NO. 12-17-00033-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

JOHN MARTIN, APPELLANT	*§*	***APPEAL FROM THE 273RD***
V.	*§*	***JUDICIAL DISTRICT COURT***
CITIZENS, AS NA OF CITIZENS STATE BANK, APPELLEE	*§*	***SHELBY COUNTY, TEXAS***

MEMORANDUM OPINION

John Martin appeals a no-evidence summary judgment rendered in favor of Citizens State Bank (the Bank). The Bank brings one counter-issue contending John waived his appeal by moving for the entry of judgment. John brings seven issues contending the court erred in granting summary judgment.[1] We hold that John did not waive his appeal by moving for the entry of final judgment, and we overrule his seven issues. We affirm.

BACKGROUND

In 2007 and 2008, John and Teri Lea Martin were husband and wife. Teri Lea's parents owned Timpson Tamco, Inc. (Timpson), for which she served as the person in charge of accounting and finance.

On August 1, 2006, Teri Lea opened a joint checking account with the Bank in the name of John Martin and wife, Teri Lea Martin a/k/a Teri Alexander. During 2007 and 2008, Teri Lea improperly endorsed and deposited into that account checks totaling $146,004.67 that were payable to her employer, Timpson. There is no evidence in the record that John knew of Teri Lea's deposits of these checks.

[1] We construe the complaints in John's brief as essentially raising seven issues.

When the improper endorsements and deposits were discovered, the Bank paid Timpson $146,004.67 in reimbursement for the checks wrongfully deposited by Teri Lea in the joint account. To forestall civil or criminal action against Teri Lea, because of her unlawful deposit of the Timpson checks into the joint account, John and Teri Lea executed a promissory note payable to the Bank in the amount of $146,004.67. In consideration for the execution of this note, the Bank agreed "to forego any other legal action, civil or criminal, against the said Teri Lea Alexander Martin, insofar as the note is timely paid, in full." Both John and Teri Lea signed the agreement. Immediately before the execution of the note and agreement, Don Dial, the Bank's president, allegedly told John that he had to sign the note or prosecution would result. No payments were ever made on the note.

John and Teri Lea divorced in 2009. In an agreement incident to the divorce, Teri Lea agreed to pay the $146,004.67 note to the Bank and indemnify John therefrom. On August 19, 2010, the Bank sued John and Teri Lea for $146,004.67 plus interest. John filed a counterclaim alleging the Bank violated the Deceptive Trade Practices Act (DTPA) engaged in unreasonable collection efforts, breached a fiduciary, and breach of the duty of good faith and fair dealing. He later filed an original cross claim against Teri Lea for breach of the agreement incident to divorce. John subsequently amended his answer and counterclaim to allege that the Bank not only violated the DTPA, but also engaged in unreasonable and illegal collection efforts in violation of the Texas Finance Code and breached the duty of good faith and fair dealing, but also committed fraud and usury. The amended counterclaim no longer alleged a breach of fiduciary duty.

In January 2013, the Bank and Teri Lea signed a Rule 11 agreement and memorandum of settlement reciting that all controversies between them had been resolved in mediation. Teri Lea agreed to pay the Bank $59,646.00. The Bank and Teri Lea filed a joint motion to dismiss all claims against each other. The Bank subsequently moved for no evidence summary judgment on John's counterclaims, and on June 20, 2014, the trial court granted the motion. On September 5, 2014, the trial court granted the Bank's motion for nonsuit of its claims against John. On September 25, John moved for summary judgment against Teri Lea for attorney's fees resulting from her failures to pay the note to the Bank and provide him a defense against the Bank.

On January 10, 2017, the trial court entered a final judgment providing that John recover $20,000.00 from Teri Lea, and denied all other relief. This appeal followed.

<u>WAIVER OF COMPLAINT</u>

As a threshold matter, the Bank contends that John waived his right to complain about the judgment by moving the court to enter the final judgment from which he seeks to appeal.

