

Affirm in part, reverse in part; Opinion Filed June 23, 2020



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

No. 05-19-00496-CV

IE.COM, LTD., Appellant

V.

**DEBORAH PEELER, MIDSOUTH DESIGN GROUP, INC. AND
MIDSOUTH DIGITIZING, INC., Appellees**

**On Appeal from the 298th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-17-04342**

MEMORANDUM OPINION

Before Justices Myers, Whitehill, and Pedersen, III
Opinion by Justice Myers

IE.Com, Ltd. appeals the summary judgment in favor of Deborah Peeler, Midsouth Design Group, Inc., and Midsouth Digitizing, Inc. IE brings two issues on appeal contending the trial court erred by granting appellees' no-evidence motion for summary judgment because (a) the motion did not identify any element on which there was no evidence other than damages, (b) damages was not an element of IE's cause of action for declaratory judgment, and (c) IE presented some evidence of damages on its other causes of action. We reverse the trial

court's judgment as to IE's cause of action for declaratory judgment, and we otherwise affirm the trial court's judgment.

BACKGROUND

Before 2016, IE and the Midsouth entities had cooperated in the marketplace in providing online embroidery services. The web technology platform they used, including all the forms on the website, was designed and paid for by IE. At some point, the parties decided to end their business arrangements. To accomplish that end, Midsouth Digitizing purchased IE's shares in Midsouth Design Group.

Besides the sales agreement, the parties signed a Technology License Agreement in which IE granted the Midsouth entities a license to use the web technology platform for a fee of \$600 per month. The Midsouth entities also agreed "not to copy and/or distribute" the web technology platform nor "attempt to compile, reverse engineer, or otherwise attempt to use the [web technology platform] for the purpose of creating a functional duplicate of the software described herein." However, IE later learned that the Midsouth entities were using a web technology platform similar to IE's without having paid the license fees. The parties also signed a Non-Solicitation Agreement in which they agreed not to solicit each other's customers for three years.

The parties also disagreed about whether their contracts required IE to compile a customer database and deliver it to appellees and whether IE had to pay the cost of preparing the database.

IE brought suit against appellees, bringing causes of action for breach of contract, “fraud/fraudulent inducement,” and civil conspiracy concerning appellees’ copying or reverse engineering the web technology platform. IE also brought a cause of action for declaratory judgment concerning the customer database.

Appellees filed a no-evidence motion for summary judgment, which the trial court granted.

SUMMARY JUDGMENT

IE’s two issues contend the trial court erred by granting appellees’ no-evidence motion for summary judgment. Rule of Civil Procedure 166a(i) provides that a party “may move for summary judgment on the ground that 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). “The motion must state the elements as to which there is no evidence.” *Id.* The non-movant’s response to the motion for summary judgment “must specifically identify the supporting proof it seeks to have considered by the trial court and explain why it demonstrates a fact issue exists.” *Skrastina v. Breckinridge-Taylor Design, LLC*, No. 05-17-00796-CV, 2018 WL 3078689, at *4 (Tex. App.—Dallas June 20, 2018, no pet.) (mem. op.) (internal quotation marks omitted); *see also* TEX. R. CIV. P. 166a(i) cmt.—1997 (non-movant’s “response need only point out evidence that raises a fact issue on the challenged elements”).

We review a no-evidence summary judgment under the same legal sufficiency standard used to review a directed verdict. *See Flood v. Katz*, 294 S.W.3d 756, 762 (Tex. App.—Dallas 2009, pet. denied). Thus, we must determine whether the nonmovant produced more than a scintilla of probative evidence to raise a fact issue on the material questions presented. *See id.* at 762. When analyzing a no-evidence summary judgment, “we ‘examine the entire record in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts against the motion.’” *Sudan v. Sudan*, 199 S.W.3d 291, 292 (Tex. 2006) (quoting *City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex. 2005)). A no-evidence summary judgment is improperly granted if the nonmovant presented more than a scintilla of probative evidence to raise a genuine issue of material fact. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003). “More than a scintilla of evidence exists when the evidence ‘rises to a level that would enable reasonable, fair-minded persons to differ in their conclusions.’” *Id.* (quoting *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)). “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.” *Id.* (quoting *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983)).

