In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-19-00116-CV

JULIO MARTINEZ, APPELLANT

V.

DKTA ENTERPRISES LTD., SUNSET WELL SERVICES, INC., AND POLICARPIO "POLY" ABALOS, APPELLEES

On Appeal from the 70th District Court
Ector County, Texas
Trial Court No. A-137,862, Honorable Denn Whalen, Presiding

May 29, 2020

MEMORANDUM OPINION

Before QUINN, C.J., and PARKER and, DOSS, JJ.

Julio Martinez (Martinez) appeals from a final summary judgment denying him recovery against DKTA Enterprises Ltd., Sunset Well Services, Inc., and Policarpio "Poly" Abalos (collectively referred to as Sunset). The underlying dispute arose from alleged promises by Sunset to Martinez concerning an agreement to sell him a house and pay him a $100,000 employment bonus after seven years of work. Apparently, Martinez worked for Sunset and DKTA under the direction of Abalos. The promises in question supposedly went unfulfilled, resulting in Martinez suing Sunset, DKTA, and Abalos for 1)

breached contract, 2) fraud, 3) conversion, 4) intentional infliction of emotional distress, 5) negligence, 6) gross negligence, 7) misrepresentation, and 8) alter ego. The traditional and no-evidence motions for summary judgment filed by his three opponents addressed each cause of action. Furthermore, the trial court granted them without specifying the grounds upon which it relied. Martinez timely appealed and presented us with multiple issues.[1] We affirm. [2]

Objections to Summary Judgment Evidence

In his first issue, Martinez contends that the trial court erred by overruling his objections to an affidavit filed in support of Sunset's motions for summary judgment. We overrule the issue for the following reason.

The admission or exclusion of evidence lies within the trial court's discretion. *Mira Mar Dev. Corp. v. City of Coppell*, 364 S.W.3d 366, 376 (Tex. App.—Dallas 2012, pet. denied). Assuming *arguendo* that the trial court erred in overruling Martinez's objections to the affidavits, it remained incumbent upon him to show harm due to the purported ruling. *Id.* That obligation required him to explain how the error probably caused the rendition of an improper judgment. *Id.* Merely concluding that it did, does not suffice. Martinez neglected to do that here. He simply concluded the alleged error was reversible.

[1] None of his issues encompass the choses-in-action for conversion or intentional infliction of emotional distress. Thus, we do not address whether summary judgment was appropriately entered on them.

[2] Because this appeal was transferred from the Eleventh Court of Appeals, we are obligated to apply its precedent when available in the event of a conflict between the precedents of that court and this Court. See TEX. R. APP. P. 41.3.

Having failed to address harm, he likewise failed to show the alleged error entitled him to reversal.

Fraud

Martinez next contends that the trial court erred in granting summary judgment on his claim of fraud. Sunset contended in its summary judgment motion that he had no evidence of either a falsehood or a promise made with the intent not to perform it. Martinez allegedly did and presented it to the trial court thereby precluding it from granting that aspect of the no-evidence motion. We overrule the issue.

Again, underlying all his claims are the supposed promises of Sunset. They consist of its agreement to 1) sell him a house and 2) pay him a $100,000 bonus after seven years of employment. The failure to perform those agreements constituted fraud, according to Martinez, because Sunset had no intent to perform when the promises were made.

There are situations where a claim of fraud may arise from a breached contract. They involve the breaching party having no intention to perform its contractual obligations when entering the agreement. *See Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 305 (Tex. 2006) (stating that a contractual promise made without the intention of performing may give rise to an action for fraudulent inducement). Yet, a subsequent breach of the agreement (i.e., failing to perform the promise) alone is not evidence of the requisite intent. *Id.* Nor is denying that an alleged promise was made legally sufficient evidence of fraud. *Id.* On the other hand, a breach coupled with "'slight circumstantial evidence' of fraud" may support a claim of fraudulent inducement. *Id.* Martinez suggests

that he presented the accompanying "slight circumstantial evidence of fraud" to elevate the breach of contract to fraud, here. We assess that by applying the standard of review applicable to reviewing summary judgments. It is explained in *Community Health Sys. Prof'l Servs. Corp. v. Hansen*, 525 S.W.3d 671 (Tex. 2017).

