3 (Tex. App.—Houston [1st Dist.] Dec. 31, 2020, no pet.); *see also* TEX. R. APP. P. 38.1(i) (providing appellant's brief "must contain a clear and concise argument for the contentions made."). "This is true even if [the new ground for attacking the judgment is] raised in response to argument within an appellee's brief." *Jetall Co., Inc. v. JPG Waco Heritage*, LLC, No. 07-20-00126-CV, 2020 WL 5036091, at *2 (Tex. App.—Amarillo June 30, 2020, pet. denied). Here, the only complaint Gonzalez made in her opening appellant's brief was that the Vantage deposit agreement was not specifically identified in the summary judgment motion.

We conclude that the award of $38,745.30 in attorney's fees, costs, and expenses was supported by at least one of the grounds presented in Vantage Bank's summary judgment motion. Issue six is overruled.

CONCLUSION

The trial court's judgment is affirmed.

Liza A. Rodriguez, Justice