IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-2403

THE DON COMPANIES,

Plaintiff-Appellant,

versus

MARSHALL & STEVENS, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(CA H 88 3855)

(April 13, 1993)

Before REAVLEY, KING, and WIENER, Circuit Judges.

PER CURIAM:*

The Don Companies brought this action against Marshall & Stevens, Inc., alleging that a preliminary letter appraisal prepared by Marshall & Stevens induced the Don Companies into purchasing property in Florida for $10 million, property which is actually worth less than $4 million. The district court, finding that the Don Companies failed to raise genuine issues of material fact regarding the presence of essential elements of its claims

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, we have determined that this opinion should not be published.

for fraud, negligent misrepresentation, and deceptive trade practices under Texas law, granted summary judgment in favor of Marshall & Stevens. The Don Companies now appeals from that judgment. Finding that the Don Companies has failed to present evidence of essential elements of its claims, we affirm.

I. BACKGROUND

A. Facts

The Don Companies (the Don Co.) is a partnership owned by Don Farris and Leonard Scamardo. In 1986, Paul Cheng,[1] the chairman of Guaranty Federal Savings and Loan (Guaranty), personally solicited the Don Co. to purchase approximately thirty acres of undeveloped land in Florida for $10 million; this land was owned by Pacific Realty, a wholly owned subsidiary of Guaranty. In actuality, the property was worth less than $4 million.

The Don Co.'s purchase of Guaranty's Florida land was part of a dual land transaction. First, the Don Co. agreed to purchase Guaranty's Florida land with proceeds from a loan of $10 million from Guaranty. The loan was nonrecourse, thereby leaving the Don Co. and its partners with no personal liability. The only collateral required to secure the loan was the land itself. The parties agreed that the purchase price for the property was

[1] Cheng and his partner Simon Heath were convicted on various counts of fraud in United States district court for their involvement in the land transaction at issue in the case before us. See United States v. Heath, 970 F.2d 1397 (5th Cir. 1992). They appealed to this court from those convictions, and we affirmed in part and, finding that two counts of their indictment were multiplicitous, remanded with instructions in part. Id.

to be the lesser of $10 million or 90 percent of its appraised value. Second, to facilitate this loan, the Don Co. sold a one-half interest in property it owned in Arizona to Guaranty for $3.3 million, thereby netting the Don Co. a $1.3 million profit on the Arizona land.

Guaranty is an insured financial institution, and federal regulations require that "R41b" appraisals be made on properties for which insured financial institutions make loans.[2] Because Marshall & Stevens, Inc. (M & S) had a steady business relationship with Guaranty,[3] it was hired to perform this requisite R41b appraisal. Ben Romero, an employee of Guaranty, contacted Mary O'Connor, a supervisory appraiser at M & S, to obtain an appraisal. According to his deposition and criminal trial testimony, Romero told O'Connor that he needed an appraisal of the Florida property, and that he needed it quickly. Romero described the property as 29.98 acres of undeveloped land in Jacksonville, Florida, and he stated that he believed the valuation should be $11.2 million. According to O'Connor, Romero also stated that a number of condominium units were to be developed on the property, and she based her conclusion as to the value of the property on that representation. Because she had not seen the property and had no experience with Florida real

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[2] "R41b" is the designation given a memorandum issued by the Federal Home Loan Bank Board on March 12, 1982. This memorandum established very specific guidelines for appraisals used on properties for which insured institutions make loans.

[3] In 1985, M & S billed Guaranty for $70,000, and in 1986, M & S billed Guaranty for $1,547,100.

estate, O'Connor told Romero that she could not provide a full narrative appraisal on such short notice. Rather, O'Connor prepared a preliminary letter appraisal of the property valuing it at $11.2 million (90 percent of which equals $10 million--the Don Co.'s purchase price for the property).[4]

The Don Co. and Guaranty closed the Florida land deal in January 1986--more than five months before M & S issued its full appraisal of the Florida property. Farris testified that he understood that the deal could not be legally closed without the requisite appraisal valuing the property at significantly more than $10 million, but that an unknown person at the closing said that Guaranty had obtained the requisite appraisal. Farris also stated that he entered the deal because the purchase of the Florida land was a non-recourse ("no-risk") deal, and the Arizona land transaction--the sale of a one-half interest in the Don Co.'s land to Guaranty--(1) provided the Don Co. with a strong financial partner, (2) reduced the amount of the Don Co.'s debt on the property from $9 million to $4.5 million, (3) gave the Don Co. a $1.3 million profit, and (4) raised an additional $2 million to deposit at Guaranty in an interest reserve account.