On December 22, 2016, John moved the trial court "to enter a Final Judgment in the form attached hereto as Exhibit A." On January 10, 2017, the trial court signed the final judgment as John requested. The judgment was approved as to form by John's attorney. John's motion for final judgment contained the following statement:

> On June 20, 2014, the court signed [a] judgment Granting No-Evidence Summary Judgment which dismissed John Martin's counterclaim against Plaintiff Citizens State Bank. (Counter-plaintiff John Martin will file an appeal of the Judgment Granting No-Evidence Summary Judgment on signing by the Court and entry of the Final Judgment requested in this motion).

The no-evidence summary, dated June 20, 2014, disposed of only claims by John against the Bank. The summary judgment was interlocutory and not appealable. Over the next two years, all the other claims, cross claims, and counterclaims were resolved. However, the entry of a judgment disposing of all claims and parties was necessary before an appeal was possible.

In ***Casu v. Marathon Refining Co***., 896 S.W.2d 388 (Tex. App.—Houston [1st Dist.] 1995, writ denied), the court stated the general rule: "Where a litigant moves the trial court to enter a judgment, and the trial court enters the judgment, the litigant cannot later complain of that judgment." ***Id***. at 389. However, the Texas Supreme Court in ***First Nat'l Bank v. Fojtik***, 775 S.W.2d 632 (Tex. 1989), stated: "There must be a method by which a party who desires to initiate the appellate process may move the trial court to render judgment without being bound by its terms." ***Id***. at 633. The Supreme Court held that a statement in the motion for judgment that the plaintiff disagreed with the verdict was sufficient to preserve the right to appeal the judgment. ***Id***.

In ***Glattly v. Air Starter Components, Inc***., 332 S.W.3d 620 (Tex. App.—Houston [1st Dist.] 2010, pet. denied), Air Starter's proposed judgment was submitted to the court after several hearings on post-trial motions and was intended to conform to what the trial court had announced as its judgment at those hearings. ***Id***. at 636. Although nothing in the proposed judgment indicated Air Starter's disagreement with the judgment, the court noted that Air Starter did not move for the entry of judgment. ***Id***. The court held that merely providing a draft judgment to conform to what the court had announced would be its judgment does not result in

waiver of the appeal. ***Id***. at 636-37. In ***Andrew Shebay & Co., P.L.L.C. v. Bishop***, 429 S.W.3d 644 (Tex. App.—Houston [1st Dist.] 2013, pet. denied), the appellant did not file a motion for judgment, but submitted a judgment to the trial court and signed "agreed as to substance and form." ***Id***. at 647. The court held there was no waiver:

> A proposed judgment submitted by a party need not note the submitting party's disagreement with the contents of the judgment to maintain the right to appeal. Rather, clear objections in the trial court or posttrial proceedings evidencing disagreement with the judgment are sufficient.

Id.

In the instant case, John stated in his motion for judgment that he intended to appeal the judgment. Therefore, no waiver of appeal resulted. *See* ***Fojtik***, 775 S.W.2d at 633; *see also* ***Bishop***, 429 S.W.3d at 647; ***Glattly***, 332 S.W.3d at 636. The Bank's counter-issue is overruled.

SPECIFICITY OF SUMMARY JUDGMENT GROUNDS

John contends, in his first issue, that the Bank's motion for summary judgment failed to explicitly state the element or elements of the several causes of action for which there is no evidence.

Applicable Law

The no-evidence summary judgment rule requires the moving party to identify the grounds for the motion:

> After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. The motion must state the elements as to which there is no evidence.

TEX. R. CIV. P. 166a(i). "The motion must be specific in challenging the evidentiary support for an element of a claim or defense; paragraph (i) does not authorize conclusory motions or general no-evidence challenges to an opponent's case." TEX. R. CIV. P. 166a(i) cmt 2. "The underlying purpose of this requirement 'is to provide the opposing party with adequate information for opposing the motion, and to define the issues for the purpose of summary judgment.'" ***Timpte Indus., Inc. v. Gish***, 286 S.W.3d 306, 311 (Tex. 2009) (quoting ***Westchester Fire Ins. Co. v. Alvarez***, 576 S.W.2d 771, 772 (Tex. 1978)). This requirement serves the same end as the fair

notice pleading requirements of Rules 45(b) and 47(a). ***Id.***; *see also* TEX. R. CIV. P. 45(b) (requiring a party's pleadings to give "fair notice" to the opponent); TEX. R. CIV. P. 47(a) (requiring a plaintiff's pleadings to give "fair notice of the claim involved").

