Affirmed and Memorandum Opinion filed May 19, 2011.

In The

Fourteenth Court of Appeals

NO. 14-10-00293-CV

EMMITT JOHNSON AND JOHNSON AND JOHNSON ENTERPRISES ASSOCIATES, INC., Appellants

V.

MARILYN LEWIS, Appellee

On Appeal from the County Court at Law No. 2
Fort Bend County, Texas
Trial Court Cause No. 09-CCV-038989

MEMORANDUM OPINION

Appellants, Emmitt Johnson and Johnson and Johnson Enterprises Associates, Inc. ("Johnson Enterprises") appeal from the trial court's denial of their motion for new trial. Finding no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Johnson Enterprises is a home remodeling business. Johnson is the vice president of Johnson Enterprises. On December 2, 2008, appellee Marilyn Lewis contracted with Johnson Enterprises to repair damage to her home allegedly caused by Hurricane Ike.

Eventually a dispute arose between appellee and Johnson Enterprises. On June 26, 2009, appellee filed her first amended petition in her lawsuit against both appellants in County Court at Law No. 2 of Fort Bend County.[1] In her amended petition, appellant asserted causes of action for fraud, negligent misrepresentation, breach of contract, and for violations of the Texas Deceptive Trade Practices Act ("DTPA"). On July 1, 2009, appellants, appearing pro se, filed an answer to appellee's lawsuit.

On July 3, 2009, appellee sent requests for admissions to both appellants by certified mail.[2] On July 27, 2009, Johnson went to the post office to pick up several pieces of certified mail. According to Johnson, he picked up only a single item, a Certificate of Written Discovery certifying that appellee had served on Johnson Enterprises several discovery requests, including requests for admissions. According to Johnson, the remaining pieces of certified mail had already been returned to the sender by July 27, 2009. Appellants made no inquiries to appellee about the discovery requests mentioned in the Certificate of Written Discovery. Neither appellant served answers to appellee's requests for admissions until after the trial court had signed the final summary judgment.

On July 20, 2009 Johnson filed a Motion to Dismiss with Prejudice on all of appellee's causes of action. In support of his motion, Johnson asserted several defenses. These defenses included his contention that he was not liable in his individual capacity because he did not execute the contract at issue in the lawsuit. Johnson also argued that appellee did not give him proper pre-suit notice of her DTPA claim. Finally, Johnson notified the trial court that Johnson Enterprises had filed a lawsuit in small claims court in Fort Bend County and he asserted this was the proper court to resolve the parties' dispute.

[1] Appellee's Original Petition does not appear in the appellate record.

[2] This date is based on the Certificate of Written Discovery appellee filed with the trial court on July 15, 2009.

Johnson's Motion to Dismiss With Prejudice was eventually set for hearing on November 3, 2009.

On September 22, 2009, the parties filed an agreed motion for continuance. The record on appeal does not reveal whether the trial court ruled on the agreed motion.

On October 8, 2009 appellee filed a traditional motion for summary judgment.[3] In her motion, appellee asserted she was entitled to judgment against appellants on each of her asserted causes of action. Appellee based her motion entirely on appellants' deemed admissions. According to appellee, the deemed admissions conclusively proved each element of her causes of action. In support of her motion, appellant attached copies of the requests for admission as well as documentation supporting the fact that she had mailed the requests to appellants by certified mail. Included in this documentation were copies of both envelopes, each of which had been stamped "Returned to Sender" and the reason checked by the post office on each envelope was "unclaimed." Appellee's motion for summary judgment was set for hearing on November 3, 2009, the same day as Johnson's Motion to Dismiss with Prejudice. Appellants received the motion as well as notice of the summary judgment hearing. Despite receiving notice of the summary judgment hearing, appellants did not file anything responsive to appellee's motion or the deemed admissions.

The summary judgment hearing took place on November 3, 2009. Johnson attended the hearing. Even though Johnson attended the hearing, he did not file anything responsive to appellee's motion. At the end of the hearing, the trial court announced it intended to grant appellee's motion for summary judgment. Despite that announcement,

[3] In her brief, appellee asserts she filed not only a traditional motion for summary judgment, but also a no-evidence motion under Rule 166a(i) of the Texas Rules of Civil Procedure. We disagree. Here, appellee was the plaintiff below and therefore she had the burden of proof on each of her causes of action. The plain language of the rule provides: "a party … may move for summary judgment on the ground there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial." *See* Tex. R. Civ. P. 166a(i).

the trial court waited more than a month, until December 22, 2009, to sign the order granting appellee's motion. During the period between the November 3, 2009 hearing and the signing of the order granting appellee's motion for summary judgment on December 22, 2009, appellants still did not file anything responsive to the motion for summary judgment or the deemed admissions.

On January 21, 2010, appellants' retained counsel filed a motion for new trial. In their motion, appellants, for the first time, asked the trial court to strike the deemed admissions and allow appellants to serve responses to appellee's requests for admissions. Appellants attached their proposed responses to their motion. Appellants argued the trial court should strike their deemed admissions because, according to appellants, they never received the requests.

