

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00265-CV

Frank W. Hill, Appellant

v.

John Choate and Justin Gilg, Appellees

**FROM THE DISTRICT COURT OF TRAVIS COUNTY, 53RD JUDICIAL DISTRICT
NO. D-1-GN-14-002998, HONORABLE J. DAVID PHILLIPS, JUDGE PRESIDING**

MEMORANDUM OPINION

Appellant Frank W. Hill appeals from a summary judgment rendered by the district court of Travis County ordering specific performance of a residential real-estate contract. Appellees are John Choate and Justin Gilg. We will affirm the judgment.

Hill owns a house located on Greenwood Avenue in Austin. In June 2014, Choate and Gilg met with Hill at the house to discuss sale of the property. After a purchase price was agreed upon, the parties signed and initialed the “Contract.” Before the parties signed and initialed the Contract, Gilg wrote his name on the line in the Contract designating “Buyer”; Choate’s name was already typed-in as buyer.

Choate and Gilg planned to take the Contract to the title company along with the required earnest-money deposit. Hill insisted on having a copy of the Contract before the purchasers

left the meeting. Responding to Hill's demand, the parties signed and initialed a second form contract (the Copy) for Hill to keep.

The Contract and the Copy are identical except that the first paragraph of the Contract identifies the buyer as Choate and Gilg whereas the Copy identifies only Choate as the buyer. However, Gilg initialed each page of the Copy and signed it. Additionally, the Copy indicates, by a check in the appropriate box, the parties' agreement to mediate disputes between the buyers and seller while the Contract is silent regarding mediation.

Choate's and Gilg's summary-judgment proof is that neither man changed anything in the Contract or the Copy after the parties executed the instruments. Choate and Gilg performed all obligations and conditions necessary to close on the sale. However, before the closing date a real-estate agent, who at no time ever represented either side of the transaction, emailed the title company stating that Hill no longer wished to sell and attached to the email a "Release of Earnest Money" bearing Hill's signature and Choate's printed name. Neither Choate nor Gilg had agreed to cancel the Contract, nor had they agreed to release the earnest money. Before the closing date, Hill faxed a letter to the title company requesting cancellation of the sale "due to family inability to move and other family issues." Hill did not appear for the closing.

Choate and Gilg made repeated demands on Hill to perform under the Contract. When Hill did not respond to their demands, Choate and Gilg filed suit for breach of contract and specific performance. During the course of the litigation, Hill filed several amended answers and counterclaims, asserting various affirmative defenses: fraud, illegality, void as against public policy, statute of frauds, and modification.

The genesis of Hill’s fraud claim is that the differences between the Contract and the Copy—i.e., the addition of Gilg’s name as a buyer in the Contract and the absence of an agreement to mediate in the Contract—constitute fraud, thereby vitiating the transaction.

Choate and Gilg filed a traditional motion for summary judgment. Hill filed a response supported by his affidavit. Later, Choate and Gilg filed an amended traditional motion for summary judgment and a no-evidence motion for summary judgment. Hill never filed a response to the no-evidence motion for summary judgment.

Choate and Gilg filed objections to Hill’s supporting affidavit. Most of the affidavit consisted of legal conclusions and inadmissible hearsay statements. The district court heard the objections to Hill’s affidavit and the motions for summary judgment together. The court sustained the objections to the affidavit, but did not strike it. The court granted the motions for summary judgment and ordered specific performance of the Contract.

On appeal, Hill claims that even after all objectionable statements in his affidavit were stricken, there still remained evidence showing fraudulent variations between the Contract and the Copy. Hill argues that because he did not agree to add Gilg as a buyer and because the Copy contained an agreement to mediate and the Contract did not, fraud had occurred. To establish fraud, there must be, among other things, proof of a false representation of a past or existing material fact. *Casstevens v. Smith*, 269 S.W.3d 222, 231 (Tex. App.—Texarkana 2008, pet. denied). “Material” means a reasonable person would attach importance to and would be induced to act on the information in determining his choice of actions in the transaction. *Italian Cowboy Partners v. Prudential Ins. Co.*, 341 S.W.3d 323, 337 (Tex. 2011).

