Affirmed and Opinion filed November 18, 1999.

In The

Fourteenth Court of Appeals

NO. 14-98-00233-CV

NORMAN H. BEVAN & SHERYLL H. BEVAN, Appellants

V.

GENERAL ELECTRIC CREDIT EQUITIES CORPORATION, GENERAL ELECTRIC CAPITAL CORPORATION, and PAUL BICE, Appellees

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On Appeal from the 113th District Court
Harris County, Texas
Trial Court Cause No. 96-61603

O P I N I O N

Appellants, Norman H. Bevan and Sheryll H. Bevan, appeal from a motion for summary judgment in favor of appellees, General Electric Credit Equities (GECE), General Electric Capital Corporation (GECC), and Paul Bice. The Bevans appeal on three points of error. We affirm the trial court judgment.

THE CONTROVERSY

In 1994, the Bevans were shopping for a lot on which to build a house. According to the Bevans, security was a priority in choosing a place to live. After looking around the Memorial Park area, the Bevans located a suitable lot in the Arlington Court subdivision. At the time the contract was made, Arlington Court had a security guard stationed at the entrance to the subdivision; the guard stopped all cars that did not display an Arlington Court subdivision sticker. The subdivision was surrounded by a seven foot high wall and had electric, resident-controlled gates at the back entrances.

The Bevins entered into a contract to purchase one lot within the Arlington Court subdivision from Arlington Development Company, Ltd., and/or GECE. Paul Bice, the on-site broker or sales agent for Arlington Development Company, Ltd. and/or GECE, signed as the authorized agent of the seller. GECC was not a party to this contract.[1] In the terms of the contract, there was no mention of any security arrangements at the complex.

When the Bevans purchased their lot and built their home, they believed Arlington Court was a relatively safe area. They cited, as the main reason for this, the presence of the security guard at the subdivision entrance. This security guard was on duty twenty-four hours a day. This security guard, in a golf cart, would station himself in the middle of the street, at the entrance to Arlington Court, and would stop every car to verify the nature of the business of its occupants. In conjunction with the security guard, there is a sign at the entrance to the subdivision which stated "STOP—ALL GUESTS MUST REGISTER".

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[1] At the time of this contract, GECC was the lender who financed the original development of Arlington Court. However, in mid-1994, the original developer defaulted and GECC was preparing to foreclose its lien on unsold lots in Arlington Court, and GECE was planning to purchase those lots at a foreclosure sale. But, as of May 26, 1994, neither GECE or GECC had any ownership interest in any lots in Arlington Court. On July 5, 1994, GECE purchased some of the lots in Arlington Court at GECC's foreclosure sale.

The May 26, 1994, contract was terminated and another was drawn up in its place. The Bevans received a $44,000 reduction in the sale price of their lot. On July 12, 1994, the Bevans and GECE signed the second sales contract. Again, Bice signed for GECE as the General Manager of Arlington Court. GECC was not a party to this contract.

Despite the fact that the front entrance just had a security guard and not a gate, like the back entrances, the Bevans felt relatively safe.

However, after the Bevans built their house, they learned that the security guard could no longer block the entrance and stop every car entering the complex because the road leading into Arlington Court was a public street. In fact, the City of Houston cited Arlington Court to prevent it from having its security guard stopping every vehicle driving into the subdivision.

Upon learning that the security guard could no longer stop all traffic, the Bevans felt that they had been misled; they sued GECE, GECC, and Bice for fraud, negligent misrepresentation, and DTPA violations. All the defendants filed motions for summary judgment. On November 3, 1997, the trial court granted the motions for summary judgment. The Bevans appeal those judgments on three points of error.

STANDARD OF REVIEW

A defendant prevails on a motion for summary judgment if he can establish with competent proof that, as a matter of law, there is no genuine issue of fact as to one or more of the essential elements of the plaintiff's cause of action. *See Gibbs v. General Motors Corp.*, 450 S.W.2d 827, 828 (Tex. 1970). If the defendant bases his motion for summary judgment on an affirmative defense, he must prove all the elements of the defense as a matter of law. *See Montgomery v. Kennedy*, 669 S.W.2d 309, 310-11 (Tex. 1984). Once the movant establishes a right to summary judgment, the non-movant must expressly present any reasons avoiding the movant's entitlement and must support the response with summary judgment proof to establish a fact issue. *See Westland Oil Dev. Corp. v. Gulf Oil Corp.*, 637 S.W.2d 903, 907 (Tex. 1982); *Cummings v. HCA Health Servs. of Texas*, 799 S.W.2d 403, 405 (Tex. App.—Houston [14th Dist.] 1990, no writ).

