Reversed and Remanded and Opinion filed August 10, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00076-CV

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LISA A. LOUCK, Appellant

V.

OLSHAN FOUNDATION REPAIR COMPANY, Appellee

On Appeal from the 165th District Court
Harris County, Texas
Trial Court Cause No. 96-42457

O P I N I O N

Appellant, Lisa A. Louck appeals from the grant of summary judgment in favor of Olshan foundation repair company. Because we find no proof to sustain the motion for summary judgment or grounds to support the motion for no-evidence summary judgment, we reverse and remand.

Lisa Louck purchased a home from Mr. and Mrs. Adair in early 1995. The Adairs told Ms. Louck about the home's history of foundation problems, and that it had recently been repaired by Olshan. Olshan told Ms. Louck that it had stabilized the foundation, and that the Adair's warranty was fully transferable. Ms. Louck had an independent engineer, Peverly,

inspect the home, and he reported the repairs were of a type that would "tend to enjoy a high rate of stability." Ms. Louck purchased the home and Olshan transferred its warranty to her.

The foundation, however, was not stable. It began to fail only months after Ms. Louck purchased the home. Olshan decided the damage was not covered under its warranty, but did offer to help Ms. Louck with the cost of a root barrier. Ms. Louck sued both Olshan and Peverly. She alleged that Olshan breached its express warranty by not repairing her foundation, misrepresented the scope of its warranty, breached its implied warranty to repair the foundation in a good and workmanlike manner, misrepresented that the foundation had been repaired when it had not been repaired, and repaired the foundation in a negligent manner.

Olshan made a motion for summary judgment under both Rule 166a (traditional summary judgment) and Rule 166a(i) ("no-evidence" summary judgment). The trial court granted the motion without stating the grounds on which it relied.

The Traditional Summary Judgment

Olshan moved for summary judgment on three main grounds. First, that Ms. Louck's DTPA, breach of implied warranty, and negligence claims failed because, as a matter of law, the independent inspection was an intervening and superceding cause between Olshan's actions and Ms. Louck's harm. Second, Ms. Louck's claim for breach of express warranty failed as a matter of law because no breach of warranty occurred. Finally, Ms. Louck's DTPA claim failed as a matter of law because no misrepresentation occurred.

The propriety of summary judgment is a question of law, therefore we review the trial court's decision de novo. *See Texas Dept. of Ins. v. American Home Assurance Co.*, 998 S.W.2d 344, 347 (Tex. App.–Austin 1999, no pet.). Summary judgment is proper when a movant establishes that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *See* TEX. R. CIV. P. 166a(c); *Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex.1995); *Bangert v. Baylor College of Med.*, 881 S.W.2d 564, 566 (Tex. App.–Houston [1st Dist.] 1994, writ denied). Therefore, a defendant is entitled

to a summary judgment if he establishes, as a matter of law, that at least one element of plaintiff's cause of action does not exist. *See Price v. Hurt*, 711 S.W.2d 84, 86 (Tex. App.–Dallas 1986, no writ). However, we make every reasonable inference, and resolve any doubts, in favor of the non-movant. *See Randall's Food Mkts., Inc.*, 891 S.W.2d at 644; *Bangert*, 881 S.W.2d at 565-66. If the movant establishes a right to summary judgment, the non-movants must then produce summary judgment proof showing the existence of an issue of material fact to preclude summary judgement. *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). Where, as here, the trial court granted the 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 Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 473 (Tex.1995).

A DTPA claim requires that the defendant's actions be the "producing cause" of the plaintiff's damage. *See* TEX. BUS. & COM. CODE ANN. § 17.50 (Vernon 1997). Olshan argues that the knowledge Ms. Louck gained from her independent inspection of the foundation, and not its actions, was the actual producing cause of her damages. Olshan relies solely on *Dubow v. Dragon*, 746 S.W.2d 857 (Tex. App.–Dallas 1988, no writ) for the proposition that Olshan's actions were not, as a matter of law, the producing harm of Ms. Louck's damages.

