Affirmed in part and Reversed and Remanded in part, and Opinion filed May 25, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-00975-CV

TOM L. BOALES, BRENDA K. BOALES, JAMES W. DUNBAR, SHAUN C. HILLS, CARLA HILLS, AND LINDA LANIER, Appellants/Cross Appellees

V.

PERRY HOMES, A JOINT VENTURE, Appellee/Cross Appellant

On Appeal from the 61st District Court
Harris County, Texas
Trial Court Cause No. 95-12354-B

O P I N I O N

This appeal is from a no evidence summary judgment and special exceptions granted in favor of the defendant homebuilder, Perry Homes, A Joint Venture ('Perry'), on all causes of action alleged by the purchasers. Appellants, Tom Boales, Brenda K. Boales, James W. Dunbar, Shaun C. Hills, Carla Hills, and Linda Lanier ('plaintiffs'), bring five points of error. The judgment of the trial court is affirmed in part, and reversed and remanded in part.

Procedural and Background Facts

This case arises from the purchase of homes by the plaintiffs in the Aberdeen Trails subdivision. Between 1993 and 1994, Perry and Brighton Builders, Inc. ('Brighton) sold homes to the plaintiffs in the Aberdeen Trials subdivision. The subdivision was located within Harris County Municipal Utility District ('MUD') No. 14. The district was responsible for providing water, sewer, drainage and flood control facilities.

Plaintiffs allege that salespeople from Perry and Brighton made substantially similar misrepresentations regarding the MUD taxes as an inducement for the plaintiffs to purchase homes in the subdivision. The plaintiffs claim that Perry's salespeople told them that the bonds in the district had been paid or retired, and that there might only be small fluctuations in the tax rates for upkeep and maintenance.

After the plaintiffs purchased their homes, the MUD taxes increased from $.19 per $100 valuation to $1.35 per $100 valuation. The bonds had never been retired; in fact, they had not been issued.

Perry agrees that the oral representations were inaccurate. However at closing, Perry gave each plaintiff a written notice as required by TEX. WATER CODE ANN. § 50.301 (Vernon 1994) regarding the current rate of taxes levied by the district and the total amount of bonds that had been or could be issued for the district. Perry claims that the notice informed the plaintiffs that they were purchasing property within the West Harris County Municipal District No. 14, and that the district had authority to issue bonds and levy taxes to provide for its services.

In 1995, the plaintiffs, along with other homeowners, sued Perry and the other defendants asserting claims for fraud, negligence, Deceptive Trade Practice Act ('DTPA') violations, breach of warranty, negligence per se, promissory estoppel, and conspiracy. A year later, the district court severed out the claims of other homeowners, leaving the six plaintiffs in the lawsuit. Perry filed special exceptions and motions for partial summary judgment on the plaintiff's causes of action for conspiracy, negligence per se and promissory estoppel. On May 20, 1997, the trial court granted Perry's special exceptions and dismissed the negligence per se and promissory estoppel claims. The trial court denied Perry's partial summary judgment as to the plaintiff's DPTA claims. The trial court subsequently granted Perry's motion for partial summary judgment on the conspiracy claim on March 16, 1998. The trial court granted special

exceptions to the plaintiff's remaining causes of action on July 22, 1998, finding that they were precluded by the Texas Water Code. Plaintiffs and Perry filed timely notices of appeal.

NO-EVIDENCE SUMMARY JUDGMENT

In their first point of error, the plaintiffs contend that the trial court erred in granting Perry's no-evidence motion for summary judgment. They argue that genuine issues of material fact exist regarding their claims of conspiracy to defraud, conspiracy to violate TEX. PEN. CODE ANN. § 32.47 (Vernon 1994), and TEX. BUS. & COM. CODE ANN. § 27.01, 17.46(b) (2), (3), (5), (9) ,(12) and (23) (Vernon 1994). We disagree and find that there is no evidence of the "meeting of the minds" of the defendant's to support the plaintiff's civil conspiracy claims.

