IN THE
TENTH COURT OF APPEALS

No. 10-17-00001-CV

LARRY JOE MOORE,

Appellant

v.

BEARKAT ENERGY PARTNERS, LLC, WILLIAM BRAMLETT, JASON B. LANE, AND JASON B. LANE ENERGY PARTNERS II, LLC,

Appellees

From the 87th District Court
Leon County, Texas
Trial Court No. NOT-12-250

MEMORANDUM OPINION

In four issues, appellant, Larry Joe Moore, challenges summary judgments granted in favor of appellees, Bearkat Energy Partners, LLC, William Bramlett, Jason B. Lane, and Jason B. Lane Energy Partners II, LLC.[1] Because we conclude that the contract at issue violates the statute of frauds, we affirm the final judgment of the trial court.

[1] We note that neither Bearkat Energy, nor Bramlett, have filed an appellee's brief in this matter.

I. BACKGROUND

Lane and his companies, Jason B. Lane Energy Partners, LLC, Jason B. Lane Energy Partners II, LLC, and Jason B. Lane Energy Partners III, LLC (collectively Lane), provide various oil and gas services and funding, including for "[l]ease acquisition, mineral buying, [and] drilling wells." Lane sought to acquire mineral leases in and around Leon County so that the leases could be packaged and sold to other buyers. To do so, Lane hired an independent landman, Bramlett, and his company, Bearkat Energy Partners, LLC, to acquire the mineral leases.

Lane alleged at trial that his relationship with Bramlett was simple. Bramlett acquired the mineral leases, Lane funded the leases, and when the leases were resold, Bramlett received a percentage of the profits as his compensation. Bramlett stated in his deposition that his agreement with Lane did not provide for any type of sharing of losses.

In any event, without telling Lane, Bramlett hired another landman, Moore, to assist in acquiring mineral leases. Moore testified in his deposition that Bramlett's agent, Doyce Cook, approached him about acquiring the mineral leases. Moore believed that he was sought out because he is a landman, and because he grew up in Leon County and "know[s] a lot of people there."

After meeting with Cook, Moore drafted a compensation agreement, had his attorney review the document, and gave the document to Cook. The agreement provided the following, in relevant part:

COMPENSATION AGREEMENT

> This Compensation Agreement ("Agreement") is made and entered into as of the 14th day of December, 2011 (the "Effective Date"), by and between BEARKAT ENERGY PARTNERS, LLC, WILLIAM W. BRAMLETT, DOYCE COOK, their heirs and assigns (the "Company") and JOE MOORE.
>
> The Company acknowledges JOE MOORE has contacts and relationships with prospective oil, gas and other mineral lessees that the Company does not have. Without the assistance of JOE MOORE[,] the Company would not have the ability to enter oil, gas and other mineral leases with these individuals.
>
> Therefore, due to the value of the contacts and relationships JOE MOORE has, the Company agrees to compensate JOE MOORE for his assistance with securing oil, gas and other mineral leases in Leon County, Texas.
>
> JOE MOORE shall be paid $600.00 per mineral acre for each and every lease the Company enters with his assistance or the said lease agreements shall be null and void.
>
> JOE MOORE's payment shall be deposited by wire transfer, to the bank account he directs, within 15 business days of the date the lessees sign said oil, gas and other mineral leases or the said oil, gas and other mineral lease agreement shall be null and void.

(Emphasis in original.) The agreement was signed by Moore, Cook, and Bramlett, in his representative capacity for Bearkat Energy and in his individual capacity. Lane and his companies were not mentioned in the agreement and, perhaps more importantly, did not sign the agreement.

