Tara Capital Partners I

2004 | Cited 0 times | Court of Appeals of Texas | May 20, 2004

AFFIRMED

MEMORANDUM OPINION

Tara Capital Partners I, L.P., Tara Venture Partners I, L.P., Norman E. Brinker, Individually and as Trustee of the Maureen Connolly Brinker Residuary Trust, and Mark Ukra appeal the take-nothing summary judgment rendered against them on their damages lawsuit against Deloitte & Touche, L.L.P. Because the facts of this case are well-known to the parties and all dispositive issues are clearly settled in law, we issue this memorandum opinion. For the reasons that follow, we affirm the trial court's judgment.

At the heart of this dispute is a series of stock purchases appellants made in an athletic footwear company called Just For Feet, Inc. Appellants assert they made their purchases on May 25, 1999 through September 28, 1999 based on Just For Feet's financial statements and quarterly reports that Deloitte either audited or reviewed. Appellants characterize themselves as "value investors." According to appellants, value investors examine audited financial statements, quarterly reports, press releases, shareholder letters, and analysts' reports with the aim of investing in companies that are trading at or below their tangible net worth. After Just For Feet filed for bankruptcy in early November 1999, appellants filed this lawsuit alleging Deloitte and Just For Feet were involved in a civil conspiracy to defraud investors and that they relied on fraudulent and/or negligent misrepresentations made in Deloitte's audits and reviews of Just For Feet's financial documents and communications their analyst had with Just For Feet executives. Deloitte moved for and was granted summary judgment on all of appellants' causes of action. Appellants timely filed this appeal.

In six issues, appellants complain the trial court erred in granting summary judgment on their claims for negligent misrepresentation, fraudulent misrepresentation, and civil conspiracy. Appellants also challenge the trial court's rulings on certain portions of their summary judgment evidence. We first review appellants' contentions that the trial court erred in sustaining several of Deloitte's objections to their summary judgment evidence. Appellants argue that certain paragraphs of their financial analyst Tara Schuchmann's affidavit were improperly excluded, that their expert reports and deposition excerpts from a Just for Feet executive were not hearsay, and that Deloitte waived its objections to the deposition excerpts of Deloitte's designated corporate representative.

Appellants' argument with respect to these evidentiary issues contains little or no analysis and cites no authority save for two evidence rules and one irrelevant case. There is no discussion about how the trial court's rulings on these issues caused rendition of an improper judgment. We conclude that appellants have waived these issues due to inadequate briefing. Tex. R. App. P. 38.1 (h).

Even absent waiver we do not agree that these issues present reversible error. The paragraphs excluded from Schuchmann's affidavit were observations and opinions requiring the witness's specialized knowledge of theories, facts, and data in her area of expertise such as defining "value investors" and their investment strategy, interpreting what Just For Feet's financials revealed, opining on what caused Just For Feet's stock to decline, and stating that Deloitte had to know analysts like her would report financial information to her clients. See Tex. R. Evid.702 (defining expert testimony). Because appellants never designated this witness as an expert, we cannot conclude the trial court abused its discretion in sustaining Deloitte's objections to the challenged paragraphs. See Tex. R. Civ. P. 193.6 (a) (a party who fails to timely identify a witness may not offer the testimony of that witness unless the trial court finds good cause or the failure will not unfairly prejudice or surprise the other parties).

With respect to the expert reports and deposition excerpt, appellants never contested Deloitte's hearsay objections in the trial court stating they "simply attached these items . . . as a backdrop to their response and [these items] do not bear on the elements on which Deloitte has moved [for summary judgment]." Finally, appellants contend Deloitte waived its objections to portions of its corporate representative's deposition testimony by failing to timely assert its lack of foundation objections.

Our review of the record indicates that even assuming these objections were untimely, the excluded items did not probably cause rendition of an improper judgment. See Tex. R. App. P. 44.1(a). The omitted deposition excerpts addressed Deloitte's general awareness of the existence of conference calls where financial information was discussed and the representative's denial that Deloitte was aware that certain statements made by Just for Feet's president were misleading. We find no merit to appellants' evidentiary complaints. We next turn to the merits of the trial court's summary judgment ruling.

Deloitte filed a traditional motion for summary judgment that encompassed all of appellants' causes of action. We review the trial court's granting of a motion for summary judgment de novo. See Dickey v. Club Corp. of Am., 12 S.W.3d 172, 175 (Tex. App.-Dallas 2000, pet. denied). In order to prevail on its traditional motion for summary judgment, Deloitte must meet its burden of showing no genuine issues of material fact exist and that it is entitled to judgment as a matter of law. See Nixon v. Mr. Prop. Mgmt. Co., 690 S.W.2d 546, 548-49 (Tex. 1985).