DTPA

In John's first amended counterclaim, he alleged that the Bank engaged in a deceptive trade practice. Specifically, he alleged as follows:

> Counter-Plaintiff is a consumer as defined by § 17.45(4), Texas Business and Commerce Code. At the time that Counter-Plaintiff signed the Note, Mr. Dial knowingly and intentionally represented that Counter-Plaintiff was required by law to sign the Note. Such representation was false, misleading and deceptive in that there is no law that mandates Counter-Plaintiff's signature on the Note. The foregoing representation violates § 17.46(b)(12),(24), Texas Business and Commerce Code and § 392.404(a), Texas Finance Code. Counter-Plaintiff relied on Mr. Dial's representations to his detriment. Further, Counter-Defendant's actions regarding the Note constitute all unconscionable course of action. Counter-Defendant's action was a producing cause of Counter-Plaintiff's economic damages of the balance due on the Note, mental anguish damages in an amount to be set on the trial of this case, and such damages should be trebled as provided by § 17.50(b)(1), Texas Business and Commerce Code.

Section 17.46 of the Texas Business and Commerce Code provides that:

> (b) Except as provided in subsection (d) of this section, the term "false, misleading, or deceptive acts or practices" includes, but is not limited to, the following acts:
>
> (12) representing that an agreement confers or resolves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law;
>
> …
>
> (24) failing to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed. . .

TEX. BUS. & COMM. CODE ANN. § 17.46(b)(12), (24) (West Supp. 2016).

In its motion for summary judgment, the Bank averred that there was no evidence that Dial made any false, misleading, or deceptive acts or practices as proscribed by section 17.46(b)(12), (24) of the Business and Commerce Code. Specifically, the Bank asserted that there was no evidence that Dial ever made a false or misleading statement "representing that [an] agreement (the Note) conferred or involved rights, remedies, or obligations which it (Citizens State Bank) does not have or involve, or which are prohibited by law." The Bank also

claimed that there is no evidence that it "failed to disclose information concerning goods or services which was known at the time of the transaction or that such information was intended to induce Counter-Plaintiff John Martin into a transaction into which he would not have entered had the information been disclosed."

In its motion, the Bank also asserted that there was no evidence that the Bank's actions were the producing cause of John's damages, and stated that there is no evidence that John suffered any damages. The Bank further contended, in its motion, that there was no evidence that John relied on any such representation or failure to disclose.

Unreasonable Debt Collection Efforts

John alleged that the Bank's actions were ". . . conducted willfully with deliberate intention and conducted with such actual conscious indifference to Counter-Plaintiff's rights and welfare. Such actions constitute unreasonable collection efforts as provided by Chapter 392 of the Texas Finance Code."

Chapter 392, Subchapter D, of the finance code proscribes six debt collection methods. *See* TEX. FIN. CODE ANN. § 392.301-.306 (West 2016). In its motion for summary judgment, the Bank specifically asserted the lack of evidence that it used any of the six prohibited methods:

