

Affirmed and Opinion filed November 1, 2001.



In The
Fourteenth Court of Appeals

NO. 14-00-00831-CV

RON EVANS, Appellant

V.

**TIM WILKINS; TCC CONSOLIDATED, INC., A COLORADO CORPORATION;
TCC CONSOLIDATED, INC., A TEXAS CORPORATION; DAVID D. TOBKIN;
DAVID D. TOBKIN C.P.A., INC.; AND HOUSTON RESIDENTIAL DISTRESS
PROPERTY FUND, LTD., A COLORADO LIMITED PARTNERSHIP, Appellees**

**On Appeal from the 189th District Court
Harris County, Texas
Trial Court Cause No. 90-39603**

OPINION

Ron Evans appeals from a directed verdict entered against him in his lawsuit claiming statutory real estate fraud, common law fraud, and statutory tax code liability arising out of the operation of a real estate venture. Evans specifically alleges that, under the parties' agreement, properties purchased with funding he provided or arranged were to have been titled in his name and were not so titled. Because we find that there is no evidence in the record to support Evans's claims, we will affirm the judgment of the trial court.

I. Background

With an eye toward exploiting perceived opportunities in the real estate market of the late 1980s, Tim Wilkins sought to raise capital to purchase, refurbish, and then lease or resell properties in the Houston area. Wilkins approached Ron Evans, a former business associate. Wilkins suggested that Evans join with Wilkins's company, TCC Consolidated, Inc., in such a venture.

Evans, Wilkins, and the other principals of TCC Consolidated, James Cunningham and Billy Mack Eldridge, signed three separate "Memorandums of Understanding" on November 17, 1987, February 17, 1988, and September 1, 1988. The memorandums address the formation of a partnership or joint venture between TCC Consolidated and Evans. The memorandums also outline the creation of a series of programs for real estate investment. One of these programs was titled the Houston Residential Distress Property Fund, Ltd. (HRDP). Under the terms of the memorandums, "units" in HRDP were to be sold to limited partners with the proceeds going to acquiring and managing residential properties. A second program was titled the Houston Residential Property Resale Program Joint Venture (HRRP). This venture was aimed at purchasing properties that would either be resold to individual investors outright or as 50-50 tenants in common. The memorandums also state that Evans was to aid the partnership in certain ways, including the procurement of a \$158,000 line of credit to be used for "inventoring [sic] property."

Evans maintains that Wilkins induced him to sign the latter two memorandums by promising that properties purchased with money Evans procured would be titled in Evans's name. This promise was also included in each of the latter two memorandums (in slightly different terms), and forms the primary basis for Evans's causes of action. In short, Evans contends that although he provided funding totaling \$211,256.89, none of the properties were ever titled in his name. Evans further maintains that the money he provided and believed would be used for HRRP was actually used to purchase properties for a HRDP.

He also contends that Wilkins promised that David Tobkin, a CPA, would review the financial performance of all the programs.

Evans eventually filed suit alleging, *inter alia*, that Wilkins's false promises constituted statutory real estate fraud and common law fraud. He claimed that David Tobkin had actual awareness of the false representations, failed to disclose such to Evans, and benefitted thereby, thus violating the real estate fraud statute. Evans further alleged that the debt from the fraudulent behavior did not become manifest until after TCC Consolidated had forfeited its corporate charter due to tax delinquency, and therefore, the principals of TCC at the relevant time (Wilkins and Tobkins) were liable as individuals under the tax code, citing TEX. TAX CODE ANN. §§ 171.252(2) and 171.255 (Vernon 1992). Lastly, Evans sought a constructive trust to be placed on the properties held by HRDP.

II. Waiver of Claims

The trial court granted a directed verdict against Evans. The court's judgment does not specify the reason for the directed verdict, but it does state that, upon resting his case, Evans abandoned certain claims leaving him with only those for statutory real estate fraud, liability under the tax code, and the constructive trust. Evans did not dispute this assertion of abandonment in the trial court, nor does he bring the issue on appeal.¹ The "issues presented" in Evans's brief omit reference to any claims other than statutory fraud and tax code liability. Although Evans mentions his claim for common law fraud in the text of the brief, he makes no attempt to separately discuss the elements or the evidence relating to this

