IN THE
TENTH COURT OF APPEALS

No. 10-16-00326-CV

ELAINE PALASOTA,

Appellant

v.

YUVAL "U.V." DORON,

Appellee

From the 272nd District Court
Brazos County, Texas
Trial Court No. 11-003374-CVA-272

MEMORANDUM OPINION

Elaine Palasota appeals from a judgment that denied her traditional and no-evidence motions for summary judgment and granted Yuval Doron's traditional and no-evidence motions for summary judgment, finding that she was a partner in Brazos Valley Services. The trial court had entered a default judgment against Brazos Valley Services for breach of contract. Elaine Palasota complains that the trial court erred by denying her motions for summary judgment and by granting Doron's motions. Because we find that

the trial court erred by granting Doron's motion for traditional summary judgment and by denying Elaine's motion for no-evidence summary judgment, we reverse the judgment of the trial court and render judgment that Elaine's no-evidence motion is granted and that she is not liable for the judgment as a partner of Brazos Valley Services.[1]

Ricky J. Palasota and Rick J. Palasota, Jr., as partners of Brazos Valley Services, entered into an agreement with Doron to pour a concrete foundation for a residence. According to Doron, the concrete was not poured properly and Brazos Valley Services did not repair the problems. Doron filed suit against Brazos Valley Services and took a default judgment against it. The same day the default judgment was entered, Doron amended his petition to add Elaine Palasota, Ricky J. Palasota, Sr., and Rick J. Palasota, Jr. as individual defendants.[2] Elaine and Ricky are married and Rick is their son. Doron claimed that Elaine, Ricky, and Rick were all partners in Brazos Valley Services. The trial court severed the default judgment from the remaining claims against the Palasotas, making that judgment final.

While Doron was attempting to collect the judgment against the partnership, Ricky and Rick each filed for bankruptcy, leaving Elaine as the sole defendant from

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[1] Doron's no-evidence motion for summary judgment related to affirmative defenses pled by Elaine and did not impact the central issue at stake in this proceeding, which is whether or not Elaine is a partner in Brazos Valley Services. Because of our resolution of that issue, it is not necessary to address his no-evidence motion. Further, Doron did not file a brief in this appeal, so this Court is proceeding on Elaine's brief and the record alone.

[2] Because Elaine Palasota, Ricky Palasota, and Rick Palasota, Jr. share the same last name, we will use their first names to distinguish them in this opinion.

whom Doron could attempt to collect the debt in the remaining proceeding. Elaine filed an answer and verified denial in which she denied that she had ever been a partner in Brazos Valley Services. Elaine later filed a traditional and no-evidence motion for summary judgment asserting that there was no material fact relating to Doron's partnership claims and that she was not otherwise liable for a breach of contract. Elaine also provided summary judgment evidence which she claimed established as a matter of law that she was not a partner in Brazos Valley Services. Elaine's no-evidence motion asserted that Doron had no evidence to support his partnership, joint venture, or breach of contract claims against her.

Doron did not file a response to Elaine's motions, but instead filed a competing traditional and no-evidence motion for summary judgment. As evidence in support of his traditional motion, Doron attached portions of Ricky and Rick's bankruptcy schedules which he argued were sufficient to establish that Elaine is a partner in Brazos Valley Services as a matter of law. Elaine filed a response to Doron's motions, and attached the partnership agreement for Brazos Valley Services as well as affidavit and deposition testimony to support her position. After a hearing, the trial court granted Doron's traditional motion for summary judgment as to his claim regarding partnership liability, finding that there is no genuine issue of material fact as to Doron's claim that Elaine was a partner in Brazos Valley Services, granted judgment against Elaine for the amount of the default judgment, and awarded Doron attorney's fees and court costs.

In her first issue, Elaine complains that the trial court erred by granting Doron's traditional motion for summary judgment because he did not establish as a matter of law that Elaine was a partner in Brazos Valley Services and the award of attorney's fees was erroneous. In her second issue, Elaine complains that the trial court erred by denying her motions for summary judgment because she established that she was entitled to judgment as a matter of law that she was not a partner (the traditional motion), and that Doron did not raise a genuine issue of material fact regarding the partnership and breach of contract claims (the no-evidence motion).

