

Affirmed and Opinion filed December 9, 1999.



In The

Fourteenth Court of Appeals

NO. 14-98-00878-CV

DAVE ZEGER D/B/A DAVE ZEGER ENTERTAINMENT, Appellant

V.

**ROCKETBALL, LTD., CHARLES HELPINSTILL D/B/A EZRA CHARLES AND THE
WORKS, Appellee**

**On Appeal from the County Civil Court at Law, No.3
Harris County, Texas
Trial Court Cause No. 656,091**

O P I N I O N

Appellant, Dave Zeger d/b/a Dave Zeger Entertainment, appeals a summary judgment in favor of appellee, Rocketball, Ltd.¹ Zeger appeals on one point of error. We affirm the trial court judgment.

THE CONTROVERSY

¹ Although the style of the case shows Charles Helpinstill d/b/a Ezra Charles and the Works, Zeger appeals only the summary judgment in favor of Rocketball, Ltd.

In October of 1993, Dave Tagliarino, Market Coordinator for Rocketball, Ltd., the owner of the Houston Rockets basketball organization, contacted Dave Zeger, a part-time talent agent. Rocketball was looking for a band to play at the Rockets' home games. Zeger sent Rocketball information on three performers. Rocketball was not interested in any of these groups and contacted Zeger again, explaining in more detail what kind of entertainment it wanted. After this second call, Zeger suggested Ezra Charles and the Works. Tagliarino wanted a meeting with Charles. Charles wanted to attend the meeting because he was uncertain of Zeger's ability to adequately promote the group, since Zeger usually booked groups for weddings and had never booked a group for a professional sports organization. So, Zeger picked up Charles and drove him to the meeting. At the meeting, details about what kind of show the Rockets wanted, space requirements for the band, electrical requirements, and potential compensation through season tickets were discussed. However, by Zeger's own admission, Charles did most of the talking at the meeting. Zeger also admits he does not recall whether details of the payment were discussed at the meeting. According to Zeger, the meeting ended and it was agreed that the details, such as exact dates of the games and the dates of the band's availability would be sent to Zeger so that he could draw up a contract. Zeger never received the details from Rocketball. However, he soon heard that the band was playing at the Rockets' games. Rocketball paid Charles, in full, for his work, but Zeger received nothing.

Zeger sued Rocketball and Ezra Charles and the Works, claiming he was owed a twenty percent commission on any amount paid to the band. The trial court granted summary judgment in favor of Rocketball. Zeger's claim against Ezra Charles and the Works went to trial. But at trial, the trial court granted an instructed verdict in favor of Charles Helpinstill d/b/a Ezra Charles and the Works. Zeger now appeals the summary judgment granted in favor of Rocketball on one point 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* TEX. R. CIV. P. 166a(c); *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 such a 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 we must employ for appellate review of 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 HOLDING

Breach of Contract

In his first point of error,² Zeger contends the trial court erred in granting Rocketball's motion for summary judgment because multiple fact issues exist that preclude summary judgment as a matter of law. In essence, Zeger's argument is that Rocketball is still liable to him even though he never spoke about his commission with Rocketball because (1) Rocketball called him to see if he could recommend a band, (2) knew he was a talent agent and (3) should have known that he would be owed a commission. However, Zeger's arguments distort the facts of the case.

The summary judgment evidence shows that, as a matter of law, no contract was formed when Rocketball called Zeger. First, Rocketball did not hire Charles as its band until after it determined that a second band would not work out. The evidence shows that after the meeting among Rocketball, Zeger, and Charles, Rocketball hired a band other than Charles to play at the Rockets' home games. It was only after Rocketball determined that this second band was not working out that it decided to hire Charles. Zeger stated in his deposition that after the meeting between himself, Rocketball, and Charles, Rocketball was free to hire another band to perform at the games. Thus, Zeger admits no contract existed at the time the meeting concluded. Had a contract existed at that time, Rocketball would have been contractually bound to hire Charles. However, Rocketball was not so bound, and thus was not obligated to hire Charles.

Second, Zeger stated that he did not need to discuss the payment of his commission with Rocketball because the commission was a matter that needed to be worked out between Charles and himself. Specifically, because Zeger stated that the payment of his commission was a matter solely between himself and Charles, his own testimony showed a lack of any intent to form a contract on this issue with Rocketball.