¹ In argument on the motions for directed verdict, Evans's counsel specifically listed certain claims as still viable but did not mention other claims that had been pled. Because we find that Evans waived any claim that such omissions did not constitute abandonment, we make no holding on whether the omissions (or any other possible points of abandonment) actually constituted abandonment. *See Houston Mercantile Exch. Corp. v. Dailey Petroleum Corp.*, 930 S.W.2d 241, 249 (Tex. App.—Houston [14th Dist.] 1996, no writ) (no authority to reverse a judgment in the absence of properly assigned error). *But cf. Field v. Aim Mgmt. Group, Inc.*, 845 S.W.2d 469, 473 (Tex. App.—Houston [14th Dist.] 1993, no writ) (a response is not *always* necessary to a motion for directed verdict). Evans had previously dropped numerous other claims not part of this appeal.

cause of action, nor does he argue that he did not abandon it. We therefore find that Evans waived any issue relating to common law fraud, and any of the other claims that the trial court found to be abandoned. *See Houston Mercantile*, 930 S.W.2d at 249 (no authority to reverse a judgment absent properly assigned error); *Winters v. Arm Refining Co., Inc.*, 830 S.W.2d 737, 738 (Tex. App.—Corpus Christi 1992, writ denied) (to complain of judgment, party must file a motion for judgment or objections directing the trial court's attention to the supposed error).

III. Substantive Analysis

In his first issue, Evans contends that the trial court erred in granting a directed verdict because the record contains probative evidence to support his claims of statutory real estate fraud and tax code liability. A directed verdict is proper when:

(1) a defect in the opponent's pleadings makes them insufficient to support a judgment; (2) the evidence conclusively proves a fact that establishes a party's right to judgment as a matter of law; or (3) the evidence offered on a cause of action is insufficient to raise an issue of fact.

TEX. R. CIV. P. 301; *Knoll v. Neblett*, 966 S.W.2d 622, 627 (Tex. App.—Houston [14th Dist.] 1998, pet. denied). In reviewing a directed verdict, we consider all of the evidence in a light most favorable to the moving party, disregarding all contrary evidence and inferences. *Knoll*, 966 S.W.2d at 627. If there is any conflicting evidence, an instructed verdict is improper and the issue must go to the jury. *White v. Southwestern Bell Tel. Co.*, 651 S.W.2d 260, 262 (Tex. 1983).

The trial court apparently granted a directed verdict based on the doctrine of unclean hands for Evans's failure as a general partner to reveal his claim of title to the limited partners (thus violating his fiduciary duty).² Unclean hands is an equitable defense that may

² The trial court's judgment does not specify a reason for the directed verdict. Immediately after granting the motions, the judge did suggest that he was going to tell the jury that the motions were granted on the equitable doctrine of unclean hands. However, the judge did not then tell the jury why he granted the motions.

be used to defeat a request for an equitable remedy. *Steubner Realty 19, Ltd. v. Cravens Road 88, Ltd.*, 817 S.W.2d 160, 165 (Tex. App.—Houston [14th Dist.] 1991, no writ). It is unclear whether, at the time the court granted the directed verdict, Evans still had a viable claim for monetary damages. In argument on the motions for directed verdict, and also in his brief, Evans’s counsel stated that they still had a monetary claim, and no one refutes that on appeal. If true, then unclean hands would not defeat Evans’s entire claim, only the portions founded in equity. *See generally id.*

However, where, as here, the judgment does not specify the grounds on which the directed verdict was granted, we may still uphold the directed verdict on any theory in the motions that finds proper support in the record. *See Hycarbex, Inc. v. Anglo-Suisse, Inc.*, 927 S.W.2d 103, 108 (Tex. App.—Houston [14th Dist.] 1996, no writ). As Evans acknowledges in his brief, the motions for directed verdict challenged the proof of statutory fraud as a no evidence issue. We therefore turn our analysis to the question of whether the record contains at least some evidence of each of the elements of Evans’s claim of statutory fraud. The elements of statutory real estate fraud are contained in section 27.01 of the Texas Business and Commerce Code, which states:

- (a) Fraud in a transaction involving real estate . . . consists of a
 - (1) false representation of a past or existing material fact, when the false representation is
 - (A) made to a person for the purpose of inducing that person to enter into a contract; and
 - (B) relied on by that person in entering into that contract; or
 - (2) false promise to do an act, when the false promise is:
 - (A) material;
 - (B) made with the intention of not fulfilling it;
 - (C) made to a person for the purpose of inducing that person to enter into a contract; and
 - (D) relied on by that person in entering into that contract.

