TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00239-CV

Rosemary Nwankpa, Appellant

v.

Cecilia Obilom, Appellee

FROM THE DISTRICT COURT OF WILLIAMSON COUNTY, 277TH JUDICIAL DISTRICT
NO. 13-0635-C277, HONORABLE BETSY F. LAMBETH, JUDGE PRESIDING

MEMORANDUM OPINION

Appellant Rosemary Nwankpa appeals from a judgment following a jury's verdict in favor of appellee Cecilia Obilom on Obilom's claims for negligent misrepresentation and promissory estoppel arising in connection with Nwankpa's and Obilom's joint business. In four issues, Nwankpa asserts that (1) the evidence supporting the jury's reliance finding is legally and factually insufficient; (2) because there is insufficient evidence to support the jury's reliance finding, the district court erred in denying Nwankpa's requests for a directed verdict, jury-charge instruction, and judgment notwithstanding the verdict related to that issue; (3) the jury's failure to find that Obilom had justifiably relied on Nwankpa's fraudulent misrepresentation precluded its finding that Obilom had relied on Nwankpa's negligent misrepresentation; and (4) the district court erred in awarding attorney fees. Because we agree, as explained below, that the trial court erred in awarding

attorney fees, we will reverse that the trial court's award of attorney fees, render judgment that Obilom take nothing on her claim for attorney fees, and affirm the remainder of the judgment.

Background

In 2001, Obilom and Nwankpa started a business, Apicon Home Health Agency, Inc., to provide in-home nursing, therapy, social work, and bathing assistance to patients. Obilom owned 55% of the company and ran the administrative and medical aspects of the business. Nwankpa owned the remaining 45% and directed the financial side of the business. Obilom and Nwankpa also formed Roce Commercial Property, Inc., which purchased and managed a commercial building in Austin, Texas, that housed Apicon's headquarters and other third-party businesses.

In September 2011, Obilom discovered what she claims were financial irregularities in Apicon's business affairs and accused Nwankpa of theft, embezzlement, and misappropriation of funds. Although she disputed Obilom's allegations against her, Nwankpa agreed to pay, and did pay, $20,000 to Obilom to resolve the matter. Soon after this settlement, however, Obilom continued to find more evidence of Nwankpa's alleged financial improprieties, and the two agreed to part ways by allowing Obilom to purchase Nwankpa's 45% interest in Apicon.

In establishing a purchase price for Nwankpa's 45%, the parties agreed that Apicon's net value was $2.5 million, making Nwankpa's 45% worth $1,125,000. The parties also agreed, although Nwankpa again disputed Obilom's claims, that the purchase price for Nwankpa's 45% would be reduced by the amount which Obilom claimed Nwankpa had embezzled from the company,

or about $633,000. Ultimately, after Apicon's board of directors approved the buyout, Obilom paid Nwankpa $507,039 for her 45% interest,[1] and Nwankpa ceased to be part of the company.

One year later, in June 2013, Obilom sued Nwankpa for fraud and negligent misrepresentation in connection with the transaction. According to Obilom, she had been misled by Nwankpa regarding the value of the company's accounts receivable—Obilom claims that, after the buyout, she discovered that approximately $600,000 of the accounts receivable were unrecoverable because they were past due and could not be liquidated—and that, as a result, Obilom had paid more than she should have. Specifically, Obilom asserted that because the receivables were unrecoverable, the total value of the company should have been $1.9 million, not $2.5 million. Thus, Obilom asserted, Nwankpa's 45% interest was worth only $855,000, meaning that after the reduction of $633,000 for the embezzled funds, Obilom should have only paid $222,000, or $285,000 less than she actually paid.

Obilom also asserted a claim for promissory estoppel in this same suit based on a project the parties had agreed on before the buyout. According to Obilom, she and Nwankpa, through their company Roce, had agreed to purchase and construct a commercial building for Apicon to be the sole occupant and, to that end, they signed a building construction contract for $1.6 million dollars. As a down payment on the project, Roce paid $162,000 and Obilom and Nwankpa each paid $81,000. When their business relationship began to deteriorate, however, Nwankpa backed out of the project, requiring Obilom to obtain financing from another company she owned jointly with her

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[1] Although the math does not work, the parties contend that the $507,039 purchase price was arrived at by deducting $633,000 from $1,125,000.

husband, Poco, to avoid being sued by the contractor. In her promissory-estoppel claim against Nwankpa, Obilom asserted that she relied to her detriment on Nwankpa's promise of financial assistance with regard to the construction project.

Nwankpa asserted several affirmative defenses and counterclaims against Obilom. Eventually, the case was tried to a jury, which found that Nwankpa had negligently misrepresented Apicon's value and that Obilom had been damaged in the amount of $137,000 as a result. The jury declined to find that Nwankpa had committed fraud. The jury did find in favor of Obilom on her promissory-estoppel claim, but failed to find that she had been damaged. Ultimately, the trial court rendered judgment awarding Obilom actual damages of $137,400, prejudgment interest totaling $17,532.58, and attorney fees of $65,000. It is from this judgment that Nwankpa appeals.

