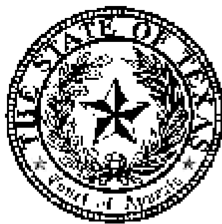
Reversed and Remanded in part; Affirmed in part and Opinion filed October 12, 2000.



In The

Fourteenth Court of Appeals

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NO. 14-98-00917-CV

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COST RECOVERY SERVICES, INC., Appellant

V.

PRICE WATERHOUSE, A LIMITED LIABILITY PARTNERSHIP, Appellee

On Appeal from the 281st District Court
Harris County, Texas
Trial Court Cause No. 95-01716

O P I N I O N

Cost Recovery Services sued Price Waterhouse for negligent misrepresentation and breach of contract. Price Waterhouse moved for summary judgment on CRS's breach of contract claim. The trial court granted summary judgment for Price Waterhouse on all of CRS's claims. In two issues, CRS argues the trial court improperly granted summary judgment on each of its claims. We affirm the summary judgment for the breach of contract and reverse the summary judgment granted for CRS's negligent misrepresentation claim.

STANDARD OF REVIEW

Price Waterhouse filed a combination traditional and "no evidence" motion for summary judgment. *See* TEX. R. CIV. P. 166a(c), (i).

When reviewing a "no evidence" summary judgment, we review the evidence in the light most favorable to the nonmovants and disregard all evidence and inferences to the contrary. *See Blan v. Ali*, 7 S.W.3d 741, 747 (Tex. App--Houston [14th Dist.] 1999, no pet.). We will sustain a no evidence summary judgment if: (1) there is a complete absence of proof of a vital fact; (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla; or (4) the evidence conclusively establishes the opposite of a vital fact. *See id.* Less than a scintilla of evidence exists when the evidence is so weak as to do no more than create a mere surmise or suspicion of a fact. *See Isbell v. Ryan*, 983 S.W.2d 335, 338 (Tex. App.—Houston [14th Dist.] 1998, no pet). 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. *See id.*

We use the usual standard of review in considering whether the trial court erred in granting a traditional summary judgment:

> 1. The movant for summary judgment has a burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law.
> 2. In deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true.
> 3. Every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor.

See Nixon v. Mr. Property Management, 690 S.W.2d 546, 548-49 (Tex. 1985); MCDONALD & CARLSON, TEXAS CIVIL PRACTICE GUIDE 2d § 28.21 (1998).

BACKGROUND

CRS represents commercial tenants in reclaiming rent they may have overpaid. CRS offered to measure the space leased by Price Waterhouse in a Houston office building and compare the measurement with the square footage described in Price Waterhouse's lease. CRS entered into an agreement with Price Waterhouse to determine if it had been overcharged. Price Waterhouse would owe CRS a fee if CRS: (1) identified an error in the landlord's assessment of Price Waterhouse's rent; and (2) successfully obtained a rent reduction or some other "economic benefit" for Price Waterhouse. If CRS obtained an economic benefit for Price Waterhouse, then CRS would receive fifty percent of that benefit. If CRS did not find a measurement error in the lease and obtain an economic benefit from the landlord, it would receive no fee from Price Waterhouse.

When CRS measured Price Waterhouse's office space, it claimed to have discovered a sizable measurement error. It claimed Price Waterhouse's landlord had overcharged Price Waterhouse in excess of $2 million. CRS claims the overcharge came from the landlord's improper inclusion of space from the building's common area.

In its summary judgment evidence, Price Waterhouse offered the testimony of its real-estate property partner, who claimed it had been properly assessed and had paid rent for its "net rentable area" in the building, i.e., the useable area on the approximately 3-1/5 floors occupied by Price Waterhouse plus a pro rata share of the building's common areas. Although the lease does not define the term "net rentable area," Price Waterhouse and its landlord agree that the term includes the area occupied by Price Waterhouse plus a pro rata share of the building's common areas.

Price Waterhouse told CRS that the rent was set on a predefined square footage that established an absolute "net rentable area, which was not formula driven, but rather a stated amount." Additionally, Price Waterhouse agreed to the specific rent only after extensive negotiation. Price Waterhouse told CRS that it did not want to pursue the matter further.

