NUMBER 13-19-00188-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

RAY HERNANDEZ, **Appellant,**

v.

MOHAMMAD MOTAGHI AND MITRA KHAN, **Appellees.**

On appeal from the 28th District Court of Nueces County, Texas.

MEMORANDUM OPINION

Before Chief Justice Contreras and Justices Benavides and Longoria
Memorandum Opinion by Justice Longoria

Appellant Ray Hernandez sued appellees Mohammad Motaghi and Mitra Khan for breach of contract, fraud, unjust enrichment, and breach of fiduciary duties. Appellees filed a hybrid motion for summary judgment, which the trial court granted. By one issue

on appeal, appellant argues that the trial court erred in granting summary judgment. We affirm.

I. BACKGROUND

In April 2017, appellant learned that the business Highway Barricades and Services, LLC (Highway Barricades) was being offered for sale.[1] appellant approached his acquaintances, appellee Motaghi and his daughter, appellee Khan, to determine if they were interested in buying Highway Barricades with him. Appellees indicated that they were interested. On August 17, 2017, without the guidance of a lawyer, appellant and appellees drafted and signed the Joint Bid Agreement (JBA). The JBA is a two-page document stating that the parties were "agreeing to prepare and submit to [Highway Barricades] . . . a joint bid to purchase all current operations and assets of [Highway Barricades]." The JBA contained the following provisions:

> 1. If joint bid is accepted by Highway Barricades, proposed ownership structure will be as follows among Joint Bidders, in a corporate form to be selected by Mitra Khan:
>
> a. Mitra Khan - 51%
> b. Mohammad Motaghi - 24.5%
> c. Ray Hernandez - 24.5%
>
> 2. If joint bid is accepted by Highway Barricades, proposed profit sharing structure will be as follows among Joint Bidders, in a corporate form to be selected by Mitra Khan:
>
> a. Mitra Khan - 40%
> b. Mohammad Motaghi - 30%
> c. Ray Hernandez - 30%
>
> . . .

[1] According to appellees, Highway Barricades "primarily provides traffic-control barricades and signs for road construction projects in Texas."

5. Joint Bidders individually agree that all bids to purchase Highway Barricades Services, LLC will be joint bids to contain Mitra Khan, Mohammad Motaghi, and Ray Hernandez.

6. Joint Bidders individually agree that that no such individual will contact Highway Barricades Services, LLC or entertain offers to provide bids individually or participation in any form with any other bidding parties without written consent of all Joint Bidders.

7. Joint Bidders individually agree that friends and family of any of such individuals are prohibited from approaching Highway Barricades to purchase the company or entertaining offers to provide bids to purchase Highway Barricades without the written consent of all Joint Bidders.

The JBA also contained a liquidated damages clause, stating that the breaching party would be liable in the amount of "300% of the purchase price of the agreement between [Highway Barricades] and the purchaser."

Together, appellant and appellees submitted a joint bid for the purchase of Highway Barricades for $8.5 million. Once the sellers accepted their bid, appellant and appellees began to more heavily research Highway Barricades' business model and what they needed to make it profitable. In Khan's opinion, the business would only be viable with a Disadvantaged Business Enterprise (DBE) certification.[2] appellant and each of the appellees then began their efforts to secure financing to pay their individual capital contributions towards purchasing Highway Barricades. Before this point, the three of them had never discussed their capital contributions or how they would divide the financial obligations.

[2] According to appellees, a DBE certification is limited to "businesses 51% owned, controlled, and managed by socially and economically disadvantaged individuals. The business must meet and maintain specific, technical requirements concerning group membership or individual disadvantage, business size, ownership, and control." Appellees assert that DBE certification is important because many federally-funded construction projects require a percentage of their contracts to be awarded to DBE-certified businesses.

On October 13, 2017, the seller sent Motaghi a draft of the purchase agreement, which identified appellant and both appellees as purchasers. Khan claims that, even though specifics were not discussed beforehand, appellant had constantly assured her that he was capable of paying his capital contribution. However, after a meeting on December 3, 2017, appellant informed Khan that he would not be able to meet his capital contribution. On February 8, 2018, appellant confirmed that he was unable to provide a financial contribution for the purchase of Highway Barricades. Motaghi was also forced out of the purchase because, though Khan needed to borrow money from her father to fund her capital contribution, DBE certification requirements prohibited Motaghi from both being an owner and funding his daughter's capital contribution. Khan later executed a series of promissory notes and guaranties that made her liable for approximately $8.6 million. On May 8, 2018, Khan executed the final purchase agreement and became the 100% owner of Highway Barricades.

