Affirmed and Memorandum Opinion filed August 17, 2023.

In The

Fourteenth Court of Appeals

NO. 14-22-00462-CV

JOHNNIE R. SANDLES, Appellant

V.

FIDELITY NATIONAL FINANCIAL, INC. D/B/A/ FIDELITY NATIONAL TITLE INSURANCE CO., Appellee

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On Appeal from the 190th District Court
Harris County, Texas
Trial Court Cause No. 2021-26219

MEMORANDUM OPINION

Appellant Johnnie R. Sandles ("Sandles") appeals the trial court's order granting the Rule 91a motion to dismiss filed by appellee Fidelity National Financial, Inc. d/b/a Fidelity National Title Insurance Co. ("Fidelity"). *See* Tex. R. Civ. P. 91a. In five issues we construe as three, Sandles argues the trial court erred when (1) it granted Fidelity's 91a motion, (2) severed his third-party cause of action against Fidelity, and (3) failed to enter findings of fact and conclusions of law. We

affirm.

I. BACKGROUND

On May 2, 2021, Sandles filed his Original Petition to Try Title against David Bejar ("Bejar"), alleging that Sandles was the owner of real property in Harris County, Texas, and that Bejar had unlawfully entered and dispossessed Sandles of the property on or about February 20, 2020. Sandles alleged that a purported deed from Jerome Wilkenfeld to David Gentry ("Gentry") was a forgery, and thus, Sandles asserts, the deed from Gentry to Bejar did not convey good title.

Bejar filed an original answer and general denial and asserted that Sandles was barred from recovery based on the affirmative defense that Bejar is a bona fide purchaser for value. *See* Tex. Prop. Code Ann. § 13.001(a). On June 28, 2021, Sandles filed a Third-Party Original Petition against Fidelity, alleging that Fidelity is the entity that prepared and inspected the closing documents and that Fidelity directed that Bejar execute the closing documents to complete the sale.[1] Sandles further alleged that:

> [i]f any additional party has liability for an alleged failure of title, it is the Third-Party Defendant, who was responsible for research of the property in question, to discover all record owners, encumbrances, any litigation involving said property, any liens on said property, preparing a title commitment which details the circumstance under which Third-Party Defendant will issue title insurance and that it is responsible insuring that all issues, including the litigation in Cause No. 2018-69172 in the 333rd Judicial District Court of Harris County, Texas, on the title commitment are satisfactory addressed before closing the sale. Further, if any party has liability for the alleged failure of title, it is due to the failure, negligence and gross negligence of the Third-Party Defendant . . . .

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[1] Sandles's third-party petition states that Sandles "incorporates by reference his allegations in his First Amended Original Petition the same as if fully set out at length herein."

Sandles further alleged that Fidelity was grossly negligent.

Fidelity filed a Rule 91a motion to dismiss, arguing that Sandles's negligence claim against Fidelity had no basis in law. Fidelity argued that it did not owe a duty to Sandles because Sandles was not a party to the closing between Gentry and Bejar, or to the escrow agreement. Sandals filed a response. The parties filed supplemental briefings, responses, and replies in support of their arguments.

On September 24, 2021, the trial court granted Fidelity's 91a motion and dismissed Sandles's "third party" claims against Fidelity with prejudice. Fidelity filed a motion to sever the trial court's order of dismissal, and Sandles filed a response opposing Fidelity's motion. The trial court granted Fidelity's motion to sever on May 23, 2022. This appeal followed.

II. Rule 91a Motion To Dismiss

In his first issue, Sandles argues that Fidelity's 91a motion to dismiss was improperly granted because he has a statutory third-party cause of action against Fidelity. Sandles also argues that there are no privity requirements contained in any of the third-party-action statutes required to bring an independent cause of action.

A. Applicable Law & Standard of Review

We review the trial court's ruling on a Rule 91a motion to dismiss de novo based on the allegations in the live petition and any attachments thereto. *Wooley v. Schaffer*, 447 S.W.3d 71, 76 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). In conducting our review, we construe the pleadings liberally in favor of the plaintiff, look to the pleader's intent, and accept as true the allegations in the pleadings. *Id.* In doing so, we apply the fair notice pleading standard applicable in Texas to determine whether the allegations of the petition are sufficient to allege a cause of action. *Id.*

Except in a case brought under the Family Code or a case governed by

> Chapter 14 of the Texas Civil Practice and Remedies Code, a party may move to dismiss a cause of action on the grounds that it has no basis in law or fact. A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought.

Tex. R. Civ. P. 91a(1).