In his live pleading, Moore alleged that despite his performance under the agreement, which resulted in the conveyance of numerous mineral leases to appellees, appellees refused to pay him anything. Moore further asserted that because of his efforts

and contacts, "Defendants obtained mineral leases from Leon County landowners and turned a significant profit by selling those leases to a third party." Because he was not compensated for his efforts, Moore asserted claims against appellees for breach of contract, quantum meruit, fraud, statutory fraud, conspiracy, unjust enrichment, and vicarious liability. With regard to the Lane parties, Moore argued that Bramlett served as their agent and that they effectively ratified the compensation agreement when numerous mineral leases were conveyed to appellees. Moore sought actual damages in excess of $1 million and exemplary damages of $10 million.

In response, the Lane parties filed traditional and no-evidence motions for summary judgment. Bramlett and Bearkat Energy also filed a motion for summary judgment. After a hearing, the trial court signed an order granting summary judgment for the Lane parties, stating that:

1. The Compensation Agreement executed by the Plaintiff Larry Joe Moore and Defendants Bramlett and Bearkat on December 14, 2011, is too vague and ambiguous to be enforceable.

2. Further, even if the agreement were not too vague and ambiguous to be enforceable, the Texas Statute of Frauds precludes its enforcement, and

3. Even if the agreement were enforceable, the court notes that the Lane Defendants were not parties to the agreement and finds that they are not liable under the agreement or for acts of Bramlett or Bearkat under the theories of partnership, agency or ratification espoused by the Plaintiff.

This order did not mention Bramlett or Bearkat's summary-judgment motions.

In a subsequent order, the trial court granted, among other things, Bramlett and Bearkat's summary-judgment motions. The trial court also ordered that Moore take nothing on each of his claims against appellees, that Moore's claims be dismissed with prejudice, and that appellees recover court costs from Moore. Moreover, the trial court noted that this judgment is final, disposes of all parties and claims, and is appealable. Moore filed a motion for new trial, which was overruled by operation of law. *See* TEX. R. CIV. P. 329b(c). This appeal followed.

II. STANDARD OF REVIEW

Different standards of review apply to summary judgments granted on no-evidence and traditional grounds. *See* TEX. R. CIV. P. 166a(c), (i). A no-evidence summary judgment is equivalent to a pre-trial directed verdict, and we apply the same legal sufficiency standard on review. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006). Once an appropriate no-evidence motion for summary judgment is filed, the non-movant must produce summary judgment evidence raising a genuine issue of material fact to defeat the summary judgment. *See* TEX. R. CIV. P. 166a(i). "A genuine issue of material fact exists if more than a scintilla of evidence establishing the existence of the challenged element is produced." *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004). We do not consider any evidence presented by the movant unless it creates a fact question. *Binur v. Jacobo*, 135 S.W.3d 646, 651 (Tex. 2004).

More than a scintilla of evidence exists if the evidence would enable reasonable and fair-minded jurors to differ in their conclusions. *Hamilton v. Wilson*, 249 S.W.3d 425, 426 (Tex. 2008) (per curiam); *see Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10 25 (Tex. 1994). Evidence that is "so weak as to do no more than create a mere surmise or suspicion of fact" is no evidence and, thus, does not create a fact issue. *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983); *see Ortega v. City Nat'l Bank*, 97 S.W.3d 765, 772 (Tex. App.—Corpus Christi 2003, no pet.) (op. on reh'g). In determining whether the non-movant has met his burden, we review the evidence in the light most favorable to the non-movant, crediting such evidence if reasonable jurors could and disregarding contrary evidence unless reasonable jurors could not. *Tamez*, 206 S.W.3d at 582; *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005).

In contrast, we review the trial court's grant of a traditional motion for summary judgment de novo. *See Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). When reviewing a traditional motion for summary judgment, we must determine whether the movant met its burden to establish that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. *See* TEX. R. CIV. P. 166a(c); *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002). The movant bears the burden of proof in a traditional motion for summary judgment, and all doubts about the existence of a genuine issue of material fact are resolved against the movant. *See Grant*, 73 S.W.3d at 215. We take as true all evidence favorable to the non-movant, and we

indulge every reasonable inference and resolve any doubts in the non-movant's favor. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). We will affirm a traditional summary judgment only if the record establishes that the movant has conclusively proved its defense as a matter of law or if the movant has negated at least one essential element of the plaintiff's cause of action. *IHS Cedars Treatment Ctr. of DeSoto, Tex., Inc. v. Mason*, 143 S.W.3d 794, 798 (Tex. 2004); *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997).

