**Affirmed in Part; Reversed and Remanded in Part and Opinion filed October 12, 2000.**

**In The**

# Fourteenth Court of Appeals

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**NO. 14-98-01427-CV**
**consolidated with**
**NO. 14-99-00222-CV**

**———————————**

**GRAND OVERSEAS DESTINATIONS, INC., Appellant**

**V.**

**BAKER HUGHES, INC., P.J. CARR, RALPH CRABTREE, AND A.P. KELLER, INC., Appellees**

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**On Appeal from the 269th District Court**
**Harris County, Texas**
**Trial Court Cause Nos. 95-44471-A and 95-44471-B**

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## O P I N I O N

This is an appeal from separate motions for summary judgment granted in favor of appellees, Baker Hughes, Inc., P.J. Carr, and Ralph Crabtree (referred to collectively as "Baker Hughes"), and A.P. Keller, Inc., all defendants below. The case arises from the purported breach of a commercial lease and subsequent lockout of appellant, Grand Overseas Destinations, Inc., by its landlord, Baker Hughes, and Baker Hughes' building manager, A.P. Keller. Grand Overseas brought suit against Baker Hughes and

A.P. Keller alleging violations of the Texas Property Code and breach of the warranty of quiet enjoyment, along with various tort claims for conversion, trespass, wrongful or constructive eviction, and civil conspiracy. Baker Hughes and A.P. Keller each filed motions for summary judgment, both of which were granted. We affirm the trial court's summary judgment as to the civil conspiracy cause of action and reverse and remand the trial court's judgment on all other causes of action.

## FACTUAL BACKGROUND

In 1992, Baker Hughes leased office space in its building at 3900 Essex Lane in Houston, Texas, to Twelve Oaks Travel, Inc., a travel agency owned and operated by Marisa Talty. On January 9, 1995, Talty sold the assets and liabilities of Twelve Oaks to Grand Overseas, retaining ownership in the corporate entity Twelve Oaks. Grand Overseas immediately entered the leasehold and began running its travel business out of the office space.

Under the lease, rent became due on the first of the calendar month. Baker Hughes, through its building manager, A.P. Keller, would customarily send out a rent invoice before the first of the month. Talty, through Twelve Oaks, paid January's rent on January 12, 1995. Grand Overseas then paid rent for the month of February. Invoices for March and April were sent out; however, no rent was paid for these two months.

On March 23, 1995, Talty, on behalf of Twelve Oaks, executed a transfer of lease wherein Twelve Oaks relinquished "all rights, obligations and responsibilities pertaining to the lease . . . ," and Grand Overseas accepted "all rights, obligations and responsibilities pertaining to the aforementioned lease." On April 5, 1995, Twelve Oaks, Grand Overseas, and Baker Hughes entered into an agreement entitled "Landlord's Conditional Consent to Lease Assignment" (LCCLA). The LCCLA confirmed the prior assignment of the lease from Twelve Oaks to Grand Overseas, set forth Baker Hughes's consent to the assignment, and released Twelve Oaks from any obligation under the lease.

Grand Overseas asserts that, sometime prior to executing the LCCLA, it had discussions with Ralph Crabtree, a Baker Hughes employee in charge of leasing, concerning the assignment of the lease. Grand Overseas maintains that, during its discussions with Crabtree, it was promised a two-month rent

abatement for March and April of 1995 which was later memorialized in paragraph "B" of the LCCLA. Paragraph "B" of the LCCLA, which is dated April 5, 1995, provides as follows: "Assignee agrees to pay all rent and other sums hereafter coming due under the Lease, subject to the terms of this Agreement."

In late April 1995, Baker Hughes demanded that Grand Overseas pay rent for the months of March and April. Grand Overseas refused to pay, citing the two-month rent abatement found in paragraph "B" of the LCCLA. After a final demand by Baker Hughes's attorney, Grand Overseas decided to pay the disputed rent under protest. An oral agreement was reached between Grand Overseas and P.J. Carr, another Baker Hughes employee, to pay the rent due for March, April, and May in three consecutive weekly installments. Grand Overseas tendered the first of these three payments on May 8, 1995. However, Baker Hughes returned the installment to Grand Overseas the next afternoon, stating that the check was unacceptable because it was uncertified. That evening, Baker Hughes instructed its agent, A.P. Keller, to change the locks to Grand Overseas' office. A.P. Keller changed the locks and posted a notice that a key could be obtained once delinquent rent was paid.