On June 6, 2018, appellant filed suit against appellees for breach of contract and sought $27 million pursuant to the liquidated damages clause of the JBA. The appellees filed a motion for partial summary judgment, asserting that the liquidated damages clause was an unenforceable penalty. The trial court granted appellees' motion; appellant does not challenge this ruling on appeal.

After several months of discovery, appellant admitted that "he had not come up with a figure for damages" because he did not know how to calculate them. Appellees filed a motion for summary judgment on both traditional and no-evidence grounds, asserting there was no evidence of any of the elements of appellant's claims. The hearing on this motion was set for October 25, 2018. Seven days before the hearing, on October

18, 2018, appellant amended his petition, adding claims for fraud and unjust enrichment. The next day, on October 19, 2018, appellees filed another motion for summary judgment addressing the newly pleaded fraud and unjust enrichment claims. Appellees argued there was no evidence of any of the elements of fraud or unjust enrichment. Appellees sought to have this motion for summary judgment also considered at the October 25, 2018 hearing. On October 22, 2018, appellant amended his petition to drop the allegation that Motaghi owed him an informal fiduciary duty. On October 24, 2018, the day before the hearing, appellant filed his fourth amended petition, adding claims for "quantum meruit" and "quasi-contract." On the same day, appellees filed a motion to strike the fourth amended petition because it was untimely filed.

At the hearing on October 25, 2018, the trial court heard all of appellees' motions for summary judgment and granted appellees' motion to strike. On November 16, 2018, the trial court rendered summary judgment on all of appellant's claims in favor of appellees.[3] This appeal ensued.

II. SUMMARY JUDGMENT

By one issue on appeal, appellant argues that the trial court erred by granting summary judgment. More specifically, appellant argues that the summary judgment evidence raised fact issues regarding his breach of contract, unjust enrichment, and breach of fiduciary duty claims.[4]

A. Standard of Review and Applicable Law

[3] Appellees have a counterclaim for attorney's fees, which was severed from the case underlying this appeal.

[4] Hernandez does not, however, argue on appeal that the summary judgment evidence raises a Fact issue as to his fraud claim.

A movant for traditional summary judgment bears the burden to show its entitlement to judgment as a matter of law. TEX. R. CIV. P. 166a(c). A no-evidence motion for summary judgment is essentially a pretrial directed verdict. *King Ranch, Inc. v. Chapman,* 118 S.W.3d 742, 750–51 (Tex. 2003). The trial court must grant a motion for no-evidence summary judgment if the respondent does not produce summary judgment evidence raising a genuine issue of fact. *See* TEX. R. CIV. P. 166a(i); *Jackson v. Fiesta Mart, Inc.*, 979 S.W.2d 68, 71 (Tex. App.—Austin 1998, no pet.). In our analysis, we review the evidence in the light most favorable to the non-movant, disregarding all contrary evidence and inferences. *See Buck v. Palmer*, 381 S.W.3d 525, 527 (Tex. 2012) (per curiam).

> A no evidence point will be sustained when (a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a mere scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact.

King Ranch, 118 S.W.3d at 750–51*.* There is no genuine issue of fact if the evidence is less than a scintilla. *See id.* There is less than a scintilla of evidence when the evidence is "so weak as to do no more than create a mere surmise or suspicion of a fact." *Id.* More than a scintilla of evidence exists when the evidence "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Id.*

The elements of a breach-of-contract claim are: (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach by the defendant; and (4) damages sustained by the plaintiff as a result of the breach. *Tex. Dep't of Transp. v. Crockett*, 257 S.W.3d 412, 416 (Tex. App.—Corpus Christi–Edinburg 2008, pet. denied). In order to be legally binding, "a contract must be sufficiently definite in its

terms so that a court can understand what the promisor undertook. The material terms of the contract must be agreed upon before a court can enforce the contract. Where an essential term is open for future negotiation, there is no binding contract." *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex. 1992) (internal citations omitted).