DECLARATORY JUDGMENT

In its first issue, IE contends the trial court erred by granting appellees’ no-evidence motion for summary judgment on IE’s cause of action for declaratory

judgment because appellees did not identify any element of the cause of action that was lacking evidence. We agree.

IE pleaded this cause of action as follows:

A controversy has arisen between the parties related to their rights and duties associated with the parties' Stock Purchase Agreement. The plaintiff asks this Court to interpret this agreement and declare the rights and duties of the parties. Specifically, pursuant to Chapter 37 of the Texas Civil Practices and Remedies Code, the plaintiff asks this Court to declare whether or not the plaintiff must provide this [database] information to the defendant at the plaintiff's cost, or whether the defendant should pay the actual cost of making the data fit for transmission to the defendant.

IE's declaratory judgment cause of action is pursuant to section 37.004(a) of the Civil Practice and Remedies Code, which provides, as relevant here, "A person interested under a . . . written contract . . . may have determined any question of construction . . . arising under the . . . contract . . . and obtain a declaration of rights, status, or other legal relations thereunder." TEX. CIV. PRAC. & REM. CODE ANN. § 37.004(a). Thus, the elements of a cause of action under section 37.004(a) involving construction of a written contract are (1) a person (2) has an interest in (3) a contract, and (4) there exists a question of construction under the contract.¹

¹ Additionally, as the Texas Supreme Court has stated,

A declaratory judgment is appropriate only if [1] a justiciable controversy exists as to the rights and status of the parties and [2] the controversy will be resolved by the declaration sought. "To constitute a justiciable controversy, there must exist a real and substantial controversy involving genuine conflict of tangible interests and not merely a theoretical dispute."

Bonham State Bank v. Beadle, 907 S.W.2d 465, 467 (Tex. 1995) (citation omitted) (quoting *Bexar-Medina-Atascosa Counties Water Control & Improvement Dist. No. 1 v. Medina Lake Protection Ass'n*,

Appellees' motion for summary judgment concerning the declaratory judgment cause of action consists of these statements:

4. Plaintiff also seeks a declaratory judgment construing a contract to determine which party must bear the costs of preparing a customer database.

....

12. Plaintiff's request for a declaratory judgment should be summarily dismissed, as Plaintiff has no admissible evidence supporting its construction of the contract.

13. Further, Plaintiff has produced no evidence of damages, an element of proof necessary on all of its causes of action.

Thus, appellees' grounds for summary judgment of this cause of action are (1) no evidence to support IE's interpretation of the contract, and (2) no evidence of damages. Neither of these is an evidentiary element of IE's declaratory judgment cause of action.

When the cause of action seeks a declaratory judgment of the construction of a contract, the only evidence supporting a party's interpretation of the contract may be the contract itself. *See Piranha Partners v. Neuhoff*, 596 S.W.3d 740, 743–44 (Tex. 2020) (unambiguous contract construed as matter of law from contract's four corners). Appellees do not appear to be asserting there is no evidence of the

640 S.W.2d 778, 779–80 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.)). Appellees did not assert that either of these conditions was not met.

existence of a contract between the parties. Nor do appellees assert that the contract is ambiguous.

Damages are not an element of IE's declaratory judgment cause of action. The relief IE sought was a declaration of whether IE or appellees had to pay the cost of preparing the customer database. IE did not seek an award of damages for this cause of action. Nor are damages a necessary element under section 37.004(a). *See* CIV. PRAC. § 37.004(a).

We conclude appellees' motion for summary judgment on IE's cause of action for declaratory judgment was fundamentally defective because it did not specify an element of the cause of action for which there was no evidence. *See Jose Fuentes Co. v. Alfaro*, 418 S.W.3d 280, 283 (Tex. App.—Dallas 2013, pet. denied) (en banc) (no-evidence motion for summary judgment that fails to challenge specific elements of plaintiff's cause of action "is fundamentally defective and cannot support summary judgment as a matter of law"). Therefore, the trial court erred by granting appellees' motion for summary judgment on this cause of action. We sustain IE's first issue.

WEBSITE-COPYING CAUSES OF ACTION

In the second issue, IE contends the trial court erred by granting appellees' no-evidence motion for summary judgment on IE's causes of action for breach of contract, fraud/fraudulent inducement, and civil conspiracy alleging appellees' copied its web technology platform. We conclude the trial court did not err by

granting appellees' motion for summary judgment on these causes of action because IE's response to the motion for summary judgment failed to point out evidence of damages.