Regardless of the numerous causes of action pleaded by Grand Overseas, all parties agree that the central issue is whether Grand Overseas committed an "act of default" under the lease by failing to pay rent,[1] or whether, as Grand Overseas contends, paragraph "B" of the LCCLA grants a two-month rent abatement.

## STANDARD OF REVIEW:
## TRADITIONAL MOTIONS FOR SUMMARY JUDGMENT

In this instance, Baker Hughes and A.P. Keller each filed a "traditional" motion for summary judgment under Rule 166a(c) of the Texas Rules of Civil Procedure to address Grand Overseas' claims for violations of the Texas Property Code and breach of the warranty of quiet enjoyment, along with

[1] The lease agreement defines "act of default" as a "failure to pay when due any Rent or other amount required to be paid under the Lease." Here, the order granting summary judgment on behalf of Baker Hughes included a specific finding that Grand Overseas had committed an act of default under the lease.

various tort claims for conversion, trespass, and wrongful or constructive eviction.[2] The standard for reviewing a granting of summary judgment under Rule 166a(c) is well established. *See Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548 (Tex. 1985). Under this standard, summary judgment is proper only when the movant meets his burden of establishing there are no genuine issues of material fact and proves he is entitled to judgment as a matter of law. *See* TEX. R. CIV. P. 166a(c). In deciding whether there exists a disputed fact issue precluding summary judgment, we must accept all proper summary judgment evidence favorable to the non-movant as true, indulge every reasonable inference in favor of the non-movant, and resolve all doubts in its favor. *See Nixon*, 690 S.W.2d at 548–49. To be entitled to summary judgment, a defendant must bring forth evidence that either (1) conclusively negates at least one essential element of each of the plaintiff's causes of action, or (2) conclusively establishes each element of an affirmative defense to each claim. *See American Tobacco Co., Inc. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997).

BAKER HUGHES'S TRADITIONAL SUMMARY JUDGMENT MOTION

In its traditional motion for summary judgment, Baker Hughes argued that Grand Overseas committed an "act of default" under the lease and, therefore, Baker Hughes was justified in the actions it took. Baker Hughes insisted, therefore, that all of Grand Overseas's claims failed as a matter of law. In response, Grand Overseas maintained that the language found in paragraph "B" of the LCCLA shows on its face that Grand Overseas did not owe March or April rent. In the alternative, Grand Overseas argued that the language is ambiguous, creating a fact issue which precludes summary judgment.

In construing a lease, the court seeks to determine the intent of the parties as that intention is expressed in the lease. *See Sun Oil Co. v. Madeley*, 626 S.W.2d 726, 728–29 (Tex. 1982). The court will enforce an unambiguous instrument as written, and ordinarily the writing alone will be deemed

[2] Baker Hughes and A.P. Keller also moved for summary judgment under Rule 166a(i), asserting there was no evidence to support Grand Destinations civil conspiracy claim. We address the no-evidence summary judgment and civil conspiracy claims in a separate section.

to express the parties' intentions. *See id.* Whether a contract is ambiguous is a question of law that must be decided by examining the contract as a whole in light of the circumstances present when the contract was entered. *See Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.*, 940 S.W.2d 587, 589 (Tex. 1996). An ambiguity does not arise simply because the parties advance conflicting interpretations of the contract; a contract is ambiguous when it is reasonably susceptible to more than one meaning or the meaning is uncertain and doubtful. *See Towers of Texas, Inc. v. J & J Sys., Inc.*, 834 S.W.2d 1, 2 (Tex. 1992). If the contract is found to be ambiguous, summary judgment is inappropriate and the contract's meaning must be resolved by a finder of fact, taking into consideration circumstances present when the particular writing was executed. *See Lenape Resources Corp. v. Tennessee Gas Pipeline Co.*, 925 S.W.2d 565, 574 (Tex. 1996).

