Affirmed and Opinion filed November 21, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-01469-CV

MTM ELECTRICAL CORPORATION, Appellant

V.

BECHTEL INTERNATIONAL, INC., AND OVERSEAS BECHTEL, INC., Appellees

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On Appeal from the 80th District Court
Harris County, Texas
Trial Court Cause No. 99-36444

O P I N I O N

Appellant MTM Electrical Corporation appeals a take-nothing judgment rendered against it following (1) a partial summary judgment, (2) directed verdicts, and (3) a jury verdict in favor of appellees Bechtel International, Inc., and Overseas Bechtel, Inc.[1] MTM challenges the summary judgment and the directed verdicts. We affirm.

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[1] We refer to the appellees collectively as "Bechtel."

FACTUAL AND PROCEDURAL BACKGROUND

Beginning in 1996, Bechtel acted as the construction manager for the owners of a project in Trinidad involving construction of a direct reduced iron plant. The project required a shiploader and conveyor system to bring iron ore from the docks into the plant and to ship the iron from the plant back to the docks, and the owners contracted with Texmarc Conveyor Company to design and build the conveyor system and shiploader. Texmarc, in turn, contracted with MTM to provide the electrical equipment for two stackers, three mobile hoppers, and a shiploader for the project. The contract price for the equipment was $503,800.

In late spring or early summer 1998, while MTM was manufacturing the equipment, MTM learned Texmarc was experiencing economic problems. In June 1998, MTM shipped the first equipment, the larger stacker, to Trinidad. Texmarc, however, did not pay for the equipment. On August 19, 1998, MTM notified Texmarc by letter MTM would ship no more equipment until MTM received payment:

> Regretfully we find it necessary to stop all shipments including the Shiploader Motor Control Building until such time that we be paid a minimum of $361,100.00. This amount is the sum of the amounts quoted for the CV02 ($173,500.00) that was shipped June 6 and the Shiploader ($187,600.00) that is to ship ASAP. Similarly, other equipment will be shipped only after payment is made.

Larry Rogers of Texmarc then contacted Lonnie McWilliams of MTM. According to McWilliams, Rogers "came up with an idea that he would talk to Bechtel about them paying us directly." McWilliams next received a call from Emil Margaritas at Bechtel. According to McWilliams, Margaritas said "he would try to get a check cut." Eventually Margaritas suggested $150,000 and said he could arrange a promissory letter guaranteeing payment of the whole amount. According to McWilliams, Margaritas said "they had $750,000 in retainage to cover anything that was not covered. In other words, if the main people in the contracts did not pay that this would cover that. They would not get this

money until everybody was taken care of." When the promissory letter came, however, it was not from Bechtel but from the owners, a fact that surprised MTM.

Margaritas denied having had a conversation with McWilliams about retainage on the project. Bechtel project manager Robbie Raina recalled having advised McWilliams that the owner had agreed to extend $150,000 to MTM in exchange for the shiploader electrical room and the balance of the materials still with MTM. Raina denied having talked about retainage or retention funds.

Mark McCracken of MTM talked with Raina and Bechtel procurement manager, Kenneth Egbuna. McCracken did not remember any wording to the effect MTM was to be paid directly out of retained funds from Bechtel. McCracken stated, however, "I know we talked about the retainage and that they would pay us if . . . Texmarc didn't." Egbuna, however, contended he never promised MTM at any time that either Bechtel or the owners would pay MTM out of the retention funds.

Following the conversations, MTM shipped the remaining equipment to Texmarc. Texmarc later became insolvent. The owners, not Bechtel, paid MTM $150,000, which was the only amount MTM received for the project.

MTM sued Bechtel, alleging breach of contract, negligent misrepresentation, promissory estoppel, fraud, constructive trust, and quantum meruit. Before trial, Bechtel filed a no-evidence summary judgment motion on MTM's breach of contract and fraud claims. The trial court granted the motion in favor of Bechtel on fraud. The parties proceeded to trial before a jury on MTM's remaining claims. At the close of MTM's case-in-chief, the trial court granted a directed verdict in favor of Bechtel on MTM's claims of negligent misrepresentation, promissory estoppel, constructive trust, and quantum meruit. The jury found in favor of Bechtel on breach of contract. The trial court rendered judgment on the verdict that MTM take nothing. On appeal, MTM challenges the directed verdicts

on negligent misrepresentation and promissory estoppel and the summary judgment on its fraud claim.