Regarding the bonus, Martinez cited us to evidence depicting that 1) Abalos represented "he was going to give him [Martinez] a loyalty bonus of $100,000.00 if [Martinez] stayed for seven years," 2) his "seven years ended in June of 2012," 3) "he went to [Abalos] and asked for the bonus," 4) Abalos said the bonus would be forthcoming "next December," and 5) "[a]fter one year . . . [he] did not get his bonus as promised . . . ." Upon our putting aside surmise or speculation, we conclude that this illustrates nothing more than a promise to pay coupled with nonpayment when it came time to perform. That evinces nothing other than a breach of contract, and evidence of a breached contract alone fails to illustrate an intent not to perform a promise when it was made. And, Martinez did not explain otherwise.

He merely concluded that it was "solid testimony from which Appellees' fraudulent intent could be easily inferred." If it were possible to "easily infer[]" the existence of deceit at the inception of the arrangement from this bit of evidence, it is equally easy to infer from it nothing more than the mere failure to abide by an earlier promise. And, because either inference is not more probable than the other, the evidence proves neither inference. *See Hancock v. Variyam*, 400 S.W.3d 59, 70–71 (Tex. 2013) (stating that a fact-finder "may not reasonably infer an ultimate fact from 'meager circumstantial

evidence which could give rise to any number of inferences, none more probable than another'").

Simply put, what Martinez relies on is not the "slight circumstantial evidence of fraud" needed to overcome the rule mentioned in *Tony Gullo*. It is merely evidence of a breached agreement.

As for the agreement about the home, it was manifested in a document signed by a Sunset representative and Martinez in June of 2011. The agreement provided that " between Julio Martinez ("Buyer") and Sunset Well Service, Inc. ("Seller"), . . . seller will sale [sic] 517 E. 93rd Street, Odessa, Texas 79765 . . . for a total sale price of $348,180.75 in the form of 348 payments of $1,000.00" which payments would be made twice a month "to the Seller." Martinez further agreed to "pay all property taxes and pay insurance coverage . . . while [the] agreement [was] in effect." Finally, the parties agreed that "[t]he property will be deeded to Buyer, Julio Martinez, ***after payoff***."[3] (Emphasis added). Allegedly, Sunset failed to perform its end of the bargain and convey the house to him. As evidence that it intended not to perform from the inception of the agreement, Martinez alludes to the failure to convey coupled with evidence of his "buying the house, [and] paying for it, [while Abalos] was not letting [Martinez] . . . claim the mortgage interest or

[3] Per the accord, Sunset agreed to deed the house to Martinez "after payoff," that is, after he paid for the house. Whether enforceable as such or not, the arrangement smacked of a contract for deed. Under a contract for deed, the seller retains title until the purchaser pays for the property in full. *Ferrara v. Nutt*, 555 S.W.3d 227, 236 (Tex. App.—Houston [1st Dist.] 2018, no pet.) (quoting *Flores v. Millennium Interests, Ltd*., 185 S.W.3d 427, 429 (Tex. 2005)); *see also Everett v. Arreola*, No. 04-14-00259-CV, 2015 Tex. App. LEXIS 4321, at * 10 (Tex. App.—San Antonio Apr. 29, 2015, no pet.) (mem. op.) (stating an instrument that does not operate as a present conveyance of title to realty is a contract to convey rather than a deed).

the homestead exemption." This too falls short of circumstantial evidence of fraud under *Tony Gullo*.

Reference to the alleged interference with claiming "mortgage interest or the homestead exemption" appeared in a deposition of Martinez. Its sum total consisted of his statement that "[i]f I was buying the house and I was paying him [Abalos], you know, why was he not letting me claim the mortgage interest or the homestead exemption, you know?" Nothing else was said about how or when Martinez attempted to "claim the mortgage interest or the homestead exemption." How and why Abalos purportedly interfered went unexplained, as did the extent of the interference, its duration, and its inception. In other words, the comment is bereft of factual support and development. Without that, it is conclusory. *See Massey Operating, LLC v. Frac Tech Servs., LLC,* No. 11-11-00118-CV, 2013 Tex. App. LEXIS 2278, at *8–9 (Tex. App.—Eastland Mar. 7, 2013, no pet.) (mem. op.) (stating that a conclusory statement is one that does not provide the underlying facts to support it). Being conclusory, it is not competent summary judgment evidence, especially when we are left to guess at when or why the interference purportedly occurred. *See Tony Gullo Motors,* 212 S.W.3d at 306 (noting that the destruction of the contract was circumstantial evidence of fraud in the contracting process because it "was part of the original contracting process").