In *Dubow*, the buyers hired an independent engineer and a foundation specialist to inspect the property in question. They uncovered some problems, and the buyers, concerned about these and future problems with the house, renegotiated the contract. In exchange for lowering the sales price, the following provision was added to the contract:

> After careful inspection of the house, and with professional opinions, [we] feel that the house will need extensive ongoing maintenance because of the site positioning, foundation and drainage. See attached inspection report. We will take the home as is, WITH ALL CONTINGENCIES REMOVED.

Dubow, 746 S.W.2d at 859. After closing, the buyers discovered additional problems with the home. They sued the sellers for failure to disclose the foundation problems and roof leaks.

The Dallas Court of Appeals, focusing on the buyers' reliance upon the experts' opinions and the fact that the contract had been renegotiated, held that the buyers' careful inspection of the house "constituted a new and independent basis for the purchase which intervened and superseded" any wrongful conduct on the part of the seller. *Id*. at 860. That being so, the court concluded the buyers had actual knowledge of the defects and had not relied upon any actions by the sellers in closing the deal. *Id*.

Olshan argues that *Dubow* controls, because Ms. Louck knew of the foundation repairs in advance, had an independent inspection, and negotiated a lower price for the house because of the foundation repairs. We find, however, that *Dubow* is inapplicable to our present facts. Ms. Louck may have known about the prior repairs to the foundation, but unlike the buyer in *Dubow*, she had no knowledge of any continuing problems. In fact, Olshan's recent repair gave her reason to believe that the foundation had been stabilized. The independent inspection, unlike *Dubow*, did not reveal the foundation's structural problems, and there was no "as is" contract. Furthermore, it does not appear that Ms. Louck negotiated a lower price based upon the condition of the foundation. It is undisputed that the Adairs accepted Ms. Louck's first offer. Ms. Louck said in her deposition[1] that her offer was $20,000 under the asking price because she thought the home needed approximately $20,000 in interior and cosmetic repairs, and it was all she could afford. She specifically said the condition of the foundation did not influence the offered price.

Olshan points to Mrs. Adair's first affidavit which says:

> Ms. Louck was made aware of all the foundation work that occurred while we owned the property, which is why we reduced the sales price of the home. The reduced price was for the condition of the foundation and to allow Ms. Louck to make cosmetic repairs.

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[1] Ms. Louck's response to Olshan's amended motion for interlocutory summary judgment explicitly incorporated her response to Olshan's original motion. Therefore, any evidence attached to that original response was properly part of the summary judgment record. *See* TEX. R. CIV. P. 58; *Evans v. First Nat. Bank of Bellville*, 946 S.W.2d 367, 377 (Tex. App.–Houston [14th Dist.] 1997, writ denied) (holding that proof attached to earlier summary judgment motions can be properly before the trial court)

While this evidence may show why the Adairs *accepted* Ms. Louck's offer, it does not reflect Ms. Louck's motivation for making the offer. In fact, in her second affidavit, Mrs. Adair unequivocally states, "Lisa Louck did not negotiate a reduced price because of 'foundation problems' with the residence."[2] So while Ms. Louck had actual knowledge of the house's history of foundation repair, there is no evidence that she had knowledge of any continuing defects. Olshan has not proven, as a matter of law, that its actions were not the producing cause of Ms. Louck's harm.

Olshan contends Ms. Louck's claim for breach of express warranty failed as a matter of law because no breach of warranty occurred. Because Olshan does not brief this point, we will address the arguments presented in its motion. Olshan quotes its written warranty which says that if "any adjustments are required during the life of this home due to settling, our company or another designated Cable Lock contractor will re-raise all areas previously underpinned without cost to the owner." Olshan claims that "[a]t no time was it determined that the work Olshan performed needed re-raising under the terms of the warranty." This language was taken from the supporting affidavit of Hank Deshazer, Olshan's owner. Olshan argues that the only remedy available under the warranty is for it to re-raise the specific *piers* it installed.[3] The warranty, however, explicitly refers to "areas." Olshan's summary judgment proof is controverted by Ms. Louck's affidavit, which states that, soon after the purchase of the home, "the center of the foundation collapsed in the same area where Olshan allegedly performed its work." Olshan's proof is insufficient to establish its entitlement to judgment as a matter of law.

