TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-19-00255-CV

JTREO, Inc., Appellant

v.

Hightower & Associates, Inc.; and Aubrey Richard Hightower, Appellees

FROM THE 419TH DISTRICT COURT OF TRAVIS COUNTY
NO. D-1-GN-13-004321, THE HONORABLE LORA J. LIVINGSTON, JUDGE PRESIDING

MEMORANDUM OPINION

JTREO, Inc., complains of the trial court's summary judgment rendered in favor of appellees Hightower & Associates, Inc., and Aubrey Richard Hightower[1] on JTREO's breach-of-contract and breach-of-fiduciary-duty claims in this dispute arising from the sale of a condo. JTREO also complains about the trial court's denial of its motion for continuance. For the following reasons, we will affirm the trial court's summary judgment and ruling on JTREO's motion for continuance.

BACKGROUND

This dispute germinated in the impending dissolution of a marriage and attendant sale of a luxury high-rise condo. The husband, Andre Jones, entered into an agreement to sell

[1] Because Mr. Hightower's surname is also the name of the law firm, we will refer to him individually as "Rick" (as he is referred to in the record) and the firm and Rick collectively as "Hightower."

the condo, purportedly for his foreign-based and estranged wife, Mari-Louise Larsen, using a fraudulent power of attorney. In that sale, Jones received a portion ($157,700) of the sales price in cash and the rest ($1,250,000) in a promissory note (the Note) from the buyer, Graymeiren Holdings, LLC. Seeking to liquidate the Note, Jones later arranged to sell it at a discount to JTREO pursuant to a Note Sale Agreement (the Note Agreement) for $874,627.70. To facilitate its purchase of the Note, JTREO obtained financing from Libertad Bank, which retained Hightower to perform legal services for Libertad in connection with the loan and closing of the Note sale.

Both the loan and the Note sale closed on June 12, 2012. The Note Agreement included a representation that the sellers—Jones and Larsen—would procure a mortgagee title policy endorsement in JTREO's favor, but no record exists of this having been done. For the closing, Jones used another fraudulent power of attorney from Larsen and forged a verification of that document. After the closing, Hightower wired $874,627.70 from one of its bank accounts to Jones's individual bank account.

More than eighteen months later, after Larsen had not received any of the sales proceeds from Jones, she brought a wide-ranging lawsuit, principally against Jones but also joining nearly everyone else involved in the transactions, including JTREO, Rick, and the title company involved in the transactions (Chicago Title). After nearly two years of litigation, and pursuant to an agreed motion by Larsen and Rick, the trial court dismissed Larsen's claims against Rick with prejudice. Fifteen months after that, the case was tried to a jury, and the trial court rendered final judgment against JTREO consistent with the jury's rejection of JTREO's defense that it was a good-faith purchaser for value, finding instead that JTREO converted the

Note and held money that in equity and good conscience belonged to Larsen.[2] JTREO filed a motion for new trial, arguing that the trial court improperly commented on the weight of the evidence and that the evidence was factually insufficient to support the jury's findings against it. The trial court granted JTREO's motion for new trial on June 27, 2017.

About four months later, JTREO filed its Second Amended Answer and First Amended Petition in which it, for the first time, cross-sued Hightower & Associates and Rick, alleging against them breaches of contract and fiduciary duty. Hightower moved for both traditional and no-evidence summary judgment on both of JTREO's claims. The trial court granted the traditional motion as to the contract claim and the no-evidence motion on both claims. JTREO filed this appeal.

DISCUSSION

No-evidence summary judgment on claim for breach of fiduciary duty

In its first issue, JTREO contends that the trial court erred in granting Hightower's no-evidence summary-judgment motion on its claim for breach of fiduciary duty.[3] In its summary-judgment motion, Hightower asserted that JTREO had no evidence to support any of the requisite elements of its claim, those being: (1) the existence of a fiduciary duty between the

[2] Larsen testified at trial that she used her separate property, received from a family inheritance, to purchase the condo and that Jones convinced her that Texas law required the names of both spouses to be on the title. The trial court's judgment awarded her damages in excess of $1,000,000 against Chicago Title, JTREO, and Jones, jointly and severally. It also granted Larsen's motion for directed verdict on her claim of forgery against Jones, declared the Note sale void as a matter of law, and awarded her additional damages against Jones for violation of the Texas Theft Liability Act plus $2,000,000 in exemplary damages.

