Affirm in part; Reverse in part; and Remand; Opinion Filed January 20, 2016.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-14-01254-CV

MARTIN L. GRAMAN, Appellant
V.
JASON L. GRAMAN, Appellee

On Appeal from the 416th Judicial District Court
Collin County, Texas
Trial Court Cause No. 416-51105-2012

MEMORANDUM OPINION

Before Justices Myers, Evans, and Whitehill
Opinion by Justice Myers

Martin L. Graman appeals the trial court's judgment that he take nothing on his claims against Jason L. Graman. Martin brings two issues on appeal contending the trial court erred by granting Jason's motion for summary judgment on Martin's claims for fraud and constructive fraud. Martin also argues the trial court erred by granting summary judgment on his claim for money had and received. Jason cross-appeals the trial court's order imposing sanctions against him. We reverse the trial court's judgment as to Martin's fraud claim and otherwise affirm the trial court's judgment.

BACKGROUND

Martin and his wife Frieda own and operate pizzeria restaurants in north Texas through various companies. In 2002, Martin had health problems, and their son Jason moved to Texas to help run the restaurants. In 2007, Martin began loaning the companies large sums of money.

Between 2007 and 2010, Martin loaned the companies managed by Jason over $700,000.[1] Martin alleged that before each of these loans, Jason represented on behalf of the companies that the money would be repaid the following Monday. However, the money was never repaid.

In 2012, Martin and Frieda brought suit against one another for divorce. Martin moved to bring a third-party suit in the divorce action against Jason and the companies for breach of contract, fraud, constructive fraud, money had and received, breach of fiduciary duty, violation of the theft liability act, conspiracy, and accounting and inspection of books and records. The trial court granted leave for Martin in his individual capacity to sue Jason in his individual capacity for breach of contract, fraud, and money had and received.

Martin's third-party petition asserted claims against Jason for the three allowed claims and for constructive fraud. Jason moved for summary judgment. Martin then amended his third-party petition and removed the claim for constructive fraud and added a request for imposition of a constructive trust. However, the allegations under Martin's request for imposition of a constructive trust were nearly identical to the allegations under the constructive-fraud cause of action. The trial court granted Jason's motion for summary judgment and dismissed Martin's claims.

Both Jason and Martin filed motions for the court to impose sanctions on one another. The trial court granted Martin's motion and imposed a $2000 sanction on Jason.

Martin and Frieda nonsuited their claims against one another, which made the trial court's judgment final.

[1] Martin testified in his affidavit that he "loaned the company (and by extension, Jason) almost a million dollars since 2007." Martin included in his summary judgment evidence copies of thirty-six canceled checks drawn on his and Frieda's account and dated January 2, 2007, through April 21, 2010, and made payable to the companies except for one check payable to "Cash." The checks total $730,600, with the average for each check being $20,294.44. Besides these checks, there was also a promissory note for $25,000 dated June 24, 2011, made payable to Martin. The note was signed by Jason as president of three of the companies and "not personal." The record does not show the circumstances leading to the signing of this note.

SUMMARY JUDGMENT

The standard for reviewing a traditional summary judgment is well established. *See Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985); *McAfee, Inc. v. Agilysys, Inc.*, 316 S.W.3d 820, 825 (Tex. App.—Dallas 2010, no pet.). The movant has the burden of showing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). In deciding whether a disputed material fact issue exists precluding summary judgment, evidence favorable to the nonmovant will be taken as true. *Nixon*, 690 S.W.2d at 548–49; *In re Estate of Berry*, 280 S.W.3d 478, 480 (Tex. App.—Dallas 2009, no pet.). Every reasonable inference must be indulged in favor of the nonmovant and any doubts resolved in its favor. *City of Keller v. Wilson*, 168 S.W.3d 802, 824 (Tex. 2005). We review a summary judgment de novo to determine whether a party's right to prevail is established as a matter of law. *Dickey v. Club Corp.*, 12 S.W.3d 172, 175 (Tex. App.—Dallas 2000, pet. denied).

We review a no-evidence summary judgment under the same legal sufficiency standard used to review a directed verdict. *Flood v. Katz*, 294 S.W.3d 756, 762 (Tex. App.—Dallas 2009, pet. denied). Thus, we must determine whether the nonmovant produced more than a scintilla of probative evidence to raise a fact issue on the material questions presented. *Id.* When analyzing a no-evidence summary judgment, we consider all the evidence in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts against the movant. *Sudan v. Sudan*, 199 S.W.3d 291, 292 (Tex. 2006) (quoting *City of Keller*, 168 S.W.3d at 824). 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. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003). "More than a scintilla of evidence exists when the evidence rises to a level that would enable reasonable, fair-minded persons to differ in their conclusions." *Id.* (quoting *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex.