Negligent Misrepresentation

The supreme court has adopted section 552 of the Restatement (Second) of Torts which defines liability for negligent misrepresentation as follows: "One who, in the course of his . . . profession . . .

supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information." Restatement (Second) of Torts § 552(1) (1977). Liability under section 552 is limited to those providers of information who (1) either intend to supply the information to (or know the recipient of the information intends to supply the information to) a particular person or limited group, and (2) either intends the person or limited group to rely on the information (or knows the person or limited group intends to rely on the information) for a particular or substantially similar transaction. Restatement (Second) of Torts § 552(2) (1977); McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787, 794 (Tex. 1999).

The limited group restriction of section 552(2) prevents against unlimited liability and narrows the scope of liability to situations where the information supplier is aware of the third party and intends that the third party rely on the information. See McCamish, 991 S.W.2d at 793. While the Restatement's approach is less restrictive than others requiring strict or near privity between the accountant and the plaintiff, it does not permit recovery for every foreseeable user of its audited financial statements. See Scottish Heritable Trust v. Peat Marwick Main & Co., 81 F.3d 606, 612 (5th Cir. 1996).

Deloitte moved for summary judgment on appellants' negligent misrepresentation claim asserting, among other things, that the undisputed evidence conclusively established it did not intend to influence appellants' transactions with respect to Just For Feet stock and that appellants were not part of a limited group to which it owed a duty.

Appellants do not dispute that Deloitte had no knowledge of their specific identity or their contemplated purchases of Just For Feet stock. The evidence conclusively establishes that Deloitte issued its last audit report for Just for Feet on April 23, 1999, over month before appellants made their first Just For Feet stock purchase. The critical inquiry for purposes of our analysis is whether the summary judgment evidence conclusively established that appellants were not members of an identifiable limited group of which Deloitte was aware and intended to influence.

Appellants contend they are members of at least three distinct groups to whom Deloitte owed a duty and intended to influence. Appellants initially attempt to characterize themselves as a limited group of potential shareholders who utilized a value investment strategy. At the time Deloitte's last audit report was issued appellants were indistinguishable from any other potential open market buyers. See id. at 613. There is absolutely nothing in the record suggesting Deloitte intended or knew Just for Feet intended to utilize its work for the purpose of attracting investors like appellants. At best the record reflects Deloitte's general awareness that such value investors exist. To conclude appellants raised a fact issue on whether value investors comprise a limited group to which Deloitte owed a duty based on the facts before us would implicitly endorse a foreseeability approach to accountant liability for negligent misrepresentation that was specifically rejected by the Restatement.

Next, appellants assert their agent, Tara Schuchmann, was one of several investment analysts who participated in conference calls with Just For Feet management where financial information was discussed. The fact that appellants' agent was one among several analysts who participated in conference calls with Just for Feet executives where financial information was discussed is also insufficient to qualify appellants as members of a limited group. Again, aside from Deloitte's general knowledge that the company held such conference calls, there is nothing in the record to indicate that Deloitte intended to or had knowledge that Just for Feet intended to supply its work to appellants through such analysts. This general awareness, without more, is insufficient to create a fact issue as to whether appellants were members of a limited group to which Deloitte owed a duty. See id. at 614.

Finally, appellants contend that after their first purchase of Just For Feet stock, they became part of the limited group of existing shareholders to whom Deloitte owed a duty. Specifically, appellants argue Deloitte must have intended existing shareholders to rely on its representations in its audit report because it addressed its 1999 audit report to them and that report formed the basis of subsequent quarterly statements that Deloitte reviewed. Assuming without deciding that existing shareholders might constitute a limited group, we conclude that appellants are not entitled to a reversal on this basis. For purposes of an accountant's liability for negligent misrepresentation, the pivotal inquiry is the accountant's intent toward this limited group at the time the representation is made. See Compass Bank v. King Griffin & Adamson P.A., 2003 WL 22077721 (N.D.Tex. Sept. 05, 2003). In this case, Deloitte's last audit report was issued before appellants ever made their first stock purchase. Because appellants were not existing shareholders at the time the audit report was issued, they could not be part of the limited group of existing shareholders to which the audit was addressed. We conclude the trial court did not err in granting summary judgment on appellants' negligent misrepresentation claim.