The standards an appellate court employs to review summary judgment proof are as follows:

1. The movant for summary judgment has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law.
2. In deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true.
3. Every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor.

Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 548-49 (Tex. 1985); *see Karl v. Oaks Minor Emergency Clinic*, 826 S.W.2d 791, 794 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

DISCUSSION AND HOLDINGS

In their first point of error, the Bevans contend the trial court erred in granting the summary judgments in favor of GECE, GECC, and Bice. The Bevans argue that they raised a fact issue to preclude summary judgment. As to their fraud claim, the Bevans argue that the actions by the security guard, statements made by Bice, and statements in the subdivision's advertising brochures constituted fraud as to whether Arlington Court was a fully secured subdivision. To establish fraud, the Bevans must establish (1) a material representation, (2) that is false, (3) was made with knowledge of its falsity and as a positive assertion, (4) with the intention that it be acted upon by them, (5) that they acted in reliance upon that assertion, and (6) that they suffered injury. *See Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 524 (Tex. 1998).

According to the Bevans, the conduct which establishes fraud consists of three things: 1) a security guard stopped cars at the entrance of the subdivision; 2) Bice made specific statements about security; and 3) brochures distributed to the Bevans discussed security. We discuss first the actions of the security guard.

The Bevans argue that the presence of the security guard at the entrance of the subdivision, who always stopped their car during their pre-purchase visits, amounted to a fraudulent misrepresentation -- an implied one -- that a security guard would always be there to perform this function. The Bevans never asked if the security guard would continue to sit on the road at the entrance, nor did they ask Bice or GECE for anything in writing about the security service. The Bevans simply assumed that, because the security guard was stopping cars when they entered into the complex, this was a representation that a guard would always be there in the future. But an assumption by the Bevans that a guard would always stop cars cannot, on its own, transform GECE's actions into such a representation. *See Crenshaw v. General Dynamics Corp.*, 940 F.2d 125, 128 (5th Cir. 1991) (stating that a plaintiff's statement of what he thought was implied by defendant's representation is not sufficient to support an actionable misrepresentation). Thus, this act does not constitute fraud.

We now turn to the statements of Bice. The Bevans argue that Bice fraudulently told them that the security guard would never be replaced with a gate and that the twenty-four security guard was the best security you could get. But, the Bevans' deposition testimony shows only that Bice told them that he doubted Arlington court would ever "do away" with the security guard.

> Q: Tell me everything you can recall about that conversation. I mean, I want you to recall as exactly as you can what Mr. Bice told you. And I realize that this was some years ago, but if you'd do the best you can.
>
> A: When I asked him—I said—my issue was, would they put up—would they do away with the 24-hour—or would they do away with the security guard. I didn't even say 24-hour security guard. I said, "Would they do away with the security guard?"
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> And he said he doubted that they would ever–or if they would put up gates. And he said, "I doubt that that would ever happen. You've got 24-hour security here and that's as good as you can get." I was very contented with that.

Several times in her deposition Sheryll repeats this answer—that Bice told her that the security guard would not be replaced with a gate. Norman Bevan's deposition contains a similar statement. In his deposition, the following exchange occurred:

> Q: I want to be real sure that we all understand exactly what your contention is about what Mr. Bice told you. So if you'll just bear with me and let's go over it again, please, sir. My question is, to the best of your recollection, what exactly did Mr. Bice tell you about security?
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> a. Mr. Bice, at the day we signed the earnest money contracts, was asked by Ms. Bevan would there ever be—would they ever switch from a guard to a gate, and he said, "No."
>
> Q: Okay. And that's it?
>
> A: That's it.

Now, the Bevans attempt to argue that Bice defrauded them because of this misrepresentation. However, Bice's statement was not a misrepresentation. The evidence shows that the security guard was not replaced by a gate. In fact, the evidence shows that there is still a twenty-four hour security guard on the premises. In Sheryll's deposition the following exchange occurred:

> Q: If he [Bice] told you there was a 24-hour security guard, that's a true statement, though, isn't it, because there's a 24-hour security guard today; isn't hat right?
>
> A: That's true . . . .

Thus, Bice did not make a misrepresentation.

Third, the Bevans argue that the subdivision advertising brochures contained fraudulent statements. The Bevans argue that the advertising brochure stated that there was someone on duty to monitor traffic. This fact is still true. A security guard sits at the entrance to the subdivision and still monitors the incoming traffic. In short, we find no misrepresentation.