[3] The standard of review for a no-evidence summary judgment is well-established. *See King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 750–51 (Tex. 2003) (outlining standard).

parties, and (2) a breach of that duty by the defendant that either (3) caused damages to the plaintiff, *Beck v. Law Offices of Edwin J. Terry, Jr., P.C.*, 284 S.W.3d 416, 429 (Tex. App.—Austin 2009, no pet.), or benefit to the defendant, *Lundy v. Masson*, 260 S.W.3d 482, 501 (Tex. App.—Houston [14th Dist.] 2008, pet. denied).

We first consider whether a fiduciary relationship existed between Hightower and JTREO, which is a question of law. *See National Plan Adm'rs, Inc. v. National Health Ins.*, 235 S.W.3d 695, 700 (Tex. 2007). While JTREO alleges that Hightower served as the "escrow agent" for the loan and Note sale, it is undisputed that there was no written escrow agreement. Hightower was not, therefore, a properly appointed escrow agent as a matter of law. *See Trahan v. Lone Star Title Co. of El Paso*, 247 S.W.3d 269, 287 (Tex. App.—El Paso 2007, pet. denied) ("An escrow agent must be appointed through a specific legal document that imparts a specific legal obligation."). Because Hightower was not a duly appointed escrow agent, it did not owe JTREO any fiduciary duties as an escrow agent. *Chapman Children's Tr. v. Porter & Hedges, L.L.P.*, 32 S.W.3d 429, 438 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) ("Absent a written agreement which appointed [appellee] as an escrow agent, [appellee] had no duty to act as one."); *see also Trahan*, 247 S.W.3d at 287 ("an escrow agent's [fiduciary] duties are strictly limited and the scope of the agent's duties are defined by the escrow agreement").

Furthermore, the evidence conclusively establishes that at all relevant times, Hightower served solely as Libertad's attorney with respect to the transaction, and JTREO acknowledged as much in a two-page disclosure that it signed.[4] Texas courts have routinely held

[4] The disclosure provided, in relevant part, that (a) Libertad "used the services of [Hightower] to prepare various legal instruments and loan documents in connection with this transaction," (b) "you [JTREO] are acknowledging that [Hightower] has not represented you or

that no fiduciary duty exists between a lender (i.e., Libertad and its agent Hightower) and a borrower (i.e., JTREO). *See Jones v. Thompson*, 338 S.W.3d 573, 583 (Tex. App.—El Paso 2010, pet. denied); *Manufacturers Hanover Tr. Co. v. Kingston Inv'rs Corp.*, 819 S.W.2d 607, 610 (Tex. App.—Houston [1st Dist.] 1991, no writ).

Moreover, as Libertad's attorneys, Hightower could not have held the funds in "escrow" for its own principal (or anyone else), because as long as the funds are in the possession and control of the principal's attorney, they remain subject to the control of the principal. *See Pickle v. Whitaker*, 224 S.W.2d 741, 745 (Tex. App.—El Paso 1949, writ ref'd); *see also Johnson v. Freytag*, 338 S.W.2d 257, 262 (Tex. App.—Beaumont 1960, writ ref'd n.r.e.) (holding that "there can be no escrow" when the instrument at issue remains "in the custody of the [principal's] agent"). Generally, in an escrow arrangement the funds or other property pass out of the control of a party to the transaction to a neutral third party. *See Bell v. Safeco Title Ins.*, 830 S.W.2d 157, 161 (Tex. App.—Dallas 1992, writ denied) ("An escrow is a written instrument that imports a legal obligation. In accordance with the escrow agreement, the grantor deposits the funds or property with a neutral third party [the escrow agent]." (citation omitted)); *Johnson*, 338 S.W.2d at 262 ("An escrow depository should be a stranger or third party," and "since [appellant's son, acting as her agent] was a party to the instrument he could not be an escrow depository."); *Pickle*, 224 S.W.2d at 745 ("In an escrow the paper passes out of the control of the maker."); *see also Capcor at KirbyMain, L.L.C. v. Moody Nat'l Kirby Housing*

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given you any legal advice concerning the financing of the property or the legal instruments and loan documents executed in connection with the transaction," and (c) "in representing [Libertad] in this transaction, [Hightower] did a variety of things of a legal nature . . . [including the preparation of] documents required by [Libertad, and] THESE SERVICES WERE PERFORMED ONLY FOR [LIBERTAD]."