"Unjust enrichment occurs when a person has wrongfully secured a benefit or has passively received one which it would be unconscionable to retain. A person is unjustly enriched when he obtains a benefit from another by fraud, duress, or the taking of an undue advantage." *Lee v. Lee*, 411 S.W.3d 95, 111 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (internal citations omitted).

To prevail on a breach of fiduciary duty claim, a plaintiff must establish the existence of a fiduciary duty, a breach of the duty, causation, and damages. *See Las Colinas Obstetrics-Gynecology-Infertility Ass'n v. Villalba*, 324 S.W.3d 634, 645 (Tex. App.—Dallas 2010, no pet.).

B. Discussion

1. Breach of Contract

Appellant first argues that he raised a genuine issue of fact regarding his breach of contract claim. Appellees argued in their summary judgment motion that the JBA is unenforceable because it is missing many material terms and includes language that suggests the terms were open to future negotiation. For instance, the JBA refers to the "proposed" ownership and profit-sharing structures, which means that the parties involved left these open for negotiation in the future. In his summary judgment response, appellant even admitted that "[t]he [JBA] is not designed to be an agreement as to ownership, profit

sharing, corporate form, [or] financing." The JBA also fails to mention how much appellant and the appellees must pay to secure an ownership role.

Appellant argues that there was at least an enforceable agreement as to the bidding process itself. According to appellant, "the parties had an enforceable agreement prohibiting Khan from individually bidding for, entertaining offers to provide bids, or participating in any bid regarding the purchase of Highway Barricades without appellant's written consent." Thus, according to appellant, the parties were required to make a joint bid. However, it is undisputed that the parties did, in fact, submit a joint bid. The initial bid listed the names of appellant, Motaghi, and Khan as the purchasers, and the seller accepted said bid. On October 13, 2017, the seller even sent a draft purchase agreement that contained all three of their names. It was not revealed until later that appellant would not be able to meet his capital contribution and he subsequently dropped out of the purchase agreement.

Appellant further claims that under the JBA, the "parties agreed to make a joint purchase or to make no purchase at all." However, this assertion is unsupported by the language of the JBA. The JBA prohibits the parties from making individual bids or bids with third parties but the JBA never requires that all three of them must be parties to the final purchase of Highway Barricades. As the name of the agreement itself implies, the plain language of the JBA indicates that the parties simply agreed that all bids would be joint bids.

Viewing the evidence in the light most favorable to appellant, we conclude there is less than a scintilla of evidence to show an enforceable contract. *See King Ranch,* 118

S.W.3d at 750–51. Therefore, the trial court did not err in granting summary judgment on his breach of contract claim. *Id.*

2. Unjust Enrichment & Quantum Meruit

Next, appellant argues that he raised a genuine issue of fact concerning his unjust enrichment claim. On appeal, appellant argues that unjust enrichment and quantum meruit are closely related and sometimes even "synonymous." However, the trial court struck his fourth amended petition, which was the only petition that raised a quantum meruit claim; appellant does not challenge the trial court's striking of his petition. Therefore, appellant's quantum meruit claim was not properly before the trial court.

Concerning his unjust enrichment claim, appellant asserts that Khan was unjustly enriched by purchasing Highway Barricades. He argues that appellees took advantage of the business opportunity that he brought to their attention. However, appellant has not cited any caselaw in which a court upheld an unjust enrichment claim solely on the basis of bringing a potential business deal to the attention of an acquaintance. Appellant ushered less than a scintilla of evidence to demonstrate that the appellees have secured a benefit that would be unconscionable for them to retain. *See Lee*, 411 S.W.3d at 111. Appellant also failed to raise even a scintilla of evidence that appellees obtained any benefit by fraud, duress, or taking undue advantage. *See id. Appellant* and appellees submitted a joint bid, per their agreement, for the purchase of Highway Barricades. Appellant was fully involved with the purchase process until it was revealed that he could not afford to buy an ownership share of the company. Even after that point, appellees continued to communicate with appellant and even offered him the ability to work for the company as an employee. We conclude that appellant has failed to raise a genuine issue

of material fact on every element of his unjust enrichment claim; accordingly, the trial court did not err in granting summary judgment on this claim. *See King Ranch,* 118 S.W.3d at 750–51.

