



CAUSE NO. 2011-CI-02000

CAROLYN J. CLARK, AS EXECUTRIX OF THE ESTATE OF PATRICIA BURNS CLARK, AND CAROLYN J. CLARK, MICHELE DAILEY CADWALLADER AND CHRISTOPHER CLARK, INDIVIDUALLY Plaintiffs,

v.

JPMORGAN CHASE BANK, N.A., INDIVIDUALLY AND IN ITS CAPACITY AS TRUSTEE FOR THE PATRICIA BURNS CLARK TESTAMENTARY TRUST AND THE PATRICIA BURNS CLARK IRREVOCABLE TRUST, AND PATRICIA SCHULTZ-ORMOND Defendants

IN THE DISTRICT COURT



438TH JUDICIAL DISTRICT

BEXAR COUNTY, TEXAS

DEFENDANT PATRICIA SCHULTZ-ORMOND'S NO EVIDENCE MOTION FOR SUMMARY JUDGMENT

Defendant Patricia Schultz-Ormond ("Ormond") files this No Evidence Motion for Summary Judgment.

I. SUMMARY OF MOTION

Plaintiffs have asserted various claims against Defendant Ormond. Plaintiffs have "no evidence" to support these claims; therefore, summary judgment is appropriate as to all claims asserted against Ormond under TRCP 166(a)(i).

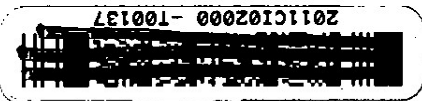
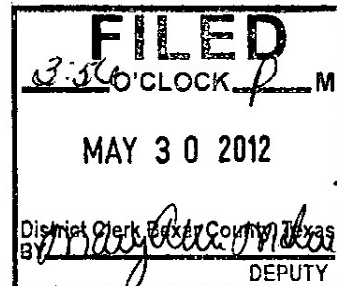
II. PARTIES

2.01 Plaintiff Carolyn J. Clark, as Independent Executrix of Patricia Burns Clark Dailey's estate, and individually.

2.02 Plaintiff Michele Dailey Cadwallader, individually.

2.03 Plaintiff Christopher Clark, individually.

2.04 Plaintiff Craig William Clark, individually.



2.05 Plaintiff Richard Burns Clark, individually.

2.06 Defendant J.P. Morgan Chase Bank, N.A., Individually, Corporately, and in its Capacity as Trustee of the Patricia Burns Clark Trust under the Will of T.E. Burns, and The Patricia Burns Clark Irrevocable Trust (collectively referred to herein as “J.P. Morgan”).

2.07 Defendant Patricia Schultz-Ormond (referred to herein as “Ormond”) is a former JPMorgan employee.

III. BACKGROUND

3.01 Defendant J.P. Morgan Chase Bank, N.A. served as the trustee of two trusts for the primary benefit of Patricia Burns Clark Dailey (collectively referred to herein as the “Burns Trusts”). One trust was established by her father, T.E. Burns, on May 1, 1961, as an irrevocable, *inter vivos* trust for her benefit and is referred to herein as the “Burns Irrevocable Trust.” The second trust was established pursuant to the Last Will and Testament of her father, T.E. Burns, dated July 25, 1962, and is referred to herein as the “Burns Testamentary Trust.” The Burns Trusts owned interests in approximately 29,958 acres, more or less, of land and the underlying minerals in Frio and La Salle Counties, Texas, known as the Burns Ranch. Ormond was an employee of J.P. Morgan during some of the time that the facts giving rise to this lawsuit occurred. Ormond was never a trustee of the Burns Irrevocable Trust or the Burns Testamentary Trust.

3.02 Patricia Burns Clark Dailey was the sole income beneficiary of the Burns Trusts and this suit (the “Dailey Suit”) was originally brought on her behalf by her attorney-in-fact at the time, Carolyn J. Clark. Ms. Dailey died on August 5, 2011, and Carolyn J. Clark was appointed as the Independent Executrix of Ms. Dailey’s estate. Carolyn J. Clark, as Independent Executrix of Ms. Dailey’s estate, then filed a Suggestion of Death in the Dailey Suit on October

7, 2011, and substituted in as Plaintiff. Carolyn J. Clark, Michele Dailey Cadwallader, and Christopher Clark are also Ms. Dailey's children, and likewise were contingent remainder beneficiaries of the Burns Trusts. After Ms. Dailey's death, they joined as plaintiffs in the Dailey Suit.

