AFFIRMED in part; REVERSED and REMANDED in part; and VACATED in part; **Opinion Filed August 27, 2009**.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-08-00654-CV

TEXAS INTEGRATED CONVEYOR SYSTEMS, INC., Appellant

V.

INNOVATIVE CONVEYOR CONCEPTS, INC., GREGORY SCOTT TERRY, MICHAEL TODD TERRY, AND DAVID BATCHELDER, Appellees

On Appeal from the 160th Judicial District Court
Dallas County, Texas
Trial Court Cause No. 06-01922-H

OPINION

Before Justices Richter, Lang, and Murphy
Opinion By Justice Lang

This case involves claims asserted by an employer, Texas Integrated Conveyor Systems, Inc. ("Texas Integrated"), against its former employees and others for, *inter alia*, breach of a non-compete agreement, misappropriation of trade secrets, and fraud. Texas Integrated, a subsidiary of American Conveyor Group, appeals the trial court's order granting the motions of Innovative Conveyor Concepts, Inc., Gregory Scott Terry, Michael Todd Terry, and David Batchelder (collectively, the "Innovative Conveyor defendants") for traditional and no-evidence summary judgment dismissing Texas Integrated's claims and order denying Texas Integrated's motion for new

trial. Additionally, Texas Integrated appeals the trial court's order imposing sanctions and order denying its motion to reconsider and vacate that order.

In five issues, Texas Integrated argues the trial court erred when it: (1) denied Texas Integrated's motion for new trial because Texas Integrated had no notice the hearing on the no-evidence motions for summary judgment had been changed or canceled; (2) denied Texas Integrated's motion for new trial without considering the timely filed new evidence; (3) granted the Innovative Conveyor defendants' motions for traditional summary judgment because Texas Integrated raised genuine issues of material fact; (4) granted the Innovative Conveyor defendants' motions for no-evidence summary judgment because Texas Integrated presented more than a scintilla of evidence supporting each of its causes of action; and (5) imposed sanctions against Texas Integrated and denied its motion to reconsider or vacate the order imposing sanctions.

We conclude the trial court erred when it denied Texas Integrated's motion for new trial as to the Innovative Conveyor defendants' motions for no-evidence summary judgment because Texas Integrated was denied due process as to those motions. In addition, we conclude the trial court properly granted the motion of Innovative Conveyor for traditional summary judgment as to the claim of civil conspiracy against it, but erred in granting the motions of the Integrated Conveyor defendants for traditional summary judgment as to all other claims. Finally, we conclude the trial court abused its discretion when it imposed the discovery sanctions at issue against Texas Integrated. As described in detail below, the trial court's judgment is affirmed in part, reversed in part, and vacated in part, and this case is remanded to the trial court for further proceedings consistent with this opinion.

I. PROCEDURAL BACKGROUND

The Innovative Conveyor defendants filed a total of eight motions for summary judgment,

four seeking no-evidence summary judgment and four seeking traditional summary judgment. The four motions for no-evidence summary judgment state they were based on Texas Integrated's petition that was filed in February 2007. The four motions for traditional summary judgment state they were based on Texas Integrated's second amended petition that was filed on July 25, 2007. Neither Texas Integrated's February 2007 petition nor its second amended original petition is in the clerk's record. The only petition of Texas Integrated in the record is its December 10, 2007 fourth amended original petition. In that petition, Texas Integrated alleges an array of claims against, among others, the Innovative Conveyor defendants, and seeks a permanent injunction, damages, and attorneys' fees. The Innovative Conveyor defendants' answer is not in the clerk's record.

The Innovative Conveyor defendants' four no-evidence summary judgment motions were filed in July 2007 and were set and reset for hearing on several occasions. The last notice of hearing sent to Texas Integrated was dated January 22, 2008 and provided the four no-evidence motions would be heard March 7, 2008 at 9:30 a.m. The Innovative Conveyor defendants each filed a traditional summary judgment motion pursuant to Texas Rule of Civil Procedure 166a(c) on September 11, 2007. The hearing on those four motions was set for February 8, 2008.

At the time of the February 8, 2008 hearing, the fourth amended original petition was the current pleading. At the commencement of the hearing, the parties advised the trial court the no-evidence summary judgment motions were set for a hearing on March 7, 2008. The trial court told counsel to proceed on the "four motions for summary judgment." However, following the hearing, the trial court signed an order on February 18, 2008 granting all eight motions for traditional and no-evidence summary judgment. The order specifically dismissed with prejudice the claims of Texas Integrated against the Innovative Conveyor defendants for (1) breach of non-compete agreement, (2) conversion, (3) breach of fiduciary duty, (4) fraud/constructive fraud, (5) misappropriation/theft of

trade secrets, (6) tortious interference with existing contracts, (7) tortious interference with prospective contracts, (8) breach of confidentiality agreement, (9) civil conspiracy, (10) misappropriation/theft of funds, (11) unjust enrichment/equitable relief, (12) violations of theft liability act, (13) alter ego, (14) respondeat superior, and (15) permanent injunctive relief. In addition, the order provided that Texas Integrated "take nothing against [the Innovative Conveyor defendants] by its suit," ordered costs taxed against Texas Integrated, and contained a "Mother Hubbard" clause.[1]

As part of our analysis in this matter, we must determine whether the eight motions for summary judgment actually addressed all of the claims asserted by Texas Integrated in its fourth amended original petition. We must compare the claims asserted, the claims addressed in the motions for summary judgment, and the trial court's ruling on the summary judgment motions. Accordingly, to simplify these facts, which would otherwise need to be tediously described in additional numerous paragraphs, we set out below a chart that shows the claims pending against each Innovative Conveyor defendant at the time of the February 8, 2008 hearing.[2] In the chart, (1) the claims for which each Innovative Conveyor defendant sought no-evidence summary judgment are indicated with an "N," (2) the claims for which each Innovative Conveyor defendant sought traditional summary judgment pursuant to rule 166a(c) are indicated with a "T," and (3) the claims on which the trial court expressly granted summary judgment are indicated with an "X."

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[1] *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 198 (Tex. 2001) (simple statement in judgment that all relief not expressly granted is denied is denominated as "Mother Hubbard" clause).

[2] In listing the claims contained in the fourth amended original petition, we note some claims are described using a slash mark or solidus: "fraud/constructive fraud," "misappropriation/theft of trade secrets," "misappropriation/theft of funds," and "unjust enrichment/equitable relief." A slash mark can be used as a substitute for the words "and" and "per," and to denote alternatives. *See* TEXAS LAW REVIEW MANUAL ON USAGE, STYLE & EDITING R. 1.42 (10th ed. 2005) (a slash mark may substitute for the word"per"); THE CHICAGO MANUAL OF STYLE R. 6.113, 6.116 (15th ed. 2003) (a slash mark may be used in certain contexts to mean "and" and may stand as a shorthand for "per"); THE REDBOOK: A MANUAL ON LEGAL STYLE R. 1.81(d) (2d ed. 2006) (slash may be used in some paired words to indicate alternatives). A review of all of Texas Integrated's pleadings suggests, because of the language below each claim description in the petition and the varying combinations in which some are addressed in motions and responses, the slash mark was intended to be a substitute for the word "and," denoting two claims that are being pleaded or discussed together. Throughout this opinion, we will use the word "and" rather than a slash mark.