Discussion

Nwankpa raises four issues on appeal. The first three assert error regarding the reliance element of Obilom's negligent-misrepresentation claim, and the fourth challenges the district court's award of attorney fees.

Reliance

In her first issue, Nwankpa challenges the legal and factual sufficiency of the evidence supporting the jury's finding that Obilom justifiably relied on Nwankpa's negligent misrepresentation. *See, e.g.*, *Grant Thornton LLP v. Prospect High Income Fund*, 314 S.W.3d 913, 923 (Tex. 2010) ("[N]egligent misrepresentation require[s] that the plaintiff show actual and justifiable reliance."); *Federal Land Bank Ass'n of Tyler v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1991)

(in adopting tort of negligent misrepresentation, including as one of four elements that plaintiff "justifiably rel[ied] on the representation"). For Nwankpa to prevail on her legal-sufficiency claim, we must determine that the evidence at trial would not enable reasonable and fair-minded people to conclude that Obilom justifiably relied on Nwankpa's misrepresentation. *See City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). In making such a determination, we consider all the evidence in the light most favorable to the verdict, crediting favorable evidence if reasonable jurors could and disregarding contrary evidence unless reasonable jurors could not. *Id*. at 823. To prevail on her factual-sufficiency challenge, Nwankpa must show on appeal that the evidence supporting the justifiable-reliance finding is so weak that the finding is clearly wrong and manifestly unjust. *See Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001). In making this determination, we consider and weigh all the evidence. *Id*.

Justifiable reliance consists of two elements: (1) the plaintiff must actually rely on the information and, at issue here, (2) the reliance must be reasonable. *See Grant Thornton*, 314 S.W.3d at 923. Whether reliance is justifiable depends on the nature of the parties' relationship and the plaintiff's intelligence and experience. *See id.* A plaintiff cannot justifiably rely on a representation if there are obvious indications that reliance is unwarranted. *See id.*

The misrepresentation at issue here was Nwankpa's valuation of Apicon, specifically Nwankpa's misrepresentation regarding the value of Apicon's accounts receivable. In support of her assertion that she justifiably relied on Nwankpa's misrepresentation, Obilom testified that Nwankpa, who had been an accountant since 1992, had always performed the accounting and bookkeeping work for Apicon, including the billing, while Obilom, a registered nurse, had been

responsible for the medical aspects of the business. Specifically regarding Nwankpa's representation regarding the value of Apicon's accounts receivable, Obilom testified as follows:

> A: Well, like I said, at the point I got this, I have no knowledge of account receivables or financials. So she just told me we have 640 something thousand dollars that we can collect; and throughout the business, I've always looked at the bottom line. Anything she give me, I trusted that whatever she is giving me is authentic.
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> Q: So you trusted in her honesty, correct?
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> A: Yes.
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> Q: You had no reason to doubt her, right?
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> A: No.
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> Q: Okay.
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> A: Because I thought it was coming from the QuickBook.
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> . . .
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> Q: You just took her at her word?
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> A: I have no other way to base it, because I didn't know accounting and—or knowledge in accounting or finance.

Finally, Obilom entered into evidence a May 31, 2012 document titled "Account Aging Report Summary" that Nwankpa had given her to show the value of the accounts receivable. The document shows the age of the various accounts, but otherwise does not indicate any other information, such as likelihood of collection. Nwankpa, in turn, testified that she had complete control over the financial aspects of Apicon, and that Obilom, for the most part, did not review any of the company's financial records or transactions.

Considering all the evidence in the light most favorable to the verdict, crediting favorable evidence if reasonable jurors could and disregarding contrary evidence unless reasonable jurors could not, we hold that reasonable and fair-minded people could conclude that it was reasonable for Obilom, who did not regularly deal with the day-to-day financial aspects of Apicon, to rely on Nwankpa's assertions regarding the value of the company's accounts receivable. *See City of Keller*, 168 S.W.3d at 827. Likewise, considering all the evidence, we cannot say that the evidence supporting the jury's finding of justifiable reliance is so weak that the finding is clearly wrong and manifestly unjust. *See Dow Chem.*, 46 S.W.3d at 242.

Nwankpa emphasizes that it was not reasonable for Obilom to rely on Nwankpa's representations given Obilom had recently discovered various financial improprieties that she attributed to Nwankpa. *See Grant Thornton*, 314 S.W.3d at 923 ("[A] person may not justifiably rely on a representation if there are red flags indicating such reliance is unwarranted." (internal quotations omitted)). But Nwankpa's alleged financial improprieties involved skimming money from the company by hiding a credit card and paying herself monies to which she was not entitled. There is nothing in the record to suggest that Obilom had discovered that Nwankpa tampered with the company's accounts receivable. Under those circumstances, the jury could have concluded that it was reasonable for Obilom to rely on Nwankpa's representation of the company's accounts receivable.