Standard of Review

When reviewing a no-evidence summary judgment, we apply the same legal sufficiency standard that we apply in reviewing a directed verdict. *See Moore v. Kmart Corp.*, 981 S.W.2d 266, 269 (Tex. App.–San Antonio 1998, pet. denied); Judge David Hittner & Lynne Liberato, No-Evidence Summary Judgments Under the New Rule, in STATE BAR OF TEXAS PROF. DEV. PROGRAM, 20 ADVANCED CIVIL TRIAL COURSE D, D-5 (1997). We look at the proof in the light most favorable to the non-movant, disregarding all contrary proof and inferences. *See Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997); *Lampasas v. Spring Center, Inc.*, 988 S.W.2d 428, 432 (Tex. App.–Houston [14th Dist.] 1999, no pet.).

A trial court cannot grant a no-evidence summary judgment if the respondent brings forth more than a scintilla of proof to raise a genuine issue of material fact. TEX. R. CIV. P. 166a(i); *Moore*, 981 S.W.2d at 26. Proof that is so weak that it only creates a mere surmise or suspicion of a fact is less than a scintilla. *See Kindred v. Con/Chem. Inc.*, 650 S.W.2d 61, 63 (Tex. 1983). On the other hand, the respondent has provided more than a scintilla of proof and survives summary judgment when the proof "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Havner*, 953 S.W.2d at 711.

Conspiracy

An actionable civil conspiracy is a combination by two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means. *See Massey v. Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex. 1983). The essential elements of a conspiracy are (1) two or more persons; (2) an object to be accomplished; (3) a meeting of minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result. *See Id*. A specific intent to agree to accomplish the unlawful purpose or to accomplish the lawful purpose by unlawful means is also required. *See Triplex Communications, Inc. v. Riley*, 900 S.W.2d 716, 719 (Tex. 1995). In his no-evidence motion for summary judgment, Perry contends that there was no-evidence of the "meeting of the minds" element necessary to any of the civil conspiracy claims.

The plaintiffs contend that the sales and purchase agreements, as well as the substantially identical representations made by the defendants, raised a genuine issue of material fact as to the "meeting of the minds" requirement.

The sales and purchase agreement between Wimpey and Perry, as well as a similar agreement between Wimpey and Brighton, are two separate documents. These documents are not evidence of an agreement between all of the defendants. Each document represents a lawful agreement for the sale and purchase of Wimpey's real property. There is no evidence in either document that the defendants intended to misrepresent utility bonds and taxes.

The plaintiffs also suggest that the "meeting of the minds" element was proved by the similarity of the misrepresentations by the defendants' sales people. The plaintiffs concede that Wimpey did not make representations on Perry's behalf, or *vice versa*. However, they claim it would be reasonable to infer that Wimpey would have made such misrepresentations, because Wimpey had done so for Brighton. This evidence does not rise above mere suspicion. We would have to infer that Wimpey and Brighton had met and planned to misrepresent the utility taxes to prospective buyers, and then infer that Wimpey would have made a similar agreement with Perry. Such vital facts cannot be established by stacking inferences upon inferences. *See Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp.*, 435 S.W.2d 854, 858 (Tex. 1968).

Therefore, we find that the plaintiffs did not raise a genuine issue of material fact as to the "meeting of the minds" element of civil conspiracy. We overrule the first point of error.

SPECIAL EXCEPTIONS

In their second point of error, the plaintiffs contend that the trial court erred by granting Perry's special exceptions and finding that the plaintiffs' causes of action were preempted by the Texas Water Code. The plaintiffs alleged that Perry committed fraud, breach of warranty, negligence, promissory estoppel, conspiracy, and violated the DTPA. Perry filed special exceptions urging that the plaintiffs failed to state a cause of action because their claims had been expressly preempted by the TEX. WATER CODE ANN. § 50.301. Act of May 16, 1973, 63rd Leg., R.S., ch. 560, § 1, 1973 Tex. Gen. Laws 1541, 1541,42 (amended 1995) (current version at TEX. WATER CODE ANN. § 49.452 (Vernon Supp. 1999). The trial court sustained Perry's special exceptions and dismissed the claims. The plaintiffs did not amend their pleadings to include a cause of action under Section 50.301 of the Water Code. Act of May 16, 1973, 63rd Leg., R.S., ch. 560, § 1, 1973 Tex. Gen. Laws 1541, 1541,42 (amended 1995).