> 1. There is *no-evidence* that Counter-Defendant Citizens State Bank used *"Threats or Coercion,"* as provided in *§ 392.301, Texas Finance Code* in any manner against Counter-Plaintiff John Martin in attempting to collect on the *"Note;"*
> 2. There is *no-evidence* that Counter-Defendant Citizens State Bank used *Harassment, Abuse,"* as provided in *§ 392.302, Texas Finance Code* in any manner against Counter-Plaintiff John Martin in attempting to collect on the *"Note;"*
> 3. There is *no-evidence* that Counter-Defendant Citizens State Bank used *Unfair or Unacceptable Means* as provided in *§ 392.303., Texas Finance Code* in any manner against Counter-Plaintiff John Martin in attempting to collect on the *"Note;"*
> 4. There is *no-evidence* that Counter-Defendant Citizens Bank used *Fraudulent, Deceptive, or Misleading Representations* as provided in *§ 392.304, Texas Finance Code* in any manner against Counter-Plaintiff John Martin in attempting to collect on the *"Note;"*
> 5. There is *no-evidence* that Counter-Defendant Citizens State Bank used *Deceptive Use of Credit Bureau Name*, as provided in *§ 392.305, Texas [Finance] Code* in any manner against Counter-Plaintiff John Martin in attempting to collect on the *"Note;"* and
> 6. There is *no-evidence* that Counter-defendant Citizens State Bank employed *Use of Independent Debt Collector* as provided in *§ 392.306, Texas Finance Code* against Counter-Plaintiff John Martin in attempting to collect on the *Note*.

Fraud

John claimed that the Bank falsely represented that he was obligated to sign the note, criminal prosecution would result if he did not sign the note, the Bank was legally required to pay Timpson $146,006.67, and the Bank would not seek John's payment of the note.

To prove a cause of action for fraud, a party must show: (1) a material representation was made; (2) the representation was false; (3) the speaker knew the representation was false when made or, alternatively, made the statement recklessly without any knowledge of its truth and as a positive assertion; (4) the speaker made the representation intending that the other party act on it; (5) the party acted in reliance upon the representation; and (6) the party was injured. ***Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.***, 341 S.W.3d 323, 337 (Tex. 2011). The Bank stated, in its summary judgment motion, that there was no evidence that it made the misrepresentations alleged by John or intended to induce John's reliance, that John relied on any such representation, and that John suffered injury as a result of the Bank's conduct.

Usury

John alleged that "[t]he Note constitutes a contract/charge of usury as the Note is for an amount that [John] does not owe to [Bank]. All such amounts due on the Note constitute a contract/charge which is interest as defined by the laws of the State of Texas, alternatively the amount of overpayment to Timpson, Tamco, Inc, is the amount of usury." A usurious transaction is composed of three elements: (1) a loan of money; (2) an absolute obligation to repay the principal; and (3) the exaction of a greater compensation than allowed by law for the use of the money by the borrower. ***First Bank v. Tony's Tortilla Factory, Inc.***, 877 S.W.2d 285, 287 (Tex. 1994). In its motion for no-evidence summary judgment, the Bank stated that there is no evidence that the amount of $146,004.67 constituted an overpayment to Timpson, or that the note was usurious.

Good Faith and Fair Dealing

In his counterclaim, John alleged generally that "[t]he actions of Mr. Dial [president of the Bank] constitute a breach of the duty of good faith and fair dealing owed by [the Bank] to [John]." "A common-law duty of good faith and fair dealing does not exist in all contractual relationships." ***Subaru of Am., Inc. v. David McDavid Nissan, Inc.***, 84 S.W.3d 212, 225 (Tex. 2002). "Rather, the duty arises only when a contract creates or governs a special relationship between the parties." ***Id***. In its motion for summary judgment, the Bank contended that there

was no evidence that it owed John a duty of good faith and fair dealing, and there was "certainly *no evidence* that Don Dial ever *breach[ed]* any such non-existent *duty*."

Conclusion

We have reviewed the Bank's motion challenging each of the five causes of action that John alleged in his First Amended Counter-Claim. We conclude that the Bank's motion points with sufficient specificity to the element or elements for which the Bank asserted there was no evidence. *See* TEX. R. CIV. P. 166(a)(i). The Bank's motion gave fair notice in that it provided John with adequate information for opposing the motion and defined the issues for purposes of summary judgment. *See* ***Gish***, 286 at 311. Contrary to John's assertion, the trial court's no evidence summary judgment need not refer to or recite the elements of the causes of action for which there was no evidence. John's first issue is overruled.