TEX. BUS. & COM. CODE ANN. § 27.01 (Vernon 1987).³

It is clear from § 27.01 that, as a threshold matter, a viable claim of fraud must relate to a transaction involving real estate. Courts have consistently interpreted this requirement strictly, holding that for a fraud in a transaction to be actionable under § 27.01, the contract in question must actually effect the conveyance of real estate between the parties and cannot merely be tangentially related or a means for facilitating a conveyance of real estate. *See Texas Commerce Bank Reagan Through Texas Commerce Bank Nat. Ass'n v. Lebco Constructors, Inc.*, 865 S.W.2d 68, 82 (Tex. App.—Corpus Christi 1993, writ denied); *see also Stanfield v. O'Boyle*, 462 S.W.2d 270, 271 (Tex. 1971); *Baskin v. Mortgage & Trust, Inc.*, 837 S.W.2d 743, 748-49 (Tex. App.—Houston [14th Dist.] 1992, writ denied); *Fillion v. Troy*, 656 S.W.2d 912, 915 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.); *Nolan v. Bettis*, 577 S.W.2d 551, 556 (Tex. App.—Austin 1979, writ ref'd n.r.e.); *Marshall v. Quinn-L Equities, Inc.*, 704 F.Supp. 1384, 1392 (N.D. Tex. 1988).⁴

As is often the case in documents underlying such disputes, the Memorandums of Understanding in the present case are far from perfectly drafted agreements. For example, the memorandums state: (1) that Evans was to procure a \$158,000 line of credit to be used for “inventoring [sic] property,” and (2) that “‘Evans’ or his assignee will hold title to the real property that is acquired through [funding provided or arranged by him].” But the memorandums fail to explain what the phrases “hold title” or “inventoring property” were to mean in terms of the aims of the agreement or the resulting programs. It could be that the

³ Section 27.01 also provides a basis for a fraud claim in transactions involving “stock in a corporation or joint stock company.” *See* TEX. BUS. & COM. CODE ANN. § 27.01(a). Evans, however, has at no time alleged that the transaction in this case involved any type of stock. We, therefore, do not address this facet of the statute. *See Marshall v. Quinn-L Equities, Inc.*, 704 F.Supp. 1384, 1392 (N.D. Tex. 1988).

⁴ Comparing cases holding the provision to be inapplicable to cases applying the provision, it becomes apparent that the statute is most often applied when the property itself does not meet the promises or representations made about it. *See, e.g. Woodlands Land Dev. Co., L.P. v. Jenkins*, 48 S.W.3d 415 (Tex. App.—Beaumont 2001, no pet. h.) (defects in home construction); *SMB Partners, Ltd. v. Osloub*, 4 S.W.3d 368 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (inaccurate survey map).

parties intended that Evans have outright ownership of such property, or it may be that the property was to be owned by the partnership but titled in Evans's name, perhaps as some sort of perceived security or protection.⁵

Regardless, two things are clear concerning the Memorandums of Understanding: (1) they do not constitute a conveyance of land or even a contract for the conveyance of land between Evans and TCC, and (2) they do not speak to any particular property or properties. Instead, the memorandums expressly contemplate the creation of "programs," such as HRDP and HRRP, the ultimate aims of which were to invest in real estate. Evans claims that Wilkins's misrepresentations induced him into signing the Memorandums of Understanding and into investing in the programs. Even assuming such misrepresentations occurred, they were far too tenuous to the purchase of actual parcels of real estate to be actionable under § 27.01. *See Marshall*, 704 F.Supp. at 1392 (holding § 27.01 inapplicable to alleged misrepresentations made to induce investment in limited partnership created for real estate acquisition).

Evans also emphasizes his contention that the \$211,256.89 was intended to be used to purchase properties for HRRP (the resale joint venture) and not HRDP (the limited partnership). The apparent distinction relied on by Evans is that, as envisioned by the memorandums, investment in HRDP was to be offered to limited partners, whereas HRRP was to purchase properties and then offer them for sale to investors outright or 50-50 as tenants in common. Even if true, this contention is not sufficient to pull the Memorandums

⁵ Texas partnership law tells us that property purchased with partnership funds is partnership property and that partnership property may indeed be titled in an individual partner's name. TEX. REV. CIV. STAT. ANN. art. 6132b, §§ 8, 10 (both expired January 1, 1999), *see now* TEX. REV. CIV. STAT. ANN. art. 6132b-2.05 (Vernon Supp. 2001). And Black's tells us that a person may hold title on behalf of another. BLACK'S LAW DICTIONARY 1485 (6th ed. 1990).