Standard of Review

When a trial court dismisses a case upon special exceptions for failure to state a cause of action, we review that issue of law using a *de novo* standard of review. *See Sanchez v. Huntsville Indep. Sch. Dist.*, 844 S.W.2d 286, 288 (Tex. App.–Houston [1st Dist.] 1992, no writ). We must accept as true all material factual allegations and all factual statements reasonably inferred from the allegations set forth in the respondent's pleadings. *See Sorokolit v. Rhodes*, 889 S.W.2d 239, 240 (Tex.1994). We therefore must accept the plaintiffs version of the facts that Perry's sales associates told the plaintiffs that the bonds were retired and that taxes would remain low.

Section 50.301 of the Texas Water Code

Section 50.301of the Texas Water Code states that persons who propose to sell or convey real property in certain districts must provide written notice to the purchaser that the property is located in the district and may be subject to district taxes. Act of May 16, 1973, 63rd Leg., R.S., ch. 560, § 1, 1973

Tex. Gen. Laws 1541, 1541,42 (amended 1995). Section 50.301(n) provides the exclusive remedy for damages arising from the failure to provide written notice:

> . . . Notwithstanding any part or provision of the general or special laws or the common law of the state to the contrary, the relief provided under Subsections (l) and (m) shall be the exclusive remedies for a purchaser aggrieved by the seller's failure to comply with the provisions of this section.

Perry argues that the plaintiffs' causes of action arise from the alleged misrepresentation of information that Perry was obligated to provide under the statute; therefore, their remedies are limited to those found in Section 50.301(l) and (m). We disagree.

Under Section 50.301(n), remedies are limited to a purchaser who is "aggrieved by the seller's failure to comply with *the provisions of this section*."(emphasis added) Act of May 16, 1973, 63rd Leg., R.S., ch. 560, § 1, 1973 Tex. Gen. Laws 1541, 1541,42 (amended 1995). The statute only requires a seller to provide written notice to the buyer. If the seller fails to provide written notice, the purchaser can recover either all the costs relative to the purchase of the property, plus interest and attorneys' fees, or $5,000 plus attorneys' fees.

This suit is not over failure to provide notice. Perry provided written notice to the plaintiffs. However, the alleged oral misrepresentations made by the salespeople contradicted the written notice. It was the oral misrepresentations that induced the plaintiffs to purchase the property. The Texas Water Code only addresses claims involving a failure to provide written notice. We are not willing to expand the Water Code to include all violations involving notice. We hold that the trial court erred in granting Perry's special exceptions and finding that the Texas Water Code preempted the plaintiffs' claims. We sustain the plaintiffs second point of error.

Negligence Per Se and Promissory Estoppel

In their fourth and fifth points of error, the plaintiffs argue that the trial court erred by granting Perry's special exceptions to their negligence per se and promissory estoppel claims and then erred by striking those claims from the pleadings.

In their twelfth amended petition, plaintiffs pleaded causes of action for negligence per se based upon violations of TEX. PEN. CODE ANN. § 32.47 (Vernon 1994) and promissory estoppel. The trial court struck the pleadings and ordered that the plaintiffs take nothing on either cause of action. We find the trial court properly granted special exceptions on the negligence per se claim. Special exceptions on the promissory estoppel claim, however, should not have been granted.

The plaintiffs failed to state a cause of action as to their negligence per se claim. The plaintiffs contend that Perry intended to defraud them by not filing a sale and purchase agreement. A party does not conceal a writing by failing to file it as a public record if there is no legal requirement to do so. Because the plaintiffs did not allege sufficient facts to show that Perry had violated Section 32.47 of the Penal Code, we find that they failed to state a cause of action.

The plaintiffs did allege sufficient facts to show a cause of action for promissory estoppel. Although promissory estoppel is normally a defensive plea, it may be used as an affirmative ground of relief. *See El Paso Healthcare System, Ltd. v. Piping Rock Corp,* 939 S.W.2d 695, 699 (Tex. App.–El Paso 1997, writ denied); *Donaldson v. Lake Vista Community Improvement Ass'n*, 718 S.W.2d 815 (Tex. App.–Corpus Christi 1986, writ ref'd n.r.e.). Their petition stated the elements of promissory estoppel and listed specific facts that supported each element. The trial court erred by granting special exceptions to plaintiff's promissory estoppel cause of action.