As allegedly promised, M & S's full R41b appraisal supports the $11.2 valuation of the Florida land reached in its

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[4] M & S actually produced two copies of this preliminary appraisal letter, one addressed to Ben Romero of the Guaranty Service Corporation and another addressed directly to Lisa Griffith of Guaranty. The letter addressed to Guaranty--which is quoted in the text above--contained a slightly different property description, but was otherwise identical to the first letter.

preliminary letter. However, this valuation is premised on the construction of twin 70 story towers on the property. Due to numerous zoning restrictions, inadequate utilities, and other complications, the construction of such buildings on the property is not feasible. Also, more than a year after the deal was closed, the Don Co. learned that a proper R41b appraisal had been conducted shortly before it purchased the Florida property, and that this appraisal valued a larger piece of land--a piece of land that included all of the 29.98 acres at issue--at only $4 million.

B. Proceedings

The Don Co. originally filed suit against M & S in Texas state court to obtain damages for common law fraud,[5] statutory fraud under Texas law,[6] negligent misrepresentation,[7] and under the Texas Deceptive Trade Practices Act (DTPA).[8] The Don Co. alleges that M & S's 1986 preliminary appraisal letter induced it into purchasing the Florida property at a price at least $6 million greater than its value.

M & S removed this action to federal court on grounds of diversity. During the pendency of the action, two of the

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[5] See infra note 11 and accompanying text.

[6] TEX. BUS. & COM. CODE ANN § 27.01 (Vernon 1977 & Supp. 1993) (quoted infra at note 12).

[7] See RESTATEMENT (SECOND) OF TORTS § 552 (1977) (quoted infra at note 13).

[8] TEX. BUS. & COMM. CODE ANN. § 17.50 (Vernon 1987 & Supp. 1993) (quoted and discussed infra at Part III.B).

principals of Guaranty--Paul Cheng and Edward Heath--were tried and convicted on federal criminal charges in connection with the Florida land transaction at issue in this case.[9] Both Farris and O'Connor testified during the course of this criminal case, and their testimony was relied upon by the parties in the case before us in motions for summary judgment. M & S moved for summary judgment on the grounds that: (1) the Don Co. cannot prove reliance on the preliminary appraisal letter because, during the course of the criminal trial, the Don Co.'s partners testified that they "had relied on their own business judgment" in making the purchase decision; (2) the Don Co. could not have relied on M & S's full narrative R41b appraisal because it was not produced until some five months after the closing; and, (3) because the dual land transaction at issue netted the Don Co. $1.3 million, the Don Co. cannot prove any damages. The Don Co. moved for partial summary judgment on the issue of liability, asserting that O'Connor's admission that she intended her preliminary letter appraisal to be used to give "comfort" to a potential buyer constitutes grounds for granting summary judgment on that issue. The district court denied the Don Co.'s motion for partial summary judgment and granted M & S's motion. The Don Co. now appeals from the district court's grant of summary judgment in favor of M & S.

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[9] See supra note 1.

II. STANDARD OF REVIEW

In reviewing a grant of summary judgment, we apply the same standard as the district court. Waltman v. International Paper Co., 875 F.2d 468, 474 (5th Cir. 1989) (we review grants of summary judgment de novo). Specifically, we ask whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). In making this determination, we view all of the evidence and inferences drawn from that evidence in the light most favorable to the party opposing the motion for summary judgment. Reid v. State Farm Mutual Auto Ins. Co., 784 F.2d 577, 578 (5th Cir. 1986).