DISCUSSION

Directed Verdicts

In issue one, MTM argues the trial court erred in granting directed verdicts against MTM on its claims of negligent misrepresentation and promissory estoppel. A movant is entitled to a directed verdict when: (1) a defect in the opponent's pleading makes it insufficient to support a judgment; (2) the evidence conclusively proves the truth of factual propositions that, under the substantive law, establish the right of the movant to judgment; or (3) the evidence is legally insufficient to raise an issue of fact on a fact proposition that must be established for the movant's opponent to be entitled to judgment. *See Knoll v. Neblett*, 966 S.W.2d 622, 627 (Tex. App.—Houston [14th Dist.] 1998, pet. denied). An appellate court will conclude the evidence is legally insufficient if: (1) there is a complete absence of evidence of a vital fact, (2) evidence was offered to prove a vital fact, but rules of law or evidence bar the court from giving any weight to the evidence, (3) the evidence offered to prove the fact is no more than a mere scintilla, or (4) the evidence conclusively establishes the opposite of the vital fact. *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997) (citing Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 362-63 (1960)). "More than a scintilla of evidence exists where the evidence supporting the finding, as a whole, 'rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.'" *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499 (Tex. 1995) (quoting *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 25 (Tex. 1994)).

We review the grant of a directed verdict in the light most favorable to the party against whom the verdict was rendered and disregard all contrary evidence and inferences. *Qantel Bus. Sys., Inc. v. Custom Controls*, 761 S.W.2d 302, 303 (Tex. 1988). This court

may affirm a directed verdict even if the trial court's reasoning is in error, if another basis supports the directed verdict. *Mulligan v. Beverly Enters.-Tex. Inc*., 954 S.W.2d 881, 883 n.4 (Tex. App.—Houston [14th Dist.] 1997, no pet.) (citing *Hutson v. City of Houston*, 418 S.W.2d 911, 914 (Tex. Civ. App.—Houston [14th Dist.] 1967, writ ref'd n.r.e.)).

Negligent Misrepresentation. The elements of a cause of action for negligent misrepresentation are: (1) the representation is made by a defendant in the course of his business, or in a transaction in which he has a pecuniary interest; (2) the defendant supplies "false information" for the guidance of others in their business; (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information; and (4) the plaintiff suffers pecuniary loss by justifiably relying on the representation. *Allied Vista, Inc. v. Holt*, 987 S.W.2d 138, 141 (Tex. App.—Houston [14th Dist.] 1999, pet. denied) (citing *Fed. Land Bank Ass'n v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1991)). The type of "false information" necessary to support a claim of negligent misrepresentation is a misstatement of existing fact, not a promise of future conduct. *Allied Vista*, 987 S.W.2d at 141. The representation of which MTM complains is Bechtel's alleged promise to pay MTM out of retainage funds in order to induce MTM to ship the remaining equipment. A promise to pay someone in the future is not a statement of existing fact for purposes of a negligent misrepresentation claim. *See id*. (holding party's representation it would pay plaintiff $55,000 insufficient to establish negligent misrepresentation as matter of law because it did not constitute representation of existing fact).[2]

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[2] MTM contends the trial court "granted Bechtel's directed verdict under the economic loss doctrine stating that MTM's tort theories were 'assumed by contract.'" In support, MTM relies on the following interaction:

> [MTM's counsel]: The fact that $150,000 was what the order was worth.
>
> [Bechtel's co-counsel]: And they got paid that.
>
> [Bechtel's co-counsel]: Your Honor, it's an economic damage case and they don't get negligen[ce] – they can't have both. There is no way. If they are going to get contract, let's submit it on contract.

