

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-08-00474-CV

RICHARD BARRY BROCK, Appellant

V.

CYNTHIA K. BROCK, Appellee

**On Appeal from the 410th District Court
Montgomery County, Texas
Trial Cause No. 07-08-08833 CV**

MEMORANDUM OPINION

Richard Barry Brock appeals the trial court's final summary judgment in favor of Cynthia K. Brock.¹ Richard claims the trial court erred in granting Cynthia's no-evidence motion for summary judgment on his cross-claims for breach of contract and breach of

¹This case arises from an interpleader action filed by substitute trustee, Patricia Poston, who is not a party to this appeal.

fiduciary duty. Because we conclude that Richard did not raise a genuine issue of material fact, we affirm.

Background

During their marriage, Richard and Cynthia acquired real property in Montgomery County, Texas. When they divorced in 2002, the agreed final divorce decree awarded the property to Cynthia, subject to the property's mortgage held by GMAC Mortgage Corporation ("GMAC"). Richard conveyed the property to Cynthia by special warranty deed. Cynthia assumed the mortgage and executed a deed of trust to secure assumption ("DTA") in favor of Richard.

Subsequently, Cynthia defaulted on the mortgage, and the property was sold at a non-judicial foreclosure sale in November 2006 for \$160,000. Patricia Poston was the substitute trustee who held the sale. After the lien was satisfied and fees were paid from the sale proceeds, excess proceeds in the amount of \$66,641.21 remained.

After the sale, Poston filed a suit as an interpleader against Richard and Cynthia and deposited the excess proceeds into the court's registry. *See* TEX. R. CIV. P. 43. Then, Cynthia cross-claimed against Richard, and requested the court to declare that she was the only person entitled to the excess proceeds. In turn, Richard cross-claimed against Cynthia, alleging breach of fiduciary duty and breach of contract. Neither Richard nor Cynthia

contested the substitute trustee's right to interplead the funds, and the court signed an agreed order granting the interpleader.

Cynthia filed two motions for summary judgment. The first was a traditional motion for summary judgment declaring her to be the sole owner of the excess proceeds. On August 4, 2008, the trial court granted summary judgment to Cynthia on her traditional motion, and Richard does not appeal from that judgment. The second was a no-evidence motion for summary judgment on Richard's cross-claims for breach of contract and breach of fiduciary duty. The trial court granted Cynthia's second motion on September 25, 2008. Richard attacks the second judgment on appeal.

Issues

Richard raises two appellate issues. He contends the trial court erred in granting a summary judgment on his breach of contract claim. He also contends the trial court erred in granting summary judgment on his claim that Cynthia breached her fiduciary duty to him.

Standard of Review

A no-evidence summary judgment motion under Rule 166a(i) is essentially a motion for a pretrial directed verdict. TEX. R. CIV. P. 166a(i); *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 581-82 (Tex. 2006). 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 produces no summary judgment evidence raising a genuine issue of material fact on those elements. *See* TEX. R. CIV. P. 166a(i). The non-moving party is not obligated to marshal its proof but is required to present evidence that raises a genuine fact issue on the challenged element. *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002). When reviewing a no-evidence summary judgment, we review the evidence “in the light most favorable to the party against whom the summary judgment was rendered, crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not.” *Mack Trucks*, 206 S.W.3d at 582 (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005); *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 208 (Tex. 2002)).

In this case, Richard, the non-movant, presented no summary judgment evidence in response to Cynthia’s no-evidence motion.

Breach of Contract

As to Richard’s breach-of-contract claim, Cynthia’s no-evidence motion asserted there was no evidence that: 1) Richard made an “advancement” pursuant to the DTA’s terms, 2) damages resulted from the alleged breach, or 3) the DTA provided for a recovery of monetary damages. Richard’s response does not refer to any evidence demonstrating his damages. On appeal, Richard asserts that a question of fact exists; he contends that his failure to produce documents related to damages does not mean he had none.

In a response to a no-evidence motion for summary judgment, the non-movant is required to present evidence that raises a genuine fact issue on the challenged element. *Grant*, 73 S.W.3d 215. Richard failed to do so. Thus, the trial court did not err in granting summary judgment to Cynthia on Richard's breach-of-contract claim. We overrule issue one.

Breach of Fiduciary Duty

Generally, to recover for the breach of a fiduciary duty, a plaintiff must show: 1) the existence of a fiduciary duty, 2) a breach of the duty, 3) causation, and 4) damages. *See Abetter Trucking Co. v. Arizpe*, 113 S.W.3d 503, 508 (Tex. App.—Houston [1st Dist.] 2003, no pet.). When, however, the plaintiff seeks fee restitution or benefit disgorgement, he need not prove actual damages. *Burrow v. Arce*, 997 S.W.2d 229, 240 (Tex. 1999); *Alavi v. MCI Worldcom Network Services, Inc.*, 2007 WL 274565, at *3 (Tex. App.—Beaumont, Feb. 1, 2007, pet. denied). Because Richard's claim for breach of fiduciary duty sought damages as his remedy, he was required to prove them. *See Alavi*, 2007 WL 274565, at *3; *Lee v. Lee*, 47 S.W.3d 767, 780-81 (Tex. App.—Houston [14th Dist.] 2001, pet. denied); *Longaker v. Evans*, 32 S.W.3d 725, 733 n.2 (Tex. App.—San Antonio 2000, pet. withdrawn).

Cynthia's no-evidence motion asserted there was no evidence that: 1) she owed a fiduciary duty to Richard, or 2) that damages resulted from the alleged breach. Richard's response contended that a DTA creates a fiduciary relationship by its "very nature," that such beneficiaries typically are unaware of delinquencies until foreclosure proceedings have

begun, that beneficiaries often (as in his case) do not have adequate funds to bring the note current, and that the unavoidable foreclosure results in a “major hit” on the beneficiary’s credit. Richard further argued that he did not have to prove damages to recover on his breach of fiduciary claim. On appeal, Richard maintains this Court should determine whether a DTA creates a fiduciary duty.

We need not reach the issue concerning whether Cynthia owed Richard a duty. Even if we assumed that Cynthia owed Richard a fiduciary duty, which she disputes, Richard is required to have presented evidence raising a genuine fact issue on his damages. *See Grant*, 73 S.W.3d 215. Because Richard failed to present any evidence proving that he had been damaged, the trial court did not err in granting summary judgment to Cynthia on Richard’s breach-of-fiduciary-duty claim. We overrule issue two.

Having overruled both of Richard’s issues, we affirm the trial court’s judgment.

AFFIRMED.

HOLLIS HORTON
Justice

Submitted on July 1, 2009
Opinion Delivered July 16, 2009
Before McKeithen, C.J., Kreger and Horton, JJ.