III. STATUTE OF FRAUDS

In his first issue, Moore contends that the statute of frauds does not bar his claims because he established several exceptions to appellees' statute-of-frauds defense, including partial performance, full performance, and unjust enrichment/constructive trust. Moore also argues that when read together with the leases, the compensation agreement satisfies the statute of frauds.

Under the statute of frauds, "certain promises and agreements are unenforceable unless they are in writing and signed by the person sought to be charged." *Case Corp. v. Hi-Class Bus. Sys. of Am., Inc.*, 184 S.W.3d 760, 777 (Tex. App.—Dallas 2005, pet. denied); *see* TEX. BUS. & COM. CODE ANN. § 26.01(a) (West 2015). Moreover, the "statute of frauds requires that a memorandum of an agreement . . . must be complete within itself in every material detail and contain all of the essential elements of the agreement so that the contract can be ascertained from the writings without resorting to oral testimony."

Sterrett v. Jacobs, 118 S.W.3d 877, 879-80 (Tex. App.—Texarkana 2003, pet. denied). And whether the writings are sufficient to satisfy the statute of frauds is a question of law that we review de novo. *Dynegy, Inc. v. Yates*, 422 S.W.3d 638, 642 (Tex. 2013); *see Petrohawk Props., L.P. v. Jones*, 455 S.W.3d 753, 764 (Tex. App.—Texarkana 2015, pet. denied).

Section 26.01(a)(7)(D) of the Business and Commerce Code provides that the statute of frauds applies to "a promise or agreement to pay a commission for the sale or purchase of . . . a mineral interest." TEX. BUS. & COM. CODE ANN. § 26.01(a)(7)(D). Here, by virtue of his compensation agreement, Moore sought commissions for the sale of mineral interests by appellees to third parties. Therefore, as a matter of law, we conclude that the statute of frauds applies to Moore's compensation agreement. *See id.*; *see also Yates*, 422 S.W.3d at 642; *Jones*, 455 S.W.3d at 764; *Sterrett*, 118 S.W.3d at 879-80.

The statute of frauds requires that the writing furnish the data to identify the property with reasonable certainty. *See Tex. Builders v. Keller*, 928 S.W.2d 479, 481 (Tex. 1996) (citing *Morrow v. Shotwell*, 477 S.W.2d 538, 539 (Tex. 1972)); *see Long Trusts v. Griffin*, 222 S.W.3d 412, 416 (Tex. 2007). More specifically, the Texas Supreme Court stated the following test for sufficiency-of-property descriptions:

> The rule by which to test the sufficiency of the description is so well settled at this point in our judicial history, and by such a long series of decisions by this court, as almost to compel repetition by rote: To be sufficient, the writing must furnish within itself, or by reference to some other existing writing, the means or data by which the land to be conveyed may be identified with reasonable certainty.

Morrow, 477 S.W.2d at 539; *see Swinehart v. Stubbeman, McRae, Sealy, Laughlin, & Browder, Inc.*, 48 S.W.3d 865, 878 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (concluding that subsequent lease documents that were not in existence at the time of the contract did not satisfy the property-description requirement of the statute of frauds).

And while the sufficiency of the writing under the statute of frauds is a question of law, "[i]f enough appears in the description so that a person familiar with the area can locate the premises with reasonable certainty, it is sufficient to satisfy the statute of frauds." *Apex Fin. Corp. v. Garza*, 155 S.W.3d 230, 237 (Tex. App.—Dallas 2004, pet. denied) (citing *Gates v. Asher*, 154 Tex. 538, 280 S.W.2d 247, 248-49 (1955)). "Extrinsic evidence may be used only for the purpose of identifying the [property] with reasonable certainty from the data contained in the contract, not for the purpose of supplying the location or description of the [property]." *Griffin*, 222 S.W.3d at 416 (internal citations & quotations omitted). A description's validity under the statute is not affected by the knowledge or intent of the parties. *See Morrow*, 477 S.W.2d at 540.