(continued...)

Promissory Estoppel. Although promissory estoppel is normally a defensive theory, it is an available cause of action to a promisee who has acted to its detriment in reasonable reliance on an otherwise unenforceable promise. *See Wheeler v. White*, 398 S.W.2d 93, 96-97 (Tex. 1965). In *Allied Vista*, this court reiterated the rule that the doctrine of promissory estoppel does not create liability:

> Generally, promissory estoppel is a viable alternative to breach of contract. The elements of promissory estoppel are a promise, foreseeability by the promisor that the promisee would rely on the promise, and substantial reliance by the promisee to his detriment. *See English v. Fischer*, 660 S.W.2d 521, 524 (Tex. 1983). The Texas Supreme Court has explained that the theory of promissory estoppel "does not create a contract where none existed before, but only prevents a party from insisting upon his strict legal rights when it would be unjust to allow him to enforce them. . . . The function of the doctrine of promissory estoppel is, under our view, defensive in that it estops a promisor from denying the enforceability of the promise." *"Moore" Burger, Inc. v. Phillips Petroleum Co.*, 492 S.W.2d 934, 937 (Tex. 1972). Promissory estoppel does not operate to create liability where it does not otherwise exist. *See Hruska v. First State Bank of Deanville*, 747 S.W.2d 783, 785 (Tex. 1988)

Allied Vista, 987 S.W.2d at 141.

The jury found there was no agreement between MTM and Bechtel that Bechtel would pay MTM for the additional sum owed MTM. MTM has not challenged this finding

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[2] (...continued)

> [Bechtel's co-counsel]: When the injury is only the economic loss to the subject of the contract itself, the action sounds in contract of law.
>
> THE COURT: It's assumed by contract. You don't have damages independent of – you agree to pay, but you didn't pay.
>
> [Bechtel's co-counsel]: So we have a contract issue only.

The court then went off the record to discuss the charge. The preceding exchange does not establish the basis on which the trial court directed the verdict on negligent misrepresentation. At an earlier point in the discussion, the court appears to have believed the summary judgment had disposed of all claims except the contract claim.

on appeal. Without a promise, the doctrine of promissory estoppel cannot provide MTM the relief it seeks.

In addition, MTM presented no evidence of compensable damages in relation to its promissory estoppel claim. In a claim for promissory estoppel, only reliance damages are allowed. *Id*. at 142. "It is well settled that damages for promissory estoppel are 'not measured by the profits that such party's reliance led him to expect, but instead are limited to the amount necessary to compensate that party for a loss already suffered.'" *Id*. (quoting *Sun Oil Co. v. Madeley*, 626 S.W.2d 726, 734 (Tex.1981)). The damages that may be awarded are those required to restore the promisee to his former position. *Allied Vista*, 987 S.W.2d at 142.

Based on the contract price of $503,800, McCracken estimated the total cost of producing the equipment was $400,000. There was also evidence MTM received $150,000 from the owners, leaving MTM with $250,000 out-of-pocket loss for the total project. MTM, however, points to no evidence of how much of that loss resulted from the cost of producing the equipment shipped after, and in reliance on, Bechtel's alleged representation. Put another way, MTM points to no evidence of the amount required to restore MTM to the position it occupied before the conversations with representatives of Bechtel. *Cf. Leyendecker & Assoc., Inc. v. Wechter*, 683 S.W.2d 369, 373 (Tex. 1984) (holding plaintiffs not entitled to recovery of out-of-pocket damages when there was no evidence establishing the value plaintiffs paid for parcel that was subject of defendant's alleged misrepresentation as distinct from value paid for entire lot and improvements).

The trial court correctly directed verdicts against MTM on its negligent representation and promissory estoppel claims. We overrule issue one.