3. Fiduciary Duty

Lastly, appellant argues that he raised a fact issue on his breach of fiduciary duty claim. Appellant asserts that Motaghi became a "direct and indirect fiduciary to appellant" because the JBA created a limited express power of attorney and appellant trusted Motaghi to act on his behalf. *See In re Estate of Miller*, 446 S.W.3d 445, 454–55 (Tex. App.—Tyler 2014, no pet.) ("A power of attorney creates an agency relationship, which is a fiduciary relationship as a matter of law."). This assertion is based on the following provision in the JBA:

> Mohammad Motaghi will lead communications and negotiations and possess exclusive responsibility to make any and all formal offers to Highway Barricades Services, LLC based on his best judgment and input from the joint bidders.

However, this does not qualify as a statutory power of attorney because it does not comply with the relevant statutory requirements. *See* TEX. EST. CODE ANN. §§ 752.004, 752.051 (requiring, amongst other things, that a statutory power of attorney be titled "STATUTORY DURABLE POWER OF ATTORNEY"). There are non-statutory powers of attorney, but appellant has not cited, and we cannot find, a single case where language such as this was found to have created a power of attorney. Powers of attorney create agency relationships. *See In re Estate of Miller*, 446 S.W.3d at 454–55. However, there is no evidence suggesting that appellant had the ability to assign tasks to Motaghi or control the details of Motaghi's actions. *See id.*

As the cases that appellant cites indicate, courts have also found fiduciary duties to arise in multiple formal, non-agent relationships. *See, e.g., Willis v. Maverick*, 760 S.W.2d 642, 645 (Tex. 1988) (finding that fiduciary duties arose for an attorney-client relationship); *Montgomery v. Kennedy*, 669 S.W.2d 309, 313 (Tex. 1984) (same for trustees); *Manges v. Guerra*, 673 S.W.2d 180, 183 (Tex. 1984) (same for mineral rights holders); *Humane Soc'y v. Austin Nat'l Bank*, 531 S.W.2d 574, 577 (Tex. 1975) (same for executors); *Watkins v. Williamson*, 869 S.W.2d 383, 387 (Tex. App.—Dallas 1993, no writ) (same for escrow agents); *Sw. Tex. Pathology Assocs. v. Roosth*, 27 S.W.3d 204, 208 (Tex. App.—San Antonio 2000, pet. dism'd) (same for spouses). And for certain types of formal relationships a fiduciary duty arises as a matter of law. *See Meyer v. Cathey*, 167 S.W.3d 327, 330–31 (Tex. 2005) (per curiam). However, none of these formal relationships apply to the present case. Motaghi was simply responsible for leading communications and negotiations with Highway Barricades; he had no authority to act on appellant's behalf or bind appellant to a business agreement. *See Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 176 (Tex. 1997) (concluding that acting as lead negotiator in a business transaction did not give rise to fiduciary duties).

Appellant additionally argues that Motaghi had a fiduciary duty because appellant trusted in him to act on his behalf. It is true that "[a]n informal relationship may give rise to a fiduciary duty where one person trusts in and relies on another." *Id.* However, in a business transaction, a court will only impose a fiduciary duty based on a high level of trust and confidence or if a prior fiduciary duty existed between the parties. *Id.* Here, there was no prior fiduciary duty between Motaghi and appellant. Furthermore, a fiduciary duty cannot arise simply from an expectation that another party in a contract will act in the best

interests of all involved parties because "[t]o permit any further inference would impose a fiduciary relationship in every contract because all contracting parties presumably contract for their mutual benefit." *Id.* at 177.

We conclude that appellant has not raised at least a scintilla of evidence for every element of his breach of fiduciary duty claim. Therefore, the trial court did not err in granting summary judgment on his breach of fiduciary duty claim. *See King Ranch,* 118 S.W.3d at 750–51.

In summary, the trial court did not err in granting summary judgment in favor of appellees on all of appellant's claims. We overrule appellant's sole issue.

III. CONCLUSION

We affirm the judgment of the trial court.

NORA L. LONGORIA
Justice

Delivered and filed the
11th day of June, 2020.