In their motion for new trial appellants also asked the trial court to set aside the summary judgment. In support of their contention they were entitled to a new trial, appellants relied entirely on their status as pro se litigants. According to appellants, they "mistakenly believed that the Court would grant the Motions to Dismiss that they had on file with the Court and [appellee's] Motion for Summary Judgment would not be heard by the Court." Appellants also argued they "mistakenly believe[d] that [appellee] would not be allowed to have the admissions deemed against them and used in support of summary judgment." In addition, appellants argued they mistakenly believed "that if the Court denied their Motions to Dismiss that the Court would consider the defenses that [appellants] had alleged in their Motions to Dismiss when ruling on [appellee's] Motion for Summary Judgment." Appellants also asserted they "did not realize their mistake until after the Court had granted [appellee's] Motion for Summary Judgment, when it was too late to file a response, to seek a continuance, or to file a late response because the Judgment had been entered." Finally, appellants asserted they "would have filed a response to the Motion for Summary Judgment but for their mistaken belief that their argument and the

defenses in their Motion to Dismiss would be considered by the court when ruling on [appellee's] Motion for Summary Judgment." The trial court denied appellants' motion for new trial. This appeal followed.

DISCUSSION

Appellants raise two issues on appeal. In their first issue, appellants contend the trial court abused its discretion when it refused to strike their deemed admissions. In their second issue, appellants assert the trial court once again abused its discretion when it denied their motion for new trial. We address each issue in turn.

I. Did the trial court abuse its discretion when it refused to strike appellants' deemed admissions?

As part of their motion for new trial, appellants asked the trial court to strike their deemed admissions. The trial court refused. Appellants contend this was an abuse of the trial court's discretion because, according to appellants, "they had never received the Requests for Admissions." In addition, appellants emphasize the fact they appeared pro se in the trial court until after the trial court granted appellee's motion for summary judgment.

The supreme court recently addressed a remarkably similar case. In *Unifund CCR Partners v. Weaver*, Weaver, a pro se defendant, was served with requests for admissions. 262 S.W.3d 796, 797 (Tex. 2008). The record did not show that Weaver "actually served Unifund with his responses." *Id.* Eventually Unifund filed a motion for summary judgment based on Weaver's failure to timely serve his responses to the requests for admissions. *Id.* Weaver did not file a response to the motion for summary judgment and it was granted by the trial court.[4] *Id.* The first time Weaver asserted that he had properly

[4] The supreme court mentions that "Weaver's responses to Unifund's requests for admissions were

served Unifund with his responses to Unifund's requests for admissions, was in a post-judgment filing. *Id.* The supreme court held that "Weaver waived his right to challenge the deemed admissions." *Id.* at 798. In explaining their holding, the supreme court pointed out that "Unifund's motion for summary judgment put [Weaver] on notice of the deficiency of his response: that Unifund never received the response because Weaver had not served, or attempted to serve, the response on Unifund." *Id.*

As in *Unifund*, appellants knew of their failure to serve responses to appellee's requests for admissions once they were served with appellee's motion for summary judgment. Despite that knowledge, appellants, like Weaver, chose to do nothing until after the final summary judgment was granted. Therefore, we hold that since appellants knew of their mistake before the final summary judgment was entered, and could have responded to appellee's motion for summary judgment based on the deemed admissions but chose not to do so, they have waived the right to raise this issue on appeal. *Id.* We overrule appellant's first issue on appeal.

II. Did the trial court abuse its discretion when it denied appellants' motion for new trial?

In their second issue, appellants assert the trial court abused its discretion when it denied their motion for new trial because (1) their failure to respond to appellee's motion for summary judgment was a mistake; and (2) the trial court should have granted their post-judgment motion to strike the deemed admissions. We disagree.

First, we have already addressed, and rejected, appellants' first issue challenging the trial court's denial of their post-judgment request to strike deemed admissions and we need not reexamine that question here.

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on file when the summary judgment motion was granted." *Unifund CCR Partners v. Weaver*, 262 S.W.3d 796, 797 (Tex. 2008).

Second, in *Unifund*, a case involving a pro se defendant appealing from the granting of a summary judgment to which he did not respond, the supreme court pointed out that "a party who fails to expressly present to the trial court any written response in opposition to a motion for summary judgment waives the right to raise any arguments or issues post-judgment." *Unifund*, 262 S.W.3d at 797.

To avoid application of this general rule, appellants cite the case of *Wheeler v. Green*, 157 S.W.3d 439 (Tex. 2005). In *Wheeler*, the supreme court determined that good cause excused Wheeler's failure to file a summary judgment response prior to judgment because "nothing in this record suggests that before summary judgment was granted, [Wheeler] realized … that she needed to file a response to the summary judgment" motion. *Id.* at 442. That is not the case here. As explained above, appellants were served with the motion for summary judgment, had notice and attended the hearing. As a result of the certificate of written discovery and the motion for summary judgment, appellants also had notice of the deemed admissions as well as appellee's intent to use them in support of her motion for summary judgment. With this knowledge, appellants could have responded to appellee's motion for summary judgment. In addition, the trial court expressly informed appellants it intended to grant appellee's motion at the conclusion of the hearing and then waited more than a month before doing so. Despite all of this, appellants still did not file any type of response to the motion for summary judgment. Since appellants did not respond, they have waived the right to raise this issue on appeal. *See Unifund*, 262 S.W.3d at 798 ("Weaver knew of his mistake before judgment and could have responded to Unifund's motion, but because he did not, he waived his right to raise the issue thereafter."). We overrule appellants' second issue.

CONCLUSION

Having overruled each of appellants' issues on appeal, we affirm the trial court's denial of appellants' motion for new trial.

/s/ John S. Anderson
Justice

Panel consists of Justices Anderson, Seymore, and McCally.