AFFIRMED; Opinion Filed March 10, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00394-CV

LUIS A. SANTIAGO & LINDA A. SANTIAGO, Appellants
V.
MACKIE WOLF ZIENTZ & MANN, P.C., Appellee

On Appeal from the 296th Judicial District Court
Collin County, Texas
Trial Court Cause No. 296-01743-2013

MEMORANDUM OPINION

Before Justices Evans, Stoddart, and Boatright
Opinion by Justice Stoddart

Luis and Linda Santiago appeal from an adverse summary judgment ruling in favor of Mackie Wolf Zientz & Mann, P.C. and the denial of their motion for continuance. In five issues, appellants argue the trial court erred by granting summary judgment on their claims, striking their summary judgment evidence, and denying their motion for continuance. We affirm the trial court's judgment.

FACTUAL BACKGROUND

Appellants obtained a home equity loan on their home in 2004. After appellants defaulted on the loan, Bank of New York Mellon (BONY) and Ocwen Loan Servicing, LLC. (Ocwen) retained Mackie Wolf to handle the foreclosure proceedings. In January 2011, Mackie Wolf sent a notice of default and acceleration to appellants. After asking to inspect the original

promissory note for the loan, Luis Santiago went to Mackie Wolf's office to inspect the note. According to appellants, the promissory note was counterfeit and the signatures on the note are not their signatures.

In May 2011, appellants sued several entities, including BONY and Ocwen, on numerous causes of action. Against Mackie Wolf, appellants alleged claims for conspiracy to commit fraud, violation of section 12.002 of the Texas Civil Practice and Remedies Code, and negligent misrepresentation. Mackie Wolf filed a traditional motion for summary judgment on the ground that it was immune from liability for actions taken in its representation of BONY and Ocwen in the foreclosure. The trial court granted the motion for summary judgment, and severed the claims against Mackie Wolf from the litigation against other parties such as BONY and Ocwen. However, on appeal, this Court reversed the trial court's judgment and remanded for further proceedings. *See Santiago v. Mackie Wolf Zientz & Mann, P.C.*, No. 05-13-00621-CV, 2014 WL 4072131 (Tex. App.—Dallas Aug. 19, 2014) (mem. op.) (*Santiago I*). Nine days after issuing our opinion in *Santiago I*, this Court issued its opinion in *Santiago v. Novastar Mortgage, Inc.*, 443 S.W.3d 462 (Tex. App.—Dallas 2014), *abrogated by Wood v. HSBC Bank USA, N.A.*, 505 S.W.3d 542 (Tex. 2016) (*Santiago II*), affirming the trial court's summary judgment in favor of the other parties who were sued by appellants as a result of the foreclosure, including BONY and Ocwen.

After the case was remanded to the trial court, Mackie Wolf filed its second motion for summary judgment asserting several grounds on which it was entitled to judgment. Appellants responded to the motion for summary judgment and moved for a continuance. The trial court denied appellants' motion for continuance and granted Mackie Wolf's motion for summary judgment. The trial court also sustained Mackie Wolf's objections to appellants' summary-judgment evidence. This appeal followed.

LAW & ANALYSIS

In their third issue, appellants argue the trial court erred by sustaining Mackie Wolf's objections to four exhibits attached to their response to the motion for summary judgment.[1] To resolve this appeal, we need only consider appellants' complaint the trial court abused its discretion by sustaining Mackie's Wolf's objections to their Exhibit E: Luis Santiago's affidavit. Our briefing rules require an appellant to make a clear and concise argument for the contentions made and include appropriate citations to authority. *See* TEX. R. APP. P. 38.1(i). When a party fails to do so, he does not establish error in connection with the trial court's evidentiary ruling and waives his complaint on appeal. *Flores v. Grayson County Cent. Appraisal Dist*., No. 05-16-00180-CV, 2016 WL 7384161, at *2 (Tex. App.—Dallas Dec. 21, 2016, no. pet.) (mem. op.) (citing TEX. R. APP. P. 38.1(i); *In re Estate of Marley*, 390 S.W.3d 421, 425 (Tex. App.—El Paso 2012, pet. denied)). Appellants cite no legal authority to support their argument that the trial court erred by sustaining objections to Luis Santiago's affidavit and, therefore, appellants have waived this complaint on appeal. We overrule appellants' third issue to this extent.