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[2] Mrs. Adair's second affidavit was attached to Ms. Louck's motion for reconsideration of the interlocutory summary judgement, which was part of the record when the trial court entered its final judgment. *See First Heights Bank, FSB v. Marom*, 934 S.W.2d 843, 845 (Tex. App.–Houston[14 Dist.] 1996, no writ) (holding that a "trial court has the power to set aside an interlocutory judgment at any time prior to the entry of a final judgment.)

[3] Olshan's interpretation of its warranty would seem to suggest the warranty would not cover situations where it failed to install a pier even where one was needed.

Olshan's final argument in its traditional motion for summary judgment is that Ms. Louck's DTPA claim fails as a matter of law because no misrepresentation occurred. Again, Olshan does not brief this point. Looking to its motion and the accompanying proof, we note that the affidavit of Hank Deshazer states that "at no time did Olshan make any false statements to [Ms. Louck] regarding the condition of the foundation prior to her purchase." Ms. Louck's affidavit, however, states that Olshan represented to her that the foundation was level and stable. Considering the foundation collapsed a few months later, there is an unresolved issue of material fact as to whether or not Olshan made a knowing misrepresentation. Furthermore, Hank Deshazer's affidavit in no way counters Ms. Louck's claim that Olshan misrepresented both the scope of its warranty and the quality of its work. Thus, Olshan's evidence is insufficient to establish that it is entitled to judgment as a matter of law.

The No-evidence Summary Judgment

The second half of Olshan's motion was a motion for no-evidence summary judgment. Olshan argued that Ms. Louck had no evidence of one or more essential elements for her DTPA , breach of implied warranty, and negligence claims. Specifically, Olshan asserts that Ms. Louck lacked evidence that Olshan (1) breached an express warranty, (2) did not perform their work in a good and workmanlike manner, or (3) engaged in any false, misleading, and deceptive acts or practices. Furthermore, Olshan asserts that Ms. Louck lacked proof that Olshan's negligence, if any, was a producing cause of Ms. Louck's injury.[4]

When responding to a no-evidence summary judgment, it is the non-movant's burden to bring forth proof that raises a fact issue on the challenged elements. *See Heiser v. Eckerd Corp.*, 983 S.W.2d 313, 316 (Tex. App.–Fort Worth 1998, no pet.); *Jackson v. Fiesta Mart, Inc.*, 979 S.W.2d 68, 70 (Tex. App.–Austin 1998, no pet.). We apply the same legal sufficiency standard in reviewing a no-evidence summary judgment as we apply in reviewing

[4] Ms. Louck first argues that Olshan's no-evidence motion was a "general no-evidence challenge" which is impermissible under Rule 166a(i). We find, however, that the motion specifically states the elements of the claims to which there is no evidence. *See* TEX. R. CIV. P. §166a(i) cmt.

a directed verdict. *See Moore v. KMart Corp.*, 981 S.W.2d 266, 269 (Tex. App.–San Antonio 1998, pet. denied). We look at the evidence in the light most favorable to the respondent against whom the summary judgment was rendered, disregarding all contrary evidence and inferences. *See id*; *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex.1997), cert. denied, 523 U.S. 1119, 118 S.Ct. 1799, 140 L.Ed.2d 939 (1998). The non-movant "is not required to marshal its proof," but need only point out the evidence produced which establishes that a question of fact exists. *Bomar v. Walls Regional Hosp.*, 983 S.W.2d 834, 840 (Tex. App.–Waco 1998, no pet.). A no-evidence summary judgment is properly granted if the respondent fails to bring forth more than a scintilla of probative evidence to raise a genuine issue of material fact as to an essential element of the respondent's case. *See Moore*, 981 S.W.2d at 269; TEX. R. CIV. P. 166a(i). 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." *Merrell Dow*, 953 S.W.2d at 714 (internal citations omitted). 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. *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex.1983).