Appellees' grounds for summary judgment on these causes of action were: (1) IE had no evidence appellees' had copied the web technology platform, and (2) IE had no evidence of damages. "Injury" or "damages" are an element of these causes of action. *Anderson v. Durant*, 550 S.W.3d 605, 614 (Tex. 2018) (fraudulent inducement); *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 501 n.21 (Tex. 2018) (breach of contract); *JPMorgan Chase Bank, N.A. v. Orca Assets G.P., L.L.C.*, 546 S.W.3d 648, 653 (Tex. 2018) (fraud); *Tri v. J.T.T.*, 162 S.W.3d 552, 556 (Tex. 2005) (civil conspiracy).

IE's response to the motion for summary judgment contained no mention of damages. On appeal, IE argues the Technology License Agreement contains evidence of damages, namely, the \$600 per month that the Midsouth entities would have paid IE for use of the web technology platform. Even if that is some evidence of damages, IE should have pointed out that evidence to the trial court in its response to the motion for summary judgment. Although IE's response to the motion for summary judgment was relatively short, the trial court was not required to examine every page, find the Technology License Agreement and the \$600 per month payment provision, and discern that this provision constituted evidence of IE's damages, all without any guidance from IE. As this Court has stated:

The number of pages [in the response], however, is not dispositive. The issue is whether the trial court must search through all of the non-movant's evidence to determine if a fact issue exists without any guidance concerning what evidence creates an issue on a particular element. Under the Rules of Civil Procedure, the party seeking to avoid the effects of a well-pleaded no-evidence motion for summary judgment bears the burden to file a written response that raises issues preventing summary judgment, and that points to evidence supporting those issues. Where the nonmovant fails to meet that burden, the trial court is not required to supply the deficiency, but instead must grant the motion.

Chambers v. Allstate Ins. Co., No. 05-15-01076-CV, 2016 WL 3208710, at *12 (Tex. App.—Dallas June 9, 2016, pet. denied) (mem. op.) (quoting *Burns v. Canales*, No. 14-04-00786-CV, 2006 WL 461518, at *6 (Tex. App.—Houston [14th Dist.] Feb. 28, 2006, pet. denied) (mem. op.)); *see also Norris v. Tenet Houston Health Sys.*, No. 14-04-01029-CV, 2006 WL 1459958, at *10 (Tex. App.—Houston [14th Dist.] May 30, 2006, no pet.) (mem. op.) (“A trial court does not abuse its discretion when it does not consider summary judgment proof to which a movant does not specifically direct the trial court’s attention.”).

IE’s response to the motion for summary judgment made no mention of the damages element. Nor did it mention the \$600 per month payments for appellees’ use of the web technology platform. IE’s response to the motion for summary judgment did not meet the requirement of Rule 166a(i) of “point[ing] out evidence that raises a fact issue on the challenged elements.” TEX. R. CIV. P. 166a(i) cmt.—1997.

We conclude the trial court did not err by granting appellees' motion for summary judgment on IE's causes of action for breach of contract, fraud/fraudulent inducement, and civil conspiracy. We overrule IE's second issue.

CONCLUSION

We reverse the trial court's judgment as to IE's cause of action for declaratory judgment, and we affirm the trial court's judgment in all other respects. We remand the case to the trial court for further proceedings.

/Lana Myers/

LANA MYERS
JUSTICE

190496F.P05



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

JUDGMENT

IE.COM, LTD., Appellant

No. 05-19-00496-CV V.

DEBORAH PEELER, AND
MIDSOUTH DESIGN GROUP, INC.
AND MIDSOUTH DIGITIZING,
INC., Appellees

On Appeal from the 298th Judicial
District Court, Dallas County, Texas
Trial Court Cause No. DC-17-04342.
Opinion delivered by Justice Myers.
Justices Whitehill and Pedersen, III
participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED** in part and **REVERSED** in part. We **REVERSE** the trial court's judgment as to appellant IE.COM, LTD.'s cause of action for declaratory judgment. In all other respects, the trial court's judgment is **AFFIRMED**. We **REMAND** this cause to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment entered this 23rd day of June, 2020.