Appellants also argue the trial court erred by signing the summary judgment order without presenting it to appellants "for form, substance, or any kind of approval or comment." To support their argument, appellants cite Collin County Local Rule 7.2, which states: "Within thirty (30) days after rendition . . . counsel shall cause, unless ordered otherwise, all judgments, decisions, and orders of any kind to be reduced to writing approved as to form by opposing counsel, and as to contents, if an agreed order, judgment, or decree, and filed with the District Clerk." Collin (Tex.) Civ. Dist. Ct. Loc. R. 7.2.

[1] The four exhibits at issue are: (1) Exhibit B: two pages from a thirteen-page document titled "Motion to Dismiss Defendants' The Bank of New York Melon as Trustee, Ocwen Loan Servicing, LLC, and Mortgage Electronic Registration Systems, Inc. and Brief in Support," which was filed in a district court for the Eastern District of Texas; (2) Exhibit E: Luis Santiago's affidavit; (3) Exhibit R: one page from a multi-page document, which appellants assert is "Page 18 of written testimony by Adam J. Levitin to Senate Committee on Banking"; and (4) Exhibit U: three pages of a sixty-five-page consent judgment that do not show in which court the document was filed and two pages of a forty-seven page document that do not show the document's title or where it was filed.

If we assume for purposes of this appeal that Mackie Wolf's counsel did not comply with rule 7.2 and the trial court erred by entering an order that was not presented to appellants, we conclude appellants have not shown reversible error. We will not reverse a trial court's judgment unless the error "(1) probably caused the rendition of an improper judgment; or (2) probably prevented the appellant from properly presenting the case to the court of appeals." TEX. R. APP. P. 44.1. Before entering the final judgment, the trial court issued a memorandum stating appellants' motion for continuance was denied and Mackie Wolf's motion for summary judgment was granted. The memorandum then states: "The Court ORDERS counsel to prepare an Order consistent to the rulings contained herein and submit said Order to the Court for signature within 10 days." The record shows the trial court provided its rulings to the parties and then ordered counsel to provide an order for the court to enter, which Mackie Wolf's counsel did.

Appellants do not argue that any error caused the rendition of an improper judgment or prevented them from properly presenting their case to this Court, and, after reviewing the record, we do not conclude that it did. We overrule the remainder of appellants' third issue.

In their second, fourth, and fifth issues, appellants argue the trial court erred by granting Mackie Wolf's motion for summary judgment. Mackie Wolf moved for summary judgment on several grounds, including that appellants' claims are barred by the doctrine of attorney immunity because the claims are based on conduct that occurred as part of Mackie Wolf's representation of its clients, BONY and Ocwen. Appellants argue that Mackie Wolf cannot benefit from the attorney immunity doctrine.

We review a grant of summary judgment de novo. *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015). A party moving for traditional summary judgment has the burden to prove that there is no genuine issue of material fact and it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Cantey Hanger*, 467 S.W.3d at 481. "When reviewing a summary

judgment, we take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor." *Cantey Hanger*, 467 S.W.3d at 481 (quoting *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005)). Attorney immunity is an affirmative defense. *Id.* Therefore, to be entitled to summary judgment, Mackie Wolf must have proven that there was no genuine issue of material fact as to whether its conduct was protected by the attorney-immunity doctrine and that it was entitled to judgment as a matter of law. *See id*. When, as here, the trial court does not specify the grounds for its ruling, we affirm the summary judgment if any of the grounds advanced by the motion are meritorious. *State v. Ninety Thousand Two Hundred Thirty-Five Dollars & No Cents in U.S. Currency ($90,235)*, 390 S.W.3d 289, 292 (Tex. 2013).

Generally, attorneys are immune from civil liability to non-clients for actions taken if they conclusively establish that their alleged conduct was within the scope of their legal representation of a client. *See Cantey Hanger*, 467 S.W.3d at 481. The purpose of this defense is to ensure "loyal, faithful, and aggressive representation by attorneys employed as advocates." *Id*. (quoting *Mitchell v. Chapman*, 10 S.W.3d 810, 812 (Tex. App.—Dallas 2000, pet. denied)). "An attorney is given latitude to 'pursue legal rights that he deems necessary and proper' precisely to avoid the inevitable conflict that would arise if he were 'forced constantly to balance his own potential exposure against his client's best interest.'" *Id*. at 483 (quoting *Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398, 405 (Tex. App.—Houston [1st Dist.] 2005, pet. denied)). If an attorney proves that his conduct is "part of the discharge of his duties to his client," immunity applies. *Id*. at 481. The *Canty Hanger* court explained that wrongful or fraudulent conduct may fall within the scope of client representation. *Id*. at 483–85 (rejecting statement in *Toles v. Toles*, 113 S.W.3d 899, 911 (Tex. App.—Dallas 2003, no pet.), that attorney immunity does not extend to attorney's knowing participation in fraudulent activities on client's behalf).