1997)). "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." *Id.* (quoting *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983)).

FRAUD

In his first issue, Martin contends the trial court erred by granting Jason's motion for summary judgment on Martin's fraud claim. The elements of fraud are

> (1) that a material misrepresentation was made; (2) the representation was false; (3) when the representation was made, the speaker knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) the speaker made the representation with the intent that the other party should act upon it; (5) the party acted in reliance on the representation; and (6) the party thereby suffered injury.

Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am., 341 S.W.3d 323, 337 (Tex. 2011) (quoting *Aquaplex, Inc. v. Rancho La Valencia, Inc.*, 297 S.W.3d 768, 774 (Tex. 2009) (per curiam)).

Jason moved for summary judgment on the grounds that (1) Martin lacked standing to bring the fraud claim, (2) Jason established as a matter of law that he made no false or reckless representations, and (3) Martin had no evidence to support the elements of his fraud claim.

Standing

Jason asserted in his motion for summary judgment that Martin had no standing because the loans to the corporations were made by the Graman Family Trust and not by Martin personally. In support of this assertion, Jason cited to his affidavit where he stated that "the Graman Family Trust made numerous cash advances to the Corporation to help the company make payroll and stay afloat." Jason also relied on Martin's deposition testimony, "I might have put it [the money loaned to the corporations] into the trust and then the trust lent it. I don't know." In response, Martin testified in his affidavit that the payments to the corporations "were all from my personal fidelity account. These payments were never made from the trust."

We conclude the competing allegations in the affidavits concerning the source of the money loaned to the companies raises a genuine issue of material fact whether Martin personally advanced the funds or whether the Graman Family Trust advanced the funds. Martin's deposition testimony, "I might have put it into the trust and then the trust lent it. I don't know," is not evidence establishing as a matter of law that the money was, in fact, loaned by the trust. Accordingly, Jason's assertion that Martin lacked standing to bring the fraud claim does not support the grant of summary judgment.

No False or Reckless Representations

Jason asserted in his motion for summary judgment that he did not make any false or reckless representations concerning repayment of the loans. To prove fraud, Martin had to prove Jason made a representation that, at the time the representation was made, he (1) knew the representation was false or (2) made the representation recklessly, as a positive assertion, and without knowledge of its truth. *Italian Cowboy*, 341 S.W.3d at 337. Failure to perform, standing alone, is no evidence of the promisor's intent not to perform when the promise is made. *Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 435 (Tex. 1986); *see S. Union Co. v. City of Edinburg*, 129 S.W.3d 74, 92 (Tex. 2003). Proof that a defendant made a statement knowing of its falsity or without knowledge of its truth may be proved by direct or circumstantial evidence. *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 526 (Tex. 1998). The party's intent at the time of the representation may be inferred from the party's subsequent acts after the representation is made. *Spoljaric*, 708 S.W.2d at 434.

Jason asserts Martin's fraud claim fails because Jason conclusively proved he did not make any representations regarding repayment with knowledge of their falsity or recklessly without knowledge of the truth. As evidence proving this assertion, Jason relied on Martin's

deposition in which Martin testified that at the time Jason promised to pay back the loans, Martin believed Jason was sincere and not reckless:

> Q. So at the time he made the statements about repayment, he believed that repayment would be made?
>
> A. I took him at his word.
>
> Q. Okay. But based on your knowledge of him and your understanding of the situation, that's what you understood from Jason? I'm just asking about your belief. You believe that when he made those statements—
>
> A. He was sincere, yes.
>
> Q. Okay. Do you think that his statements regarding repayment of the loans were made recklessly?
>
> . . . .
>
> [W]hen he says to you, I'll repay you on Monday, based on your recollection and your knowledge, did that strike you as, in your opinion, a reckless statement?
>
> A. No.

Martin argues that this evidence is not relevant to whether Jason intended not to repay the loans at the time he promised Martin that the loans would be repaid. We agree with Martin. This evidence shows only Martin's perception of Jason's intent at that time, that is, Martin thought at the time Jason made the promises that Jason was sincere and not reckless. This evidence does not conclusively prove Jason's actual intent or his lack of recklessness.

We conclude this ground does not support the trial court's grant of summary judgment on Martin's fraud claim.

No Evidence of Fraud

Martin also moved for summary judgment on the ground that Martin had no evidence of the elements of fraud.

Martin testified in his affidavit, "Every time I loaned Jason money, he promised to repay me after the weekend. These repayments never came." This testimony is evidence of a representation that was false.