While it is clear that the LCCLA does not explicitly grant Grand Overseas an abatement for March and April rent, we find that the language, "pay all rent . . . hereafter coming due . . ." is uncertain and doubtful because it could imply that Grand Overseas is responsible to pay rent from the date of the LCCLA. While Baker Hughes insists that such a conclusion would be contrary to the terms of the original lease, the LCCLA expressly provides that "in the event of any conflict between [the LCCLA] and the Lease, [the LCCLA] shall control." We therefore hold the LCCLA is ambiguous as to the meaning of this provision and a genuine issue of material fact exists. Further, because we have determined that a fact issue exists as to whether Grand Overseas committed an act of default, Baker Hughes is unable to conclusively establish that its actions were justified under the lease. It follows that summary judgment was improper. Accordingly, we reverse the summary judgment granted to Baker Hughes, P. J. Carr, and Ralph Crabtree.

A.P. KELLER'S TRADITIONAL SUMMARY JUDGMENT MOTION

In its traditional motion for summary judgment, A.P. Keller also relied on the defense of legal justification. A.P. Keller asserted further that, because it was acting as Baker Hughes's agent when it locked Grand Overseas out of its office space, it is not liable here. Specifically, A.P. Keller argued that because it was a mere agent for Baker Hughes, it is not liable regardless of whether Baker Hughes was justified in locking out Grand Overseas. On appeal, A.P. Keller reasons that the lockout arose from a

simple contract dispute between Baker Hughes and Grand Overseas, rather than from a tort committed by A.P. Keller. A.P. Keller contends, therefore, the general rule of agency liability does not apply.

The general rule is well established in Texas that an agent is personally liable for his own torts even if he acts at the principal's command. *See Light v. Wilson*, 663 S.W.2d 813, 815 (Tex. 1983) (Spears, J., concurring) (citing *Leonard v. Abbott*, 366 S.W.2d 925 (Tex. 1963); *Tarrant v. Walker*, 140 Tex. 249, 166 S.W.2d 900 (1942); *Poole v. The H. & T.C. Ry. Co.*, 58 Tex. 134 (1882); *Baker v. Wasson*, 53 Tex. 150 (1880); *Mayfield v. Averitt*, 11 Tex. 140 (1853); *Dr. Salsbury's Labs. v. Bell*, 386 S.W.2d 341 (Tex. Civ. App.—Dallas 1964, writ dism'd w.o.j.)); *see also Leyendecker & Assoc., Inc. v. Wechter*, 683 S.W.2d 369, 375 (Tex. 1984) (holding that an agent is personally liable for tortious acts which he directs or participates in during his employment). Section 343 of the Restatement (Second) of Agency sets out this rule as follows:

> An agent who does an act otherwise a tort is not relieved from liability by the fact that he acted at the command of the principal or on account of the principal, except where he is exercising a privilege of the principal, or a privilege held by him for the protection of the principal's interests, or where the principal owes no duty or less than the normal duty of care to the person harmed.

RESTATEMENT (SECOND) OF AGENCY § 343 (1958). Under this general rule, an agent's liability is based on the agent's own actions, and not his status as agent. *See Light*, 663 S.W.2d at 815.

Here, A.P. Keller contends that, because Baker Hughes was justified in locking out Grand Overseas, A.P. Keller was likewise privileged in changing the locks. A.P. Keller argues, therefore, that it is exempt from the agency rule's application. As discussed above, however, a genuine issue of material fact exists on whether Baker Hughes was justified in ordering the lockout. That same fact question affects A.P. Keller and precludes a summary judgment in this instance.

A.P. Keller argues further that it was privileged to conduct the lockout because it owed a duty to Baker Hughes, its principal, and not to Grand Overseas. As support for this argument, A.P. Keller relies on *Leitch v. Hornsby*, 935 S.W.2d 114 (Tex. 1996) (holding that, in the employment context, a corporate officer or agent is not liable for negligence absent an individual duty) and *Forestpark Enters.*,

*Inc. v. Culpepper*, 754 S.W.2d 775 (Tex. App.—Fort Worth 1988, writ denied) (noting, in a landlord-tenant dispute, that a property manager owed a contractual duty to the landlord only, and therefore could not be liable in negligence to the tenant). Both of those cases, however, found that the agent was not liable for negligence for lack of a duty owed to the injured party. *See Leitch*, 935 S.W.2d at 117–18; *Forestpark*, 754 S.W.2d at 779–80 (citing *Zeidman v. Davis*, 161 Tex. 496, 342 S.W.2d 555, 558 (Tex. 1961)). However, in contrast to those decisions, the instant case involves claims of intentional tort, not negligence.[3] A.P. Keller's reliance on *Leitch* and *Forestpark* is therefore misplaced.

