TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

ON REHEARING

NO. 03-19-00011-CV

William Dollahite; Interest Partners, LLC.; Driveway Austin GP, LLC f/k/a Driveway Austin, LLC.; and Driveway Austin, L.P., Appellants

v.

Howry, Breen & Herman, L.L.P., Appellee

FROM THE 419TH DISTRICT COURT OF TRAVIS COUNTY
NO. D-1-GN-17-002967, THE HONORABLE JAMES LEE CARROLL, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

After considering appellants' motion for rehearing and appellee's response, we grant rehearing, withdraw our previous opinion and judgment issued on December 11, 2019, and substitute the following opinion in its place.

Appellants William Dollahite; Interest Partners, LLC.; Driveway Austin GP, LLC f/k/a Driveway Austin, LLC.; and Driveway Austin, L.P. appeal the district court's summary judgment in favor of Appellee Howry, Breen & Herman, L.L.P. (HBH). We will affirm.

BACKGROUND

Appellants hired the law firm Jackson Walker to draft a limited partnership agreement for them that would allow them to partner with investors to build and operate a road racing and off-road motorsports complex. Dollahite instructed Jackson Walker to draft an agreement to form Driveway Austin, LP, under which Driveway Austin GP would be the general partner and the investors would be limited partners who would be unable to remove Driveway Austin GP as the general partner without unanimous agreement. Jackson Walker drafted the agreement to contain a provision that appeared to effect Dollahite's intent by requiring a unanimous vote to remove the general partner. However, the agreement also contained a provision that allowed a simple majority of the limited partners to amend the agreement. A few years after the agreement became effective, the limited partners attempted to amend (by simple majority) the provision requiring unanimity to change the general partner, and they later attempted to change the general partner to Turbo Partners, LLC. In 2010, Turbo Partners sued Driveway Austin GP (the Turbo Suit). *See Driveway Austin GP, LLC v. Turbo Partners, LLC*, 409 S.W.3d 197 (Tex. App.—Amarillo 2013, pet. granted, judgm't vacated w.r.m.).

Jackson Walker referred Appellants to Randy Howry, an attorney at HBH, so that HBH could defend Appellants in the Turbo Suit. HBH also defended Appellants in a suit filed against them by Ray B. Powers in 2011 (the Powers Suit). Appellants entered into hourly fee agreements with HBH, under which HBH agreed to represent them in each of these two suits. Both parties agree that at least as early as 2012 or 2013, Howry informed Appellants that he would not file a claim against Jackson Walker. As a result, Appellants hired another attorney, who on April 8, 2014, filed a crossclaim against Jackson Walker in the Powers suit for Jackson Walker's drafting of the agreement. The Powers suit settled on May 9, 2014.

HBH had invoiced Appellants for services it performed in the Turbo and Powers suits, but Appellants did not fully pay. By the end of HBH's representation, sometime in 2014, there was an unpaid balance of $198,247.50. HBH sued Appellants in 2017 to recover the outstanding fees for its services. A year after filing suit, HBH moved for summary judgment. In response, on July 13, 2018, Appellants amended their answer to allege both as a counterclaim and an affirmative defense that HBH breached a fiduciary duty owed to Appellants by failing to disclose Howry's close relationship with attorneys at Jackson Walker and misleading Appellants into refraining from taking action against Jackson Walker. Appellants asserted in response to the motion for summary judgment that their affirmative defense of breach of fiduciary duty raised a fact issue sufficient to preclude summary judgment. HBH then moved for partial summary judgment on the ground that any claim for breach of fiduciary duty was barred by the four-year statute of limitations. The district court granted both of HBH's motions for summary judgment, resulting in a final judgment that concluded HBH was entitled to recover $198,427.50 and that Appellants' claim for breach of fiduciary duty was time-barred. This appeal followed.

ANALYSIS

Appellants challenge the summary judgment, alleging that (1) the district court erred in granting summary judgment as to Appellants' counterclaim for breach of fiduciary duty because there is at least a fact issue as to when the cause of action accrued and whether the discovery rule applies and (2) the record does not support granting summary judgment in light of their affirmative defense of breach of fiduciary duty.

We review the district court's summary-judgment ruling de novo. *Beck v. Law Offices of Edwin J. (Ted) Terry, Jr., P.C.*, 284 S.W.3d 416, 425 (Tex. App.—Austin 2009, no

pet.) (citing *Joe v. Two Thirty Nine J.V.*, 145 S.W.3d 150, 156-57 (Tex. 2004)). To prevail on its traditional motion for summary judgment, HBH had the burden of proving "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Id.* at 425-46 (citing Tex. R. Civ. P. 166a(c); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985)). If HBH met this burden, Appellants would have the burden to present to the district court any grounds that would preclude summary judgment. *See id.* at 426 (citing *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979)). Summary judgment is appropriate only when there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.* (citing *Nixon*, 690 S.W.2d at 548). In deciding whether a disputed fact issue exists to preclude summary judgment, we treat evidence favorable to the non-movant as true, and we must resolve every doubt and indulge all reasonable inferences in the non-movant's favor. *Id.* (citing *Nixon*, 690 S.W.2d at 548-49). When the order granting summary judgment does not specify the ground or grounds relied on for the ruling, summary judgment will be affirmed on appeal if any of the theories advanced are meritorious. *Id.* (citing *State Farm Fire & Cas. Co. v. S.S.*, 858 S.W.2d 374, 380 (Tex. 1993)).

