



NUMBER 13-19-00282-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

**EDWARD FERRER AND
SHERLYN FERRER,**

Appellants,

v.

**JOERESTY ABELIDA AND
MARIA ABELIDA,**

Appellees.

**On appeal from the 224th District Court
of Bexar County, Texas.**

MEMORANDUM OPINION

**Before Justices Hinojosa, Perkes, and Tijerina
Memorandum Opinion by Justice Hinojosa**

By one issue, appellants Edward and Sherlyn Ferrer (the Ferrers) assert the trial court erred in granting appellees', Joeresty and Maria Abelidas' (the Abelidas), motion for no-evidence summary judgment. We affirm.

I. BACKGROUND¹

According to the Ferrers' first supplemental petition, the Ferrers and Abelidas are members of World Financial Group (WFG), an insurance company that primarily sells life insurance. WFG's apparent business model is to recruit agents who sell insurance, and then these agents recruit other agents to do the same. A portion of an agents' sales commissions is paid to the agent who recruited the selling agent, creating an "upstream" of income on commission. The Abelidas recruited the Ferrers into WFG. The Ferrers subsequently recruited Trinidad Pardo into WFG. Accordingly, the Ferrers claim they are entitled to any commissions on life insurance policies sold by Pardo.

According to the petition, Pardo allegedly sold a life insurance policy to Nestor² Montemayor on or about September 15, 2015.³ As the upstream agents for Pardo, the Ferrers claim they should have received a partial commission from this sale. Ferrer, however, claimed he never received this commission. Instead, he asserted that the commission went straight to the Abelidas in full. The Ferrers' petition asserted a cause of action for conversion against the Abelidas, claiming that the Abelidas kept the full commission which "constituted a wrongful exercise of dominion and control over the funds

¹ This case is before this Court on transfer from the Fourth Court of Appeals in San Antonio pursuant to a docket-equalization order issued by the Supreme Court of Texas. See TEX. GOV'T CODE ANN. § 73.001.

² Nestor is sometimes referred to as Elmer in the record. This name discrepancy is not relevant to our analysis.

³ The Ferrers' earlier petitions referenced the sale of a different life insurance policy to a Dr. Leonor Rivera. The trial court granted summary judgment on this claim on April 30, 2018, and the Ferrers do not challenge the Rivera judgment on appeal.

due to Plaintiff Edward Ferrer.” The Ferrers argued that they were entitled to share the commission with the Abelidas.

The Abelidas answered by contending that any and all funds they may have received as an advance on Montemayor’s life insurance policy were returned in full when Montemayor failed a requisite health examination. To support this claim, they produced an e-mail correspondence from Cindy Morrison, a Senior Underwriter at Transamerica Insurance, indicating that the Montemayor life insurance policy was not approved based on the results of Montemayor’s medical examination. The Abelidas also produced the WFG Associate Agreement Rules. Rule 1, Part IV, entitled “Insurance Commissions,” provided that,

Upon the submission of an application for an insurance policy, no commission is earned. Monies may be advanced as a loan to an associate upon the submission of an application for an insurance policy even though the full premium has not been paid by the applicant and the policy has not been issued by a Product Provider.

. . .

Only after the Product Provider accepts an application, receives premiums, and issues an insurance policy can a commission begin to become earned.

Rule 1 also set forth that “[i]f, for any reason, an application for an insurance policy is rejected, then no commission is earned by the associate.”

The Abelidas filed a motion for no-evidence summary judgment, contending that adequate time for discovery had passed and that there was no evidence they had “converted” the Montemayor commission. The Ferrers filed a response, including affidavits from Edward and Sherlyn. Both affidavits set forth that “\$3,029.57 was actually

advanced to Maria Abelida” on the Montemayor policy, and that Edward and Sherlyn should have received a portion of this commission.⁴ Of note, the response also included a copy of the e-mail correspondence from Morrison, confirming that the Montemayor policy had been rejected.

In their reply to the Ferrers’ response, the Abelidas reiterated that any and all funds received in advance when Montemayor applied for the life insurance policy were returned in full when Montemayor failed his health examination. Additionally, the Abelidas provided testimony by affidavits. In his affidavit, Joeresty testified that neither he nor his wife Maria “earned any commission upon the submission of an application for an insurance policy. Monies advanced as Advance Commission are a loan to an associate upon the submission of an application for an insurance policy.” Joeresty further explained that although he and his wife received an advance for the policy, “all funds advanced as Advance Commission were shortly later returned in full.” Maria’s affidavit testified to the same thing.