We overrule Nwankpa's first issue. Further, because there was factually and legally sufficient evidence supporting the jury's finding that Obilom's reliance was reasonable, we also overrule Nwankpa's second issue, which is predicated on a favorable resolution of her first issue.

In her third issue, Nwankpa asserts that the jury's finding of an absence of justifiable reliance on Obilom's fraud claim precludes its finding of justifiable reliance on Obilom's negligent misrepresentation. But Nwankpa's issue mischaracterizes the jury's finding. The jury here simply found that Nwankpa had not committed fraud against Obilom; it did not make a specific finding regarding the reliance element of a fraud claim. And although Nwankpa is correct that both fraud and negligent misrepresentation require a finding of actual and justifiable reliance, *see Grant Thornton*, 314 S.W.3d at 923, a fraud claim requires elements that a negligent-misrepresentation does not, including that the defendant knew that the representation was false when made (or made the representation recklessly without knowledge of its truth) and that the defendant made the representation with the intent that the plaintiff rely on it, *see Zorrilla v. Aypco Constr. II, LLC*, 469 S.W.3d 143, 153 (Tex. 2015). As such, the jury here could have concluded that Nwankpa did not make the representation knowingly, or that she did not intend for Obilom to rely on it. *See id.* Accordingly, the jury's negative fraud finding did not preclude its affirmative negligent-misrepresentation finding. We overrule Nwankpa's third issue.

Attorney Fees

In her final issue, Nwankpa asserts that the trial court erred in awarding attorney fees because there is no statute or contractual agreement authorizing them in this dispute. Specifically, she urges that Obilom is not entitled to attorney fees because such fees are not recoverable on a negligent-misrepresentation claim and because the jury awarded her zero damages on her promissory-estoppel claim. We agree.

In Texas, attorney fees may not be recovered from an opposing party unless they are authorized by statute or by contract between the parties. *Holland v. Wal-Mart Stores*, 1 S.W.3d 91, 95 (Tex. 1999). No statute allows attorney fees to be awarded for negligent misrepresentation, nor does Obilom point to a contract that authorizes attorney fees. *See Oat Note, Inc. v. Ampro Equities, Inc.*, 141 S.W.3d 274, 280 (Tex. App.—Austin 2004, no pet.). Further, Obilom's negligent-misrepresentation claim did not relate to any contract between the parties that authorized such fees. *See Polk v. St. Angelo*, No. 03-01-00356-CV, 2002 WL 1070550, at *3 (Tex. App.—Austin May 31, 2002, pet. denied) (mem. op.) (noting that attorney fees are not generally available for tort claims like negligent misrepresentation, but holding that plaintiff was entitled to fees because misrepresentation related to contract under terms of contract itself) (citing *Dickerson v. Trinity-Western Title Co.*, 985 S.W.2d 687, 692–93 (Tex. App.—Fort Worth 1999, pet. denied) (holding that contract language entitled parties to attorney fees because claim for negligence, misrepresentation, and deceptive trade practices was "related to" contract itself)); *see also Oat Note*, 141 S.W.3d at 281 (discussing *Polk* and issue of attorney fees for negligent misrepresentation related to contract).

Likewise, even if we were to assume without deciding here that the Texas Civil Practice & Remedies Code permits an award of attorney fees under a promissory-estoppel claim, Obilom is not entitled to such fees because the jury awarded her zero damages for her promissory-estoppel claim. *See Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 201 (Tex. 2004) (holding that plaintiff was not entitled to recover attorney fees because it was not awarded damages on its claim); *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 390 (Tex. 1997) (holding

that to recover attorney fees under section 38.001, party must "prevail on cause of action for which attorney fees are recoverable" and "recover damages"); *see also MBM Fin. Corp. v. Woodlands Operating Co.*, 292 S.W.3d 660, 666 (Tex. 2009) (noting that "some damages are necessary to recover fees under [section 38.001]"). Obilom asserts that she did have a recovery because she did not have to return to the $81,000 deposit to Nwankpa. But Obilom did not "recover" any amount as damages based on her claim for promissory estoppel—the deposit simply remained with the construction company. We sustain Nwankpa's fourth issue.

Conclusion

Having determined that Obilom was not entitled to attorney fees, we reverse the trial court's award of attorney fees and render judgment that Obilom take nothing on her claim for attorney fees. We affirm the remainder of the judgment.

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Jeff Rose, Chief Justice

Before Chief Justice Rose, Justices Field and Bourland

Reversed and Rendered in part, and Affirmed in part

Filed: August 24, 2017