S., L.L.C., 509 S.W.3d 379, 385 (Tex. App.—Houston [1st Dist.] 2014, no pet.) ("An escrow agent acts as a neutral party to the transaction and owes a fiduciary duty to both parties."); *Trevino v. Brookhill Capital Res., Inc.*, 782 S.W.2d 279, 281 (Tex. App.—Houston [1st Dist.] 1989, writ denied) ("An escrow agent owes a fiduciary duty to both parties to a contract. This fiduciary duty consists of: (1) the duty of loyalty; (2) the duty to make full disclosure; and (3) the duty to exercise a high degree of care to conserve the money and pay it only to those persons entitled to receive it." (citations omitted)).

Nonetheless, JTREO contends that Hightower "served as the closing/escrow agent for the sale of the Note" through its actions, despite the lack of a written escrow agreement and Hightower's undisputed role as Libertad's attorneys, citing *Home Loan Corp v. Texas American Title Co.* for the proposition:

> Even where, as in this case, no formal escrow agreement has been entered into, a title company that accepts funds for disbursement in a closing transaction for a fee owes the party remitting those funds a duty of loyalty, a duty to make full disclosure, and a duty to exercise a high degree of care to conserve the money and pay it only to those persons who are entitled to receive it.

191 S.W.3d 728, 731–34 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (citing *City of Fort Worth v. Pippen*, 439 S.W.2d 660, 664–65 (Tex. 1969))). However, JTREO's reliance on *Home Loan Corp.* is misplaced because in that case the title company that had acted as a settlement agent for a loan closing was a third party, not the attorney for the lender, as here. *See id.*; *cf. Johnson*, 338 S.W.2d at 262 (noting that, while unwritten escrow agreement might be enforceable, "there can be no escrow" agreement when funds or property at issue are "in the custody of [a party's] agent"). Furthermore, whereas in *Home Loan Corp.* the party remitting the funds to the de facto escrow agent had paid the agent a fee for the service of disbursing the funds

appropriately, JTREO has not identified any evidence in the record demonstrating that it paid a fee to Hightower for such service. *See* 191 S.W.3d at 731; *see also Pippen*, 439 S.W.2d at 664--65 (holding that title company, while not serving as "true escrow" agent to sale transaction because "[t]here was no escrow agreement," nonetheless owed fiduciary duty to buyer because it "took the [buyer's] money to accomplish a purpose directed by" buyer and "was paid a fee for its services and for the careful handling of these funds," but such fiduciary duty extended only to buyer and not to seller).

We hold that Hightower did not owe a fiduciary duty to JTREO as a matter of law and, therefore, we need not consider whether the evidence raised a material fact issue on any of the remaining challenged elements of JTREO's breach-of-fiduciary-duty claim. *See Provident Life & Accident Ins. v. Knott*, 128 S.W.3d 211, 216 (Tex. 2003) (holding that if trial court did not specify grounds for its summary judgment, appellate court must affirm order granting summary judgment if any grounds presented to trial court are meritorious); *see also* Tex. R. Civ. P. 166a(i) ("The trial court must grant the [no-evidence] motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact."). Accordingly, we overrule JTREO's first issue.

No-evidence summary judgment on claim for breach of contract

In its second issue, JTREO contends that the trial court erred in granting Hightower's no-evidence summary-judgment motion on its claim for breach of contract. Because in its motion Hightower asserted that there was no evidence to support any of the requisite elements of this claim, to avoid summary judgment JTREO was required to produce more than a scintilla of evidence on each of the following elements: (1) the existence of a contract between

the parties; (2) performance or tendered performance by the claimant; (3) breach of the contract by the opposing party; and (4) damages caused by the breach. *See USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 501 n.21 (Tex. 2018). To prove the existence of a contract, JTREO must have produced more than a scintilla of evidence of an offer and acceptance (i.e., a "meeting of the minds") and consideration. *See Domingo v. Mitchell*, 257 S.W.3d 34, 39 (Tex. App.—Amarillo 2008, pet. denied). Consideration is a bargained-for exchange of promises that consists of benefits and detriments to the contracting parties. *Roark v. Stallworth Oil & Gas Co.*, 813 S.W.2d 492, 496 (Tex. 1991).