Martin also had to present some evidence that Jason knew the representation was false when he made it or that he made the representation recklessly without any knowledge of the truth and as a positive assertion. Martin's summary judgment evidence included the affidavit of Martin's son-in-law, Joseph Vastano, who was the husband of Jason's sister. Vastano testified that in 2011, he talked to Jason for an hour at a coffee shop "about what was going on."

> We ended up talking about the loans his parents made to him and *he told me that he never intended to pay his parents back at that point in time*—mainly because if he ever sold the business, he would never see a cent after paying them back and then splitting the remaining money between the three of them. When I told him he owed that money to his parents, he replied that since he never signed anything or agreed to a payment schedule, he wasn't obligated to pay anything back. *He told me he never intended on paying them back*—and that's why he never signed on what I recall him telling me was approximately $850,000.

(Emphasis added.) This statement contains two different statements about Jason's intent not to repay the loans, the two italicized statements. The first statement is clearly Jason's intent in 2011 while they are having the conversation. This statement is not evidence of Jason's intent at a date preceding the conversation. As for the second statement, a fact finder could determine that statement showed Jason's intent at the time of all the loans: he did not sign any documentation for the loans at the time they were made because "he never intended" at the time the loans were made to repay the loans. We conclude this statement constitutes some evidence of Jason's knowledge of the falseness of his representations to repay the loans at the time he made the representations.

Martin also had to present some evidence that Jason intended for Martin to act on the representations and that Martin relied on the representations. Martin testified in his affidavit, "I loaned the company (and by extension, Jason) almost a million dollars since 2007. Every time I

loaned Jason money, he promised to repay me after the weekend." Martin testified in his deposition that "he took him [Jason] at his word" when Jason promised to repay the loans. Martin's testimony, together with the circumstances of the loan, which were that Martin made the loans after Jason promised to repay the amount loaned, is some evidence that Jason intended for Martin to act on the representations and make the requested loans and that Martin relied on Jason's representations.

Finally, Martin had to present some evidence of damages from the fraud. Martin's testimony that he loaned almost a million dollars to the companies "and by extension, Jason," and that the money was never repaid constitutes some evidence of damages.

We conclude Jason's no-evidence ground did not support the trial court's grant of summary judgment on Martin's claim for fraud.

Because none of the grounds for summary judgment supported the trial court's order granting summary judgment on Martin's claim for fraud, we conclude the trial court erred by granting Jason's motion for summary judgment on this cause of action. We sustain Martin's first issue.

MONEY HAD AND RECEIVED

Martin also contends the trial court erred by granting summary judgment on Martin's cause of action for money had and received. To prove a claim for money had and received, a plaintiff must show that (1) a defendant holds money (2) which in equity and good conscience belongs to the plaintiff. *MGA Ins. Co. v. Charles R. Chesnutt, P.C.*, 358 S.W.3d 808, 814 (Tex. App.—Dallas 2012, no pet.). "The question in an action for money had and received, is to which party does the money, in equity, justice, and law, belong. All plaintiff need show is that defendant holds money which in equity and good conscience belongs to him." *Id.* at 813

(quoting *Staats v. Miller*, 243 S.W.2d 686, 867–88 (Tex. 1951)). It is an equitable doctrine applied to prevent unjust enrichment. *Id.*

Jason moved for summary judgment on several grounds, including that he does not hold any money advanced to the companies by Martin and that Martin has no evidence to support either element of the cause of action. Jason testified in his affidavit that Martin made the "cash advances" to the companies to help them make payroll and stay afloat. Jason stated, "I did not accept any funds in my personal capacity."

In his brief on appeal, Martin's only argument is, "Martin presented at least some evidence that the money given to Jason, including the $10,000 check made payable to cash, rightfully belongs to Martin and not Jason." In his reply brief, Martin argues, "At least $10,000 was given to Jason payable to cash and not returned. That money is subject to a money had and received claim." (Citation omitted.) This argument does not explain how Jason holds any money belonging to Martin. Martin's summary judgment evidence included copies of thirty-six canceled checks, thirty-five of which were made payable to the companies and one was payable to "Cash." The record contains no evidence of whether this check payable to "Cash" was delivered to Jason, and the check does not appear to have been endorsed by Jason. The checks payable to the companies were not payable to Jason. Martin never identified what monies Jason holds that belong to Martin. We conclude Martin has failed to show the trial court erred by granting summary judgment on Martin's claim for money had and received.

CONSTRUCTIVE FRAUD

In his second issue, Martin contends the trial court erred by granting summary judgment on Martin's constructive-fraud claim.