Ms. Louck brought forward more than a scintilla of evidence that Olshan breached both a written and an oral express warranty.[5] As noted above, the written warranty states that if "any adjustments are required during the life of this home due to settling, our company or another designated Cable Lock contractor will *re-raise all areas previously underpinned* without cost to the owner." (emphasis added) Ms. Louck's affidavit states that, soon after the purchase of the home, "the center of the foundation collapsed *in the same area* where Olshan allegedly performed its work."(emphasis added) Olshan, by its own admission, has refused to re-raise

[5] We note that the proof Olshan attached to its traditional motion for summary judgment may also be considered as proof in its motion for no-evidence summary judgment. *See Saenz v. Southern Union Gas Co.*, 999 S.W.2d 490(Tex. App.–El Paso 1999); *Fiesta Mart, Inc.*, 979 S.W.2d at 70 (evidence attached by movant in a no-evidence summary judgment is nonetheless "summary judgment evidence before the court").

Ms. Louck's foundation. This is more than a scintilla of evidence that Olshan breached its express warranty.

Ms. Louck's also states in her deposition that Rick LaPair, an Olshan representative, said she had a lifetime warranty on the foundation and that if a problem ever occurred, Olshan would take care of the problem at no cost to Louck. She was asked if he said "foundation" or "piers," and she said LaPair's statement was regarding the foundation as a whole. She also stated that she would not have purchased the house if she did not think the warranty covered any problem with the foundation. This is more than a scintilla of evidence that Olshan breached an oral express warranty. *See* TEX. BUS. & COM. CODE ANN. § 2.313(a)(1) (Vernon 1968); *Crosbyton Seed Co. v. Mechura Farms,* 875 S.W.2d 353, 361.(Tex. App.–Corpus Christi 1994, no writ).

Moreover, Ms. Louck brought forward more than a scintilla of evidence that Olshan's work was not done in a good and workmanlike manner. The Supreme Court of Texas has defined "good and workmanlike" as "that quality of work performed by one who has the knowledge, training, or experience necessary for the successful practice of a trade or occupation and performed in a manner generally considered proficient by those capable of judging such work." *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 354 (Tex. 1987). The affidavit of Bill Ross, a licensed engineer with thirty-six years experience in the construction industry, was attached Ms. Louck's response to Olshan's amended motion for summary judgment. In his affidavit, Ross says that Olshan's methodology was not "prudent" because it was not based upon a soil analysis. He states that soil conditions are "the single most important factor for determining the cause of foundation distress." Furthermore, he says the fact that Olshan knew of the prior, failed attempts to stabilize the foundation exemplifies Olshan's lack of "prudence." Again, this is more than a scintilla of evidence that Olshan breached an express warranty.

Finally, Ms. Louck brought forward more than a scintilla of evidence that Olshan engaged in false, misleading, and deceptive acts or practices in the sale of goods and services.

Rick LaPair's statement that Olshan would take care of any problems with Ms. Louck's foundation at no cost to her is more than a scintilla of evidence that Olshan made a misrepresentation as to the scope of the foundation's warranty. The affidavit of Bill Ross detailing the methods Olshan used to repair the foundation is more than a scintilla of evidence that Olshan misrepresented the quality of their work Finally the simple fact that the foundation collapsed only months after Olshan said they had stabilized it is more than a scintilla of evidence that Olshan misrepresented the condition of the foundation at the time of the sale

The affidavit of Bill Ross which details the mistakes he believes Olshan made in its repairs, and Ms. Louck's affidavit stating the foundation collapsed in the same area that Olshan performed its work is more than a scintilla of evidence that Olshan's alleged negligence was the cause of Ms. Louck's damages..

Having found no grounds to sustain Olshan's traditional motion for summary judgment or its motion for no-evidence summary judgment, we reverse the judgment of the trial court and remand the cause for further proceedings.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed August 10, 2000.
Panel consists of Chief Justice Murphy and Justices Hudson and Wittig.
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