Even if the utterances were not conclusory, we are at a loss understanding how they indicate fraud. Referring to the contract signed by the parties, we note it says nothing of a mortgage or interest. Rather, he apparently obligated himself under the instrument to 1) pay a specific price for the house and 2) pay that price in a specific number of

payments with each being for a specific amount. Furthermore, we were cited to nothing of record illustrating that he paid a particular amount of interest or that a portion of the monthly payments were attributable to interest. *See Cottledge v. Roberson*, No. 05-12-00720-CV, 2013 Tex. App. LEXIS 4540, at *2–3 (Tex. App.—Dallas Apr. 9, 2013, no pet.) (mem. op.) (imposing upon the appellant the burden of directing the reviewing court to the evidence in the record supporting her contentions and stating that the reviewing court is not responsible for searching the summary judgment record for such evidence). Unless Martinez paid or obligated himself to pay interest it is rather nonsensical to begin to suggest that interfering with his ability to deduct interest is an indicia of fraud. The same is no less true with the purported homestead designation.

Elsewhere in his appellate brief Martinez clarifies that he needed some type of "house documents" from Sunset illustrating he owned the house to secure the homestead designation. Yet, given the nature of the contract he signed, he did not own the house. We explain why later in our opinion. If he did not own the house, then Sunset had no obligation to give him documents purporting to show he did. Given that, it seems nonsensical to deem Sunset's alleged refusal to provide false documentation to him as indicia that the company was defrauding him.

In sum, the trial court did not err in granting Sunset summary judgment on the fraud claim.

Breach of Contract

Martinez next argued that the trial court erred in denying his claims that Sunset breached the agreements to pay a bonus and sell the house. Allegedly, they were not

barred by the statute of frauds, and he presented sufficient evidence to establish a fact issue regarding the existence of each element. We overrule the issue.

As for the bonus, again, it was payable in seven years and conditioned upon his continued employment during that period. Furthermore, Martinez conceded, via discovery, that "all is oral agreement," i.e., the agreement was oral. Despite being oral, he nevertheless kept his end of the deal and worked for seven more years. And, his so working removed the agreement from the scope of the statute of frauds. We disagree.

Per the statute of frauds, a promise or agreement which is not performable in one year from the date it was made is unenforceable unless in writing and signed by the person to be charged with the promise. TEX. BUS. & COMM. CODE ANN. § 26.01(a) & (b)(6) (West 2015). Though full or partial performance of a contract may remove the accord from the teeth of the statute, Martinez failed to illustrate that it did here.

In Texas, the full or partial performance exceptions to the statute of frauds do not apply when the party seeking enforcement of the oral contract is an employee who received compensation in the form of wages for performing the actions allegedly performed under the oral contract. *Fuller v. Wholesale Elec. Supply Co. of Houston Inc.,* No. 14-18-00328-CV, 2020 Tex. App. LEXIS 2643, at *15 (Tex. App.—Houston [14th Dist.] Mar. 31, 2020, no pet. h.); *Holloway v. Dekkers*, 380 S.W.3d 315, 324 (Tex. App.—Dallas 2012, no pet.) (stating that if a person received payment for his services, those services will not act as an exception to the statute of frauds). This rule appears to be an iteration of a legal tenet mentioned earlier in *Chevalier v. Lane's Inc.,* 174 Tex. 106, 213 S.W.2d 530 (Tex. 1948). There, the Supreme Court told us that for the exception to apply