In the sale of real property the essential elements required, in writing, are the price, the property description, and the seller's signature. *Rus-Ann Dev., Inc. v. ECGC, Inc.*, 222 S.W.3d 921, 927 (Tex. App.—Tyler 2007, no pet.); *Lynx Expl. & Prod. Co. v. 4-Sight Operating Co.*, 891 S.W.2d 785, 788 (Tex. App.—Texarkana 1995, writ denied).

Hill does not show the Court any authority for the propositions that the number of buyers in a real-estate transaction or the existence or absence of an agreement to mediate constitute “material” terms, or that a reasonable seller would attach such importance to those terms. After the district court sustained the objections to Hill's affidavit, the remaining parts of the affidavit may have, at best, raised fact issues, but not “material” issues so as to defeat Choate's and Gilg's right to summary judgment on Hill's fraud defense.

Choate and Gilg filed a no-evidence motion for summary judgment asserting that Hill did not have any evidence to establish his counterclaim and various affirmative defenses. Included among Hill's affirmative defenses was his claim that the Contract was in violation of the statute of frauds. Hill filed no response to the no-evidence motion for summary judgment nor did he file any summary-judgment evidence in support of his counterclaim or affirmative defenses. Pursuant to Texas Rule of Civil Procedure 166a(i), the district court properly rendered summary judgment for lack of a response by Hill, since Choate's and Gilg's motion warranted a final summary judgment based upon lack of evidence to support Hill's counterclaim and affirmative defenses. *See Jackson v. Fiesta Mart, Inc.*, 979 S.W.2d 68, 71 (Tex. App.—Austin 1998, no pet.).

Finally, Hill asserts error by the district court in granting final summary judgment without addressing Hill's statute of frauds defense asserted in his counterclaim. The day after

Choate and Gilg filed their First Amended Motion for Summary Judgment, Hill filed his Fifth Amended Answer and Amended Counterclaim. In his amended counterclaim, Hill added, for the first time, “Count 2”—violation of the statute of frauds. As previously noted, Hill had pleaded the statute of frauds as an affirmative defense in prior answers. In his fifth amended counterclaim, Hill requests no affirmative relief; rather, he asserts that the contract is “unenforceable under the statute of frauds.” It appears that he is simply reasserting the statute of frauds as an affirmative defense dressed in the robes of a counterclaim.

Usually, when a non-movant amends his pleadings after a movant has moved for summary judgment, the movant must file an amended motion for summary judgment to prevail in the entirety of the non-movant’s case. *Smith v. Atlantic Richfield Co.*, 927 S.W.2d 85, 88 (Tex. App.—Houston [1st Dist.] 1996, writ denied). A judgment that grants more relief than a party is entitled to is subject to reversal. *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 200 (Tex. 2001). An exception applies, however, when the grounds initially asserted in the motion for summary judgment conclusively negate an element that is common to the allegation asserted in the amended pleadings. *See Lampasas v. Spring Ctr., Inc.*, 988 S.W.2d 928, 437 (Tex. App.—Houston [14th Dist.] 1999, no pet.); *Judwin Props., Inc. v. Griggs & Harrison*, 911 S.W.2d 498, 502-03 (Tex. App.—Houston [1st Dist.] 1995, no writ). Hill’s statute-of-fraud claim asserted in the amended counterclaim is based upon the same grounds as his fraud claim—i.e., that the differences between the Contract and the Copy constitute fraud. In addition, Hill pleaded the statute of frauds as an affirmative defense in his fourth amended answer. Choate and Gilg’s no-evidence motion for summary judgment attacked Hill’s affirmative defenses of fraud and the statute of frauds.

Because the summary-judgment evidence conclusively negated the existence of misrepresentation of material fact and the grounds for a violation of the statute of frauds, and Hill failed to respond to the no-evidence motion for summary judgment, the district court properly rendered final judgment.

The judgment is affirmed.

Bob E. Shannon, Justice

Before Chief Justice Rose, Justices Goodwin and Shannon*

Affirmed

Filed: September 29, 2017

* Before Bob E. Shannon, Chief Justice (retired), Third Court of Appeals, sitting by assignment. *See* Tex. Gov't Code § 74.003(b).