DISCUSSION AND HOLDINGS

Negligent Misrepresentation

In its first issue, CRS argues the trial court improperly granted summary judgment on its negligent misrepresentation claim because Price Waterhouse's motion for summary judgment did not address this cause of action. We agree.

Granting a motion for summary judgment on causes of action not addressed in the motion is reversible error. *See Mafrige v. Ross*, 866 S.W.2d 590, 591 (Tex. 1993). In its original petition, CRS alleged Price Waterhouse owed it damages in two causes of action: breach of contract and negligent misrepresentation. Price Waterhouse's motion for summary judgment only mentions CRS's breach of contract claim.

Both parties have extensively briefed whether summary judgment was appropriate on the negligent misrepresentation claim. However, the trial court was not given the benefit of this briefing or argument. And, although a properly worded summary judgment motion may prevail in the trial court, we cannot "read

between the lines, infer or glean from the pleadings or the proof any grounds for granting the summary judgment other than those grounds expressly set forth before the trial court in the motion for summary judgment." *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 343 (Tex. 1993) (citations omitted); *see Great-Ness Professional Serv., Inc. v. First Nat'l Bank of Louisville*, 704 S.W.2d 916, 918 (Tex. App.—Houston [14th Dist.] 1986, no writ).

Several courts of appeals have allowed summary judgment on causes of action that are not specifically addressed in a movant's motion if reversing the summary judgment would be meaningless because the omitted cause of action is precluded as a matter of law. *See Withrow v. State Farm Lloyds*, 990 S.W.2d 432, 437-38 (Tex. App.—Texarkana 1999, pet. denied); *Vogel v. Travelers Indem. Co.*, 966 S.W.2d 748, 754 (Tex. App.—San Antonio 1998, no pet. h.); *Chale Garza Inv., Inc. v. Madaria*, 931 S.W.2d 597, 601 (Tex. App.—San Antonio 1996, writ denied); *Judwin Properties, Inc. v. Griggs & Harrison*, 911 S.W.2d 498, 502-03 (Tex. App.—Houston [1st Dist.] 1995, no writ); *Mackie v. McKenzie*, 900 S.W.2d 445, 452 (Tex. App.—Texarkana 1995, writ denied); *Bieganowski v. El Paso Med. Ctr. Joint Venture*, 848 S.W.2d 361, 362 (Tex. App.–El Paso 1993, writ denied). For example, the Texarkana Court of Appeals has held that a summary judgment is proper on causes of action not specified in the motion for summary judgment where the motion negates, as a matter of law, the causation element for all the causes of action in the plaintiff's petition. *See Withrow*, 990 S.W.2d at 438.

However, our court is not one of them. *See Guest v. Cochran*, 993 S.W.2d 397, 404-05 (Tex. App.—Houston [14th Dist.] 1999, no pet.); *Southwestern Clinic of Bone & Joint Diseases v. Farmers Ins. Group*, 850 S.W.2d 750, 754 (Tex. App.—Corpus Christi 1993, no writ); *Rose v. Kober Financial Corp.*, 874 S.W.2d 358, 362 (Tex. App.—Houston [14th Dist.] 1994, no writ); *Roberts v. Southwest Texas Methodist Hosp.*, 811 S.W.2d 141, 146 (Tex. App.–San Antonio 1990, writ denied); *see also DeWoody v. Rippley*, 951 S.W.2d 935, 942 (Tex. App.—Fort Worth 1997, pet. dism'd by agr.). This Court has held that a motion attacking proximate cause in a breach of contract action will not support summary judgment on negligent misrepresentation, even though both breach of contract and negligent misrepresentation share the element of proximate cause. *See Guest*, 993 S.W.2d at 405. Stated another way, negation of one element of a cause of action will not negate the same named element of a different cause of action. *See id.*

The Supreme Court has addressed this issue and stated:

> Under Rule 166a(c), Texas Rules of Civil Procedure, a motion for summary judgment must "state the specific grounds therefor," and the trial court is to render judgment if "the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion or in an answer or any other response." Prior to the 1978 amendments to Rule 166a(c), we held that a summary judgment could be affirmed on appeal for reasons other than those urged in the motion. *Phil Phillips Ford, Inc., v. St. Paul Fire & Marine Ins. Co.*, 465 S.W.2d 933, 937 (Tex. 1971); *In re Price's Estate*, 375 S.W.2d 900, 903-04 (Tex. 1964). When those cases were decided, Rule 166a(c) did not expressly limit the trial court to consideration of the issues raised by the parties. The effect of the 1971 and 1978 changes adding the language quoted above is to unequivocally restrict the trial court's rule to issues raised in the motion, response, and any subsequent replies. *See McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 339-342 (Tex. 1993); *City of Houston v. Clear Creek Basin Auth.,* 589 S.W.2d 671, 677 (Tex. 1979).