In addition, A.P. Keller contends that this case is analogous to those which hold that an insured cannot sue the insurer's employee or agent for bad faith because the only duty owed to the insured arises from the contract and runs between the insured and the insurer. *See Natividad v. Alexis, Inc.*, 875 S.W.2d 695, 697–98 (Tex. 1994); *Allstate v. Watson*, 876 S.W.2d 145, 150 (Tex. 1994). A.P. Keller argues that, "[t]he only contractual relationship, and the only duty," runs between Grand Overseas and Baker Hughes. A.P. Keller maintains, therefore, that Grand Overseas cannot seek to enforce its lease against A.P. Keller because A.P. Keller, a mere agent, is not a party to the lease and owes the tenant no duty. Once again, A.P. Keller's argument is misplaced. The duty of good faith and fair dealing found to exist between an insurer and its insured concerns a "special relationship" between parties to an insurance contract. *See Natividad*, 875 S.W.2d at 698. For important public policy reasons, a breach of this relationship gives rise to tort damages as well as contractual liability. *See id.* at 698. Because of the special nature of that relationship, non-parties to an insurance contract are not liable for bad faith. *See id.*

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[3] Duty is one of three essential elements under a negligence cause of action. *See Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990) (noting that an action for negligence consists of these elements: (1) a legal duty; (2) a breach of that duty; and (3) damages proximately resulting from the breach); *El Chico Corp. v. Poole*, 732 S.W.2d 306, 311 (Tex. 1987) (same). It follows that if there is no duty owed, there is no negligence claim. By contrast, claims of trespass and conversion, such as those alleged by Grand Overseas, involve no duty element. A claim for trespass simply requires a showing that a person entered upon property belonging to another without consent. *See General Mills Restaurants, Inc. v. Texas Wings, Inc.*, 12 S.W.3d 827, 833 (Tex. App.—Dallas 2000, no pet.). To prevail on a claim for conversion, a plaintiff need only demonstrate "the wrongful exercise of dominion and control over another's property in denial of or inconsistent with his rights." *Bandy v. First State Bank, Overton, Tex.*, 835 S.W.2d 609, 622 (Tex. 1992) (citing *Tripp Village Joint Venture v. MBank Lincoln Centre, N.A.*, 774 S.W.2d 746, 750 (Tex. App.—Dallas 1989, writ denied)).

Absent a showing that a "special relationship" is present here, we decline to extend that reasoning to landlord-tenant disputes involving property managers like A.P. Keller and the situation before us.

A.P. Keller has not demonstrated that it is exempt from the general rule that an agent can be personally liable for its torts. *See Wechter*, 683 S.W.2d at 375; *Light*, 663 S.W.2d at 815. Because genuine issues of material fact remain on whether Baker Hughes and A.P. Keller, respectively, were justified or privileged in locking Grand Overseas out of its office space, the trial court erred in granting summary judgment in A.P. Keller's favor. The summary judgment in favor of A.P. Keller is therefore reversed.

CIVIL CONSPIRACY NO-EVIDENCE SUMMARY JUDGMENT

Grand Overseas asserted a cause of action for civil conspiracy against Baker Hughes and A.P. Keller. Baker Hughes and A.P. Keller both filed "no-evidence" motions for summary judgment directed at that specific claim under Rule 166a(i) of the Texas Rules of Civil Procedure. *See* TEX. R. CIV. P. 166a(i). Grand Overseas contends the trial court erred in granting these motions. We disagree.