To defeat a motion for summary judgment, Rule 56(e) of the Federal Rules of Civil Procedure requires the non-moving party to set forth specific facts sufficient to establish that there is a genuine issue for trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). While a mere allegation of the existence of a dispute over material facts is not sufficient to defeat a motion for summary judgment, if the evidence shows that a reasonable jury could return a verdict for the non-moving party, the dispute is genuine. Anderson, 477 U.S. at 247-48, 106 S. Ct. at 2510. On the other hand, if a rational trier of fact, based upon the record as a whole, could not find for the non-moving party, there

is no genuine issue for trial. Amoco Production Co. v. Horwell Energy, Inc., 969 F.2d 146, 147-48 (5th Cir. 1992). Such a finding may be supported by the absence of evidence to support an essential element of the nonmoving party's case. See Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986); Topalian v. Ehrman, 954 F.2d 1125, 1131 (5th Cir. 1992); International Ass'n of Machinists & Aerospace Workers, Lodge No. 2504 v. Intercontinental Mfg. Co., 812 F.2d 219, 222 (5th Cir. 1987).

Finally, where the non-moving party has presented evidence to support the essential elements of its claims but that "evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Anderson, 477 U.S. at 249-50 (citations omitted). Moreover, self-serving and speculative testimony is subject to especially searching scrutiny. See Elliott v. Group Medical and Surgical Service, 714 F.2d 556, 564 (5th Cir. 1983), cert. denied, 467 U.S. 1215 (1984).

III. DISCUSSION

In challenging the district court's grant of summary judgment in favor of M & S, the Don Co. raises the following issues on appeal: (**a**) whether the district court erred in granting summary judgment on the Don Co.'s claims of common law fraud, statutory fraud, and negligent misrepresentation on the ground that the Don Co. has failed to provide evidence to support the existence of reliance on M & S's representations; (**b**) whether the district court erred in granting summary judgment on the Don

Co.'s claim under the Texas Deceptive Trade Practices Act, TEX. BUS. & COMM. CODE ANN. § 17.50. (Vernon 1987 & Supp. 1993); and (**c**) whether the district court abused its discretion by failing to grant the Don Co.'s request for access to the grand jury testimony of M & S's employees.

A. Claims of Fraud and Negligent Misrepresentation: The Requisite Element of Reliance

To establish a claim of actionable fraud under Texas law, a plaintiff must show reliance upon a defendant's misrepresentation.[10] More specifically, reliance is an essential element for three of the claims raised by the Don Co. in the case at issue--common law fraud,[11] statutory fraud under section 27.01

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[10] The Texas Supreme Court has held that, to establish a claim of actionable fraud, a plaintiff must show:

> (1) that a material representation was made; (2) that it was false; (3) that, when the speaker made it, he knew it was false or made it recklessly without any knowledge of its truth and as a positive assertion; (4) that the speaker made it with the intention that it should be acted upon by the party; (5) <u>that the party acted in reliance upon it</u>; and (6) that the party thereby suffered injury.

<u>Blue Bell, Inc. v. Peat, Marwick, Mitchell & Co.</u>, 715 S.W.2d 408, 415 (Tex. App.--Dallas 1986, no writ), <u>citing</u> <u>Stone v. Lawyers Title Ins. Corp</u>., 554 S.W.2d 183, 185 (Tex. 1977).

[11] Under Texas law, the following "fundamental characteristics" must be present to establish actionable common law fraud:

> (1) there must be a misrepresentation as to material facts, either positive untrue statements, or concealment or failure to disclose facts within the knowledge of the parties sought to be charged, and as to which the law imposed upon such party a duty to disclose; (2) <u>the complaining party must be shown to have relied upon the alleged misrepresentation to his detriment</u>; and (3) the complaining party must, himself,

of the Texas Business and Commercial Code,[12] and negligent misrepresentation.[13] The district court, finding that the Don

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> not have failed to exercise reasonable care to protect himself--in other words, in a `caveat emptor' situation he must not have shut his eyes and ears to matters equally open and available to him upon reasonable inquiry and investigation.

