COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-15-00388-CV

CARL AND CYNTHIA MILLER — APPELLANTS

V.

EL CAMPO HOLDINGS LLC AND PATTY DIANN LYERLA — APPELLEES

FROM THE 342ND DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 342-271782-14

MEMORANDUM OPINION[1]

Appellants Carl and Cynthia Miller appeal the trial court's order granting the combined traditional and no-evidence motion for summary judgment filed by appellees El Campo Holdings LLC and Patty Diann Lyerla. In three related issues, appellants contend that the summary judgment, which disposed of their fraud-related claims, was improper only because a genuine issue of material fact

[1]*See* Tex. R. App. P. 47.4.

exists concerning whether appellees intended to deceive them. Because we must uphold the summary judgment on another, unchallenged-on-appeal ground, we affirm.

Background Facts

Appellants sued appellees for common law fraud and statutory fraud.[2] In their amended original petition—their live pleading at the time of the trial court's summary judgment decision—they alleged that appellees had committed fraud with respect to related contracts by which appellees purchased appellants' property and gave appellants a six-month option to repurchase the property. Specifically, appellants pled that appellees surreptitiously obtained mineral rights in the original contract conveying the property to appellees while having "no intention" of ever reconveying those rights to appellants through the repurchase agreement.[3] In pleading their claims for fraud and statutory fraud, appellants recognized that one of the elements of the claims was that they relied on a material misrepresentation. Appellants sought actual and exemplary damages or "specific performance wherein [they would] retain title to [the] land."

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[2]*See* Tex. Bus. & Com. Code Ann. § 27.01(a) (West 2015).

[3]Appellants did not comply with the terms of the repurchase agreement, so appellees never reconveyed any part of the property to them. During the hearing on appellees' motion for summary judgment, appellants' counsel acknowledged that the original contract explained that the repurchase option included the reconveyance of mineral interests. Appellees' counsel represented at that hearing that appellees were "ready to close" on the repurchase but that appellants "didn't show up" for the closing.

Appellees filed a combined traditional and no-evidence motion for summary judgment. They argued, in part, that there was no genuine issue of material fact concerning whether (1) they made representations with no intent of performing or (2) appellants relied on any such representations when entering the agreements. With respect to their argument concerning reliance, appellees stated in part,

> To survive summary judgment, [appellants] must establish, among other elements of their fraud claims, that [appellees] made a false representation or promise for purposes of inducing [appellants] to enter into a contract *and that [appellants] relied on the false representation or promise* in entering into the contract. . . .
>
> Here, the undisputed evidence . . . *establishes that [appellants] did not rely on anything that [appellees] allegedly told them* . . . .
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> . . . .
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> . . . [Appellants] must establish that they relied on [appellees'] promise and actually entered into a binding agreement based on the representation. *However, there is "no evidence" that [appellants] relied on [appellees'] promise . . . . Because [appellants] have failed to and cannot present evidence of reliance to support their claims, [appellees] are entitled to summary judgment as a matter of law[.]* [Emphasis added.]

Appellees attached evidence to their motion, including a deposition transcript and affidavits from various witnesses.

In their response to appellees' motion, appellants recognized that appellees had sought summary judgment on a no-evidence basis on the reliance element. They pointed to various facts to contend that there was more than a scintilla of evidence of reliance. They also addressed appellees' other grounds

for summary judgment, objected to some of appellees' evidence,[4] and submitted their own evidence.

After appellees filed a reply to appellants' response, the trial court held a hearing on appellees' motion. During the hearing, although much of the trial court's exchanges with the attorneys focused on the issue of appellees' intent (or lack thereof) to fully perform their obligations under the repurchase agreement, appellees again contested the reliance element of appellants' claims, and appellants again acknowledged that their reliance on any misrepresentations had been challenged. After the hearing, the court signed an order granting appellees' combined traditional and no-evidence motion. In the order, the court did not specify the grounds upon which it granted the motion; rather, the court stated that the motion was "in all things" granted. Appellants brought this appeal.

Appellants' Failure to Challenge All Summary Judgment Grounds

On appeal, appellants present the following arguments: (1) "THE COURT ERRED IN GRANTING APPELLEES['] TRADITIONAL MOTION FOR SUMMARY JUDGMENT BECAUSE APPELLEE[S] FAILED TO NEGATE THE ELEMENT OF INTENT"; (2) "THE COURT ERRED IN GRANTING APPELLEES['] TRADITIONAL MOTION FOR SUMMARY JUDGMENT BECAUSE INTENT REMAINS A GENUINE ISSUE OF MATERIAL FACT"; and (3) "THE COURT ERRED IN GRANTING APPELLEES['] MOTION FOR NO-

[4]The record does not contain an order in which the trial court explicitly ruled on these objections.