A writing need not contain a metes and bounds property description to be enforceable, but it must furnish data to identify the property with reasonable certainty. *Tex. Builders*, 928 S.W.2d at 481 (citing *Morrow*, 477 S.W.2d at 539). "The legal description in the conveyance must not only furnish enough information to locate the general area as in identifying it by tract survey and county, it need contain information regarding the

size, shape, and boundaries." *Reiland v. Patrick Thomas Props., Inc.*, 213 S.W.3d 431, 437 (Tex. App.—Houston [1st Dist.] 2006, pet. denied).

Here, the compensation agreement does not contain within itself, or by reference to some other identified writing then in existence, a sufficient description of the properties Moore believes he should be compensated for based on his efforts in the leasing process. Rather, the compensation agreement merely refers to "oil, gas and other mineral leases in Leon County, Texas." The compensation agreement does not provide any information regarding the size, shape, or boundaries of the land subject to the leases for which Moore was to be compensated. *See Reiland*, 213 S.W.3d at 437. We do not believe that this language sufficiently describes the property in question such that a person familiar with the area could locate the premises that are the subject of the compensation agreement with reasonable certainty. *See Morrow*, 477 S.W.2d at 539; *Reiland*, 213 S.W.3d at 437; *Apex Fin. Corp.*, 155 S.W.3d at 237; *Swinehart*, 48 S.W.3d at 878.

And to the extent that Moore directs us to various lease documents to provide a sufficient property description, we note that Texas courts have held that parol evidence cannot be used to supply the "essential elements" of the contract and that lease documents that were not in existence at the time the contract was executed do not satisfy the statute of frauds. *See Morrow*, 477 S.W.2d at 539; *Wilson v. Fisher*, 144 Tex. 53, 188 S.W.2d 150, 152 (1945); *Swinehart*, 48 S.W.3d at 878; *see also Ardmore, Inc. v. Rex Group, Inc.*, 377 S.W.3d 45, 56-57 (Tex. App.—Houston [1st Dist.] 2012, pet. denied). Therefore, based

on the foregoing, we conclude that Moore cannot use the subsequently-executed lease documents to bring the compensation agreement into compliance with the property-description requirement of the statute of frauds. *See Morrow*, 477 S.W.2d at 539; *Reiland*, 213 S.W.3d at 437; *Apex Fin. Corp.*, 155 S.W.3d at 237; *Swinehart*, 48 S.W.3d at 878.

And because we have concluded that Moore's compensation agreement did not sufficiently describe the leases subject to the agreement, we hold that the agreement is void and unenforceable under the statute of frauds as to all of Moore's claims against all parties. *See Ardmore, Inc.*, 377 S.W.3d at 57 (citing *Nguyen v. Yovan*, 317 S.W.3d 261, 267 (Tex. App.—Houston [1st Dist.] 2009, pet. denied)); *see also Quigley v. Bennett*, 227 S.W.3d 51, 54 (Tex. 2007) (rejecting a quantum-meruit claim when an agreement was deemed in violation of the statute of frauds and, thus, unenforceable); *Haase v. Glazner*, 62 S.W.3d 795, 798-99 (noting that when an agreement violates the statute of frauds and is unenforceable, allowing recovery for benefit-of-the-bargain damages would deprive the statute of any effect).[2]