Moore & Moore Drilling Company v. White, 345 S.W.2d 550, 555 (Tex. Civ. App.--Dallas 1961, writ ref'd n.r.e.) (emphasis added).

[12] Section 27.01, entitled "Fraud in Real Estate and Stock Transactions," provides that:

> (a) Fraud in a transaction involving real estate or stock in a corporation or joint stock company consists of a
> (1) False representation of a past or existing material fact, when the false representation is
> (A) made to a person for the purpose of inducing that person to enter into a contract; and
> (B) relied on by that person in entering into that contract . . . .
> * * *
> (d) A person who (1) has actual awareness of the falsity of a representation or promise made by another person and (2) fails to disclose the falsity of the representation or promise to the person defrauded, and (3) benefits from the false representation or promise commits the fraud described in Subsection (a) of this section and is liable to the person defrauded for exemplary damages. Actual awareness may be inferred when objective manifestations indicated that a person acted with actual awareness.

TEX. BUS. & COM. CODE § 27.01 (Vernon 1977 & Supp. 1993) (emphasis added).

[13] In considering claims of negligent misrepresentation, Texas courts have relied upon section 552 of the RESTATEMENT (SECOND) OF TORTS, which provides:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon

Co. failed to provide any showing of this essential element of these claims, held that,

> [a]lthough Plaintiff has established that there exists an issue of material fact concerning whether the full appraisal and the letter appraisal were misrepresentations in that the appraisals failed to conform to R41B standards and significantly misstated the value of the Florida property, it fails to bring forward any summary judgment evidence that it relied on either appraisal in closing the deal with Guaranty federal.[14]

> the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
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> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
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> > (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
> >
> > (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.
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> (3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

RESTATEMENT (SECOND) OF TORTS § 552 (1977) (emphasis added); see Blue Bell, 715 S.W.2d at 411. To establish a claim of negligent misrepresentation, the plaintiff must show actual reliance and that this reliance was reasonable. See Geosearch, Inc. v. Howell Petroleum Corp., 819 F.2d 521, 526 (5th Cir. 1987) (applying Texas law).

[14] The district court went on to add that

> Plaintiff's evidence of reliance shows, at best, that they relied on: (1) the fact that an R41B appraisal was required before Guaranty Federal could loan money on the Florida property; (2) the competency and trustworthiness of the parties in the closing room; and

In challenging this holding on appeal, the Don Co. asserts that the district court failed to give proper consideration to the Farris and Scamardo affidavits, and that these affidavits provide evidence that the Don Co. relied on representations by M & S when it entered the Florida land deal with Guaranty.

1. M & S's Representations

The Don Co. may have relied on a number of representations and reasonable assumptions which caused it to conclude that a full R41b appraisal had been obtained at the time it finalized the Florida land deal with Guaranty.[15] Nevertheless, the Don Co.

> (3) a statement by some unidentified person in the closing room who said Guaranty Federal had an appraisal for $11,200,000 on the Florida property.

[15] Specifically, in his affidavit, Farris states that he relied on several factors, including the following:

> (1) previous transactions with Paul Cheng which at that time seemed to be transactions reflecting trustworthiness on the part of Mr. Cheng and his companies; (2) the knowledge, based on both experience and [the Guaranty letter of loan approval], that a financial institution such as [Guaranty] could not make the $10,000,000.00 loan without an R41B appraisal concluding a value of substantially more than $10,000,000.00 or there would be serious repercussions with government regulators; (3) all parties to the transaction had knowledgeable and reputable attorneys and other professionals at the closing with check lists of numerous items needed before the closing could take place, including an appraisal; (4) someone's statement in the closing room, which I cannot identify at this time, stating that [Guaranty] had a letter appraisal stating a value for the Florida property of 11.2 million dollars; and (5) based on many years of experience, and reliance on the numerous professionals involved to perform their duties properly, knowledge that the transactions did actually close and were funded.