It is undisputed that there was no written or express contract between JTREO and Hightower. However, JTREO contends that they had an "implied in fact" contract. The difference between express contracts and implied contracts is the means by which the contracts are formed. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 850 (Tex. 2009). An express contract arises when the parties have stated the contractual terms, whereas a contract implied in fact arises from the acts and conduct of the parties. *Haws & Garrett Gen. Contractors, Inc. v. Gorbett Bros. Welding Co.*, 480 S.W.2d 607, 609 (Tex. 1972). In the case of an implied contract, mutual assent is inferred from the circumstances—a "meeting of the minds" is inferred from and evidenced by the parties' conduct and course of dealing. *Id.*; *see Fielding*, 289 S.W.3d at 850 ("Regardless of whether a contract is based on express or implied promises, mutual assent must be present."). Thus, "[t]he legal effect of [express and implied] contracts [is] identical; the distinction is based on the way in which mutual assent is manifested." *Houston Med. Testing Servs., Inc. v. Mintzer*, 417 S.W.3d 691, 698–99 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

JTREO alleges that its contract with Hightower, implied by the parties' conduct, was that Hightower would "facilitate the closing of the Note sale" in consideration of payment by JTREO for such "closing services." It contends that Hightower accepted JTREO's request that it perform closing services, performed the services, and received payment from JTREO therefor. While JTREO does not specify which exact "services" Hightower agreed to perform, it cites the following evidence to support its claim that the parties had an implied contract: (1) an email from Rick to JTREO, Jones, and Libertad just before closing, attaching the "whole package" of closing documents and stating, "We [Hightower] have prepared at borrower's [JTREO] request documents to finalize the transfer of the note from [] Jones to borrower"; (2) the testimony of JTREO's president, David Buttross, in which he explained his "understanding" that closing attorneys are "supposed to verify" all parties' signatures and POAs and that Hightower was among the various "attorneys involved in the transaction to make sure [Buttross's] I's were dotted and T's were crossed"; (3) a copy of the wiring instructions by which Hightower directed that funds in its bank account be wired to Jones's individual account; and (4) the "Borrower's Closing Statement" for the Libertad loan.

As to the closing statement, JTREO relies on three line items therein among the list of "charges/expenses" that Libertad assessed to JTREO to close the loan: (1) "Recording Fees payable to Hightower" totaling $146; (2) "Legal Fees payable to Hightower" of $5,000; and (3) "Endorsement to Title Policy payable to Chicago Title" of $100. One of JTREO's main contentions in both its breach-of-contract and breach-of-fiduciary-duty claims is that Hightower failed to obtain an endorsement to the existing title insurance policy on the condo that would have entitled it to indemnification for Larsen's claims. However, this evidence does not indicate that Hightower agreed to obtain the endorsement or received any payment from JTREO therefor;

rather, the closing statement indicates that the $100 title-endorsement payment was to be made by Libertad to Chicago Title. While JTREO may have assumed that it was Hightower's obligation to so perform, there is no evidence that Hightower so agreed. Indeed, the Note Agreement specifically required *Larsen and Jones,* as sellers, to obtain the title policy endorsement. Additionally, by signing the loan disclosure, JTREO acknowledged that although it was required to pay Hightower's legal fees as set forth on the closing statement, Hightower was representing Libertad in the transaction and *not* JTREO.[5]

JTREO has neither identified any evidence in the record raising a fact issue as to a "meeting of the minds" with Hightower whereby Hightower agreed to obtain the title endorsement or perform any other specific "closing services," nor has it identified any evidence of consideration that it provided to Hightower for the vague "services" it contends Hightower promised to provide. Having failed to raise a fact issue on whether a valid implied-in-fact contract existed, JTREO did not meet its burden to defeat Hightower's no-evidence motion. Accordingly, the trial court properly granted summary judgment in favor of Hightower on JTREO's breach-of-contract claim, and we overrule JTREO's second issue. Because of our disposition of this issue, we need not consider whether the trial court properly granted Hightower's traditional motion on that same claim (JTREO's third issue). *See* Tex. R. App. P. 47.1, 47.4.

[5] The disclosure reads, in relevant part, "you [JTREO] are acknowledging that [Hightower] has not represented you or given you any legal advice concerning the financing of the property or the legal instruments and loan documents executed in connection with the transaction" and "you [JTREO] are aware and must pay, at the time of closing or on demand, the legal fees of [Hightower] . . . [which] are set forth on the closing statement."

Motion for continuance

In its final issue, JTREO contends that the trial court erred in denying its motion to continue the hearing on Hightower's motion for summary judgment. A party may move for a no-evidence summary judgment only "[a]fter an adequate time for discovery." Tex. R. Civ. P. 166a(i); *Specialty Retailers, Inc. v. Fuqua*, 29 S.W.3d 140, 145 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). The rule does not require that discovery must have been completed, only that there has been "adequate time." *Fuqua*, 29 S.W.3d at 145. The trial court may order a continuance of a hearing on a summary-judgment motion if it appears "from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition." Tex. R. Civ. P. 166a(g).