STANDARD OF REVIEW

We review a trial court's summary judgment de novo. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). Our review is limited to consideration of the summary judgment evidence presented to the trial court. *See* TEX. R. CIV. P. 166a(c) (no oral testimony may be considered in support of a motion for summary judgment). When the trial court does not specify the grounds for its ruling, a summary judgment must be affirmed if any of the grounds on which judgment is sought are meritorious. *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013); *State v. Ninety Thousand Two Hundred Thirty—Five Dollars & No Cents in U.S. Currency*, 390 S.W.3d 289, 292 (Tex. 2013).

When a party moves for summary judgment on both no-evidence and traditional grounds on the same ground or issue, we first review the trial court's judgment under the

no-evidence standard of review. *Merriman*, 407 S.W.3d at 248; *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004). "That is because if the non-movant fails to produce legally sufficient evidence to meet his burden as to the no-evidence motion, there is no need to analyze whether the movant satisfied its burden under the traditional motion." *Merriman*, 407 S.W.3d at 248.

We review no-evidence summary judgments under the same legal sufficiency standard as directed verdicts. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 750-51 (Tex. 2003). Under that standard, we consider evidence in the light most favorable to the non-movant, crediting evidence a reasonable jury could credit and disregarding contrary evidence and inferences unless a reasonable jury could not. *See Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 756 (Tex. 2007); *City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex. 2005). The non-movant has the burden to produce summary judgment evidence raising a genuine issue of material fact as to each challenged element of its cause of action. TEX. R. CIV. P. 166a(i). A no-evidence challenge will be sustained when: (1) there is a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla; or (4) the evidence conclusively establishes the opposite of the vital fact. *Merriman*, 407 S.W.3d at 248 (citations omitted). When a non-movant presents more than a scintilla of probative evidence that raises a genuine issue of material fact, a no-evidence summary judgment is

improper. *Smith v. O'Donnell*, 288 S.W.3d 417, 424 (Tex. 2009).

The party moving for traditional summary judgment bears the burden of showing that no genuine issue of material fact exists and that he is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002). The burden of proof is on the movant and we resolve all doubts about the existence of a genuine issue of material fact against the movant. *Sw. Elec. Power Co.*, 73 S.W.3d at 215. In determining whether the non-movant raises a fact issue, we review the evidence in the light most favorable to the non-movant, crediting favorable evidence if reasonable jurors could do so, and disregarding contrary evidence unless reasonable jurors could not. *See Fielding*, 289 S.W.3d at 848, *citing City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). A moving party who conclusively negates a single essential element of a cause of action or conclusively establishes an affirmative defense is entitled to summary judgment on that claim. *Frost Nat. Bank v. Fernandez*, 315 S.W.3d 494, 508-09 (Tex. 2010).

When both parties move for summary judgment and the trial court grants one motion and denies the other, we review all the summary judgment evidence, determine all issues presented, and render the judgment the trial court should have. *Merriman*, 407 S.W.3d at 248; *Fielding*, 289 S.W.3d at 848. If any of the summary judgment grounds are meritorious, we must affirm the summary judgment. *Texas Workers' Compensation Comm'n v. Patient Advocates of Texas*, 136 S.W.3d 643, 648 (Tex. 2004).

PARTNERSHIP CLAIMS

Elaine argues that the trial court erred by finding that she was a partner in Brazos Valley Services, both based on her traditional motion to which she attached evidence supporting her position, and based on her no-evidence motion where she argued that Doron has no evidence to support his claims regarding any of the elements set forth in the Business Organizations Code. Elaine further contends that the evidence presented by Doron in support of his traditional motion for summary judgment did not establish as a matter of law that she was a partner.

The Business Organizations Code states that a general partnership is an association of two or more persons to carry on a business for profit as owners, regardless of whether the persons intend to create a partnership or whether the association is called a "partnership." TEX. BUS. ORGS. CODE § 152.051(b) (West 2012). In the Business Organizations Code, factors indicating that persons have created a partnership include:

> (1) receipt or right to receive a share of the profits of the business;
> (2) expression of an intent to be partners in the business;
> (3) participation or right to participate in control of the business;
> (4) agreement to share or sharing:
> A. losses of the business; or
> B. liability for claims by third parties against the business; and
> (5) agreement to contribute or contributing money or property to the business.

Id. § 152.052(a).