SUMMARY JUDGMENT

John's remaining issues challenge the summary judgment granted in favor of the Bank.[2]

Standard of Review

Appellate courts review a trial court's granting of a summary judgment de novo. ***Nall v. Plunkett***, 404 S.W.3d 552, 555 (Tex. 2013). "A no-evidence summary judgment motion under Rule 166a(i) is essentially a motion for a pretrial directed verdict; it requires the nonmoving party to present evidence raising a genuine issue of material fact supporting each element specified in the motion." ***Gish***, 286 S.W.3d at 310; *see* TEX. R. CIV. P. 166a(i). An appellate court reviews a no-evidence summary judgment by reviewing "the evidence presented by the motion and response in the light most favorable to the party against whom the summary judgment was rendered, crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not." ***Gish***, 286 S.W.3d at 310 (quoting ***Mack Trucks, Inc. v. Tamez***, 206 S.W.3d 572, 582 (Tex. 2006)).

DTPA

In his second issue, John claims that he presented evidence that Dial, the Bank's president, told him that he was required to sign the note and that if he did not sign it, criminal prosecution would result. John further asserted that Dial failed to disclose that nothing in the account agreement required him to sign the note. John maintains that in falsely representing that

[2] John also complains that the judgment fails to address the specific elements of his claims.

the agreement conferred rights and remedies on the Bank which it did not have, the Bank violated the DTPA. *See* TEX. BUS & COM. CODE ANN. § 17.46(b)(12). John further claims that Dial's failure to disclose was made to induce John to sign the note in violation of the DTPA. *See* ***id***. § 17.46(b)(24). He contends that, in signing the note, he relied on these false representations, including Dial's failure to disclose that he was not obligated to sign the note. Therefore, John maintains that Dial's conduct was actionable under the DTPA.

The record shows that Teri Lea took a check for $146,004.67 belonging to Timpson and deposited the check into a joint account belonging to her and John. She had opened the account without John's knowledge. Teri Lea's conduct constituted theft. As a result, the Bank was forced to pay the payee of the check, Timpson, $146,004.67. The Bank naturally sought reimbursement from the Martins. The Martins came to the Bank to arrange to pay the Bank for the amount it had to pay Timpson. The evidence shows that John signed the note as an accommodation party to provide for an extension of credit so that they might pay the Bank the $146,004.67 and forestall Teri Lea's prosecution for theft.

John claims Dial told him that he was required by law, or the account agreement, to sign the note and that if he refused he would be prosecuted. The summary judgment evidence does show that Dial told John that he was required to sign the note or prosecution would result. But it is also clear from the evidence that only Teri Lea's prosecution was contemplated if John did not sign the note. Teri Lea committed theft and was subject to prosecution. It was inherently reasonable for a banker to tell someone who wanted to borrow money to prevent his wife's prosecution that he had to sign the note. There is no evidence that the Bank represented that an agreement conferred or involved "rights, remedies, or obligations which it did not have or involve." Nor is there any evidence that the Bank failed to disclose information in an attempt to induce John into a transaction. Because there is no evidence that the Bank violated the DTPA, the trial court properly granted no-evidence summary judgment in favor of the Bank on this claim. *See* ***Gish***, 286 S.W.3d at 310; *see also* ***Tamez***, 206 S.W.3d at 582; TEX. R. CIV. P. 166a(i). John's second issue is overruled.

<u>Unreasonable Collection Efforts</u>

In his third issue, John argues that Dial threatened him with prosecution if he did not sign the note and that this threat was an unreasonable debt collection method proscribed by the finance code. *See* TEX. FIN. CODE ANN. § 392.301-.306. There is evidence that Dial threatened

Teri Lea's prosecution if the note was not signed and the money repaid that the Bank lost by reason of her theft. Dial's statement was not fraudulent, deceptive, or misleading. There is no evidence that the Bank threatened to prosecute John. Nor is there any evidence that the Bank resorted to any of the debt collection methods prohibited by the Finance Code. Accordingly, the Bank was entitled to summary judgment as to this claim. *See* ***Gish***, 286 S.W.3d at 310; *see also* ***Tamez***, 206 S.W.3d at 582; TEX. R. CIV. P. 166a(i). John's third issue is overruled.