3.03 Carolyn J. Clark, as Independent Executrix of Ms. Dailey's estate, and individually, Michele Dailey Cadwallader, and Christopher Clark (collectively referred to herein as the "Dailey Plaintiffs") filed their Second Amended Petition on October 12, 2011 (the "Dailey Petition"). The Dailey Petition alleges the following causes of action against Ormond: (i) breach of fiduciary duty; (ii) fraud by nondisclosure; and (iii) negligent misrepresentation. The Dailey Petition further alleges the Dailey Plaintiffs' entitlement to exemplary damages.

3.04 Craig William Clark and Richard Burns Clark (collectively referred to herein as the "Clark Plaintiffs") are two of Ms. Dailey's children and were contingent remainder beneficiaries of the Burns Trusts. The Clark Plaintiffs originally brought suit against Defendants in the Probate Courts of Bexar County, Texas, but subsequently nonsuited the Probate Court suit, and filed their Plaintiffs' Original Petition on October 11, 2011, in cause number 2011-CI-16542, styled *Craig William Clark and Richard Burns Clark v. JP Morgan Chase Bank, N.A., Individually and Corporately and as Trustee of The Burns Irrevocable Trust and the Burns Testamentary Trust, and Patricia Schultz-Ormond*, in the 73rd Judicial District Court of Bexar County, Texas (the "Clark Suit").

3.05 The Clark Plaintiffs assert the following causes of action in their Plaintiffs' Original Petition (the "Clark Petition") against Ormond: (i) breach of fiduciary duty for the alleged negligence and mismanagement of the mineral estate; and (ii) breach of fiduciary duty

for failure to disclose. The Clark Petition further alleges the Dailey Plaintiffs' entitlement to exemplary damages.

3.06 Defendants filed their Motion to Consolidate the Clark Suit and the Dailey Suit on November 2, 2011. Judge Peter Sakai signed the Order Granting Defendants' Motion to Consolidate on November 15, 2011, ordering that the Clark Suit be consolidated for all purposes into the Dailey Suit.

IV. PROCEDURAL BASIS

4.01 This "No Evidence" Motion for Summary Judgment ("Motion") is filed in accordance with TEXAS RULE OF CIVIL PROCEDURE 166(a)(i), and is directed against all of the claims brought by the Dailey Plaintiffs and the Clark Plaintiffs against Ormond (collectively referred to herein as the "Claims"). See *Timpte Indus. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009).

4.02 The Clark Plaintiffs instituted their Probate Court suit on February 3, 2011, and the Dailey Plaintiffs instituted this suit on February 8, 2011. Over sixteen (16) months have elapsed since these actions were instituted. Further, pursuant to the Docket Control Order entered on February 21, 2012 controlling this suit, the discovery deadline is June 22, 2012. Furthermore, Defendants have produced over 14,800 pages of documents during the course of discovery, and at least fifteen (15) individuals have been deposed. Therefore an adequate time for discovery has elapsed and this Motion is properly before the Court. See *Restaurant Teams Int'l v. MG Sec. Corp.*, 95 S.W.3d 336, 339-341 (Tex. App.—Dallas 2002, no pet.).

V. SUMMARY JUDGMENT GROUNDS

A. NO EVIDENCE OF ORMOND'S FIDUCIARY RELATIONSHIP TO PLAINTIFFS, NO EVIDENCE OF BREACH, AND NO EVIDENCE OF DAMAGES AND/OR BENEFIT, AND THEREFORE NO EVIDENCE OF BREACH OF FIDUCIARY DUTY

5.01 The Dailey Plaintiffs allege a breach of fiduciary duty claim against Ormond, and the Clark Plaintiffs allege breach of fiduciary duty claims against her for the alleged negligence and mismanagement of the mineral estate underlying the Burns Ranch, and for failure to disclose material facts regarding the Burns Trusts (collectively referred to herein as the “Fiduciary Duty Claims”), allegations which Ormond hereby specifically denies.

5.02 Texas law is clear and unambiguous. The Plaintiffs must prove all of the following elements to succeed on their Fiduciary Duty Claims: (i) that Plaintiffs and Ormond had a fiduciary relationship; (ii) that Ormond breached her fiduciary duty to the Plaintiffs, and (iii) that Ormond’s breach resulted in injury to the Plaintiffs or a benefit to Ormond. *See Burrow v. Arce*, 997 S.W.2d 229, 237 (Tex. 1999); *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 513-514 (Tex. 1942); *Graham v. Mortg. Corp. v. Hall*, 307 S.W.3d 472, 479 (Tex. App.—Dallas 2010, no pet.).