In this cause of action, Martin alleged that Frieda breached her fiduciary duty to him by transferring stock in the companies, which was community property, to Jason without Martin's

knowledge or permission. Martin alleged that Jason knew Martin was not a party to the stock transfer, that Jason should have known Frieda was breaching her fiduciary duty to Martin by executing the transfer, and that Jason committed constructive fraud by participating in the transfer. Martin alleged that a monetary judgment against Frieda would not restore his interest in the companies, and he asked that the court "impose a constructive trust against the property or the proceeds that were transferred to Jason Graman." Jason moved for summary judgment on the grounds that the trial court had not authorized Martin to bring a constructive-fraud claim as part of the third-party action, that Jason owed no fiduciary duty to Martin, and that Martin had no evidence of the elements of constructive fraud.

On appeal, Martin argues that Jason had a fiduciary duty to him because Martin entrusted the business to Jason and relied on Jason during Martin's periods of ill health. Martin argues on appeal that Jason breached this fiduciary duty by failing to repay the loans and revealing that he never intended to repay the loans. These arguments do not address the cause of action Martin pleaded, which alleged that Frieda breached her fiduciary duty by transferring the stock and that Martin committed constructive fraud by participating in that transfer. Martin does not discuss in his appellant's brief the cause of action he pleaded. Accordingly, we conclude Martin has failed to show the trial court erred by granting Jason's motion for summary judgment on this cause of action. We overrule Martin's second issue.

SANCTIONS

In his cross-issue, Jason contends the trial court's order imposing a $2,000 sanction against him is unenforceable because it does not state the particulars of any good cause found to justify imposition of the sanction.

The trial court's order imposed the sanction under Texas Rule of Civil Procedure 13 and section 10.001 of the Texas Civil Practice and Remedies Code. Both rule 13 and chapter 10 of

the civil practice and remedies code require that an order imposing a sanction describe the reasons for the sanction. TEX. CIV. PRAC. & REM. CODE ANN. § 10.005 (West 2002) ("A court shall describe in an order imposing a sanction under this chapter the conduct the court has determined violated Section 10.001 and explain the basis for the sanction imposed."); TEX. R. CIV. P. 13 ("No sanctions under this rule may be imposed except for good cause, the particulars of which must be stated in the sanction order."). The trial court's order does not describe the conduct leading to the imposition of the sanction or state the particulars of the good cause for the order. Thus, the order does not meet the requirements of chapter 10 or rule 13.

A trial court's failure to include the particulars of good cause for the sanction in the body of the order imposing the sanction is reversible error on appeal. *Friedman & Assocs., P.C. v. Beltline Road, Ltd.*, 861 S.W.2d 1, 3 (Tex. App.—Dallas 1993, writ dism'd by agr.). However, before a party may raise a complaint in the appellate court, the party must have raised the complaint in the trial court by a timely request, objection, or motion. TEX. R. APP. P. 33.1(a)(1). A party against whom a sanction is imposed must raise the defectiveness of the order in the trial court to preserve the error for appellate review. *Tanner v. Black*, 464 S.W.3d 23, 28 (Tex. App.—Houston [1st Dist.] 2015, no pet.) ("However, when the party against whom sanctions are imposed fails to object to the form of the sanctions order, he waives any objection to the lack of particularity in the order."); *Nolte v. Flournoy*, 348 S.W.3d 262, 273 (Tex. App.—Dallas 2012, pet. denied) (party did not preserve trial court's error of failing to describe in the order the party's conduct on which the sanction was based when the party failed to object to this error in the trial court). Because Jason did not object to the trial court's failure to describe in the order the conduct on which the sanction was based, the error was not preserved for appellate review. We overrule Jason's cross-issue.

CONCLUSION

We reverse the trial court's judgment to the extent it dismissed Martin's cause of action for fraud against Jason. In all other respects, we affirm the trial court's judgment. We remand this case to the trial court for further proceedings.

/Lana Myers/
LANA MYERS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

MARTIN L. GRAMAN, Appellant

No. 05-14-01254-CV V.

JASON L. GRAMAN, Appellee

On Appeal from the 416th Judicial District Court, Collin County, Texas
Trial Court Cause No. 416-51105-2012.
Opinion delivered by Justice Myers. Justices Evans and Whitehill participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED** in part and **REVERSED** in part. We **REVERSE** that portion of the trial court's judgment granting appellee Jason L. Graman's motion for summary judgment as to appellant Martin L. Graman's cause of action for fraud and dismissing the cause of action for fraud. In all other respects, the trial court's judgment is **AFFIRMED**. We **REMAND** this cause to the trial court for further proceedings.

It is **ORDERED** that appellant MARTIN L. GRAMAN recover his costs of this appeal from appellee JASON L. GRAMAN.

Judgment entered this 20th day of January, 2016.