However, attorneys "are not protected from liability to non-clients for their actions when they do not qualify as 'the kind of conduct in which an attorney engages when discharging his duties to his client.'" *Id*. at 482. (quoting *Dixon Fin. Servs., Ltd. v. Greenberg, Peden, Siegmyer & Oshman, P.C.*, No. 01–06–00696–CV, 2008 WL 746548, at *9 (Tex. App.—Houston [1st Dist.] Mar. 20, 2008, pet. denied) (mem. op. on reh'g)). For example, an attorney who participates in a fraudulent business scheme with his client or assaults opposing counsel during a trial is not protected by the doctrine because such acts are "entirely foreign to the duties of an attorney" and "not part of the discharge of an attorney's duties in representing a party." *Id*. (citing *Poole v. Houston & T.C. Ry. Co*., 58 Tex. 134, 137 (1882), and *Bradt v. West*, 892 S.W.2d 56, 72 (Tex. App.—Houston [1st Dist.] 1994, writ denied)).

Attorney immunity does not grant attorneys the right to violate ethical rules, but merely limits third-party recovery against attorneys acting within the scope of their representative capacity. "[O]ther mechanisms are in place to discourage and remedy [wrongful] conduct, such as sanctions, contempt, and attorney disciplinary proceedings." *Id.*; *see also Renfroe v. Jones & Assocs*., 947 S.W.2d 285, 287 (Tex. App.—Fort Worth 1997, writ denied) ("If an attorney's conduct violates his professional responsibility, the remedy is public, not private.").

Here, the summary judgment record includes an affidavit of Keller Mackie, a partner at Mackie Wolf. Mackie averred that the law firm and its attorneys were retained as foreclosure counsel "to commence foreclosure proceedings to enforce the mortgagee's lien against the Property secured by the Note; and to provide Client with legal representation in protecting its interests against those of Luis A. Santiago and Linda A. Santiago. To the extent [the firm] or any of its attorneys or representatives . . . had any contact or communication with Luis A. Santiago or Linda A. Santiago, that contact or communication was conducted by [the firm] in our capacity as counsel for Client." Further, he averred that during the course of Mackie Wolf's

representation, appellants contacted the law firm and "requested that our Client make available for inspection and copying a copy of the original Note executed by [appellants] for the property. Pursuant to [the firm's] role as legal counsel for Client, [the firm] obtained the requested Note from Client and made it available to [appellants] for inspection and copying at its office." This evidence is not controverted.

The evidence shows Mackie Wolf provided appellants with a copy of the original note that appellants executed and all actions taken by Mackie Wolf were made in connection with its representation of its clients, BONY and Ocwen. The actions taken by Mackie Wolf that are the subject of this litigation—obtaining the note and presenting it to appellants—are the kinds of actions that are part of the discharge of an attorney's duties in representing a party *See Cantey Hanger*, 467 S.W.3d at 482; *Highland Capital Mgmt., LP v. Looper Reed & McGraw, P.C.*, No. 05-15-00055-CV, 2016 WL 164528, at *6 (Tex. App.—Dallas Jan. 14, 2016, pet. denied) (mem. op.). Because Mackie Wolf conclusively established its alleged conduct was within the scope of its legal representation of its clients, summary judgment was proper. *See Cantey Hanger*, 467 S.W.3d at 482; *see also Highland Capital*, 2016 WL 164528, at *3–4.