In sum, because defendants made no misrepresentations, the Bevans failed to establish a material issue of fact on their fraud cause of action. The trial court properly granted summary judgment on this issue.

As to their claim of negligent misrepresentation, the Bevans argue that, based on the evidence, GECE, GECC, and Bice did not exercise reasonable care in making the representation discussed above. Generally, to establish negligent misrepresentation, the Bevans must show the following four things:

> (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.

Federal Land Bank Ass'n of Tyler v. Sloane, 825 S.W.2d 439, 442 (Tex. 1991). However, as shown by the evidence above, GECE, GECC, and Bice did not make a misrepresentation to the Bevans, and therefore, could not make a negligent misrepresentation about an existing fact. The trial court properly granted summary judgment on this cause of action.

As to their DTPA cause of action, the Bevans argue that they were consumers under the DTPA, and thus should be allowed to recover under the statute. However, as with their other causes of action, to prevail on their DTPA claim, the Bevans also needed to show one other thing: a misrepresentation.[2] We have already held that no misrepresentation -- either by word or action -- was made. Thus, the trial court properly granted summary judgment on this cause of action.

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[2] Under section 17.05(a)(1), a consumer may not recover unless some misrepresentation has been made.

> (a) A consumer may maintain an action where any of the following constitute a producing cause of economic damages or damages for mental anguish:
>
> (1) the use or employment by any person of a false, misleading, or deceptive act or practice. . . . .

TEX. BUS. & COM. CODE ANN. § 17.50(a)(1) (Vernon Supp. 1999); *see also*, TEX. BUS. & COM. CODE ANN. § 17.46 (Vernon Supp. 1999).

Because the trial court properly granted summary judgment as to all the Bevans' causes of action, the trial court did not err. We, therefore, overrule the Bevans' first point of error.

In their second point of error, the Bevans contend the trial court erred in granting GECE's, GECC's, and Bice's objections to their summary judgment evidence. After GECE, GECC, and Bice filed their motion for summary judgment, the Bevans responded and filed a number of exhibits. GECE, GECC, and Bice objected to exhibits B, C, F, G, H, I, J, and L, and to two affidavits—by Kurt Hanson and Joe Maida. At the summary judgment hearing, the trial court sustained these objections. However, the trial court gave the Bevans additional time to conduct discovery for the limited purpose of curing the problems with the admissibility of the exhibits. On November 3, 1997, the trial court conducted another summary judgment hearing and found the Bevans had not rectified the admissibility problems with the exhibits and sustained GECE's, GECC's, and Bice's objections.

The admission and exclusion of evidence is committed to the trial court's sound discretion. *See City of Brownsville v. Alvarado*, 897 S.W.2d 750, 753 (Tex. 1995). "Further, error may not be predicated upon a ruling which excludes evidence unless a substantial right of the party is affected." *Steenbergen v. Ford Motor Co.*, 814 S.W.2d 755, 760 (Tex. App.—Dallas 1991, writ denied). For the exclusion of evidence to constitute reversible error, the Bevans must show (1) that the trial court committed error and (2) that the error was reasonably determined to cause and probably did cause rendition of an improper judgment. *See Glasscock v. Income Property Servs., Inc.*, 888 S.W.2d 176, 179 (Tex. App.—Houston [1st Dist.] 1994, writ dism'd by agr.). The Bevans do not have to prove that but for the exclusion of the evidence, a different judgment would have been reached; they only need to show that the exclusion of evidence probably resulted in the rendition of an improper judgment. *See id.*

The Bevans present no argument as to why exhibits B, C, F, G, and L, as well as the affidavits of Hanson and Maida were improperly excluded from evidence. Since the Bevans present no argument and cite no cases to support their argument as to the trial court's ruling on this evidence, we do not address it, because they have presented nothing for us to review. *See* TEX. R. APP. P. 38.1.

As to Exhibits H, I, and J, the trial court properly excluded them from evidence. Exhibit H was a memorandum from Drew Garner to Jim Caton, who was general manager of the project before Bice became general manager. Copies of this memo were sent to Paul Anderson and Joe Maida. The memo, dated February 7, 1994, discussed (among other things) the problem the subdivision was having with the entrance on the public street. Exhibit I was a memo from Jim Caton to Paul Bice with copies going to Joe Maida, Paul Anderson, Randy Hendricks, Carol Richard, Barry Depew, Niel Morgan, and Kim Smith. In this memo, dated May 30, 1994, Caton discusses the possibility of replacing the guard with a gate. Exhibit J was a document entitled "Minimum Security/Guard Requirement" dated February 16, 1994. Apparently, it was prepared by Arlington Court Association and defined the objectives and requirements of guard service.