Further adding to the confusion, an attachment to the September 1, 1988, memorandum states that when HRRP sold a 50% interest in property to an investor, "[HRRP] will own the remaining 50% interest." But in the same paragraph, the attachment states that "[t]itle will be held in Evan's [sic] name." This clearly suggests that Evans would be holding title on behalf of the HRRP joint venture.

of Understanding under § 27.01. The agreements are simply not contracts for the conveyance of particular real estate between the parties, regardless of whether the investment was in HRDP or HRRP. *See Lebco Constructors*, 865 S.W.2d at 82 ; *Marshall*, 704 F.Supp. at 1392.

At oral argument, Evans’s counsel suggested that the transfer of funds to HRRP in effect made TCC Evans’s agent in the purchase of particular properties. In other words, the contention appears to be that each time Evans sent money to TCC he was induced into a new and separate contract for the conveyance of land. Counsel, however, fails to cite us to any case law or place in the record that supports this assertion. Counsel does direct us to a list of transactions from Evans’s accounts to TCC for the “purchase of property for resale prog.” However, this is no evidence of the existence of a separate contract. At most, it demonstrates that the transfers were for investment in HRRP pursuant to, and in fulfillment of, the Memorandums of Understanding. Furthermore, as discussed in footnote 5 above, an attachment to one of the memorandums specifically states that when HRRP sold a 50% interest in the properties to investors, “[HRRP] will own the remaining 50% interest,” even though title was to be in Evans’s name. This strongly suggests that actual ownership would be in the HRRP joint venture and not Evans. In short, Evans cites us to no place in the record establishing that the transfers were pursuant to new, independent contracts created for the conveyance of specific pieces of property. Section 27.01 expressly limits its application to false representation or promises made to induce a party into a contract. *See TEX. BUS. & COM. CODE ANN. § 27.01; Burlison State Bank v. Plunkett*, 27 S.W.3d 605, 611 (Tex. App.—Waco 2000, pet. denied). Accordingly, the alleged misrepresentations do not fall under the real estate fraud statute.

Evans makes additional allegations of misrepresentations, *e.g.*, regarding whether HRRP was ever initiated, a financial review allegedly to be performed by Tobkin, and claims of lost deeds. Evans fails, however, to connect these claims to any inducement to enter any contract for the sale of real estate. Section 27.01 expressly limits its application

to false representation or promises made to induce a party into a contract. *See* TEX. BUS. & COM. CODE ANN. § 27.01; *Burleson*, 27 S.W.3d at 611. Evans’s other claims of fraud therefore, are likewise not actionable under the real estate fraud provision.⁶

Evans’s remaining claim for liability under the tax code against Tobkin and Wilkins, as the principals of TCC, is premised entirely on the existence of liability for fraud. In other words, if Evans did not have a valid fraud claim at the time TCC forfeited its corporate charter due to tax delinquency, Wilkins and Tobkins would not be liable as individuals under the tax code. *See* TEX. TAX CODE ANN. §§ 171.252(2) and 171.255 (Vernon 1992). Because we hold above that there is no evidence to establish a fact question concerning any claim of fraud, the tax code claim must therefore fail. Likewise, Evans’s request that a constructive trust be placed on properties held by HRDP must fail, as it too is premised entirely on liability for fraud. The trial court properly granted the motions for directed verdict because there is no evidence in the record to support elements of Evans’s specific claims. *See Knoll*, 966 S.W.2d at 627. Accordingly, Evans’s first issue is overruled.

Evans’s second issue attacks the trial court’s presumed finding of unclean hands based on a breach of a fiduciary duty. Because we uphold the directed verdict based on Evans’s failure to produce evidence on every element of his fraud claims, we need not address the issue of unclean hands. We therefore dismiss the second issue as moot.

The judgment of the trial court is affirmed.

/s/ Don Wittig
Senior Justice

⁶ Appellees contend that Evans has waived his claims against the two TCC entities by failing to discuss their liability in his brief. Given our holdings on Evans’s substantive points, we will not address this issue.

Judgment rendered and Opinion filed November 1, 2001.

Panel consists of Justices Yates, Fowler, and Wittig⁷.

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⁷ Senior Justice Don Wittig sitting by assignment.