In a no-evidence motion for summary judgment the movant must specify the element(s) of the nonmovant's cause of action to which there is no evidence. *See* TEX. R. CIV. P. 166a(i). The burden then shifts to the nonmovant to produce more than a scintilla of evidence as to the challenged element(s). *See id.* If the nonmovant is unable to provide sufficient evidence, then the trial court must grant the motion. *See id.*

When reviewing the grant of a no-evidence summary judgment, we review the evidence in the light most favorable to the nonmovant, disregarding all contrary evidence and inferences. *See Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997), *cert. denied*, 523 U.S. 1119 (1998). 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. *See* TEX. R. CIV. P. 166a(i); *Grant v. Joe Myers Toyota, Inc.*, 11 S.W.3d 419, 422 (Tex. App.—Houston [14th Dist.] 2000, no pet.). Proof so weak that it only creates 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, when the proof "rises to a level

that would enable reasonable and fair-minded people to differ in their conclusions," the respondent has provided more than a scintilla of proof and survives summary judgment. *See Havner*, 953 S.W.2d at 711.

The essential elements of a civil conspiracy claim include: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result. *See Juhl v. Airington*, 936 S.W.2d 640, 644 (Tex. 1996) (citing *Massey v. Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex. 1983)). In their motions for a no-evidence summary judgment, Baker Hughes and A.P. Keller asserted there was no proof of a meeting of the minds between the alleged conspirators. Grand Overseas responded that a meeting of the minds of the alleged conspirators could be proven solely by showing the alleged conspirators intended to engage in the conduct (*i.e.*, the lockout) which resulted in injury.

"To succeed in a civil conspiracy claim, the plaintiff must prove as an essential element a meeting of the minds among the alleged conspirators." *J. Parra e Hijos, S.A. de C.V. v. Barroso*, 960 S.W.2d 161, 170 (Tex. App.—Corpus Christi 1997, no pet.). "The parties must be *aware of the harm or wrongful conduct* at the inception of the combination or agreement." *Triplex Communications, Inc. v. Riley*, 900 S.W.2d 716, 719 (Tex. 1995) (emphasis added). Further, there must be specific intent "to agree 'to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means.'" *Juhl*, 936 S.W.2d at 644. Therefore, proof of intent to participate in a conspiracy is a necessary factor of the "meeting of the minds" element. *See Times Herald Printing Co. v. A.H. Belo Corp.*, 820 S.W.2d 206, 216 (Tex. App.—Houston [14th Dist.] 1991, no writ) (citing *Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp.*, 435 S.W.2d 854, 857 (Tex. 1968)). Because of the nature of a civil conspiracy, a plaintiff usually must prove intent by circumstantial evidence and reasonable inference. *See Garcia v. C.F. Jordan, Inc.*, 881 S.W.2d 155, 158 (Tex. App.—El Paso 1994, no writ) (citing *Schlumberger*, 435 S.W.2d at 858).

While conclusive proof is not necessary to overcome a no-evidence summary judgment, Grand Overseas, as respondent to Baker Hughes's and A.P. Keller's no-evidence motions for summary

judgment, bore the burden of mustering more than a scintilla of evidence to prove the meeting of the minds of the alleged conspirators, an essential element of civil conspiracy. Rather than mustering some evidence, Grand Overseas responded that intent is shown by Baker Hughes and A.P. Keller's concert of action. The Texas Supreme Court, in *Riley*, specifically disagreed that proof of acting in concert necessarily shows the specific intent required for a civil conspiracy claim. *See Riley*, 900 S.W.2d at 719. Grand Overseas produced no evidence, direct or circumstantial, to prove meeting of the minds, specific intent, or an awareness of the harm or wrongful conduct on the part of any of the alleged conspirators.[4] Therefore, we hold that the trial court did not err in granting the no-evidence motions for summary judgment in favor of Baker Hughes and A.P. Keller on the civil conspiracy claim lodged by Grand Overseas.

## CONCLUSION

The judgment of the trial court granting the no-evidence motions for summary judgment of Baker Hughes and A.P. Keller on the civil conspiracy cause of action is affirmed. The summary judgments granted to Baker Hughes, Inc., P.J. Carr, and Ralph Crabtree, and A.P. Keller on all other causes of action are reversed and remanded for further

[4] In another civil conspiracy case, for example, this court viewed evidence that one party stood to gain financially as some evidence of an economic motive to conspire. *See Times Herald Printing Co. v. A.H. Belo Corp.*, 820 S.W.2d 206, 216 (Tex. App.—Houston [14th Dist.] 1991, no writ).

proceedings not inconsistent with this opinion.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed October 12, 2000.

Panel consists of Justices Yates, Fowler and Frost.

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