[2] Here, Moore asserted fraud, unjust-enrichment, and conspiracy claims to recover benefit-of-the-bargain damages under the compensation agreement. In addition to the case law mentioned above barring the recovery of benefit-of-the-bargain damages under an agreement that violates the statute of frauds, we also emphasize that neither conspiracy nor unjust enrichment are separate, independent causes of action. *See Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996) ("Civil conspiracy . . . might be called a derivative tort. That is, a defendant's liability for conspiracy depends on participation in some underlying tort for which the plaintiff seeks to hold at least one of the named defendants liable. As a result, we do not analyze the trial court's refusal to dismiss plaintiffs' causes of action for conspiracy separately from its refusal to dismiss their other causes of action." (internal citations omitted)); *see also Richardson Hosp. Auth. v. Duru*, 387 S.W.3d 109, 114 (Tex. App.—Dallas 2012, no pet.) ("This Court has held that unjust enrichment is not an independent cause of action. . . . The unjust enrichment doctrine applies principles of restitution to disputes in which no actual contract exists." (internal citations omitted)).

IV. EXCEPTIONS TO THE STATUTE OF FRAUDS

However, despite the foregoing, Moore argues that several exceptions to the statute of frauds apply—namely, the partial-performance, full-performance, and unjust enrichment/constructive trust exceptions. Once appellees met their burden of establishing the statute of frauds applies to the compensation agreement, the burden shifted to Moore to establish the existence of an exception to the statute of frauds. *Yates*, 422 S.W.3d at 641. The question of whether an exception to the statute of frauds applies is generally a question of fact. *See Adams v. Petrade Int'l, Inc.*, 754 S.W.2d 696, 705 (Tex. App.—Houston [1st Dist.] 1988, writ denied).

A. The Partial-Performance Exception

Under the partial-performance exception to the statute of frauds, contracts that have been partly performed, but do not meet the requirements of the statute of frauds, may be enforced in equity if denial of enforcement would amount to a virtual fraud. *Exxon Corp. v. Breezevale Ltd.*, 82 S.W.3d 429, 439 (Tex. App.—Dallas 2002, pet. denied). "The fraud arises when there is strong evidence establishing the existence of an agreement and its terms, the party acting in reliance on the contract has suffered a substantial detriment for which he has no adequate remedy, and the other party, if permitted to plead the statute, would reap an unearned benefit." *Id.* at 439.

The partial performance must be unequivocally referable to the agreement and corroborative of the fact that a contract actually was made. *Id.*; *see Holloway v. Dekkers*,

380 S.W.3d 315, 324 (Tex. App.—Dallas 2012, no pet.). The performance a party relies on to remove a parol agreement from the statute of frauds "must be such as could have been done with no other design than to fulfill the particular agreement sought to be enforced." *Breezevale Ltd.*, 82 S.W.3d at 439-40. Without such precision, the acts of performance do not tend to prove the existence of the parol agreement sought to be enforced. *Id.* at 440.

Here, obtaining the leases was not unequivocally referable to the compensation agreement. The summary-judgment record shows that Moore claimed that he is an experienced landman who had contacts in the area before the agreement. However, Bramlett testified in his deposition that the compensation agreement was to be limited to "one particular lease" that "[w]e never bought." Additionally, Bramlett noted that he was using other landmen in the area to obtain leases and that the properties leased were not subject to Moore's compensation agreement. Rather, according to Bramlett, the leases obtained and ultimately sold were not leases from Moore but from third parties for reasons other than to fulfill any obligations under the compensation agreement. And though the compensation agreement purported to void the leases if Moore was not paid, his name was not on any of the leases, nor was the compensation agreement referred to in any of the leases. Accordingly, we cannot say that the acts of the parties were "unequivocally referable" to the compensation agreement. *See id.* at 439; *see also Nat'l Prop. Holdings, L.P. v. Westergren*, 453 S.W.3d 419, 426-27 (Tex. 2015) ("In other words, the purpose of the alleged acts of performance must be to fulfill a specific agreement. If the

evidence establishes that the party who performed the act that is alleged to be partial performance could have done so for some reason other than to fulfill obligations under the oral contract, the exception is unavailable."). In other words, "[t]here is nothing in the nature of these acts which suggests the existence of a contract." *Francis v. Thomas*, 129 Tex. 579, 106 S.W.2d 257, 260 (1937) ("The sale of oil leases to one party does not suggest the existence of a prior oral contract with another party to convey royalty interest in consideration therefor.").

