

Court of Appeals of Texas, Houston (1st Dist.).

**----- Akram Mushtaha, M.D., Appellant v. Thornton L. Kidd, M.D. and
Betty L. Kidd, Appellees**

NO. 01-09-00456-CV

Decided: December 30, 2010

Panel consists of Chief Justice Radack and Justices Massengale and Matthews.1

MEMORANDUM OPINION

This is a suit on an alleged contract for the sale of commercial real estate. Appellant Akram Mushtaha sued for breach of contract and specific performance. Appellees Thornton L. and Betty L. Kidd countersued for declaratory judgment arguing that they had no valid contract to sell Mushtaha their property and that the alleged contract violated the statute of frauds. The Kidds also sought attorney's fees and the removal of a lis pendens.

The trial court granted a summary declaratory judgment in the Kidds' favor, removed the lis pendens, and awarded them attorney's fees. On appeal, Mushtaha argues that the trial court erred in doing so because: (1) his summary judgment evidence conclusively proved-or at least raised a genuine issue of material fact about-each element required for contract formation (issues 1 and 3); (2) the alleged contract satisfied the statute of frauds; and (3) the Kidds were not entitled to attorney's fees because his lawsuit was not frivolous and their declaratory judgment action was improper.

Because we conclude that the alleged contract did not satisfy the statute of frauds and that the Kidds' countersuit was not improper,

we affirm the trial court's judgment.

I. Background

Thornton and Betty Kidd owned a commercial office building in Pasadena. In 2007, they entered into a standard listing agreement with Alix Fox of Qualified Properties, but they did not sell the property. In 2008, the Kidds again contacted Fox in a second attempt to sell the property, and they told her that they would reduce the asking price from \$300,000 to \$190,000. Fox's associate, Greg Williams, who also worked as a realtor for Qualified Properties, contacted Mushtaha, whom he knew was previously interested in the property. On April 18, 2008, Mushtaha signed a proposed earnest money contract, in which he offered to buy the property for \$170,000, and Williams submitted it to Fox. The contract stated:

CONTRACT AS OFFER. The execution of this contract by the first party constitutes an offer to buy or sell the Property. Unless the other party accepts the offer by 5:00 p.m., in the time

zone in which the Property is located, on April 21, 2008 the offer will lapse and become null and void.

The Kidds declined Mushtaha's offer to buy their property for \$170,000. They reiterated that \$190,000 was their bottom line, and they authorized Fox to cross out the price term of \$170,000 substitute their proposed price of \$190,000. Fox did so. She placed her initials beside the changes she made, but she did not initial or sign anywhere else on the proposed earnest money contract. The Kidds did not sign or initial the proposed contract either. Fox delivered the proposed earnest money contract to Mushtaha's agent. Williams emailed the Kidds' response to Mushtaha at 4:00 p.m. on April 18, 2008. That same day, a second prospective buyer, Jim AL, Ltd., offered to buy the property for \$191,000.

On April 21, Williams informed Mushtaha that another party had offered to buy the property for \$191,000 and that he would have to match or exceed this price if he wished to buy the property. Mushtaha signed and initialed the proposed contract with the sales price of \$190,000. At approximately 7:30 p.m. that same day, Mushtaha faxed the proposed earnest money contract to Qualified Properties.

The Kidds never signed the proposed contract with Mushtaha. Both the affidavits of Thornton Kidd and Alix Fox state that the Kidds did not authorize Fox to accept the proposed contract. Additionally, Thornton's affidavit states that he never directed Fox nor gave her the authority to sell the property without confirming his signature on the sales agreement. On April 23, 2008, the Kidds signed an earnest money contract proposed by Jim AL.

When Mushtaha realized that the Kidds did not intend to sell him the property, he sued for breach of contract and specific performance. He also placed a lis pendens on the property, preventing the Kidds from selling it to Jim AL. The Kidds countersued for a declaratory judgment that there was no valid contract to sell Mushtaha the property or that the alleged contract did not comply with the statute of frauds. In addition, the Kidds sought attorney's fees and the removal of the lis pendens.

The Kidds filed a motion for summary judgment on all claims. Mushtaha responded, offering his own affidavit as summary judgment proof. The Kidds objected to his affidavit. The trial court sustained the Kidds' objection to Mushtaha's summary judgment proof, granted the Kidds' motion, and entered a final declaratory judgment in their favor. The trial court ordered the lis pendens removed and awarded attorney's fees to the Kidds.