EVIDENCE SUMMARY JUDGMENT BECAUSE APPELLANT RAISED MORE THAN A SCINTILLA OF EVIDENCE REGARDING INTENT." True to these argument headings, appellants' opening brief exclusively focuses on the issue of intent; in fact, appellants contend that "intent was the only matter addressed before the Court" at the hearing on appellees' motion. Appellants contend that the trial court

> erred in concluding [that] [a]ppellees negated the element of intent.
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> Appellants further allege the court erred by not finding *intent* to have been raised as a genuine issue of material fact to survive summary judgment. . . .
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> . . . Appellants contend the court erred in not deferring the issue of intent to the trier of fact . . . .
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> . . . .
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> [Appellants contend] the Court erred on three (3) grounds: (1) [appellees] did not satisfactorily negate the element of intent . . . . ; (2) [appellants] raised intent as a genuine issue of material fact . . . . ; and (3) [appellants] raised more than a scintilla of evidence in showing [appellees] never intended on re-conveying the land and/or minerals back.

Nothing within appellants' opening brief contains any discussion of the reliance element of their fraud claims; the brief does not even acknowledge that reliance was an element or that appellees sought summary judgment on the basis that there was no evidence of that element. Thus, appellees argue that we must affirm the summary judgment because appellants do not challenge the ground that they presented no evidence of reliance.

After an adequate time for discovery, the party without the burden of proof may, without presenting evidence, move for summary judgment on the ground that there is no evidence to support an essential element of the nonmovant's claim or defense. Tex. R. Civ. P. 166a(i). The trial court must grant the motion unless the nonmovant produces summary judgment evidence that raises a genuine issue of material fact. *See id.*; *Hamilton v. Wilson*, 249 S.W.3d 425, 426 (Tex. 2008); *Drake Interiors, L.L.C. v. Thomas*, 433 S.W.3d 841, 847 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (op. on reh'g) ("In a no-evidence motion for summary judgment, the movant asserts that there is no evidence of one or more essential elements of the claims for which the nonmovant bears the burden of proof at trial. The burden then shifts to the nonmovant to present evidence raising a genuine issue of material fact as to the elements specified in the motion." (citations omitted)). We review a summary judgment de novo. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010).

As we have explained,

> The law is well-settled that either (1) a specific assignment of error must be attributed to each ground on which a summary judgment could be based or (2) a general assignment that the trial court erred by granting summary judgment must be made, which permits the appellant to assert arguments against all grounds on which summary judgment could be based. *See Malooly Bros., Inc. v. Napier*, 461 S.W.2d 119, 121 (Tex. 1970) (articulating this rule); *see also, e.g.*, *Star–Telegram v. Doe*, 915 S.W.2d 471, 473 (Tex. 1995) (recognizing broad issue was raised and arguments thereunder attacked each ground on which summary judgment could have been based). Error is not preserved as to every ground on which summary judgment could be based simply by raising a general issue; the appellant must also support the issue with

> argument and authorities challenging each ground. *See, e.g.*, *Ramirez v. First Liberty Ins. Corp.*, 458 S.W.3d 568, 572 (Tex. App.—El Paso 2014, no pet.) (holding plaintiff waived right to challenge summary judgment on breach of contract and promissory estoppel causes of action by failing to assert arguments challenging them in appellate brief); *Rangel v. Progressive Cnty. Mut. Ins. Co.*, 333 S.W.3d 265, 269–70 (Tex. App.—El Paso 2010, pet. denied) (same). . . . *When an argument is not made challenging every ground on which the summary judgment could be based, we are required to affirm the summary judgment, regardless of the merits of the unchallenged ground. See, e.g.*, *Malooly*, 461 S.W.2d at 120–21 (affirming summary judgment based on unchallenged ground of affirmative defense of limitations but expressing "no opinion as to whether a grant of summary judgment would be proper or erroneous" on that ground); *Ramirez*, 458 S.W.3d at 572 (affirming summary judgment based on grounds not challenged in brief on appeal without referencing merits of ground); *Strather v. Dolgencorp of Tex., Inc.*, 96 S.W.3d 420, 422–23 (Tex. App.—Texarkana 2002, no pet.) (affirming summary judgment based on unchallenged ground although that ground appeared unmeritorious).