Similarly, Scamardo states in his affidavit that he relied upon:

has brought this action against M & S, and the only representations by M & S at issue are the preliminary appraisal letter produced by M & S and M & S's promise to later produce a full narrative R41b appraisal.[16] According to the Don Co., "[i]t, to Plaintiff's sorrow, was a promise grounded not on any facts relating to the property. . . . [T]he `R41b' appraisal dated April 1, 1986, based its value conclusion contingent on the construction of a high-rise residential and commercial complex not permitted by local laws."

> (1) my trust in the business judgment of my partner, Don Farris; (2) knowledge based on my experience in real estate investment and development that a financial institution such as [Guaranty] could not make a loan for the purchase of real property for an amount which exceeded 90% of its value as determined by a R41B appraisal; (3) each party to the transactions had present attorneys and other professionals with exhaustive check lists of items necessary, such as appraisals, tax records, and title policies, all of which I knew from experience had to be present before the closing was finalized and funded; and (4) knowing all of the above, I relied on the proper execution of everyone of their own duties when I knew that the transactions were closed and the funds were transferred.

[16] The Don Co. asserts that M & S promised to deliver a full appraisal unconditionally supporting the preliminary appraisal. To support this assertion, the Don Co. relies upon the following testimony by O'Connor:

> Q. Well, when you send out a letter like the letters that we've been looking at, both dated January 16th, do you normally have something in the file supporting your opinion that the letter contains?
> A. The preliminary letter is really meant to be a promise to do a full appraisal.
> Q. A what?
> A. Really more of a promise to begin the process to complete an appraisal. It begins the process. The notes backing up the numbers are not necessarily that important.

It is uncontroverted that, when contacted and asked to prepare an appraisal for the Florida Property, M & S unambiguously informed Guaranty that it could not prepare a full appraisal under the time constraints put forth by Guaranty. As an alternative, M & S offered to issue a preliminary appraisal letter, and the reliability of that letter is unmistakably limited on its face; the letter in no way misrepresents itself as constituting a full appraisal of the Florida property. Specifically, the letter states:

> It is our understanding that these two parcels of land, comprising approximately 29.98 acres, will be developed as a twin-tower, multi-family residential and shopping complex. . . . The purpose of our evaluation is to estimate the market value of the subject real property subject to the definition of value and the assumptions and limiting conditions attached to this letter.[17] This document should not be construed as a complete appraisal of the subject real estate. Our formal conclusion of value will be contained in our full narrative report to follow.[18]

The Don Co. also asserts that this noncommittal preliminary letter was backed by a promise that an identical formal appraisal would follow. Beyond the fact that the record contains no evidence of such a binding promise and does contain substantial evidence to the contrary (for example, the testimony of O'Connor, quoted supra at note 16, that preliminary letters are nothing

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[17] These assumptions and limiting conditions include the following: (1) "[i]nformation supplied by others which has been considered in this evaluation is from sources believed to be reliable, but no further responsibility is assumed for its accuracy"; and (2) "[a] representative of Marshall and Stevens Incorporated has not inspected the assets of the subject property."

[18] Emphasis has been added.

more than what their name implies--an estimation made at the beginning of the appraisal process), the preliminary letter expressly states that it was M & S's expectation that the Florida land would "be developed as a twin-tower, multi-family residential and shopping complex." Therefore, to the extent that M & S did make the promise that the Don Co. alleges, the record establishes that this promise was fulfilled.

2. The Farris and Scamardo Affidavits

In concluding that the Don Co. failed to establish a genuine issue of material fact as to whether it relied on M & S's preliminary appraisal letter, the district court focused upon testimony given by the Don Co.'s partners during the course of the Cheng and Heath criminal trial. See supra note 1 and accompanying text. Specifically, the court focused upon the testimony of Farris and Scamardo that they (1) relied upon their own business judgment when entering the Florida land transaction with Guaranty, (2) considered Guaranty completely responsible for obtaining the requisite appraisal, and (3) never even saw the M & S preliminary appraisal letter before they closed the deal.[19]

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[19] As stated in the district court's opinion,