II. Standard of Review

We review de novo the trial court's ruling on a motion for summary judgment. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex.2009). “We review the evidence presented in the motion and response in the light most favorable to the party against whom the summary judgment was rendered, crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not.” *Id.* (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex.2005)); see *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 208 (Tex.2002). We must review all of the summary judgment

grounds on which the trial court ruled that are dispositive of the appeal, and we may consider any other grounds on which the trial court did not rule. See *Baker Hughes, Inc. v. Keco R. & D., Inc.*, 12 S.W.3d 1, 5 (Tex.1999) (citing *Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 624 (Tex.1996)). However, issues not expressly presented to the trial court by written motion, answer, or other response shall not be considered as grounds for reversal. Tex.R. Civ. P. 166a(c); see *Via Net v. TIG Ins. Co.*, 211 S.W.3d 310, 313 (Tex.2006).

The party moving for traditional summary judgment must show 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); *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 216 (Tex.2003). A defendant must disprove at least one of the essential elements of the plaintiff's cause of action to prevail on summary judgment. *Elliott-Williams Co., Inc. v. Diaz*, 9 S.W.3d 801, 803 (Tex.1999); see *Science Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex.1997). Alternatively, a defendant may obtain summary judgment based on an affirmative defense by proving all the essential elements of the affirmative defense as a matter of law. *KPMG Peat Marwick v. Harrison County Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex.1999); *Leach v. Conoco, Inc.*, 892 S.W.2d 954, 959 (Tex.App.-Houston [1st Dist.] 1995, writ *dism'd w.o.j.*). “The nonmovant has no burden to respond to a summary judgment motion unless the movant conclusively establishes its cause of action or defense.” *M.D. Anderson Hosp. and Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex.2000). However, once the defendant produces sufficient evidence conclusively establishing his right to summary judgment, the burden of proof shifts to the plaintiff to present evidence sufficient to raise a fact issue. See *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex.1995) (citing “*Moore*” *Burger, Inc. v. Phillips Petroleum Co.*, 492 S.W.2d 934, 936-37 (Tex.1972)).

III. Statute of Frauds

In his second issue, Mushtaha argues that the trial court erred in concluding that the contract did not satisfy the statute of frauds.

Under the statute of frauds, a contract for the sale of real estate must be in writing and signed by the party charged with compliance with its terms or by someone lawfully authorized to sign for him. Tex. Bus. & Com.Code Ann. § 26.01(a), (b)(4) (Vernon 2009). Ordinarily, a real estate broker is only a special agent whose authority is “limited to showing the property and finding a purchaser.” *Loma Vista Dev. Co. v. Johnson*, 180 S.W.2d 922, 924 (Tex.1944); see *Joseph v. James*, No. 03-07-00197-CV, 2009 WL 3682608, at *3 (Tex.App.-Austin Nov. 6, 2009, no pet.) (mem.op.); *Placemaker, Inc. v. Greer*, 654 S.W.2d 830, 834-835 (Tex.App.-Tyler 1983, writ *dism'd*). Absent a special agreement conferring additional agency authority, a real estate broker cannot bind the owner or consummate a sale. *Loma Vista Dev. Co.*, 180 S.W.2d at 924; *Joseph*, 2009 WL 3683608, at *3; *Placemaker, Inc.*, 654 S.W.2d at 834-835.

Mushtaha contends that Fox had actual and apparent authority to sign on behalf of the Kidds and that her initials next to the particular terms of the proposed agreement were equivalent to a signature accepting the entire agreement on behalf of the Kidds. In his affidavit, Thornton Kidd asserts that he never directed Fox to sell the property without confirming his signature on the sales agreement, nor did he give Fox the authority to act on his behalf to sell the property without

his written signature on the sales contract. In her affidavit, Fox states that the Kidds never authorized her to accept Mushtaha's offer of \$190,000. In addition, Fox did not sign the contract; she merely initialed the change in price. This is not evidence that Fox was authorized to bind the Kidds to an agreement; it is evidence of the parties' negotiation and the price that the Kidds were willing to accept at that time.

Mushtaha relies on *Lebow v. Weiner*, 420 S.W.2d 755 (Tex.App.-Houston [14th Dist.] 1967, writ denied), to support his contention that there existed a signed writing that satisfied the statute of frauds. That case held that a real estate agent's signature was sufficient to support a finding of a signed writing. *Id.* at 757-58. However, in *Lebow*, the real estate agent signed the contract in the presence of the seller, which was a circumstance that supported the trial court's implied finding that indicated the seller intended thereby to enter into the contract. *Id.* As we have explained, Fox did not execute the proposed earnest money contract, and the Kidds did not perform any act that would demonstrate their intent to enter into a final contract with Mushtaha.