the performance must be unequivocally referable to the agreement sought to be enforced. *Id.* at 533–34; *accord Exxon Corp. v. Breezevale, Ltd.,* 82 S.W.3d 429, 439 (Tex. App.—Dallas 2002, pet. denied) (stating the same). Conduct which may be explained without reference to it does not constitute partial performance. *Chevalier v. Lane's Inc.*, 213 S.W.2d at 534 (quoting *Woolley v. Stewart*, 222 N.Y. 347, 351, 118 N.E. 847, 848 (1918)); *accord Nat'l Prop. Holdings, L.P. v. Westergren*, 453 S.W.3d 419, 426–27 (Tex. 2015) (stating that when the evidence illustrates the party who performed the act that is alleged to be partial performance could have done so for some reason other than to fulfill obligations under the oral contract, the exception is unavailable); *see also Exxon Corp. Ltd*., 82 S.W.3d at 439–40 (stating that the acts must be of the type which could have been done with no other design than to fulfill the particular agreement sought to be enforced; otherwise they do not tend to prove the existence of the parol agreement relied upon by the plaintiff). This tenet has application here.

Sunset employed Martinez, and he worked for at least the seven years mentioned in the purported oral promise. Yet, he cites us to no evidence of record indicating that the only compensation he was to receive for working was the alleged bonus. *See Chevalier,* 213 S.W.2d at 534 (observing that "[i]f in the case of an employment contract for the term of more than one year from its making, the employee should have worked the full term without receiving any compensation at all . . . such circumstances . . . might well be sufficiently 'corroborative' of or 'referable to' the claimed agreement"). Nor did he cite us to evidence of record suggesting that the agreement induced him to engage in work outside the scope of the normal duties for which he was being compensated. Given those

circumstances, we find no material issue of fact regarding the partial performance exception to the statute of frauds. Thus, Martinez has not shown that the trial court erred by implicitly rejecting the exception when it granted summary judgment on the bonus claim.

As for the home, there was a written contract regarding the sale of the house by Sunset to Martinez. Assuming *arguendo* that it met the requirements for avoiding the statute of frauds, another impediment stands in the way to his securing reversal. One of the various grounds Sunset posed to defeat the breach of contract allegation concerned who breached first. It alleged that he breached the agreement first, which breach barred Martinez from enforcing the contract for deed. *See Mustang Pipeline Co. v. Driver Pipeline Co*., 134 S.W.3d 195, 196 (Tex. 2004) (stating that when one party to a contract commits a material breach of that contract, the other party is discharged or excused from further performance). Martinez failed to address this ground on appeal and explain why the trial court could not rely on it. The omission is fatal given that the trial court did not specify any particular ground on which it relied in granting summary judgment. *Plunkett v. Conn. Gen. Life Ins. Co.*, No. 11-13-00129-CV, 2015 Tex. App. LEXIS 5492, at *12 (Tex. App.—Eastland May 29, 2015, pet. denied) (mem. op.) (stating that when the summary judgment order does not specify the grounds underlying it, an appellate court will affirm the decree if any ground in the motion is meritorious and the burden lies with the appellant to show that each of the grounds asserted in the motion were insufficient).

Simply put, Martinez failed to carry his burden to negate the viability of each ground urged by Sunset to defeat the breach of contract claim relating to the home sale. Thus,

he also failed to establish that the trial court erred in granting summary judgment on that particular cause of action.

Negligence and Gross Negligence

Next, Martinez contended that the trial court erred in granting summary judgment on its claims of negligence and gross negligence. The record allegedly contained ample evidence of Sunset's duty to provide him with "house documents" to enable him to secure a homestead exemption. Those documents were not provided, according to Martinez. So, "[t]he Trial Court erred in granting Appellees' summary judgment based on its sole ground that it owed no duty." We overrule the issue for several reasons.

First, Sunset urged multiple grounds to defeat the claims of negligence and gross negligence. One concerned the absence of a legal duty. Another consisted of the allegation that Martinez had no evidence illustrating the existence of each element to his causes of action.[4] So, Martinez mistakenly suggests that Sunset urged only one ground. And, though he may have addressed on appeal the legal duty aspect of Sunset's motion he did not do the same regarding the other ground.