Fraud

Appellants' fraud claim requires proof that (1) Deloitte made a material representation that was false; (2) knew the falsity of the representation or made the representation recklessly as a positive assertion without any knowledge of its truth; (3) intended to induce appellants to act on the representation; and (4) appellants actually and justifiably relied on the representation causing them injury. See Ernst & Young v. Pac. Mut. Life Ins. Co., 51 S.W.3d 573, 577 (Tex. 2001). Among other things, Deloitte claimed it was entitled to summary judgment on appellants' fraud claim because it did not intend to induce appellants to rely on any representation it may have made. Relying on section 531 of the Restatement, Deloitte argued the evidence showed that Deloitte did not possess any information that would lead a reasonable man to conclude that there was an "especial likelihood" that any alleged representation would reach and influence appellant's conduct. See Restatement (Second) of Torts § 531 comment d. In fact, Deloitte argued the evidence established that it had no specific knowledge of appellants' existence because its last audit report was issued before appellants purchased any stock. Deloitte further argued appellants' evidence that Deloitte was generally aware of value investors' reliance on financial statements and that corporate management holds conference calls with analysts to discuss financial information was insufficient to raise a fact issue on whether Deloitte intended to induce appellants' transactions.

Appellants agree that section 531 outlines the proper standard for determining Deloitte's liability on the intent element of their fraud cause of action. However, they assert the standard has been met because Deloitte's summary judgment motion did not specifically challenge any element of their conspiracy cause of action. Appellants argue that in light of Deloitte's failure to refute their conspiracy allegation, we must presume the existence of a conspiracy between Just for Feet and Deloitte. Once the Deloitte/Just For Feet conspiracy is presumed, appellants' argument continues, we must impute to Deloitte each fraud element proven with respect to Just For Feet. Specifically, appellants assert their summary judgment evidence that Just for Feet executives made misrepresentations to appellants' analyst/agent in conference calls and direct conversations to induce investments in the company combined with the unchallenged conspiracy allegation requires reversal of the trial court's summary judgment. This argument does not appear in appellants' summary judgment response. Because appellants did not expressly present this issue to the trial court in their written response to Deloitte's motion for summary judgment, we may not consider it on appeal. See Tex. R. Civ. P. 166a(c); City of Houston v. Clear Creek Basin Auth.,589 S.W.2d 671, 678 (Tex. 1979).

Even if we were to consider appellants' argument, we would not be persuaded that it would require reversal of the trial court's judgment. To support their position, appellants generally rely on case law holding that each conspirator is liable for the acts of the other once a common intent is established. See Akin v. Dahl, 661 S.W.2d 917, 921 (Tex. 1983). While this is a correct statement of conspiracy law, it does not follow from this proposition that Deloitte must negate both the elements of the conspiracy claim and the underlying fraud claim before it is entitled to summary judgment. In fact, a recent Texas Supreme Court case suggests the contrary. See Ernst & Young, 51 S.W.3d 573. In Ernst & Young, an investor alleged that it had purchased notes issued by Interfirst Corporation after it had merged with RepublicBank relying on an audit report confirming RepublicBank's financial strength. RepublicBank filed for bankruptcy shortly after the merger, and the investor sued the accounting firm for misrepresentations in the audit opinion asserting claims for fraud, conspiracy, and "aiding and abetting." The supreme court held that the accounting firm conclusively negated the intent element of the fraud claim by establishing it did not have reason to expect the investor would rely on the audit report when it bought the notes. Id. at 583. The court went on to state that even though the accounting firm did not specifically challenge the investor's conspiracy and "aiding and abetting" claims, it was also entitled to summary judgment on these claims because they were dependent on the fraud claim. Id.

Likewise, the record here demonstrates that Deloitte conclusively negated the intent element of appellants' fraud claim. Based upon the supreme court's ruling in Ernst & Young, we conclude that an unchallenged conspiracy allegation is insufficient to create a fact issue with respect to Deloitte's intent on appellant's fraud claim. The trial court correctly granted summary judgment on appellants' fraud claim.

Finally, in a footnote in the argument portion of their brief, appellants argue the summary judgment on their conspiracy claim should be reversed because the summary judgment on the underlying fraud was error. Having previously concluded the trial court did not err in granting summary judgment on the fraud claim, we need not reach this issue.

We affirm the trial court's judgment.

MOLLY FRANCIS JUSTICE