Summary Judgment

In issue two, MTM argues the trial court erred in granting Bechtel's no evidence summary judgment motion on MTM's fraud claim.[3] The elements of fraud are (1) a party made a material misrepresentation; (2) which was false; (3) when the party made the representation, the party knew it was false or the party recklessly asserted the statement without any knowledge of its truth and as a positive assertion; (4) the party made the false representation with the intent that it be acted on by a second party; (5) the second party acted in reliance on the misrepresentation; and (6) the second party suffered injury as a result. *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 222 (Tex. 1992). If the representation involves a promise to do an act in the future, the plaintiff must also prove that, at the time the defendant's representative made the promise, the defendant had no intent of performing the act. *Id.* In its motion for summary judgment, Bechtel alleged there was no evidence of (1) intent not to perform at the time Bechtel made the alleged representations, (2) Bechtel's knowledge or reckless disregard of the falsity of the representations, or (3) Bechtel's having made the representations with the intent they be acted on by MTM. The court granted the motion without stating the specific grounds for doing so.

In reviewing a "no evidence" summary judgment, we review the evidence in the light most favorable to the nonmovant and disregard all evidence and inferences to the contrary. *Coastal Conduit & Ditching, Inc. v. Noram Energy Corp.*, 29 S.W.3d 282, 284 (Tex. App.—Houston [14th Dist.] 2000, no pet.). We sustain a no evidence summary judgment if: (1) there is a complete absence of proof of a vital fact; (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a scintilla; or (4) the evidence conclusively establishes the opposite of a vital fact. *Id.* Less than a scintilla of evidence exists when the evidence offered to prove a vital fact is so weak as to do no more than create

[3] *See* TEX. R. CIV. P. 166a(i).

a mere surmise or suspicion of its existence, and in legal effect is no evidence. *Id.* at 284-85. 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 as to the existence of the vital fact. *Id*. at 285. Where, as here, the trial court grants a motion for summary judgment without stating the grounds on which it relied, we must affirm the summary judgment if any ground argued in the motion was sufficient. *See Blan v. Ali*, 7 S.W.3d 741, 747-48 (Tex. App.—Houston [14th Dist.] 1999, no pet.); *see also Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 473 (Tex. 1995).

As with its other claims, the representation on which MTM bases its fraud claim is Bechtel's alleged promise to pay MTM out of retainage funds in order to induce MTM to ship the remaining equipment. MTM points to the following components of its evidence as supporting Bechtel's intent not to perform: denial of the promise and failure to perform.

In analyzing whether this evidence constitutes any evidence of intent not to perform we find a case from Texas Supreme Court instructive. In *T.O. Stanley Boot Co., Inc., v. Bank of El Paso*, the supreme court concluded there was no evidence of the bank's intent not to perform a promise to loan the appellant corporation $500,000 when (1) the bank president denied at trial having made an agreement with appellants to loan them the money, and (2) there was evidence ostensibly showing the bank had investigated alternative means of financing the loan. 847 S.W.2d at 222. Just as the evidence in *T.O.Stanley*, constituted no evidence of intent not to perform, the evidence in the present case constitutes no evidence.[4]

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[4] MTM cites the following two cases in support of its contention there was some evidence of intent not to perform in the present case: *Duval County Ranch Co. v. Wooldridge*, 667 S.W.2d 887, 894-95 (Tex. App.—Austin 1984, writ dism'd, w.o.j.); and *Stone v. Williams*, 358 S.W.2d 151, 155 (Tex. Civ. App.—Houston 1962, writ ref'd n.r.e.). In both of these cases, the courts of appeals affirmed the judgment of the trial court. In *T.O. Stanley Boot Co., Inc. v. Bank of El Paso*, the supreme court affirmed that portion of the judgment of the court of appeals, which had rendered judgment in favor of the bank, contrary to the trial court's judgment rendered on a jury verdict in favor of the defendants. *See* 847 S.W.2d at 219, 222. *T.O. Stanley Boot* applies a standard of review more analogous to the standard appropriate in the present case (continued...)

We overrule issue two.

We affirm the judgment of the trial court.

/s/ John S. Anderson
Justice

Judgment rendered and Opinion filed November 21, 2001.

Panel consists of Justices Anderson, Hudson, and Frost.

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[4] (...continued)
than do the cases on which MTM relies.