On February 8, 2019, the trial court granted the Abelidas’ no-evidence motion for summary judgment on the Ferrers’ conversion claim. The Ferrers filed a Motion for New Trial on March 13, 2019, which was overruled by operation of law. The Ferrers subsequently appealed the granting of the motion for summary judgment.

⁴ The Ferrers’ exhibits also included financial statements regarding the Rivera policy, which are irrelevant to this appeal.

II. STANDARD OF REVIEW & APPLICABLE LAW

Texas Rule of Civil Procedure 166a(i) provides the rule for motions for no-evidence summary judgment:

After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. The motion must state the elements as to which there is no evidence. The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact.

TEX. R. CIV. P. 166a(i).

“A no-evidence summary judgment is essentially a pretrial directed verdict, and we apply the same legal sufficiency standard in reviewing a no evidence summary judgment as we apply in reviewing a directed verdict.” *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 750–51 (Tex. 2003). Accordingly, we review the evidence in the light most favorable to the non-movant, disregarding all contrary evidence and inferences. See *id.* at 751 (citing *Merrell Dow Pharms. Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)). “A no evidence point will be sustained when (a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a mere scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact.” *Id.* Thus, a no-evidence summary judgment is improperly granted if the respondent brings forth more than a scintilla of probative evidence to raise a genuine issue of material fact. See TEX. R. CIV. P. 166a(i). 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. *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983). 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.” *Merrell Dow Pharms.*, 953 S.W.2d at 711.

Where, as here, a proponent brings a no-evidence motion for summary judgment solely under Texas Rule of Civil Procedure 166a(i) and attaches evidence, “that evidence should not be considered unless it creates a fact question.” *Binur v. Jacobo*, 135 S.W.3d 646, 651 (Tex. 2004). We do not, however, disregard the proponent’s motion. See *id.* The Texas Supreme Court has held that “[w]e disapprove of decisions that hold or imply that, if a party attaches evidence to a motion for summary judgment, any request for summary judgment under Rule 166a(i) will be disregarded.” *Id.*

To prove a claim for conversion, a plaintiff must show: (1) the plaintiff owned, had legal possession of, or was entitled to possession of the property; (2) the defendant assumed and exercised dominion and control over the property in an unlawful and unauthorized manner, to the exclusion of and inconsistent with plaintiff’s rights; (3) plaintiff made a demand for the property; and (4) the defendant refused to return the property. See *Ojeda v. Wal-Mart Stores, Inc.*, 956 S.W.2d 704, 707 (Tex. App.—San Antonio 1997, pet. denied) (citing *Apple Imports, Inc. v. Koole*, 945 S.W.2d 895, 899 (Tex. App.—Austin 1997, writ denied); *Whitaker v. Bank of El Paso*, 850 S.W.2d 757, 760 (Tex. App.—El Paso 1993, no writ)).

III. ANALYSIS

WFG's business model was designed so that the Ferrers would share in the commission in the sale of any life insurance policy sold by Pardo. The record shows that Pardo attempted to sell a life insurance policy to Montemayor.

Here, the Abelidas attached affidavits to their no-evidence motion for summary judgment. Both Joeresty and Maria's affidavits pronounced that "all funds advanced as Advance Commission [for Montemayor's policy] were shortly later returned in full" when the life insurance policy was not approved. Because this testimonial evidence does not create a fact issue favorable to the Ferrers, we disregard it. See *Binur*, 135 S.W.3d at 651; TEX. R. CIV. P. 166a.

Even disregarding the Abelidas' affidavits, however, we conclude there is still no evidence that Montemayor was issued a life insurance policy. The Ferrers attached the e-mail correspondence from Morrison to their summary judgment response which documented that Montemayor failed his health examination. This e-mail further confirmed that the insurance company "regretted" to inform Montemayor that it was "not able to approve coverage" for him at that time. Thus, Montemayor's application for a life insurance policy was rejected.

In sum, we hold that the Abelidas could not "convert" or "exercise[] dominion and control" over a commission when the Ferrers' own evidence established that a policy was never issued, such that no commission could be earned by an associate. See *Ojeda*, 956 S.W.2d at 707. We conclude the trial court did not err in granting the Abelidas' no-evidence motion for summary judgment, as there was "a complete absence of evidence

of a vital fact” of the “property” element of the alleged conversion claim. *King Ranch, Inc.*, 118 S.W.3d at 751; *Merrell Dow Pharms.*, 953 S.W.2d at 711. We overrule the Ferrers’ sole issue.

IV. CONCLUSION

We affirm the trial court’s judgment.

LETICIA HINOJOSA
Justice

Delivered and filed the
16th day of July, 2020.