> Don Farris testified that pursuant to the deal on the Florida property, he never saw an appraisal for that property prior to or during the closing. Farris also testified that he did not rely on an appraisal in purchasing the Florida property but on his own judgment and what Mr. Cheng, president of Guaranty federal, told him as to a fair purchase price. He went on to explain that he first learned of the Marshall & Stevens appraisal for $11,200,000 in early 1987, over a year after closing.
>
> Leonard Scamardo also testified that he never saw

The Don Co. contends that the district court's grant of summary judgment in favor of M & S was improper in light of the affidavits from both of its partners. According to the Don Co., the district court erred by ignoring these affidavits because they conflict with the earlier testimony given by Farris and Scamardo during the Cheng and Heath criminal trial. In support of this proposition, the Don Co. relies upon this court's holding in Kennett-Murray Corp. v. Bone, 622 F.2d 887, 893 (5th Cir. 1980), where we stated that "a genuine issue can exist by virtue of a party's affidavit even if it conflicts with earlier testimony in the party's deposition."

The Farris and Scamardo affidavits are consistent with their testimony during the related criminal trial in that they present no evidence of actual reliance on representations by M & S. In these affidavits, Farris and Scamardo simply state that, had they known that there was no R41b appraisal valuing the Florida property at $11.2 million, they would not have carried out the Florida land transaction. Although both Farris and Scamardo state that they relied on Guaranty's representations that a R41b appraisal valuing the property at $11.2 million existed at the time of closing, they never stated that they relied upon the contents of the preliminary appraisal letter issued by M & S as confirmation of the land's value. In short, Farris and Scamardo

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an appraisal on the Florida property at the time of or prior to the closing. In addition, he stated that he relied on his own judgment in buying the property, not on any appraisal.

may have acted on the belief that an adequate appraisal existed for purposes of the loan closing, but they have put forth no evidence that they relied on any substantive representations of value made by M & S. In fact, the affidavits and testimony of Farris and Scamardo establish that their belief that the land was worth $11.2 million or more was the product of their own assumptions--assumptions based upon their business experiences and assurances made by Guaranty.[20]

3. Summation

In sum, the Don Co. entered into a $11.2 million land deal involving a $10 million loan without satisfying the R41b appraisal requirement imposed by federal law. Although the Farris and Scamardo affidavits present substantial evidence that the Don Co. relied upon Guaranty's representations that the requisite R41b appraisal had been obtained, the Don Co. has brought this action against M & S.

After reviewing the record de novo, we find that the Don Co. has failed to present evidence that it in any way relied upon representations made by M & S. Because such reliance is an essential element of the Don Co.'s claims against M & S for common law fraud, statutory fraud under section 27.01 of the Texas Business and Commercial Code, and negligent misrepresentation, and because the Don Co. would bear the burden of proof for establishing reliance at trial, we hold that M & S is entitled to summary judgment on these causes of action.

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[20] See supra note 15.

Celotex, 477 U.S. at 322, 106 S. Ct. at 2552; Topalian, 954 F.2d at 1131; International Ass'n of Machinists, 812 F.2d at 222.

B. Claim under the Texas DTPA: The Requisite Element of Producing Cause

Under the Texas DTPA, one injured by a deceptive trade practice may bring a private cause of action for multiple damages or injunctive relief. See TEX. BUS. & COMM. CODE ANN. § 17.50 (Vernon 1987 & Supp. 1993); Thomas C. Cook, Inc. v. Rowhanian, 774 S.W.2d 679, 681 (Tex. App.--El Paso 1989). The DTPA provides that:

> (a) A consumer may maintain an action where any of the following constitute a producing cause of actual damages:
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> (1) the use or employment by any person of a false, misleading, or deceptive act or practice . . . .