And finally, we note the prevailing public policy regarding the partial-performance exception as applied to agreements pertaining to commissions:

> "From its very nature a claim for commission cannot be made until earned. The sale is made, or the agent procures the purchaser ready and able to buy, and not until then does the right to the commission accrue. It accrues by virtue of a contract express or implied. But the statute says that no such contract shall be valid unless in writing. To hold that performance takes a claim of this character out of operation of the statute would, in our opinion, leave nothing for the statute to operate on."
>
> We reached the same conclusion more recently in *Boyert v. Tauber*, 834 S.W.2d 60 (Tex. 1992). There, a broker sued to recover a commission on a written agreement that did not identify the broker with the specificity section 20(b) requires. We held that the doctrine of partial performance would not render the agreement enforceable. *Id.* at 63-64. To hold otherwise would be in direct opposition to the expressed will of the Legislature and would unduly expose the public to fraudulent claims for commissions. *Id.* at 64.

Trammel Crow Co No. 60 v. Harkinson, 944 S.W.2d 631, 636 (Tex. 1997) (quoting *Landis v. W.H. Fuqua, Inc.*, 159 S.W.2d 228, 231 (Tex. Civ. App.—Amarillo 1942, writ ref'd)). As

was the case in *Harkinson*, Moore's compensation agreement does not provide the required specificity to meet the statute of frauds or the partial-performance exception to the statute of frauds. *See id.* To conclude otherwise would be in direct opposition to the expressed will of the Legislature and could unduly expose the public to fraudulent claims for commissions. *See id.*

B. The Full-Performance Exception

The full-performance exception to the statute of frauds provides that when one party fully performs a contract, the statute of frauds is unavailable to the other who knowingly accepts the benefits and partly performs. *See McElwee v. Estate of Joham*, 15 S.W.3d 557, 559 (Tex. App.—Waco 2000, no pet.); *see also Stripe-a-Zone, Inc. v. M.J. Scotch Family Ltd. P'ship*, No. 02-16-00130-CV, 2017 Tex. App. LEXIS 3281, at *17 (Tex. App.—Fort Worth Apr. 13, 2017, no pet.) (mem. op.); *Davis v. Insurtek, Inc.*, No. 05-09-01029-CV, 2010 Tex. App. LEXIS 10292, at **10-13 (Tex. App.—Dallas Dec. 30, 2010, no pet.) (mem. op.).

> Although full performance and partial performance are considered to be distinct exceptions to the statute of frauds, Texas courts have used the terms interchangeably, particularly when one party has fully performed and the other has only partly performed. 'There is a fundamental difference in the principle involved, however, in that part performance is ordinarily regarded as a strictly equitable doctrine, available in equity courts only, whereas complete performance by one party is frequently regarded as taking the contract out of the statute, even in an action at law.'

Davis, 2010 Tex. App. LEXIS 10292, at *11 n.3 (quoting 41 TEX. JUR. 3d *Statute of Frauds* § 115 (2007)).

Here, appellees' duties under the compensation agreement were to pay Moore $600 per mineral acre for each and every lease the Company entered with his assistance within fifteen days after the leases were executed. However, Moore argues that appellees have not paid him under the compensation agreement. Moore's contention demonstrates that appellees allegedly have not performed at all under the compensation agreement. But, Moore claims that he has fully performed.

We also note that the evidence does not establish that appellees knowingly accepted benefits from Moore. Indeed, as mentioned above, Bramlett's deposition testimony indicated that Bramlett and Moore's purported agreement was limited to one lease that was not bought; the leases sold in this case were not subject to Moore's compensation agreement. Because appellees have not compensated Moore at all and, thus, have not partly performed under the compensation agreement, and because the evidence does not establish that appellees knowingly accepted benefits from Moore, we cannot say that the full-performance exception applies in this case.