5.03 Plaintiffs allege that Ormond owed fiduciary duties to Plaintiffs, yet plead no facts in support of such a duty. Ormond was a Vice President and Senior Property Manager for the Specialty Assets, Oil and Gas Management division of J.P. Morgan during some of the relevant time, but was not an employee of the bank when the Option Agreement was signed. Ormond never personally served as a trustee of the Burns Trusts. Plaintiffs have no evidence to raise a genuine issue of material fact that the Plaintiffs and Ormond had a fiduciary relationship at any relevant time. Fiduciary relationships may be either formal or informal. *Crim. Truck & Tractor Co. v. Navistar Int’l Transp.*, 823 S.W.2d 591, 594 (Tex. 1992)(parties to a contract do not share a fiduciary relationship). However, Plaintiffs have no evidence to raise a genuine issue of material fact that the Plaintiffs and Ormond had either a formal or informal fiduciary relationship. *See Meyer v. Cathey*, 167 S.W.3d 327, 330-331 (Tex. 2005)(there exists no

fiduciary relationship among business associates). Because Plaintiffs cannot produce any evidence that Plaintiffs and Ormond had a fiduciary relationship at any relevant time, summary judgment should be entered as to the Plaintiffs' Fiduciary Duty Claims.

5.04 Further, Plaintiffs have no evidence to raise a genuine issue of material fact that Ormond breached any fiduciary duties to the Plaintiffs. *See Priddy v. Rawson*, 282 S.W.3d 588, 599 (Tex. App.—Houston [14th Dist.] 2009, pet. denied)(to prove an action for breach of fiduciary duty, plaintiff must establish that defendant breached its fiduciary duty). Because Plaintiffs cannot produce any evidence that Ormond breached any fiduciary duties to the Plaintiffs, summary judgment should be entered as to the Plaintiffs' Fiduciary Duty Claims.

5.05 Finally, Plaintiffs have no evidence to raise a genuine issue of material fact that Ormond's alleged breach resulted in injury to the Plaintiffs or a benefit to Ormond. Plaintiffs also have no evidence to raise a genuine issue of material fact that any of their alleged damages or any benefit to Ormond was caused by Ormond's alleged breach. *See Baker Botts, L.L.P. v. Cailloux*, 224 S.W.3d 723, 734-735 (Tex. App.—San Antonio 2007, pet. denied)(inference stacking impermissible on the issue of causation in a breach of fiduciary duty context). Because Plaintiffs cannot produce any evidence that Ormond's alleged breach resulted in any injury to the Plaintiffs or any benefit to Ormond, summary judgment should be entered as to the Plaintiffs' Fiduciary Duty Claims.

5.06 Plaintiffs cannot produce any evidence of the necessary elements to prove their Fiduciary Duty Claims against Ormond. Therefore, summary judgment should be entered as to all of Plaintiffs' Fiduciary Duty Claims against Ormond.

B. DAILEY PLAINTIFFS HAVE NO EVIDENCE OF ANY ELEMENTS OF FRAUD BY NONDISCLOSURE CLAIM

5.07 In order to succeed on their cause of action for fraud by nondisclosure, the Dailey Plaintiffs must prove all of the following elements: (i) Ormond concealed from or failed to disclose certain material facts to the Dailey Plaintiffs, (ii) Ormond had a duty to disclose these material facts to the Dailey Plaintiffs, (iii) Ormond knew that the Dailey Plaintiffs were ignorant of the facts and that they did not have an equal opportunity to discover these material facts, (iv) Ormond was deliberately silent when she had a duty to speak, (v) by failing to disclose the material facts, Ormond intended to induce the Dailey Plaintiffs to take some action or refrain from acting, (vi) the Dailey Plaintiffs relied on Ormond's nondisclosure, and (vii) the Dailey Plaintiffs were injured as a result of acting without the knowledge of the undisclosed material facts. See *Bradford v. Vento*, 48 S.W.3d 749, 754-755 (Tex. 2001); *Insurance Co. of N. Am. v. Morris*, 981 S.W.2d 667, 674 (Tex. 1998); *Worldwide Asset Purchasing, L.L.C. v. Rent-A-Center East, Inc.*, 290 S.W.3d 554, 566 (Tex. App.—Dallas 2009, no pet.); *McCarthy v. Wani Venture, A.S.*, 251 S.W.3d 573, 585-586 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).