That is, the elements of negligence are 1) the existence of a legal duty owed by the defendant to the plaintiff, 2) its breach, and 3) damages proximately caused by that breach. *Kroger Co. v. Elwood*, 197 S.W.3d 793, 794 (Tex. 2006); *Jones v. Energen Res. Corp*., No. 07-18-00132-CV, 2020 Tex. App. LEXIS 854, at *6 (Tex. App.—Amarillo Jan. 29, 2020, no pet.) (mem. op.). Martinez says nothing of his proving the latter element in

[4] It alleged in its motion that "[t]here is no evidence of any of the elements of a negligence claim against any Defendant."

his appellate brief. Nowhere does he try to explain that he presented evidence sufficient to create a material issue of fact on the element of damages proximately caused by Sunset's withholding of "house documents." Nor were we cited to any evidence purporting to illustrate damages proximately caused by the default. He merely addressed the existence of a legal duty on the part of Sunset given that he mistakenly thought it was the "sole ground" urged to support summary judgment So, the appellate burden mentioned earlier in *Plunkett* again went unsatisfied by him.

Second, the nondescript "house documents" to which he alluded where just that, nondescript. Martinez failed to either define them or direct us to a portion of the record whereat they were defined or specifically described. Without knowing what they are, we cannot assess whether Sunset had a duty to provide them as part of the home sale agreement.

Assuming *arguendo* that the nondescript "house documents" were documents denoting his ownership of the house (as suggested in his brief), there exists another impediment to Martinez's success. That impediment relates to the nonexistence of a duty to provide them. To reiterate, the contract struck likened to one for a deed. As such, it did not require Sunset to transfer ownership of the property until Martinez paid all the 300 plus monthly payments. Nor does it vest Martinez with title to the property. Indeed, our jurisprudence clearly holds that the buyer acquires neither legal nor equitable title to the realty, but only an equitable right to receive a deed upon complete payment of his obligation. *Rangel v. Rangel*, No. 03-12-00146-CV, 2014 Tex. App. LEXIS 9402, at *8–9 (Tex. App.—Austin Aug. 26, 2014, no pet.) (mem. op.); *S. Vanguard Ins. Co. v.*

Silberstein, No. 14-09-00472-CV, 2010 Tex. App. LEXIS 6202, at *9–12 (Tex. App.—Houston [14th Dist.] Aug. 3, 2010, no pet.) (mem. op.); *Tex. Am. Bank/Levelland v. Resendez*, 706 S.W.2d 343, 345 (Tex. App.—Amarillo 1986, no writ). Without evidence that Martinez had completely performed his obligations under the contract when he sought the "house documents" (which there is none), we cannot say that Sunset had any legal duty (contractual or otherwise) to convey him the deed to, i.e., ownership of, the house. And, without that legal duty, failing to convey "house documents" illustrating ownership cannot form the basis of either negligence or gross negligence.

Misrepresentation

Next, Martinez avers that the trial court erred in granting summary judgment against him on his misrepresentation claims. The purported misrepresentations were the very same ones upon which he based his claims of fraud, i.e., breached promises to sell him the house and pay a bonus. Because they allegedly were false when made, they supposedly constituted actionable misrepresentations. Yet, as discussed earlier, Martinez failed to illustrate that the promises were false or fraudulent, that is, made with the intent not to perform them. So, the very reasons why we overruled his earlier issue regarding fraud constitute reasons for overruling his issue on misrepresentation. He created no material issue of fact regarding whether the promises were false when made.

Summary Judgment on Piercing the Corporate Veil

In his final issue, Martinez questions the trial court's rejection of his attempt to pierce the corporate veil and hold Abalos responsible for the fraud and breached contract perpetrated by Sunset and DKTA. Yet, alter ego or piercing the corporate veil is not an

independent cause of action but rather a means of imposing liability for an underlying cause of action. *Dodd v. Savino*, 426 S.W.3d 275, 291 (Tex. App.—Houston [14th Dist.] 2014, no pet.). Logically, then, without a viable underlying cause of action, alter ego becomes irrelevant. And, as illustrated above, Martinez failed to establish a viable underlying cause of action. In other words, he failed to illustrate that the trial court erred in granting summary judgment on his causes of action. So, it matters not whether the trial court purportedly erred in granting summary judgment on his attempt to pierce the corporate veil.

Having overruled each of Martinez's issues, we affirm the trial court's summary judgment.

Brian Quinn
Chief Justice