

**AFFIRMED AS MODIFIED and Opinion Filed June 19, 2020**



**In the  
Court of Appeals  
Fifth District of Texas at Dallas**

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**No. 05-18-01126-CV**

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**BRIGETTA D'OLIVIO, Appellant  
v.  
ERHARD HERMUS, Appellee**

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**On Appeal from the 68th Judicial District Court  
Dallas County, Texas  
Trial Court Cause No. DC-16-14449**

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**MEMORANDUM OPINION**

Before Justices Bridges, Molberg, and Carlyle  
Opinion by Justice Carlyle

Brigetta D'Olivio appeals from the trial court's summary judgment in favor of Erhard Hermus.<sup>1</sup> Because the legal issues are settled, we affirm as modified in this memorandum opinion. *See* TEX. R. APP. P. 47.4.

Hermus contracted to have his home renovated after a tornado damaged it in late 2015. The contract, entered "by and between Erhard Hermus . . . and Brigetta

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<sup>1</sup> We previously dismissed Brigetta Homes, LLC as a party to this appeal because, as with other legal entities, an LLC must be represented by a licensed attorney, and despite our warnings, the LLC never appeared with counsel. *See L'Arte De La Mode, Inc. v. Neiman Marcus Group*, 395 S.W.3d 291, 295 (Tex. App.—Dallas 2013, no pet.). We do not address any part of D'Olivio's issues seeking reversal for the LLC.

Homes, LLC,” states as relevant that “the individuals who have signed this Agreement have the actual legal power, right and authority to make this Agreement and bind each respective party.” The parties executed the agreement “by their duly authorized representatives”: Hermus for himself and “Brigetta D’Olivio for Brigetta Homes, LLC.” D’Olivio is Brigetta Homes’s sole owner, member, and manager.

After Brigetta Homes partially performed work on the contract, Hermus refused to pay a substantial portion of the amount invoiced, contending the work was shoddy and untimely. Brigetta Homes sued Hermus in November 2016, alleging claims for breach of contract, quantum meruit, and promissory estoppel. Hermus generally denied the claims and asserted affirmative defenses. He countersued Brigetta Homes in March 2017, alleging various common law and statutory claims.

After Brigetta Homes’s counsel withdrew in February 2018, the trial court sent a notice stating it would dismiss Brigetta Homes’s claims if counsel did not appear on its behalf by March 26. *See L’Arte De La Mode, Inc. v. Neiman Marcus Group*, 395 S.W.3d 291, 295 (Tex. App.—Dallas 2013, no pet.) (legal entities cannot appear in court without licensed representation). Counsel never again appeared on behalf of Brigetta Homes.

Instead, D’Olivio filed a pro se amended petition on March 26 adding herself as a party. She sought a constitutional lien for the work performed on Hermus’s property, as well as damages for breach of contract and fraudulent inducement. She later explained at a hearing that her intention was to substitute herself as a party for

Brigetta Homes, suggesting her “claims as an individual are the same issues and claims” as Brigetta Homes’s claims.

On April 13, D’Olivio filed a no-evidence motion for summary judgment on Hermus’s counterclaims and affirmative defenses. D’Olivio tried to set her motion for hearing on May 7. Although there is no reporter’s record of the scheduling conference, D’Olivio filed a verified statement admitting both that the trial court refused her request to set the motion for hearing on May 7 and that it set the hearing for June 4 over her objection.

Undeterred, D’Olivio filed a “Notice of Hearing” stating that her motion was set for hearing on May 7. The May 7 reporter’s record confirms the trial court did not hear the motion that day, though it heard other motions. That day, the trial court entered an order dismissing Brigetta Homes’s claims for want of prosecution.

On May 11, Hermus amended his answer, adding verified denials that (1) there was no contract between Hermus and D’Olivio individually; (2) D’Olivio executed the contract solely on behalf of Brigetta Homes; and (3) D’Olivio lacked both standing and capacity to assert claims for alleged harm to Brigetta Homes.

Hermus also moved for summary judgment on May 11, contending that D’Olivio’s new individual claims failed because she was not a party to the contract. Hermus attached an affidavit to his motion that included the contract and stated, among other things: (1) he “never entered into any contract with Brigetta D’Olivio in her individual capacity”; (2) he “never dealt with or spoke with Brigetta D’Olivio

other than in her capacity as a representative of Brigetta Homes, LLC”; (3) his “dealings and communications with Brigetta D’Olivio involved the work on [his] house that was the subject” of his contract with Brigetta Homes; and (4) all invoices he received for the work done on his house came from Brigetta Homes.

The trial court set Hermus’s motion for summary judgment for hearing on June 4. Hermus filed certificates of service stating he sent D’Olivio copies of his amended answer, motion for summary judgment, and notice of hearing, all by certified mail, on May 11. The record includes a return receipt showing D’Olivio signed for all three documents on May 25.

D’Olivio did not amend her motion to address Hermus’s verified denials, nor did she file a response to Hermus’s motion in advance of the June 4 hearing. Hermus responded to D’Olivio’s motion on May 29. D’Olivio did not appear at the June 4 hearing, and the trial court entered orders both denying her motion and granting Hermus’s. The trial court later entered a final order when it granted summary judgment for Hermus on his counterclaims against Brigetta Homes.

Proceeding pro se, D’Olivio contends on appeal that the trial court erred by denying her no-evidence motion for summary judgment and by granting Hermus’s traditional motion for summary judgment. We review de novo. *See Tarr v. Timberwood Park Owners Ass’n, Inc.*, 556 S.W.3d 274, 278 (Tex. 2018).