To the extent appellants argue that attorney immunity applies only for attorneys involved in litigation, and Mackie Wolf's actions occurred before litigation began, *Canty Hanger* states that "[t]he majority of Texas cases addressing attorney immunity arise in the litigation context [,] [b]ut that is not universally the case." *Cantey Hanger*, 467 S.W.3d at 482 n.6. Opinions in other cases have noted that attorney immunity applies outside of the litigation context. *See Farkas v. Wells Fargo Bank, N.A.*, No. 03-14-00716-CV, 2016 WL 7187476, at *8 (Tex. App.—Austin Dec. 8, 2016, no. pet.) (mem. op.) (citing *Canty Hanger*, 467 S.W.3d at 482; *Campbell v. Mortgage Elec. Registration Sys., Inc.*, No. 03–11–00429–CV, 2012 WL 1839357, at *6 (Tex. App.–Austin May 18, 2012, pet. denied) (mem. op.); *Reagan Nat'l Advert. of Austin, Inc. v.*

Hazen, No. 03–05–00699–CV, 2008 WL 2938823, at *3 (Tex. App.–Austin, July 29, 2008, no pet.) (mem. op.)). Even if we were to conclude that Mackie Wolf's actions occurred outside of the litigation context, the doctrine applied.

We overrule appellants' fourth issue arguing Mackie Wolf is not entitled to attorney immunity. Because at least one ground advanced by the summary judgment is meritorious, we need not address appellants' arguments in their second and fifth issues challenging other grounds argued by Mackie Wolf on summary judgment. *See Ninety Thousand Two Hundred Thirty-Five Dollars & No Cents in U.S. Currency ($90,235)*, 390 S.W.3d at 292; *see also* TEX. R. APP. P. 47.1.

In their first issue, appellants argue the trial court erred by denying their motion for continuance. We review a trial court's order denying a motion for continuance for a clear abuse of discretion. *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 161 (Tex. 2004). A trial court abuses its discretion when it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. *Id.* A trial court may order a continuance of a summary judgment hearing if it appears "from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition." TEX. R. CIV. P. 166a(g); *see also Two Thirty Nine Joint Venture*, 145 S.W.3d at 161.

As to Linda Santiago, the trial court denied the request for continuance because she failed to appear at the hearing on the motion. Appellants do not challenge this ground for denying the motion, and we affirm the trial court's ruling as to her. *See The Shops at Legacy (Inland) Ltd. P'ship v. Fine Autographs & Memorabilia Retail Stores, Inc.*, No. 05-14-00889-CV, 2015 WL 2201567, at *2 (Tex. App.—Dallas May 8, 2015, pet. denied) (mem. op.) (we must affirm ruling when appellant fails to attack all independent bases or grounds supporting the ruling).

As to Luis Santiago, the trial court's order does not explain why it denied the motion for continuance and we have not been provided with a transcript of the hearing. Appellants sought a continuance to conduct discovery to gather evidence about Mackie Wolf's "acts, omissions, and communications" related to its representation of its clients as well as the depositions of BONY's and Ocwen's corporate representatives, and "the written communications between the parties and the attorneys." The trial court could have acted within its discretion by denying the requested continuance because the additional discovery sought by appellants would have been protected by attorney-client privilege. *See, generally,* TEX. R. EVID. 503 (lawyer-client privilege). The trial court also may have concluded that resolution of the litigation in *Santiago II*, which included resolution of the Santiago's claims for fraud, fraud by nondisclosure, and violations of the Texas Civil Practice and Remedies Code against the parties seeking the foreclosure, precluded appellants from pursuing their claims against Mackie Wolf because the resolution of *Santiago II* meant the subject loan agreement was valid and enforceable and, therefore, appellants' allegations of forgery were unsupported. Finally, the trial court could have concluded that even if appellants acquired evidence supporting their allegations against Mackie Wolf, Mackie Wolf would have been protected by the attorney immunity doctrine and additional discovery would not have been fruitful.

Based on the record before us, we cannot say the trial court's denial of appellants' motion for continuance was so arbitrary and unreasonable as to amount to a clear abuse of discretion. *See Two Thirty Nine Joint Venture*, 145 S.W.3d at 161. We overrule appellants' first issue.

CONCLUSION

We affirm the trial court's judgment.

/Craig Stoddart/
CRAIG STODDART
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

LUIS A. SANTIAGO & LINDA A. SANTIAGO, Appellants

No. 05-16-00394-CV V.

MACKIE WOLF ZIENTZ & MANN, P.C., Appellee

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Trial Court Cause No. 296-01743-2013.
Opinion delivered by Justice Stoddart.
Justices Evans and Boatright participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee Mackie Wolf Zientz & Mann, P.C. recover its costs of this appeal from appellants Luis A. Santiago & Linda A. Santiago.

Judgment entered this 10th day of March, 2017.