

Affirmed and Opinion filed August 10, 2000.



In The

Fourteenth Court of Appeals

NO. 14-99-00434-CV

DON J. DAVIS, INDIVIDUALLY AND NUCORP, INC., Appellants

V.

NATIONSBANK OF TEXAS, N.A., Appellee

**On Appeal from the Probate Court No. 4
Harris County, Texas
Trial Court Cause No. 231, 749-408**

OPINION

This case arises out of ongoing disputes regarding several trusts established by Noble and Minnie Ginther.¹ One of the beneficiaries, Fergus Ginther, assigned his beneficial interests in the trusts to appellant, Don J. Davis, who in turn assigned the interests to appellant, NuCorp, Inc. In spite of having assigned all his right and title to NuCorp, Davis joined NuCorp

¹ The parties to this suit have been before this court previously. *See Davis v. NationsBank of Texas, N.A.*, No. 14-98-00312-CV (Tex. App.—Houston [14th Dist.] Aug. 13, 1998, no pet.) (not designated for publication). In that case Davis and NuCorp attempted to appeal the 215th District Court's order of dismissal. *See id.* However, this court dismissed the appeal for want of jurisdiction due to Davis' and NuCorp's untimely filing of their notice of appeal. *See id.*

and instituted this suit against appellee, NationsBank of Texas (in its capacity as predecessor trustee) claiming breach of fiduciary duty, negligence, gross negligence, fraud, constructive fraud, and DTPA violations. Appellants complain that NationsBank breached fiduciary duties owed to the trusts' beneficiaries because NationsBank allegedly thwarted a "global settlement" among the beneficiaries. NationsBank moved for and was granted summary judgment. Appellants appeal the probate court's denial of a continuance and the granting of summary judgment. We affirm the probate court.

While the probate court based its summary judgment on several grounds, we find two arguments - that appellants did not have standing to assert claims against NationsBank arising out of its handling of the trusts, and that appellants were not consumers under the DTPA - to be dispositive of this appeal.

CONTINUANCE

Although Davis and Nucorp complain in their first issue of being denied a continuance by the probate court, no motion for continuance or order denying such a request is in the record before us. They claim to have "raised the motion for continuance . . . in their 'Motion to Strike Motion for Summary Judgment and, subject thereto, preliminary response to defendants' Motion for Summary Judgment.'" However, the sole mention of continuance in that motion appears as a request that "the Motion for Summary Judgment be stricken or *continued* until such time as the deposition[s] . . . are taken." (Emphasis added). There being no proof in the record that a verified motion for continuance was ever filed, we overrule appellants' first issue for review. *See* TEX. R. CIV. P. 251, 252.

STANDING

Standing deals with whether a litigant is the proper person to bring a lawsuit, not whether that party can ultimately prevail on the claims asserted. *See Amerada Hess Corp. v. Garza*, 973 S.W.2d 667, 680 (Tex. App.—Corpus Christi 1996), writ *dism'd w.o.j.*, 979

S.W.2d 318 (Tex. 1998). Standing consists of some interest peculiar to the person.² *See id.* To establish standing, a litigant must demonstrate a personal stake in the controversy. *See Hunt v. Bass*, 664 S.W.2d 323, 324 (Tex. 1984). Standing generally requires a real controversy between the parties, which will be actually determined by the relief sought. *See Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993).

It is true that beneficial interests in trusts are generally assignable. *See Nunn v. Titcher-Goettinger Co.*, 245 S.W. 421, 422 (Tex. Comm'n App. 1922, judgm't adopted). However, assignments of such interests are invalid when they are subject to a spendthrift provision in the trust. *See TEX. PROP. CODE ANN. § 112.035(a)* (Vernon 1995 & Supp. 2000) (spendthrift provision prevents the voluntary transfer of a beneficial interest in a trust); *Dierschke v. Central Nat'l Branch of First Nat'l Bank at Lubbock*, 876 S.W.2d 377, 380 (Tex. App.—Austin 1994, no writ).

In their pleadings, Davis and NuCorp premised their right to assert claims related to the trusts against NationsBank as assignees of an assignment by Fergus Ginther of his beneficial interests in the trusts. The Ginther trusts each contained spendthrift provisions prohibiting the beneficiaries from assigning their interests in the trusts. Based on the spendthrift provisions in the trust instruments prohibiting the assignment of a beneficiary's interest, the assignments of Fergus Ginther's beneficial interests to Davis and NuCorp were invalid. Because the assignments of the interests were invalid, neither Davis nor NuCorp had standing to assert claims relating to NationsBank's handling of the trusts. Therefore, we hold that the probate court did not err in granting summary judgment in favor of NationsBank on these causes of action asserted by Davis and NuCorp.

² The Texas Trust Code defines an "interested person" as:

a trustee, beneficiary, or any other person having an interest in or a claim against the trust or any person who is affected by the administration of the trust. Whether a person, excluding a trustee or named beneficiary, is an interested person may vary from time to time and must be determined according to the particular purposes of and matter involved in any proceeding.

See TEX. PROP. CODE ANN. § 111.004(7) (Vernon 1995 & Supp. 2000).

CONSUMER STATUS

In addition to the claims Davis and NuCorp asserted relating to NationsBank's handling of the trusts, Davis and NuCorp also assert that NationsBank violated the DTPA. *See* TEX. BUS. & COM. CODE ANN. § 17.41 *et seq.* (Vernon 1987 & Phamp. 2000). In particular, they claim that Nationsbank engaged in an unconscionable action or course of action by allegedly thwarting a global settlement among the beneficiaries.

To recover under the DTPA, the plaintiff must be a consumer. *See* TEX. BUS. & COM. CODE ANN. § 17.50 (Vernon 1987 & Phamp. 2000); *Vinson & Elkins v. Moran*, 946 S.W.2d 381, 406 (Tex. App.—Houston [14th Dist.] 1997, writ dism'd by agr.). The plaintiff has the burden of proving consumer status. *Precision Sheet Metal Mfg. Co. Inc. v. Yates*, 794 S.W.2d 545, 551 (Tex. App.—Dallas 1990, writ denied). To be considered a consumer under the DTPA, the plaintiff must have sought or acquired goods or services by purchase or lease, and the goods or services purchased or leased must form the basis of the complaint. *See* TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon 1987 & Phamp 2000); *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 351-52 (Tex. 1987). The mere fact that third parties may benefit or be damaged in a particular transaction does not make them consumers with rights to an action under the DTPA. *See Vinson & Elkins*, 946 S.W.2d at 408.

In the present case, Davis and NuCorp claim that they have consumer status because Nationsbank encouraged them to negotiate and work toward a settlement with the Ginther siblings. We fail to see how NationsBank's encouraging, if they did, Davis and NuCorp to do anything can be equated to a purchase or lease of a good or service. At best, Davis and NuCorp were merely third parties having no relationship with NationsBank. Davis and NuCorp were not consumers and are not entitled to maintain a cause of action against NationsBank under the DTPA.

Because Davis and NuCorp had no standing to assert the beneficiary claims and they were not consumers, the probate court did not err in granting summary judgment in favor of NationsBank. Appellant's second issue for review is overruled.

The judgment of the probate court is affirmed.

/s/ Ruby K. Sondock
Justice

Judgment rendered and Opinion filed August 10, 2000.

Panel consists of Justices Fowler, Edelman, and Sondock.*

Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Justice Ruby K. Sondock sitting by assignment.