The trial court did not err by denying D’Olivio’s no-evidence motion for summary judgment. A party may move for summary judgment if, after adequate

time for discovery, there is “no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial.” TEX. R. CIV. P. 166a(i). A properly filed no-evidence motion shifts the burden to the nonmovant to present evidence raising an issue of material fact on each of the elements identified by the motion. *See Bever Props., L.L.C. v. Jerry Huffman Custom Builder, L.L.C.*, 355 S.W.3d 878, 887–88 (Tex. App.—Dallas 2011, no pet.).

D’Olivio argues the trial court erred by denying her motion because Hermus did not timely respond and failed to produce evidence raising an issue of fact on his counterclaims and affirmative defenses. Her timing argument is based on an incorrect assumption that she had unilaterally set her motion for hearing on May 7. In any event, the burden never shifted to Hermus to produce evidence because D’Olivio’s motion did not identify any claims or defenses on which she could move for summary judgment in an individual capacity. D’Olivio was not a party when Hermus filed his affirmative defenses and counterclaims against Brigetta Homes and never addressed Hermus’s May 11 verified denials as to her individual claims. The trial court did not err by denying D’Olivio’s motion for summary judgment.

The trial court also did not err by granting Hermus’s traditional summary judgment motion. To prevail on a traditional motion for summary judgment, the movant must show that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. *See Tarr*, 556 S.W.3d at 278; TEX. R. CIV. P. 166a(c). Standing is a prerequisite to subject-matter jurisdiction, which is essential to a

court's power to decide a case, and may be raised by a motion for summary judgment. *See Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 553–54 (Tex. 2000).

D'Olivio did not respond to Hermus's motion or provide evidence to support her claims. She complains on appeal that she did not receive the motion or notice of hearing. The law presumes a trial court hears a case only after proper notice to the parties, a presumption only overcome when appellant affirmatively shows lack of notice. *See Hanners v. State Bar of Tex.*, 860 S.W.2d 903, 908 (Tex. App.—Dallas 1993, writ dismissed). The record—including the certificate of service and the return receipt that D'Olivio signed on May 25—demonstrates D'Olivio received both the motion and the notice of hearing. *See id.*; *Mayfield v. N. Vill. Green I Homeowner's Ass'n, Inc.*, No. 01-12-00748-CV, 2014 WL 2538554, at \*4 (Tex. App.—Houston [1st Dist.] June 5, 2014, pet. denied) (mem. op.).

D'Olivio also complains the motion does not specify grounds for relief and that Hermus did not provide sufficient evidence to defeat her claims as a matter of law. Hermus's motion correctly stated D'Olivio could not enforce the contract in her individual capacity because the contract, which he attached to the motion along with his affidavit, unambiguously states it is by and between Hermus and Brigetta Homes. It says “the individuals who have signed this Agreement have the actual legal power, right and authority to make this Agreement and bind each respective party” and also “the parties hereto have caused this agreement to be executed by their duly

authorized representatives . . . Erhard Hermus[] and Brigetta D’Olivio for Brigetta Homes, LLC.”

Nothing in the contract gives D’Olivio an individual right to enforce it, and she points to no record evidence suggesting she acquired that right. Brigetta Homes owns all claims involved here. D’Olivio lacks privity, and thus standing, and cannot maintain her claims for breach of contract, *see OAIC Commercial Assets, L.L.C. v. Stonegate Vill., L.P.*, 234 S.W.3d 726, 738 (Tex. App.—Dallas 2007, pet. denied), fraudulent inducement, *see Zarnow v. Clinics of N. Tex.*, No. 2-06-418-CV, 2007 WL 2460360, at \*11 (Tex. App.—Fort Worth Aug. 31, 2007, no pet.) (mem. op.), or constitutional lien, *see Guniganti v. C & S Components Co., Ltd.*, 467 S.W.3d 661, 666 (Tex. App.—Houston [14th Dist.] 2015, no pet.). The trial court did not err by granting Hermus’s motion for summary judgment.

Because the trial court should have dismissed her claims for lack of standing rather than entering a take-nothing judgment on the merits, we modify the judgment to dismiss D’Olivio’s claims for lack of standing and affirm as modified. *See DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304 (Tex. 2008); TEX. R. APP. P. 43.2(b).

/Cory L. Carlyle/  
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CORY L. CARLYLE  
JUSTICE



**Court of Appeals  
Fifth District of Texas at Dallas**

**JUDGMENT**

BRIGETTA D'OLIVIO, Appellant

No. 05-18-01126-CV      V.

ERHARD HERMUS, Appellee

On Appeal from the 68th Judicial District Court, Dallas County, Texas Trial Court Cause No. DC-16-14449. Opinion delivered by Justice Carlyle. Justices Bridges and Molberg participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **MODIFIED** as follows:

The statement that "Plaintiff Brigetta D'Olivio individually, take nothing on the claims asserted against Defendant Erhard Hermus in Plaintiff/Counter-Defendant's First Amended Petition and First Amended Reply to Counterclaims as they have been previously dismissed by Order Granting Defendant's Motion for Summary Judgment Against Plaintiff Brigetta D'Olivio dated June 7, 2018" is removed and replaced with the following statement: "Plaintiff Brigetta D'Olivio's claims are dismissed for lack of standing."

It is **ORDERED** that, as modified, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee Erhard Hermus recover his costs of this appeal from appellant Brigetta D'Olivio.

Judgment entered this 19th day of June, 2020.