GECE, GECC, and Bice objected to these exhibits because the Bevans failed to authenticate them under TEX. R. CIV. P. 166a(f), the exhibits were hearsay, and they were irrelevant. At the summary judgment hearing, the trial court sustained these objections, but after agreement among the parties, gave the Bevans a second chance to cure the defects. After the additional time period had passed, the trial court again sustained GECE's, GECC's, and Bice's objections to the exhibits' admissibility.

The Bevans attempted to lay a foundation for Exhibits H, I, and J by attaching affidavits from Kurt M. Hanson, an attorney with the Bevans' law firm of record, and from Joe S. Maida, a local attorney. Although both affidavits state that each exhibit is a true, correct, full and complete copy of what it purports to be, they are insufficient to

authenticate the exhibits. *See Wiggins v. Overstreet*, 962 S.W.2d 198, 201 (Tex. App.–Houston [14th Dist.] 1998, pet. denied).

An affidavit is legally insufficient if it does not positively and unqualifiedly represent the facts disclosed in the affidavit to be true and within the affiant's personal knowledge. *See Humphreys v. Caldwell*,888 S.W.2d 469, 470 (Tex. 1994). Here, the Bevans' affidavits do not show that they are based on either Hanson's or Maida's personal knowledge, or that the facts they seek to prove would be admissible in evidence at a conventional trial. TEX. R. CIV. P. 166a(f); *Wiggins*, 962 S.W.2d at 201. An affidavit itself must set forth facts, must show that the affiant is competent, the allegations in the affidavit must be direct and unequivocal, so that perjury is assignable, and must also affirmatively show how the affiant became personally familiar with the facts to enable him to testify as a witness. *See id.*; *Villacana v. Campbell*, 929 S.W.2d 69, 74 (Tex. App.–Corpus Christi 1996, pet. denied). The Bevans' affidavits fail to show how Hanson and Maida were personally involved with the documents and do not render Hanson and Maida competent to testify as witnesses. Because the affidavits only state that the attached exhibits are true and correct copies of the documents, Hanson and Maida can only testify that the statements in the documents were made. *See id.* They do not set forth unequivocal facts that would be admissible into evidence. Thus, Exhibits H, I, and J were not properly authenticated according to TEX. R. CIV. P. 166a(f), and they do not constitute competent summary judgment evidence.

In short, the trial court did not abuse its discretion in its ruling to exclude exhibits H,I and J. Therefore, we overrule the Bevans second point of error.

In their third point of error, the Bevans contend the trial court erred in denying their motion for new trial and excluding newly discovered evidence. The Bevans argue that newly discovered evidence, namely the affidavit of Jim Caton, should have been considered by the trial court as it settled the issue of authentication of Exhibits H, I, and J. The

standard of review in denying a motion for new trial based on newly discovered evidence is the abuse of discretion standard. *See Jackson v. Van Winkle*, 660 S.W.2d 807, 809 (Tex. 1983). To obtain a new trial on the grounds of newly discovered evidence, the Bevans must show that (1) the evidence has come to their knowledge since the trial; (2) the reason they did not find the information sooner was not want of diligence; (3) the evidence is not cumulative; and (4) the evidence was so material that it would probably produce a different result if a new trial was granted. *See id.* The Bevans cannot meet this standard because they did not meet their burden of showing that they used due diligence to locate Caton.

The record shows that, six months before the motion for summary judgment was heard, the Bevans had information that, if pursued, would have led them to Caton. The Bevans learned from one set of interrogatories that a realtor at Martha Turner Properties had knowledge about the case. The Bevans took her deposition and she informed them that Rosemary Hoyt at Martha Turner Properties was in charge of the sell-out of the development. Thus, before the motion for summary judgment was heard, the Bevans knew that Rosemary Hoyt was very involved with the sale of homes in the subdivision. Ultimately, after the summary judgment motion was granted, the Bevans located Caton with Rosemary Hoyt's help. Since the Bevans knew about Ms. Hoyt before the motion for summary judgment but did not contact her until after judgment, we hold that the trial court did not abuse its discretion in refusing to grant a new trial based on newly discovered evidence.

We overrule the Bevans' third point of error and affirm the trial court judgment.

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Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed November 18, 1999.

Panel consists of Justices Yates, Fowler and Sondock.[3]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[3] Senior Justice Ruby Sondock sitting by assignment.