5.08 The Dailey Plaintiffs have no evidence to raise a genuine issue of material fact that Ormond concealed from or failed to disclose any material facts from the Dailey Plaintiffs. The Dailey Plaintiffs further have no evidence to raise a genuine issue of material fact that Ormond had a duty to disclose these alleged material facts to the Dailey Plaintiffs. The Dailey Plaintiffs likewise have no evidence to raise a genuine issue of material fact that Ormond knew the Dailey Plaintiffs were ignorant of these alleged material facts and that the Dailey Plaintiffs did not have an equal opportunity to discover the alleged material facts. Nor do the Dailey Plaintiffs have any evidence to raise a genuine issue of material fact that Ormond was deliberately silent when she had a duty to speak. Further, the Dailey Plaintiffs have no evidence

to raise a genuine issue of material fact that by failing to disclose the alleged material facts, Ormond intended to induce the Dailey Plaintiffs to take some action or refrain from acting. The Dailey Plaintiffs also have no evidence to raise a genuine issue of material fact that the Dailey Plaintiffs relied in any way on Ormond's alleged nondisclosure. Finally, the Dailey Plaintiffs have no evidence to raise a genuine issue of material fact that they were injured as a result of acting without knowledge of the allegedly undisclosed material facts.

5.09 The Dailey Plaintiffs have had more than an adequate time to discover any evidence of their fraud by nondisclosure claim, and they have none. The Court should therefore grant the Motion regarding the Dailey Plaintiffs' fraud by nondisclosure claim.

C. NO EVIDENCE OF NEGLIGENT MISREPRESENTATION

5.10 The Dailey Plaintiffs allege that Ormond made negligent misrepresentations to Plaintiffs. In order to prevail on this cause of action, Plaintiffs must show the following elements: (i) Ormond made a representation to Plaintiffs in the course of Ormond's business or in a transaction in which Ormond had an interest; (ii) Ormond supplied false information for the guidance of others; (iii) Ormond did not exercise reasonable care or competence in obtaining or communicating the information; (iv) Plaintiffs justifiably relied upon the representation, and (v) Ormond's negligent misrepresentation proximately caused the Plaintiffs' injury. *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W. 2d 787, 791 (Tex. 1999).

5.11 The Dailey Plaintiffs have no evidence that (i) Ormond made a representation to Plaintiffs in the course of Ormond's business or in a transaction in which Ormond had an interest; (ii) Ormond supplied false information for the guidance of others; (iii) Ormond did not exercise reasonable care or competence in obtaining or communicating the information; (iv)

Plaintiffs justifiably relied upon the representation, and (v) Ormond's negligent misrepresentation proximately caused the Plaintiffs' injury.

5.12 The Dailey Plaintiffs have had more than an adequate time to discover any evidence of their negligent misrepresentation claim, and they have none. The Court should therefore grant the Motion regarding the Dailey Plaintiffs' negligent misrepresentation claim.

D. NO EVIDENCE OF EXEMPLARY DAMAGES

5.13 In order to succeed in their claim for exemplary damages, Plaintiffs must prove all of the following elements (i) the parties and the underlying claim come within the purview of Chapter 41 of the TEXAS CIVIL PRACTICE & REMEDIES CODE (the "Damages Act"), (ii) the Plaintiffs must recover actual damages against Ormond on the Fiduciary Duty Claims and/or the fraud by nondisclosure claim, and (iii) the Plaintiffs must prove Ormond's conduct amounted to gross negligence, malice, or fraud. *See* TEX. CIV. PRAC. & REM. CODE §§41.001-41.013; *Diamond Shamrock Ref. Co. v. Hall*, 168 S.W.3d 164, 170 (Tex. 2005); *Quest Int'l Comms. v. AT&T Corp.*, 167 S.W.3d 324, 326 (Tex. 2005); *Bunton v. Bentley*, 153 S.W.3d 50, 54 (Tex. 2004).

5.14 Because the Plaintiffs have no evidence to raise a genuine issue of material fact regarding their Fiduciary Duty Claims, and because the Dailey Plaintiffs have no evidence to raise a genuine issue of material fact regarding their fraud by nondisclosure or negligent misrepresentation claims, summary judgment should be granted disposing of all of these claims. As such, the Plaintiffs cannot and will not recover any actual damages from Ormond on these claims. Because Plaintiffs do not allege a viable claim against Ormond which enables them to

recover exemplary damages under the Damages Act, their claim for exemplary damages fails as a matter of law.

5.15 Further, Plaintiffs have no evidence to raise a genuine issue of material fact that Ormond acted with gross negligence, malice, and/or fraud. See *Bennett v. Reynolds*, 315 S.W.3d 867, 871 n. 13 (Tex. 2010); *Vela v. Marywood*, 17 S.W.3d 750, 761 (Tex. App.—Austin 2000, pet. denied).