We overrule the plaintiff's fourth point of error, but sustain their fifth point of error.

TEXAS PENAL CODE § 32.47

In their third point of error, the plaintiffs argue that the trial court erred in *sua sponte* entering an order stating that Perry's failure to file its earnest money contract did not violate TEX. PEN. CODE ANN. § 32.47 (Vernon 1994). This issue, however, is moot. We previously found that the plaintiffs offered no evidence of the "meeting of the minds" requirement in any of their conspiracy claims, including their claim that Perry conspired to violate Section 32.47 of the Penal Code. We also found that plaintiffs failed to state a cause of action under Section 32.47. Therefore, we need not reach the merits of the plaintiffs third point of error.

Deceptive Trade Practices Act

In their sole cross-point of error, Perry contends that the trial court erred in declining to grant summary judgment as to the plaintiffs ('DPTA') claims, because the plaintiffs were not consumers.

Standard of Review

In order to prevail on summary judgment, the movant must disprove at least one of the essential elements of each of the plaintiffs' causes of action. *See Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 471 (Tex.1991). This burden requires the movant to show that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. *See Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex.1985). In determining whether a material fact issue exists to preclude summary judgment, evidence favoring the nonmovant is taken as true, and all reasonable inferences are indulged in favor of the nonmovant. *See Id.*; *see also Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 477 (Tex.1995). Any doubt is resolved in favor of the nonmovant. *Nixon*, 690 S.W.2d at 548-49.

Definition of Consumer

A consumer is someone who seeks to purchase or lease goods or services. *See* TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon 1987 & Supp. 1999); *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 815 (Tex.1997). To qualify as a consumer, the plaintiff must satisfy two requirements: (1) he must have sought or acquired the goods or services by purchase or lease, and (2) the goods or services must form the basis of the complaint. *See Vinson & Elkins v. Moran*, 946 S.W.2d 381, 406-07 (Tex. App.–Houston [14th Dist.] 1997, writ dism'd by agr.); *Hand v. Dean Witter Reynolds, Inc.*, 889 S.W.2d 483, 496 (Tex. App.–Houston [14th Dist.] 1994, writ denied) (*citing Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 539 (Tex.1981)). Perry contest the plaintiffs standing under the second prong of the test: the goods (the house) do not form the basis of the plaintiff's complaint (misrepresentations about taxes). We disagree.

In a case involving misrepresentations about property, the Texas Supreme Court held that purchasers of real estate made in connection with the use of surrounding property had standing to sue under the DTPA. *See Chastain v. Koonce*, 700 S.W.2d 579, 581-82 (Tex.1985). The purchasers were told by the sellers that the surrounding lots would be restricted for residential use only. Shortly after their purchase, the lots were used to construct a pipe storage yard. The court held that the sellers made representations calculated to induce the purchasers to buy the lots. The seller's representations enhanced the desirability of the property. *Id*. at 581. Thus, the purchasers are complaining about an aspect of the lots purchased and the transaction involved. *Id*.

The purchasers in our case are also complaining about an aspect of the lots that they purchased. Plaintiffs were induced by Perry to buy the lots through representations about lower taxes. These representations enhanced the desirability of the property. Because we must construe the DTPA liberally to promote its underlying purposes: "which are to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty. TEX. BUS. & COM. CODE ANN. § 17.44 (Vernon 1987 & Supp. 1999), we find that the plaintiffs qualify as consumers and have standing to sue under the DTPA. We overrule Perry's sole cross-point of error.

Accordingly, we affirm the trial court's orders as to Perry's no evidence summary judgment on plaintiff's conspiracy claims, and special exceptions granted on the negligence per se claim. We also affirm the trial court's denial of Perry's summary judgment as to the plaintiff's DTPA claim. We reverse and remand the claims for promissory estoppel, negligence, DTPA, fraud, and breach of warranty, which were improperly struck from the pleadings, for further proceedings consistent with this opinion.

/s/ Ross A. Sears
Justice

Judgment rendered and Opinion filed May 25, 2000.

Panel consists of Justices Sears, Cannon, and Draughn.*

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

* Senior Justices Ross A. Sears, Bill Cannon, and Joe Draughn sitting by assignment.