Rollins v. Denton Cty., No. 02-14-00312-CV, 2015 WL 7817357, at *2 (Tex. App.—Fort Worth Dec. 3, 2015, no pet.) (mem. op.) (emphasis added); *see Scott v. Galusha*, 890 S.W.2d 945, 948 (Tex. App.—Fort Worth 1994, writ denied) ("When the trial court's judgment rests upon more than one independent ground or defense, the aggrieved party must assign error to each ground, or the judgment will be affirmed on the ground to which no complaint is made."); *see also Krueger v. Atascosa Cty.*, 155 S.W.3d 614, 621 (Tex. App.—San Antonio 2004, no pet.) ("Unless an appellant has specifically challenged every possible ground for summary judgment, the appellate court need not review the merits of the challenged ground and may affirm on an unchallenged ground."); *Lowe v. Townview Watersong, L.L.C.*, 155 S.W.3d 445, 447 (Tex. App.—Dallas 2004, no

pet.) ("Because summary judgment may have been granted on the unchallenged no-evidence grounds, we must affirm the trial court's summary judgment.").

Despite appellants' failure to challenge the no-reliance ground for summary judgment in their original brief, they contend in their reply brief that we should not affirm the judgment on that basis because the element of reliance "was never sufficiently and/or specifically raised in [appellees'] motion." We disagree. As demonstrated above, appellees explicitly sought summary judgment on the basis that there was no evidence of appellants' reliance.

Next, appellants contend in their reply brief that the no-reliance ground was not meritorious. But as stated above, when an appellant fails to challenge a ground for summary judgment, we assume that the unchallenged ground is meritorious and affirm the judgment on that basis. *See Rollins*, 2015 WL 7817357, at *2. Furthermore, appellants' discussion of the no-reliance ground for the first time in their reply brief is insufficient to raise the issue.[5] *See Stovall & Assocs. v. Hibbs Fin. Ctr., Ltd.*, 409 S.W.3d 790, 803 (Tex. App.—Dallas 2013, no pet.) ("That Stovall could have but did not make such an argument in its opening brief does not allow it to do so for the first time in its reply brief."); *Miner Dederick Constr., LLP v. Gulf Chem. & Metallurgical Corp.*, 403 S.W.3d 451, 463 n.3 (Tex. App.—Houston [1st Dist.] 2013) (op. on reh'g) ("[T]he rules of appellate procedure do not allow an appellant to include in a reply brief a new issue in

[5]We note that even in their reply brief, appellants do not analyze where the record establishes evidence of reliance or cite any legal authority on that issue.

response to some matter pointed out in the appellees brief but not raised in the appellant's opening brief."), *pet. denied*, 455 S.W.3d 164 (Tex. 2015); *see also Barrios v. State*, 27 S.W.3d 313, 322 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd) ("Pointing out the absence of an appellant's argument does not raise the argument or entitle appellant to assert that argument for the first time in his reply brief. If the rule were construed otherwise, an appellee could never point out matters not raised by an appellant for fear of reopening the door."), *cert. denied*, 534 U.S. 1024 (2001).

Finally, appellants argue in their reply brief that although the trial court's order granting summary judgment did not specify the basis for the court's decision, the transcript from the hearing on appellees' motion shows "exactly why [the court] was granting" the motion. Appellants contend, "[T]he trial court was clear—the only matter considered and/or discussed was the issue of intent. . . . The trial court's specific references as to 'WHY' [it] is granting the summary judgment should not be ignored . . . ."

Appellant does not cite any case, however, in which a court held that oral statements made by the parties or the trial court on the record at a summary judgment hearing govern the scope of grounds upon which the trial court could have granted summary judgment over an otherwise unlimited order. Texas courts have reached the opposite conclusion. *See Strather*, 96 S.W.3d at 426 ("We are constrained . . . to look only to the order granting summary judgment to determine the trial court's reasons for ruling. That rule has a fairly sound policy

basis in that it gives litigants and appellate courts a single place to look to determine why the trial court granted summary judgment." (citation omitted)); *Simmons v. Healthcare Ctrs. of Tex., Inc.*, 55 S.W.3d 674, 680 (Tex. App.—Texarkana 2001, no pet.) ("[W]e must look only to the order granting summary judgment, in which the trial court did not provide the reasons for its ruling."); *see also HB Turbo, L.P. v. Turbonetics Eng'g & Servs.*, No. 13-06-00083-CV, 2007 WL 1629949, at *1 (Tex. App.—Corpus Christi June 7, 2007, pet. denied) (mem. op.) (collecting cases that stand for the proposition that appellate courts are "constrained to look only to the order granting summary judgment to determine the trial court's reasons for ruling").

Because appellants did not challenge appellees' no-reliance ground for summary judgment on appeal, we overrule their three issues that challenge another independent ground. *See Rollins*, 2015 WL 7817357, at *2; *Krueger*, 155 S.W.3d at 621; *see also* Tex. R. App. P. 47.1.

Conclusion

Having overruled appellants' three issues, we affirm the trial court's judgment.

/s/ Terrie Livingston

TERRIE LIVINGSTON
CHIEF JUSTICE

PANEL: LIVINGSTON, C.J.; GABRIEL and SUDDERTH, JJ.

DELIVERED: January 26, 2017