5.16 In order to provide gross negligence, Plaintiffs must show by clear and convincing evidence either that (1) Ormond's acts or omissions, when viewed objectively from Ormond's standpoint at the time they occurred, involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others; or (2) Ormond had actual, subjective awareness of the risk but proceeded with conscious indifference to the rights, safety and welfare of others. TEX. CIV. PRAC. & REM. CODE §41.001(11)(A) and (B). Plaintiffs have no evidence to support these necessary elements that Ormond's alleged acts or omissions constituted gross negligence under these standards.

5.17 In order to prove malice, Plaintiffs must show by clear and convincing evidence that Ormond has a specific intent to cause substantial injury or harm to Plaintiffs. TEX. CIV. PRAC. & REM. CODE §41.001(7). Plaintiffs have no evidence of specific intent by Ormond to cause substantial injury or harm nor that Ormond's alleged acts or omissions constituted malice under this standard.

5.18 In order to sustain an award for exemplary damages due to fraud, Plaintiffs must show actual fraud by clear and convincing evidence. As previously discussed, Plaintiffs have no evidence that Ormond committed actual fraud. Plaintiffs' only allegations of fraud are allegations by the Dailey Plaintiffs that Ormond committed fraud by non-disclosure, which

requires proof of the following elements: (i) Ormond concealed from or failed to disclose certain material facts to the Dailey Plaintiffs, (ii) Ormond had a duty to disclose these material facts to the Dailey Plaintiffs, (iii) Ormond knew that the Dailey Plaintiffs were ignorant of the facts and that they did not have an equal opportunity to discover these material facts, (iv) Ormond was deliberately silent when she had a duty to speak, (v) by failing to disclose the material facts, Ormond intended to induce the Dailey Plaintiffs to take some action or refrain from acting, (vi) the Dailey Plaintiffs relied on Ormond's nondisclosure, and (vii) the Dailey Plaintiffs were injured as a result of acting without the knowledge of the undisclosed material facts. *See Bradford v. Vento*, 48 S.W.3d 749, 754-755 (Tex. 2001); *Insurance Co. of N. Am. v. Morris*, 981 S.W.2d 667, 674 (Tex. 1998); *Worldwide Asset Purchasing, L.L.C. v. Rent-A-Center East, Inc.*, 290 S.W.3d 554, 566 (Tex. App.—Dallas 2009, no pet.); *McCarthy v. Wani Venture, A.S.*, 251 S.W.3d 573, 585-586 (Tex. App.—Houston [1st Dist.] 2007, pet. denied). Plaintiffs cannot show any of these elements by clear and convincing evidence necessary to sustain an award of exemplary damages.

5.19 The elements of common law fraud (not pled by Plaintiffs) are as follows: (i) Defendant made a representation to Plaintiffs; (ii) that was material; (iii) that was false; (iv) Defendant knew the representation was false when made or made the representation recklessly, as a positive assertion, and without knowledge of its truth; (v) with the intent that Plaintiffs would rely upon the representation; (vi) Plaintiffs relied upon the representation; and (vii) the representation caused the Plaintiffs injury. *Italian Cowboy Partners v. Prudential Ins.*, 341 S.W. 3d 323, 337 (Tex. 2011). Plaintiffs cannot show any of these elements by clear and convincing evidence necessary to sustain an award of exemplary damages.

5.20 Because the Plaintiffs have no evidence that Ormond acted with gross negligence, malice, and/or fraud, the Court should therefore grant the Motion regarding the Plaintiffs' exemplary damages claim.

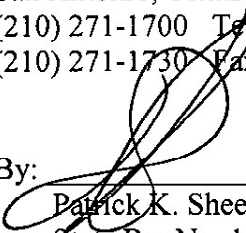
WHEREFORE, PREMISES CONSIDERED, Patricia Schultz-Ormond prays that the Court grant this Motion and enter a judgment that the Plaintiffs take nothing under their claims against Patricia Schultz-Ormond; that she be discharged with judgment in her favor, together with judgment for her costs; and for such other relief to which she is justly entitled.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANTS



FIAT

The foregoing is set for hearing on June 21, 2012 at 8:30 a.m. in the Presiding District Court, Bexar County, Texas.

Signed on the 30th day of May 2012.

DAVID A. BERCHELMANN, ..
PRESIDING JUDGE
37th DISTRICT COURT
BEXAR COUNTY, TEXAS

JUDGE PRESIDING

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing DEFENDANT PATRICIA SCHULTZ-ORMOND'S NO EVIDENCE MOTION FOR SUMMARY JUDGMENT was served on the following, as indicated, on this the 30th day of May 2012:

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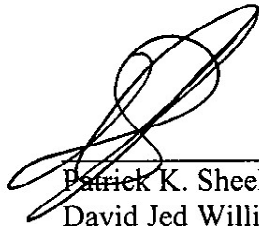
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