Appellants allege that the district court erred in granting summary judgment as to their counterclaim for breach of fiduciary duty because there is at least a fact issue as to when the cause of action accrued and whether the discovery rule applies. The basis for their claim is that "HBH brought no evidence of when [Appellants] discovered or should have discovered" the breach. Appellants allege that HBH had a conflict of interest in representing Appellants based on Howry's friendships with some attorneys at Jackson Walker and that Howry breached his fiduciary duty to Appellants by failing to tell them they had a claim against Jackson Walker based on its drafting of the agreement. Assuming that the correct cause of action against HBH

for this alleged failure is breach of fiduciary duty, the statute of limitations is four years. *See* Tex. Civ. Prac. & Rem. Code § 16.004(5). Appellants raised their breach of fiduciary duty claim for the first time on July 12, 2018. They had sued Jackson Walker for its drafting of the agreement in April 2014 and settled that suit the following month. Thus, the evidence conclusively established that Appellants were aware of their claim against Jackson Walker and HBH's alleged failure to advise them of that claim more than four years before bringing this claim against HBH. As a result, the district court correctly determined that Appellants' counterclaim for breach of fiduciary duty was time-barred as a matter of law.

Appellants also urge that the record does not support granting summary judgment in favor of HBH in light of their affirmative defense of breach of fiduciary duty. If the party opposing a summary judgment relies on an affirmative defense, that party must come forward with summary-judgment evidence sufficient to raise an issue of fact on each element of the defense to avoid summary judgment. *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984). Ordinarily, prevailing on a breach-of-fiduciary-duty claim requires showing (1) the existence of the fiduciary relationship and (2) a breach of a fiduciary duty by the defendant (3) that causes (4) damages to the plaintiff. *Beck*, 284 S.W.3d at 429. However, the Texas Supreme Court has held that a claimant need not show causation or actual damages as to any equitable remedies sought for a claim of breach of fiduciary duty. *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 221 (Tex. 2017).

An attorney owes fiduciary duties to a client as a matter of law. *Beck*, 284 S.W.3d at 428-29. Therefore, the first element is met. As for the second element, Appellants assert that HBH breached a fiduciary duty by failing to disclose friendships between Howry and several attorneys at Jackson Walker and that, because of those friendships, Howry failed to

advise Appellants to pursue a claim against Jackson Walker for its drafting of the agreement. Again, assuming that the correct cause of action against HBH for this alleged failure is breach of fiduciary duty, Appellants have presented no evidence of a breach. Appellants assert that Howry's relationship with Jackson Walker resulted in a conflict of interest under Texas Disciplinary Rule of Professional Conduct 1.06(b)(2), which prohibits a lawyer from representing "a person if the representation of that person" "reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests." However, the existence of friendships between Howry and attorneys at Jackson Walker does not in itself show that HBH breached its fiduciary duty to Appellants by failing to advise them of a possible claim against Jackson Walker. In this case, Howry was hired to defend Appellants in two lawsuits brought by entities other than Jackson Walker, and the evidence unequivocally shows that when Appellants sought to pursue a claim against Jackson Walker, Howry declined to represent them, thereby avoiding the alleged conflict. Dollahite's affidavit explains that Howry initially advised Dollahite that the best strategy would be to "stick to [Dollahite's] interpretation of the limited partnership agreement" as not allowing for Dollahite's removal. Dollahite further averred that, in 2012 or 2013, when Dollahite asked Howry whether Dollahite should sue Jackson Walker, Howry responded "I can't tell you what to do. That's up to you. I can tell you that I'm not going to do it." Dollahite further argues that Howry never explained the possible adverse consequences of not suing Jackson Walker, and implies that suing Jackson Walker sooner would have resulted in lower legal fees on the theory that the case would have settled sooner. *See Beck*, 284 S.W.3d at 429 ("Attorneys must, among other things, 'render a full and fair disclosure of facts material to the client's representation.'" (quoting *Willis v. Maverick*, 760 S.W.2d 642, 645 (Tex. 1988))).

However, as presented in Dollahite's affidavit, Howry chose a litigation strategy that might have been negatively impacted by suing Jackson Walker for its drafting of the agreement while simultaneously attempting to argue that the agreement did not contain the flaw for which Jackson Walker was being sued. In this case, Howry's litigation strategy of not pursuing inconsistent legal theories did not amount to a breach of fiduciary duty. Moreover, speculation that an earlier crossclaim against Jackson Walker might have ended litigation brought by other parties does not create a fact issue precluding summary judgment. *See Jackson v. Fiesta Mart*, 979 S.W.2d 68, 70 (Tex. App.—Austin 1998, no pet.) ("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 fact, and the legal effect is that there is no evidence." (quoting *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983))). On this record, Appellants have not presented more than a scintilla of evidence on the element of breach. We therefore conclude Appellants have not shown that their affirmative defense barred the granting of HBH's motion for summary judgment.

CONCLUSION

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

Gisela D. Triana, Justice

Before Justices Goodwin, Baker, and Triana

Affirmed

Filed: June 11, 2020