Fraud

In his fourth issue, John contends that Dial's statement that he was required to sign the note, when Dial knew the account agreement contained no such requirement, constituted fraud. There is no evidence that Dial's statement was false or that Dial told John that he was required to sign the note by the terms of his account agreement. There is simply no evidence that Dial's statement was a misrepresentation of a material fact. Nor is there other evidence that the Bank knowingly or recklessly made a misrepresentation of a material fact with the intent that John rely on it. Thus, summary judgment was appropriate as to John's fraud claim. *See* ***Gish***, 286 S.W.3d at 310; *see also* ***Tamez***, 206 S.W.3d at 582; TEX. R. CIV. P. 166a(i). We overrule his fourth issue.

Usury

John contends, in his fifth issue, that Dial required him to sign the note while knowing that John did not owe the Bank the $146,004.67. Therefore, John claims that the entire amount of the note, plus five percent interest, was usurious.

The evidence shows that John signed the note as an accommodation party so that Teri Lea would have a means to repay the Bank the money that it lost by her misconduct and therefore, avoid prosecution. There is no evidence that the amount of the note was "compensation for the use, forbearance, or detention of money" as interest is defined in the finance code. *See* TEX. FIN. CODE ANN. § 301.002 (West 2016). Nor is there evidence that interest charged exceeded the applicable maximum amount allowed by law. Accordingly, summary judgment was properly granted as to this claim, and John's fifth issue is overruled. *See* ***Gish***, 286 S.W.3d at 310; *see also* ***Tamez***, 206 S.W.3d at 582; TEX. R. CIV. P. 166a(i).

Good Faith and Fair Dealing

In issue six, John argues that the Bank owed him the duty of good faith and fair dealing, because there existed an unequal bargaining position between the parties when the note was

signed. He argues that his unequal bargaining position was demonstrated by Dial's threat to prosecute him unless he signed the note.

There is no evidence that a special or confidential relationship existed between the Bank and the Martins that would have given rise to a duty of good faith and fair dealing. But even assuming the existence of such a duty, there is no evidence that the Bank breached that duty. John claims that Dial's threat to prosecute him if he did not sign the note constituted a breach of the duty of good faith and fair dealing. However, Dial threatened the prosecution of Teri Lea at the meeting where the note was signed. There is no evidence that Dial threatened to have John prosecuted. There is simply no evidence that the Bank breached any duty of good faith and fair dealing. Under these circumstances, summary judgment on John's claim of breach of the duty of good faith and fair dealing was proper. *See* ***Gish***, 286 S.W.3d at 310; *see also* ***Tamez***, 206 S.W.3d at 582; TEX. R. CIV. P. 166a(i). John's sixth issue is overruled.

Breach of Fiduciary Duty

In his seventh issue, John asserts the Bank's motion for no-evidence summary judgment did not address his counterclaim against the bank for breach of fiduciary duty. However, John, in his First Amended Counter-Claim, did not assert a cause of action for breach of fiduciary duty. His seventh issue is overruled.

DISPOSITION

Having overruled each of Appellant's issues, we ***affirm*** the judgment of the trial court.

BILL BASS
Justice

Opinion delivered November 8, 2017.
Panel consisted of Worthen, C.J., Neeley, J., and Bass, Retired J., Twelfth Court of Appeals, sitting by assignment.

(PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

NOVEMBER 8, 2017

NO. 12-17-00033-CV

JOHN MARTIN,
Appellant
V.
CITIZENS, AS NA OF CITIZENS STATE BANK,
Appellee

Appeal from the 273rd District Court
of Shelby County, Texas (Tr.Ct.No. 10CV31217)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that all costs of this appeal are hereby adjudged against the Appellant, **JOHN MARTIN,** for which execution may issue, and that this decision be certified to the court below for observance.

Bill Bass, Justice.
Panel consisted of Worthen, C.J., Neeley, J. and Bass, Retired J., Twelfth Court of Appeals, sitting by assignment.