TEX. BUS. & COM. CODE ANN. § 17.50 (Vernon 1987 & Supp. 1993) (emphasis added). Therefore, to establish a claim under the Texas DTPA, a plaintiff must establish that the alleged deceptive trade practice is a "producing cause" of his or her damages. See Weitzel v. Barnes, 691 S.W.2d 598, 600 (Tex. 1985). The Texas Supreme Court has defined "producing cause" as "an efficient, exciting, or contributing cause, which in a natural sequence, produced injuries or damages complained of, if any." Rourke v. Garza, 530 S.W.2d 794, 801 (Tex. 1976). Producing cause has also been referred to as "factual causation," and this standard lacks the element of "foreseeability" accompanying the standard of proximate causation. Riojas v. Lone Star Gas Co., 637 S.W.2d 956, 959 (Tex. App.--Fort Worth 1982, writ ref'd n.r.e.). There

may be more than one producing cause for a plaintiff's damages,[21] and, to bring a successful claim under the Texas DTPA, a plaintiff needs only to show that the defendant's deceptive acts were a cause in fact of the plaintiff's damages. Riojas, 637 S.W.2d at 959. The plaintiff need not show actual reliance on the defendant's deceptive acts. Weitzel, 691 S.W.2d at 600; see Dubow v. Dragon, 746 S.W.2d 857, 859 (Tex. App.--Dallas 1988, no writ) ("Under Section 17.46(b) of the Act, `producing cause' and not `reliance' is the ultimate standard.").

The district court granted summary judgment in favor of M & S on the Don Co.'s DTPA claim, holding that "[t]he Don Companies fail[ed] to establish an essential element to recovery under the Deceptive Trade Practices Act; it cannot show that the Marshall & Stevens' appraisals were a producing cause of their damages." The Don Co. challenges this holding on appeal by asserting that,

> under the contract with Guaranty Federal[,] the closing would not have occurred without the Marshall & Stevens letter and Marshall & Stevens knew it. The fact is that Marshall & Stevens failed to perform its professional duties and in fact produced a fraudulent letter appraisal followed by a fraudulent R41B appraisal which is the gravaman of this suit and was a producing cause of the damages to [t]he Don Companies.

Although producing cause is the "least onerous" causation standard, "there can be no recovery of damages by an aggrieved party against another unless the injuries or damages be caused by that other's actions." Riojas, 637 S.W.2d at 959. Even if we assume arguendo that generating the preliminary appraisal letter

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[21] Rourke, 530 S.W.2d at 801.

and promising to generate a full appraisal constitutes a misleading act or practice on the part of M & S,[22] the testimony and affidavits of the Don Co.'s own partners establishes that they did not rely on representations made by M & S when entering the Florida land deal. See supra Part III.A. Rather, they relied on the fact that the loan was nonrecourse and on their belief--a belief resulting from the partner's own assumptions, business experiences, and representations made by Guaranty--that a proper R41b appraisal had been obtained. Accordingly, the question posed is whether (1) Guaranty's representations, (2) Farris' and Scamardo's reliance on those representations and their business judgment (which was influenced by the fact that the loan was nonrecourse), and (3) the Don Co.'s failure to make any effort to ensure that a proper R41b appraisal had been obtained constitute "a new and independent force which intervened and superseded [M & S's alleged wrongful acts] and itself became the sole efficient cause of" the Don Co.'s injuries. Riojas, 637 S.W.2d at 959; see MacDonald v. Texaco, Inc., 713 S.W.2d. 203, 206 (Tex. App.--Corpus Christi 1986, no writ) (finding that the alleged misrepresentation does not constitute a producing cause). We find that the representations of Guaranty, along with Farris' and Scamardo's reliance on those representations and their own business judgment, constitutes "a cause sufficiently efficient to

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[22] As discussed above, the M & S preliminary letter is noncommittal on its face and, to the extent that M & S did make the promise that the Don Co. alleges, the record establishes that this promise was fulfilled. See supra Part III.A.1.

have broken the causal link" between M & S's alleged representations and the Don Co.'s injuries. Therefore, we hold that M & S is entitled to summary judgment on the Don Co's DTPA claim.[23] Celotex, 477 U.S. at 322, 106 S. Ct. at 2552; Topalian, 954 F.2d at 1131; International Ass'n of Machinists, 812 F.2d at 222.