867 S.W.2d at 26.

Additionally, we have recently disregarded the rule in *Judwin* permitting a trial court to grant summary judgment on claims not expressly addressed in a motion for summary judgment. *See Guest*, 993 S.W.2d at 404-05; *Rose* 874 S.W.2d at 362; *see also DeWoody,* 951 S.W.2d at 942. In *Guest* we stated:

> The law in Texas is well-established—a movant may not be granted summary judgment as a matter of law on a cause of action not addressed in a summary judgment proceeding. Moreover, it is also well established that it is reversible error to grant summary judgment on a cause of action not addressed in the motion.

993 S.W.2d at 405. (Citations omitted).

Accordingly, we find the trial court improperly granted summary judgment on CRS's negligent misrepresentation claim.

Breach of Contract

To establish a breach of contract, a plaintiff must prove: (1) a binding contract existed; (2) the defendant breached the contract; and (3) the plaintiff suffered damages caused by the defendant's alleged breach. *See Ryan v. Superior Oil Co.*, 813 S.W.2d 594, 596 (Tex. App.—Houston [14th Dist.] 1991, writ denied). CRS argues Price Waterhouse failed to compensate it for savings it discovered in the lease between Price Waterhouse and its landlord. CRS argues it identified an error in the calculation of "net rentable area;" thus, Price Waterhouse's landlord improperly charged rent for portions of the common building area. CRS claims the lease provided that the square footage recited was subject to change upon

measurement and certification of the "net rentable area" actually occupied by Price Waterhouse. Thus, it claims, the "net rentable area" was not a stipulated amount. Additionally, CRS claims the lease's definition of "net rentable area" did not include any "common areas."

CRS, however, may not claim any error in Price Waterhouse and its landlord's construction of the terms of the lease. *See Esquivel v. Murray Guard, Inc.*, 992 S.W.2d 536, 543 (Tex. App.—Houston [14th Dist.] 1999, pet. denied); *Loyd v. ECO Resources, Inc.*, 956 S.W.2d 110, 134-35 (Tex. App.—Houston [14th Dist.] 1997, no pet.). Generally, "only parties to a contract have the right to complain of a breach thereof; and if they are satisfied with the disposition which has been made of it and of all claims under it, a third person has no right to insist that it has been broken." *Merrimack Mut. Fire Ins. Co. v. Allied Fairbanks Bank*, 678 S.W.2d 574, 577 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.). "A well defined exception is that if one who is not privy to the contract demonstrates that the contract was actually made for his benefit and the contracting parties intended that he benefit by it, he becomes a third-party beneficiary entitled to bring an action on the contract." *Id*. Although CRS may have been directly affected by Price Waterhouse and its landlord's conduct, this does not make it a third-party beneficiary. *See id*. CRS cannot argue there were any errors in the lease because it is not an intended-third-party beneficiary.

Thus, because CRS cannot claim there were errors in the parties' construction of the lease, Price Waterhouse was not contractually obligated to pay CRS. Additionally, there was no breach of contract, as a matter of law, because CRS, who could not contest the construction of Price Waterhouse's lease, was not owed any money under its own employment contract with Price Waterhouse. Accordingly, we find the trial court properly granted summary judgment on the breach of contract claim and overrule CRS's second issue.

For the foregoing reasons, we affirm the summary judgment regarding the breach of contract, but because the summary judgment purports to grant more relief than requested, we must reverse and remand this cause to the trial court.

/s/ Norman Lee
Justice

Judgment rendered and Opinion filed October 12, 2000.

Panel consists of Justices Cannon, Draughn and Lee[*]

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

[*] Senior Justices Bill Cannon, Joe L. Draughn, and Norman Lee sitting by assignment.