Because the proposed earnest money contract was not signed by the Kidds or someone lawfully authorized to sign for them, the proposed contract does not satisfy the statute of frauds. See Tex. Bus. & Com.Code Ann. § 26.01(a), (b)(4). We hold that the trial court properly granted summary judgment on this basis, and we overrule Mushtaha's second issue. In light of this disposition, we need not address Mushtaha's first or third issues, which relate to the question of whether a contract had been formed. See *Cincinnati Life Ins. Co.*, 927 S.W.2d at 626 (holding that “courts of appeals should consider all summary judgment grounds the trial court rules on and the movant preserves for appellate review that are necessary for final disposition of the appeal when reviewing a summary judgment”).

IV. Attorney's Fees

In his fourth issue, Mushtaha argues that the trial court erred in awarding attorney's fees to the Kidds because there was no evidence that Mushtaha's lawsuit was frivolous and because the Kidds' suit for declaratory judgment was improper.

Under the Declaratory Judgments Act, the trial court may award reasonable and necessary attorney's fees that are equitable and just. Tex. Civ. Prac. & Rem.Code § 37.009 (Vernon 2008). The Act “entrusts attorney fee awards to the trial court's sound discretion, subject to the requirements that any fees awarded be reasonable and necessary, which are matters of fact, and to the additional requirements that fees be equitable and just, which are matters of law.” *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex.1998). Therefore, we review a trial court's award of attorney's fees under the Act for an abuse of discretion. *Id.* A trial court abuses its discretion by ruling arbitrarily, unreasonably, or without regard to guiding legal principles or without supporting evidence. *Id.* We presume that the trial court acted within the bounds of discretion unless the record shows the contrary. *Beard v. Endeavor Natural Gas, L.P.*, No. 01-08-00180-CV, 2008 WL 5392026, at *8 (Tex.App.-Houston [1st Dist.] Dec. 19, 2008, pet. denied). In the context of the Act, “[u]nreasonable fees cannot be awarded, even if the court believed them just, but the court may conclude that it is not equitable or just to award even reasonable and necessary fees.” *Bocquet*, 972 S.W.2d at 21.

The Declaratory Judgments Act is not available to settle disputes already pending before a court. BHP Petroleum Co. v. Millard, 800 S.W.2d 838, 842 (Tex.1990) (orig.proceeding); Indian Beach Prop. Owners' Ass'n v. Linden, 222 S.W.3d 682, 701 (Tex.App.-Houston [1st Dist.] 2007, no pet.); see Sanchez v. AmeriCredit Fin. Servs., Inc., 308 S.W.3d 521, 524 (Tex.App.-Dallas 2010, no pet.) (“A counterclaim for declaratory judgment is improper if it is nothing more than a mere denial of the plaintiff’s claims and the counterclaim fails to have greater ramifications than the original suit.”). “For example, a counterclaim brought under the Declaratory Judgment Act presenting no new controversies but brought solely to pave an avenue to attorney’s fees is improper.” Warrantech Corp. v. Steadfast Ins. Co., 210 S.W.3d 760, 770 (Tex.App.-Fort Worth 2006, pet. denied). “[H]owever, a defensive declaratory judgment may present issues beyond those raised by the plaintiff.” Indian Beach Prop. Owners' Ass'n, 222 S.W.3d at 701. For example, a counterclaim that seeks affirmative relief may be the proper subject of a declaratory judgment. Id. at 702.

Here, Mushtaha sued for breach of contract and specific performance. The Kidds' declaratory judgment action was more than a mere denial of Mushtaha's claims because in addition to seeking a declaration that there was no contract to sell their property that satisfied the statute of frauds, the Kidds also sought cancellation of the lis pendens that Mushtaha placed on the property. Thus, the Kidds sought affirmative relief to clear title to their property. We conclude that the Kidds' defensive declaratory judgment action was not improper. See id.

The trial court awarded the Kidds \$9,833 in attorney's fees. This amount is supported by the affidavit of the Kidds' attorney. Mushtaha did not object to this summary-judgment evidence. Mushtaha has not shown that these fees were not reasonable, necessary, equitable, and just. See Beard, 2008 WL 5392026 at *8.

We overrule Mushtaha's third issue.

Conclusion

We affirm the judgment of the trial court.

Michael Massengale Justice