"A third-party plaintiff is a party defending a claim who files a pleading to bring a third party into the lawsuit in an effort to pass on or share any liability." *In re Ford Motor Co.*, 442 S.W.3d 265, 271 (Tex. 2014) (orig. proceeding); *see also Jaster v. Comet II Const., Inc.*, 438 S.W.3d 556, 568 (Tex. 2014) (plurality op.) (discussing Rule 38 and third-party practice). A plaintiff may add a third party when a counterclaim has been asserted against the plaintiff. *See* Tex. R. Civ. P. 38(b).

B. Analysis

Sandles argued at the trial court and argues on appeal that he is seeking to hold Fidelity liable "for its negligence, errors and omissions for not timely and diligently discovering the true record title holder ([Sandles]) of the real property that made the basis of this litigation . . . ."

To prove an action for negligence, the plaintiff must establish that the defendant had a legal duty. *Nabors Drilling, U.S.A., Inc. v. Escoto*, 288 S.W.3d 401, 404 (Tex. 2009); *see Kroger Co. v. Elwood*, 197 S.W.3d 793, 795 (Tex. 2006) (per curiam) (noting that "liability cannot be imposed if no duty exists."). The existence of a duty is generally a question of law, and that determination is made from the facts surrounding the occurrence in question. *Tri v. J.T.T.*, 162 S.W.3d 552, 563 (Tex. 2005); *see Pagayon v. Exxon Mobil Corp.*, 536 S.W.3d 499, 503 (Tex. 2017).

Here, Fidelity argued in its Rule 91a motion that it owed no duty to Sandles. Sandles alleged in his third-party petition that Fidelity acted as the closer of the sale of the property to Gentry and was responsible for the title commitment and title

insurance, presumably averring that this duty was owed to Sandles. Contrary to Sandles's argument, a closer and escrow agent in a real estate transaction does not owe duties to non-parties to the transaction. *See Muller v. Stewart Title Guar. Co.*, 525 S.W.3d 859, 872 (Tex. App.—Houston [14th Dist.] 2017, no pet.); *Gary E. Patterson & Assocs., P.C. v. Holub*, 264 S.W.3d 180, 203 (Tex. App.—Houston [1st Dist.] 2008, pet. denied); *see also Home Loan Corp. v. Tex. Am. Title Co.*, 191 S.W.3d 728, 733–34 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) ("To the extent an escrow agent is employed only to close a transaction in accordance with a contract that has already been entered into by the parties, it is not apparent how the agent's duty of disclosure could extend beyond matters affecting the parties' rights in the closing process to those concerning the merits of the underlying transaction."); *Martinka v. Commonwealth Land Title Ins.*, 836 S.W.2d 773 (Tex. App.—Houston [1st Dist.] 1992, writ denied) ("A title insurance company is not a title abstractor and owes no duty to examine title."). Furthermore, "the only duty imposed by a title insurance policy is the duty to indemnify the insured against losses caused by defects in title." *Chi. Title Ins. v. McDaniel*, 875 S.W.2d 310, 311 (Tex. 1994); *Hahn v. Love*, 394 S.W.3d 14, 35 (Tex. App.—Houston [1st Dist.] 2012, pet. denied); *see, e.g.*, *W. Loop Hosp., LLC v. Hous. Galleria Lodging Assocs., LLC*, 649 S.W.3d 461, 496 (Tex. App.—Houston [1st Dist.] 2022, pet. denied) ("Thus, Chicago Title's issuance of a policy did not constitute a representation regarding the status of the property's title; rather, it constituted an agreement to indemnify the McDaniels against losses caused by any defects."); *see also Kawecki v. First Am. Title Ins. Co. of Tex., Inc.*, No. 01-01-00886-CV, 2002 WL 31721351, at *4 (Tex. App.—Houston [1st Dist.] Dec. 5, 2002, no pet.) (mem. op.) ("This rule applies to allegations of liability for nondisclosure under the DTPA as well as allegations of negligence."). Therefore, we conclude that Fidelity did not owe a duty to Sandles under the facts pleaded, and thus, his negligence claim has no basis in law. *See* Tex. R. Civ. P. 91a.

We conclude that the trial court did not err when it granted Fidelity's Rule 91a motion and overrule Sandles's first issue.

III. Severance Order

In his second issue, Sandles argues that the trial court erred when it severed his third-party cause of action against Fidelity.