C. The Unjust Enrichment/Constructive Trust Exception

With regard to this exception, Moore asserts that a fact issue exists as to whether appellees committed a fraud. Moore argues that appellees "were unjustly enriched when they made millions by selling the leases that they obtained only by virtue of Moore's work under the Contract."

"A constructive trust is an equitable remedy created by the courts to prevent unjust enrichment." *Swinehart*, 48 S.W.3d at 878 (internal citations omitted). "The imposition of a constructive trust may be based on a fiduciary or confidential relationship or when there has been actual fraud." *Id.* (internal citations omitted). The theory underlying the remedy of constructive trust is the equitable notion that the "acquisition or retention of the property is wrongful and that [the possessor of the property] would be unjustly enriched if [the possessor] were permitted to retain the property." *KCM Fin. LLC v. Bradshaw*, 457 S.W.3d 70, 88 (Tex. 2015) (quoting *Baker Botts, L.L.P. v. Cailloux*, 224 S.W.3d 723, 736 (Tex. App.—San Antonio 2007, pet. denied)). "[T]he Statute of Frauds is not a bar to the creation of a constructive trust arising from an abuse of a confidential or fiduciary relationship in the context of a parol transaction." *Procom Energy, L.L.A. v. Roach*, 16 S.W.3d 377, 381 (Tex. App.—Tyler 2000, pet. denied).

To obtain a constructive trust, the proponent must prove: "(1) breach of a special trust or fiduciary relationship or actual or constructive fraud; (2) unjust enrichment of the wrongdoer; and (3) an identifiable res that can be traced back to the original property." *KCM Fin. LLC*, 457 S.W.3d at 87. There are two type of fiduciary relationships—one formal and the other informal. *Swinehart*, 48 S.W.3d at 878-79. The formal fiduciary relationship, which arises as a matter of law, includes relationships between attorney and client, principal and agent, partners, and joint venturers. *Id.* at 878-79 (internal citations omitted). The informal fiduciary relationship may arise from "a moral, social, domestic

or purely personal relationship of trust and confidence, generally called a confidential relationship." *Id.* at 879 (quoting *Associated Indem. Corp. v. CAT Contracting, Inc.*, 964 S.W.2d 276, 287 (Tex. 1998)). A confidential relationship exists in cases where influence has been acquired and abused, in which confidence has been reposed and betrayed. *Id.* (internal citations & quotations omitted).

However, despite the foregoing, the Texas Supreme Court has stated that this exception "'must be used with caution, especially whereas here proof of the wrongful act rests in parol, in order that it may not defeat the purposes of the statute of wills, the statute of descent and distribution, or the statute of frauds.'" *Rankin v. Naftalis*, 557 S.W.2d 940, 944 (Tex. 1977) (quoting *Pope v. Garrett*, 147 Tex. 18, 211 S.W.2d 559, 562 (1948)). Furthermore, ordinary contract relationships provide no basis for the application of this exception. *See id.* ("Subjective trust, cordiality and the trust which prevails between businessmen which is the foundation of ordinary contract law, affords no basis for the imposition of an oral trust that thwarts the Statute of Frauds."); *see also Consol. Gas & Equip. Co. of Am. v. Thompson*, 405 S.W.2d 333, 336 (Tex. 1966) ("[T]he fact that one businessman trusts another, and relies upon his promise to carry out a contract, does not create a constructive trust. To hold otherwise would render the Statute of Frauds meaningless."). Accordingly, there must be "'strict proof of a prior confidential relationship and unfair conduct or unjust enrichment on the part of the wrongdoer.'" *Ginther v. Taub*, 675 S.W.2d 724, 725 (Tex. 1984) (quoting *Rankin*, 557 S.W.2d at 944).