For these reasons, we find, as a matter of law, no contract existed between Rocketball and Zeger. We, therefore, overrule Zeger's first issue presented for review.

Quantum Meruit

² Zeger's brief complains broadly that the trial court erred in granting Rocketball's motion for summary judgment because multiple fact issues exist that preclude summary judgment as a matter of law. Under the umbrella of that global complaint, however, he urges in several subpoints that fact issues exist as to (1) whether the parties intended a contract; (2) each element of appellee's quantum meruit claim; (3) fraudulent inducement; and (4) whether Rocketball conspired with Charles to defraud Zeger. For clarity, we will treat each subpoint as a separate point of error.

In his second point of error, Zeger contends that summary judgment was inappropriate as to his claim for *quantum meruit*, as there was a fact issue concerning that claim. *Quantum meruit* is an equitable theory of recovery based on an implied agreement to pay for benefits received. *See Heldenfels Bros. v City of Corpus Christi*, 832 S.W.2d 39, 41(Tex.1992). To recover under the doctrine of *quantum meruit*, a plaintiff must establish the following:

1) valuable services and/or materials were furnished, 2) these services were furnished to the party sought to be charged, 3) the services were accepted by the party sought to be charged, and 4) the services were accepted under such circumstances as reasonably notified the recipient that the plaintiff, in performing, expected to be paid by the recipient. *See id.*

As noted above, Zeger stated that the commission was a matter solely between him and Charles. Furthermore, he testified that he did not discuss the matter of a commission with Rocketball. As such, the circumstances did not “reasonably notify” Rocketball that Zeger expected Rocketball to pay him.

Zeger contends that he raised a genuine issue of material fact because Rocketball’s Senior Executive Vice President, John Thomas, testified that “if someone performs for us, we would expect to pay them.” However, Thomas made this statement in the context of whether Rocketball would pay a band with whom it had a performance agreement. This evidence does not raise a genuine issue of material fact as to whether Rocketball was reasonably notified that Zeger expected Rocketball to pay him. Zeger also argues that he stated at his deposition that he told Rocketball he expected to be compensated for his services. The record, however, does not support that contention. Zeger merely testified that he called Rocketball several times after Charles began playing. Again, this does not raise a genuine issue of fact that Zeger reasonably notified Rocketball at the meeting or before it hired Charles, that Zeger expected to be compensated.

We find that Rocketball was entitled to judgment as a matter of law as to Zeger’s *quantum meruit* claim.

Fraudulent Inducement

In his third point of error, Zeger contends he raised a genuine issue of fact as to fraudulent inducement. The elements of a fraudulent inducement cause of action are as follows: (1) a material misrepresentation, (2) which was false, (3) and which was either known to be false when made or was asserted without knowledge of its truth, (4) which was intended to be acted upon, (5) which was relied upon, and (5) which caused injury. *See Formosa Plastics Corp. v. Presidio Eng’rs &*

Contractors, Inc., 960 S.W.2d 41, 47 (Tex. 1998). The summary judgment proof establishes that Rocketball made no representation to Zeger regarding a commission, let alone a false one: as noted above, Zeger testified he did not discuss a commission with Rocketball.

Zeger contends that Rocketball made an implied promise to pay him by contacting Zeger regarding Rocketball's need for a band. First, this contention sounds more in contract than in tort. Second, Zeger admitted at his deposition that Rocketball was not bound to him, even after the meeting with Charles; it necessarily would not be bound to him merely after it contacted him by telephone. Third, no such implied promise was made by Rocketball, since Zeger admits that the matter of his commission is strictly between the agent (himself) and the client (Charles).

We overrule Zeger's third point of error.

Conspiracy

In his fourth point of error, Zeger asserts that a fact issue exists as to whether Rocketball conspired with Charles to defraud him. He does not cite to the record in contending that there is a fact issue as to this cause of action. Consequently, he has waived this contention. *See* TEX. R. APP. P. 38.1(h). We overrule his fourth point of error.

CONCLUSION

Having found that Zeger did not raise a genuine issue of material fact as to any claim he made against Rocketball, we affirm the judgment of the trial court.

Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed December 9, 1999.

Panel consists of Justices Yates, Fowler and Frost.

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