We review a trial court's order denying a motion for continuance for a clear abuse of discretion, which occurs when the court reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 161 (Tex. 2004). Appellate courts have considered the following non-exclusive factors when deciding whether a trial court abused its discretion in denying a motion for continuance seeking additional time to conduct discovery: the length of time the case has been on file, the materiality and purpose of the discovery sought, and whether the party seeking the continuance has exercised due diligence to obtain the discovery sought. *Id.*

When Hightower filed its motion for summary judgment, JTREO's cross-claims against it had been on file for ten months, and eight months had elapsed since Hightower answered and appeared. JTREO filed a combined response and, in the alternative, motion for continuance, attaching various forms of evidence, such as excerpts from the trial testimony of Larsen and Buttross and certain documentary evidence such as the closing statement. Although

tasked with the burden to create a fact issue on each of the elements of its claims in response to the no-evidence motion, JTREO notably did not attach the affidavit of any of its corporate representatives. The only affidavit it attached was that of its attorney, which merely authenticated the exhibits attached to the pleading and averred that an adequate time for discovery had not elapsed. *See Pickett v. Texas Mut. Ins.*, 239 S.W.3d 826, 840 (Tex. App.—Austin 2007, no pet.) ("Under Texas law, when a party contends that it has not had an adequate opportunity for discovery before a summary judgment hearing, it must file in the trial court either an affidavit explaining the need for further discovery or a verified motion for continuance.").

JTREO's attorney averred the following in support of the motion for continuance:

- Discovery in this case is not complete and there has been inadequate time to complete discovery pertaining to JTREO's crossclaims against Hightower.

- The depositions of [Rick] and [April] Hightower must be taken. It is likely that a representative of Libertad Bank will also be deposed. The evidence from these depositions is material to JTREO's case, and the defense of the Hightower [summary-judgment] Motion, because it is believed it will provide further detail concerning the scope of the relationship between JTREO and Hightower[] and Hightower's breaches of contract and breaches of fiduciary duty. These depositions were not obtained earlier because, in the eight months since Hightower appeared, JTREO has been addressing written discovery. And, the information available from these witnesses is unique to them and cannot be obtained elsewhere: [Rick] is a party to JTREO's crossclaims, April Hightower worked on the Note closing, and a corporate representative of Libertad will be able to address the precise matters for which it engaged Hightower and the form of this engagement.

- In addition, it appears that Hightower's document production is inadequate and that, if Hightower does not agree to supplement this discovery, discovery motions and judicial intervention may be required.

As already mentioned, eight months had elapsed between when Hightower made an appearance and when it filed its summary-judgment motion; additionally, its motion had been on file for forty days before the hearing. Discovery periods substantially similar to this have been

deemed adequate by two of our sister courts. *See Restaurant Teams Int'l, Inc. v. MG Secs. Corp.*, 95 S.W.3d 336, 340 (Tex. App.—Dallas 2002, no pet.); *McClure v. Attebury*, 20 S.W.3d 722, 729–30 (Tex. App.—Amarillo 1999, no pet.).

As for the materiality and purpose of the outstanding discovery (the depositions of Rick, April Hightower, and possibly a Libertad representative), JTREO vaguely averred that it believed the depositions would provide further detail about the "scope" of the parties' relationship and Hightower's alleged breaches. However, JTREO had the opportunity to both cull from the evidentiary record of a four-day jury trial and to provide affidavits of its own representatives in response to Hightower's motion to support its claims of duties, the formation of a contract, and various alleged breaches. Yet, as addressed above, JTREO did not surmount the scintilla hurdle.

Finally, JTREO did not explain how it had exercised due diligence in the previous eight months to schedule the anticipated depositions, averring merely that it instead had been "addressing written discovery." JTREO's motion and affidavit did not aver that either Hightower or the court had prevented it from scheduling the depositions. Furthermore, JTREO did not explain why it did not present any affidavit evidence opposing the motion besides its counsel's affidavit. JTREO notes that Hightower did not actively oppose the motion to continue, but such a fact is only one of many circumstances for the trial court to consider in exercising its discretion. On the basis of this record, we conclude that the trial court's denial of the motion for continuance was not so arbitrary and unreasonable as to constitute a clear and prejudicial error of law. *See Joe*, 145 S.W.3d at 161. Accordingly, we overrule JTREO's fourth issue.

CONCLUSION

Having overruled JTREO's issues, we affirm the trial court's summary judgment.

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Thomas J. Baker, Justice

Before Chief Justice Rose, Justices Baker and Triana

Affirmed

Filed June 18, 2020