The Supreme Court has adopted a "totality-of-the-circumstances test" for determining partnership formation. *See Ingram v. Deere*, 288 S.W.3d 886, 896 (Tex. 2009).

In *Ingram*, the Court offered guidelines for application while recognizing that the totality-of-the-circumstances test may be difficult to apply uniformly. *See id*. at 898. An absence of evidence as to all five factors will preclude the recognition of a partnership and even conclusive evidence of only one factor will normally be insufficient to establish the existence of a partnership. *Id*. On the other hand, conclusive evidence of all five factors will establish the existence of a partnership as a matter of law. *Id*. Points on the spectrum between the extremes present the "challenge" of the totality-of-the-circumstances test. *Id*. In *Ingram*, the Court concluded that the proponent of the partnership agreement adduced no evidence of any of the five factors, and therefore that there was no partnership as a matter of law. *See id*. at 904; *see also Hoss v. Alardin*, 338 S.W.3d 635, 650 (Tex. App.—Dallas 2011, no pet.) (concluding that because proponent of partnership adduced no evidence of four factors and only weak evidence of fifth factor, there was no partnership as matter of law).

In support of his traditional motion for summary judgment, Doron attached the bankruptcy schedules filed by Elaine's husband, Ricky Palasota, Sr., in his Chapter 13 Bankruptcy proceeding and the schedules and statement of financial affairs that were filed by her son, Rick Palasota, Jr., in his Chapter 13 bankruptcy proceeding. Ricky's bankruptcy did not list Elaine as a partner in any business in the schedules. On Schedule F, which lists the unsecured creditors, Ricky listed the debt owed to Doron as a community debt, but not as a joint debt for which Elaine was jointly liable. On Schedule

H, the schedule for listing co-debtors, the liability to Doron was listed and rather than listing Elaine's name as co-debtor, Ricky listed "Spouse name not entered," as he did for each unsecured creditor that he had listed as a community debt. In Rick, Jr.'s statement of financial affairs, he listed Elaine as being a 52% partner in a partnership with him and Ricky, but the name of the partnership was not included. Rick, Jr.'s schedules listed his father as co-debtor in the debts of the partnership, Brazos Valley Services, and stated that he and his father each owned a 50% interest in that partnership.

In his motion for summary judgment filed with the trial court, Doron made no effort to distinguish the relevant factors in the Business Organizations Code to be considered in determining whether or not Elaine was a partner in Brazos Valley Services, and his evidence did not establish that Elaine was a partner in Brazos Valley Services as a matter of law. We also find that the evidence presented by Doron in his motion for summary judgment, as the only evidence that could be considered to be presented in opposition to Elaine's motion for no-evidence summary judgment, is no more than a mere scintilla to establish that Elaine was a partner in Brazos Valley Services. There was no evidence regarding profits of the partnership, control of the partnership, Elaine's agreement to participate as a partner, or any contributions made by Elaine to the partnership. The evidence relating to liabilities based on the bankruptcy schedules is nothing more than a surmise to show that Elaine was liable for any debt as a partner rather than potentially liable as a spouse of the partner. When we consider the factors set

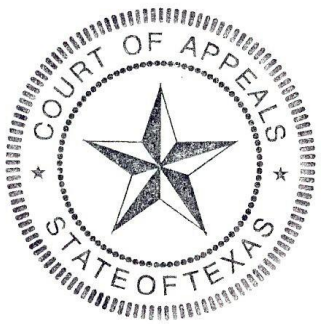
forth in Section 152.051(a), we find under the "totality-of-the-circumstances" that the trial court erred by granting Doron's traditional motion and by failing to grant Elaine's no-evidence motion for summary judgment.

Because we have found that the trial court erred by denying Elaine's no-evidence motion for summary judgment, we do not consider Elaine's complaints regarding her traditional motion for summary judgment. Because the trial court erred by granting Doron's motion for summary judgment, the trial court's award of attorney's fees to Doron was also erroneous. We sustain issues one and two.

CONCLUSION

Having found that the trial court erred by granting Doron's motion for summary judgment and by denying Elaine's no-evidence motion for summary judgment, we reverse the judgment of the trial court in its entirety and render judgment that Elaine's no-evidence motion for summary judgment is granted and that Doron take nothing on his claims against Elaine.

TOM GRAY
Chief Justice



Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
Reversed and rendered
Opinion delivered and filed May 2, 2018
[CV06]