C. Grand Jury Testimony

The Don Co.'s final contention is that the district court abused its discretion by failing to grant its request for access to the grand jury testimony of M & S employees. The testimony primarily at issue is that of O'Connor. Specifically, in the brief it has submitted to this court, the Don Co. states that:

> O'Connor is a critically important witness. She may well have been a co-conspirator with Cheng, Heath and Romero in agreeing to provide the hokey letter appraisal to facilitate their raid on Guaranty Federal and Plaintiff. While Plaintiff can speculate and draw inferences from her criminal trial testimony and her `convenient' lack of memory when deposed in this case, you need not speculate on the effect of her grand jury testimony on this motion.

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[23] The district court also held that, even if it could establish the other elements of a DTPA cause of action, the Don Co. has failed to establish any injuries under the DTPA. This holding was based on the following findings: (1) the sale of the Arizona property and the purchase of the Florida property were intertwined; (2) during the related criminal trial, the Don Co.'s partners testified that they made a $1.3 million profit on the sale of the Arizona property; and (3) the Don Co. has no liability on the note on the Florida property because it is non-recourse, and it offered no evidence that it was damaged by its purchase of the Florida property. Although the Don Co. challenges this determination on appeal, we do not reach it because we have found that M & S's representations do not constitute a "producing cause" of the Don Co.'s alleged damages.

The Don Co. was awarded access to this testimony by the judge who supervised the grand jury, and the district court had this testimony before it when considering M & S's motion for summary judgment. According to the Don Co., "[t]he district court, by inaction or apparent non-consideration of the materials, here did not rule."

As this court stated in Fisher v. Metropolitan Life Ins. Co., 895 F.2d 1073, 1078 (5th Cir. 1990),

> [i]t is the established law of this circuit that a plaintiff's entitlement to discovery prior to a ruling on a summary judgment motion may be cut off when, within the trial court's discretion, the record indicates that further discovery will not likely produce facts necessary to defeat the motion.

See Cormier v. Pennzoil Exploration & Production Co., 969 F.2d 1559, 1560 (5th Cir. 1992); Rosas v. United States Small Business Administration, 964 F.2d 351, 359 (5th Cir. 1992); International Shortstop, Inc. v. Rally's, Inc., 939 F.2d 1257, 1267 (5th Cir. 1991), cert. denied, __ U. S. __, 112 S. Ct. 936 (1992). We have held that the Don Co. has failed to provide evidence that (1) it relied on M & S's representations when closing its Florida land deal with Guaranty and (2) M & S's representations constitute a producing cause of the Don Co.'s alleged damages; these are essential elements of the Don Co.'s claims. See supra Parts III.A & B. The undisputed facts establish that the Don Co.'s decision to enter the Florida land deal was not based upon M & S's representations. Rather, it was based upon the nonrecourse nature of the loan, Guaranty's representations that a proper R41b appraisal existed, the business judgment of the Don Co.'s

partners, and the general failure of the Don Co. to ensure that the R41b appraisal required under federal law had in fact been obtained before closing the land deal. Although O'Connor's testimony supports some of these determinations, they rest primarily upon the testimony and affidavits of Farris and Scamardo. Even assuming that the grand jury testimony of O'Connor and other M & S employees would have impeached some of O'Connor's testimony in this case,[24] it would not have altered the testimony of the Don Co.'s partners.

Accordingly, based upon our de novo review of the record, we conclude that it is highly unlikely that discovery of the grand jury testimony of M & S's employees would produce facts necessary to defeat M & S's motion for summary judgment. We also conclude, therefore, that the district court's failure to grant the Don Co. access to this testimony does not constitute reversible error. See Fisher, 895 F.2d at 107; see also Cormier, 969 F.2d at 1560; Rosas, 964 F.2d at 359; Rally's, 939 F.2d at 1267.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's grant of summary judgment in favor of M & S.

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[24] In the brief it has submitted to this court, the Don Co. has included an excerpt of the testimony at issue. This testimony merely supports the Don Co.'s assertion that M & S issued the preliminary letter without conducting a formal computation and based upon information supplied by Guaranty--a fact that is surmisable from the face of the preliminary letter and the conditions accompanying it. See supra Part III.A.1.