A. Applicable Law & Standard of Review

Rule 41 of the Texas Rules of Civil Procedure provides that "[a]ny claim against a party may be severed and proceeded with separately." *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 693 (Tex. 2007) (citing Tex. R. Civ. P. 41)). We will not reverse a trial court's order severing a claim unless the trial court abused its discretion. *Id.*; *Guar. Fed. Sav. Bank v. Horseshoe Op. Co.,* 793 S.W.2d 652, 658 (Tex. 1990). A trial court abuses its discretion when it acts arbitrarily or unreasonably or without reference to guiding rules or principles. *Worford v. Samper*, 801 S.W.2d 108, 109 (Tex. 1990) (per curiam).

A claim is properly severable if (1) the controversy involves more than one cause of action, (2) the severed claim is one that would be the proper subject of a lawsuit if independently asserted, and (3) the severed claim is not so interwoven with the remaining action that they involve the same facts and issues. *F.F.P. Operating Partners, L.P.*, 237 S.W.3d at 693. Avoiding prejudice, administering justice, and increasing convenience are the controlling reasons to allow a severance. *Id.*

B. Analysis

Here, Sandles asserted a claim to try title against Bejar and a claim for negligence against Fidelity.

By statute, a trespass-to-try-title action "is the method of determining title to lands." Tex. Prop. Code Ann. § 22.001(a). In a trespass-to-try-title action, a plaintiff

may prove legal title by establishing: (1) a regular chain of title of conveyances from the sovereign to the plaintiff; (2) a superior title to that of the defendant out of a common source; (3) title by limitations; or (4) possession that has not been abandoned. *Brumley v. McDuff*, 616 S.W.3d 826, 832 (Tex. 2021).

Here, Sandles's negligence claim against Fidelity is a separate cause of action from his claim to try title against Bejar, and Sandles's negligence claim against Fidelity would be the proper subject of a lawsuit if independently asserted. Further, Sandles did not allege that Fidelity has an interest in the real property at issue. *See* Tex. Prop. Code Ann. § 22.001(a). Thus, Sandles's negligence claim is not so interwoven with Sandles's try-title claim that it involves the same facts and issues. Accordingly, we cannot conclude that the trial court abused its discretion when it granted Fidelity's motion to sever. *See* Tex. R. Civ. P. 41; *Worford*, 801 S.W.2d at 109; *see also Cherokee Water Co. v. Forderhause*, 641 S.W.2d 522, 525–26 (Tex. 1982) (concluding that severance of deed-reformation claim after the trial court granted summary judgment on declaratory-judgment claim, "apparently in an effort to expedite appellate review of the declaratory judgment action," did not constitute an abuse of discretion).

We overrule Sandles's second issue.

IV. FINDINGS OF FACT & CONCLUSIONS OF LAW

In his third issue, Sandles argues that the trial court erred when it failed to enter findings of fact and conclusions of law.

In any case tried in the district or county court without a jury, any party may request the court to state in writing its findings of fact and conclusions of law. Tex. R. Civ. P. 296. However, findings of fact and conclusions of law should not be requested or made when the trial court renders judgment as a matter of law, as they

serve no purpose. *IKB Indus. (Nigeria) Ltd. v. Pro-Line Corp.*, 938 S.W.2d 440, 443 (Tex. 1997).

When ruling on a Rule 91a motion to dismiss, a court does not consider evidence but rather must determine whether, accepting all facts alleged by the plaintiff as true, recovery by the plaintiff is foreclosed as a matter of law. *See Wooley*, 447 S.W.3d at 76. Because the trial court rules on a Rule 91a motion to dismiss based upon the pleading of the causes of action, findings of fact and conclusions of law are neither required nor appropriate. *See* Tex. R. Civ. P. 91a.6; *IKB Indus. (Nigeria) Ltd.*, 938 S.W.2d at 443; *see also Linwood v. NCNB Tex.*, 885 S.W.2d 102, 103 (Tex. 1994) (noting that "findings of fact and conclusions of law have no place in a summary judgment proceeding . . . .").

Sandles's negligence claim against Fidelity was not "tried" within the meaning of Rule 296 because the trial court rendered judgment as a matter of law. *See* Tex. R. Civ. P. 91a.6; Tex. R. Civ. P. 296; *IKB Indus. (Nigeria) Ltd.*, 938 S.W.2d at 443. Thus, we conclude that the trial court did not err by implicitly denying Sandles requests for findings of fact and conclusions of law.

We overrule Sandles's third issue.

V. Conclusion

We affirm the trial court's judgment.

/s/ Margaret "Meg" Poissant
Justice

Panel consists of Justices Bourliot, Hassan, and Poissant.