Here, it is undisputed that no prior fiduciary or confidential relationship existed between Moore and appellees.[3] *See Thompson*, 405 S.W.2d at 336 ("[F]or a constructive trust to arise there must be a fiduciary relationship before, and apart from, the agreement made the basis of the suit."). Specifically as to Lane, Moore admitted that he never had met, spoken to, or otherwise interacted with Lane. Moore also acknowledged that he was unaware of any false representations or promises made by Lane. Moreover, Moore cannot establish his claim for fraud because the compensation agreement upon which he

[3] We are not persuaded by Moore's reliance on *In re Estate of Whipple*. *See generally* No. 04-11-00645-CV, 2013 Tex. App. LEXIS 4754 (Tex. App.—San Antonio Apr. 17, 2013, pet. denied) (mem. op.). The San Antonio Court of Appeals reversed a summary judgment based in part on evidence raising a fact issue on the existence of a prior confidential relationship between siblings. *See id.* at **13-14. Specifically, the court noted:

> As evidence of the fiduciary relationship between Phyllis and her brother Raymond, Richard points to the July 31, 2000 e-mail which provides, in part: "I don't know if you've been talking to your Mom or Chris about [Phyllis's] situation. She's had a couple of 'mini-strokes' and whereas she was having a hard time getting around for the last couple of years, she can't really walk by herself at all now. For a long time Raymond has been taking care of her but it looks like she needs to be in a nursing home to get the special care that will help her.
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> We agree that this evidence raises a fact issue as to whether a confidential relationship existed between Phyllis and Raymond. The record shows that Phyllis was elderly and immobile and in need of living assistance when John and Raymond made arrangements to transfer her assets. As to the second and third elements necessary to impose a constructive trust, Richard provided some evidence that Raymond was unjustly enriched by keeping the Rockport property instead of transferring it to Christian as promised. Because Richard has provided some evidence of each element of a constructive trust, we hold that a genuine issue of fact exists as to whether Phyllis was entitled to the imposition of a constructive trust. We therefore conclude that John failed to show he was entitled to summary judgment on Richard's fiduciary-duty-based claims based on the statute of frauds.

Id. at **13-14 (internal citations omitted). As noted above, there is no evidence in this record of a prior fiduciary or confidential relationship between Moore and appellees such that a constructive trust should be imposed.

relies violates the Statute of Frauds and, thus, was unenforceable. Furthermore, as we have noted above, the Texas Supreme Court has held that a fraud claim for benefit-of-the-bargain damages cannot be the basis for avoiding the application of the statute of frauds. *See Haase*, 62 S.W.3d at 798-99. Therefore, based on the foregoing, we cannot conclude that this exception applies in this case.

V. SUMMARY

Because we have concluded that the statute of frauds applies to the compensation agreement at issue, that the compensation agreement violates the statute of frauds, and that Moore did not establish a material fact issue as to any exception to the statute of frauds, we conclude that the trial court did not err in granting summary judgment in favor of appellees. *See* TEX. R. CIV. P. 166a(i); *see also Tamez*, 206 S.W.3d at 582. As such, we overrule Moore's first issue.

Additionally, we need not address his remaining issues because Moore's agency arguments are immaterial given that the compensation agreement is unenforceable, and because Moore's request for benefit-of-the-bargain damages are not recoverable under his remaining theories. *See* TEX. R. APP. P. 47.1; *see also Haase*, 62 S.W.3d at 798-99.

VI. CONCLUSION

We affirm the final judgment of the trial court.

AL SCOGGINS
Justice

Before Justice Davis,
Justice Scoggins, and
Judge Walton[4]
Affirmed
Opinion delivered and filed January 31, 2018
[CV06]

[4] Hon. Ralph H. Walton, Jr., Judge of the 355th District Court of Hood County, sitting by assignment of the Chief Justice of the Texas Supreme Court pursuant to section 74.003(h) of the Government Code. *See* TEX. GOV'T CODE ANN. § 74.003(h) (West 2013).