In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-09-00063-CV

MICHAEL D. GREENE, Appellant

V.

WOODFOREST NATIONAL BANK, Appellee

On Appeal from the 9th District Court
Montgomery County, Texas
Trial Cause No. 07-03-02212 CV

MEMORANDUM OPINION

In this breach of contract case, we must decide whether the trial court properly granted Woodforest National Bank's no-evidence motion for summary judgment on Michael D. Greene's claim alleging the bank had wrongfully dishonored checks drawn on his account. We affirm.

Background

Greene opened a checking account at Woodforest in 2004. In July 2005, Greene deposited $630,199.65 into his account via a wire-transfer from Chicago Title Insurance Company. On September 12, 2005, Greene's mother, to whom Greene had written a

check, presented Woodforest a $300,000.00 check. When Greene's mother requested payment, Woodforest refused to honor her request and began an investigation into Greene's account.

During the following ten days, Greene's mother deposited several other checks that had been drawn on Greene's account into her accounts at other financial institutions. When those checks were presented to Woodforest for collection, Woodforest did not honor them.

On September 21, 2005, Greene's son entered a Woodforest branch. Based on a power of attorney that named him as Greene's attorney-in-fact, Greene's son requested that Woodforest close Greene's account and give him the remaining balance. Woodforest refused the request made by Greene's son to close Greene's account.

In its investigation of Greene's account, Woodforest learned that Greene had been convicted of tax evasion, in Case No. 04-CR-209-HDC, styled *United States of America v. Michael Don Greene*, in the United States District Court for the Northern District of Oklahoma. Woodforest contacted the Internal Revenue Service, and on October 6, 2005, the IRS placed a levy on Greene's account. Pursuant to the IRS levy, Woodforest then forwarded all of the funds in Greene's account to the IRS.

Over a year later, Woodforest received a demand letter requesting that Woodforest pay Greene's mother the sum total of all checks that Greene issued to his mother and that Woodforest had dishonored. In March 2007, Woodforest filed a declaratory judgment suit against Greene, his mother, his son, and several entities over which they exercised

control. Greene counterclaimed and asserted that Woodforest, by failing to honor his checks, had breached the parties' contract.

The trial court granted Woodforest's summary judgment and dismissed Greene's breach of contract counterclaim. In three issues, Greene appeals.

Adequate Time for Discovery

Initially, we address Greene's contention that he was not given adequate time for discovery before Woodforest filed its no-evidence motion for summary judgment. *See* TEX. R. CIV. P. 166a(i) ("After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim[.]") We note that this suit had been on file approximately nineteen months before Woodforest filed its motion for summary judgment. We further note that Greene failed to file an affidavit explaining the need for further discovery or to file a verified motion for continuance. *See Tenneco, Inc. v. Enterprise Prods. Co.*, 925 S.W.2d 640, 647 (Tex. 1996). Thus, we conclude Greene waived any argument that Woodforest's motion was premature. *See Bradford Partners II, L.P. v. Fahning*, 231 S.W.3d 513, 521 (Tex. App.—Dallas 2007, no pet.); *see also Tenneco*, 925 S.W.2d at 647.

Standard of Review

We review a trial court's decision to grant a no-evidence motion for summary judgment under the standards set forth in Rule 166a(i) of the Texas Rules of Civil Procedure. To defeat a no-evidence motion for summary judgment, the non-movant must

produce competent summary judgment evidence that raises a genuine issue of material fact on each of the elements of the claim that the movant has challenged. TEX. R. CIV. P. 166a(i); *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004).

The non-movant raises a genuine issue of material fact by producing "more than a scintilla of evidence" to establish the challenged element's existence. *Ford Motor Co.*, 135 S.W.3d at 600. More than a scintilla of evidence exists when the evidence is such that reasonable and fair-minded people can differ in their conclusions. *Id.* at 601. If "'the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence.'" *Id.* (quoting *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983)). In determining whether the non-movant has produced more than a scintilla of evidence, we review the evidence in the light most favorable to the non-movant, "crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not." *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006).

Analysis

The elements of a breach of contract claim include proving that (1) a valid contract exists, (2) the party alleging the breach performed or tendered performance, (3) the other contracting party breached the contract, and (4) the party alleging the breach suffered damages caused by the other party's breach. *Bank of Tex. v. VR Elec., Inc.*, 276 S.W.3d 671, 677 (Tex. App.—Houston [1st Dist.] 2008, pet. denied); *Winchek v. Am. Express*

Travel Related Servs. Co., 232 S.W.3d 197, 202 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *Sullivan v. Smith*, 110 S.W.3d 545, 546 (Tex. App.—Beaumont 2003, no pet.).

In this case, Woodforest's no-evidence motion for summary judgment attacked elements two, three, and four of Greene's breach of contract claim. Greene's response asserts that Woodforest breached the deposit account agreement by dishonoring the various checks made payable to his mother and by refusing his son's request to close the account. As a result of Woodforest's alleged breach, Greene claimed damages of $559,350.00, which represents the sum of three of the checks that Greene gave to his mother.

Greene's response to Woodforest's motion for summary judgment included the following: (1) the deposit account agreement; (2) excerpts of depositions that had been given by various Woodforest employees or former employees; (3) Greene's power of attorney; (4) portions of Woodforest's internal guide for handling powers of attorney; (5) Woodforest's responses to five requests for admission; and (6) a summary, allegedly created by Woodforest, of the checks dishonored by Woodforest. Because Greene bore the burden of producing competent summary judgment evidence on each of the elements of his claim, a failure to produce competent summary judgment evidence on any one element is fatal to his case.

We first address whether Greene's summary judgment evidence raised a genuine issue of material fact that Woodforest's actions caused Greene's alleged damages. *See* TEX. R. CIV. P. 166a(i); *Landers v. State Farm Lloyds*, 257 S.W.3d 740, 746 (Tex.

App.—Houston [1st Dist.] 2008, no pet.) (holding no-evidence motion filed under Rule 166a(i) that challenges a specific element of a claim shifts burden to non-movant to raise genuine issue of material fact by presenting at least a scintilla of evidence as to challenged element). Greene alleged in his response that, "but for Woodforest['s] failure to honor the subject checks the [$559,350.00 in] funds would not have been subject to the later IRS levy, and therefore lost to Defendant Greene." Thus, Greene's claim for damages implicitly assumes that he was damaged by Woodforest's decision to honor the levy placed on his funds by the IRS.

When Woodforest received the IRS levy, it was put on notice that releasing any funds to which the levy had attached subjected it to liability for the released funds and for statutory penalties. *See* 26 U.S.C.A. § 6332(a), (d) (West 2002) (instructing that absent specific statutory authority, anyone possessing property upon which a levy has been made must surrender the property or face liability and penalties). Anyone who surrenders property to the IRS pursuant to an IRS levy is statutorily "discharged from any obligation or liability to the delinquent taxpayer and any other person with respect to such property or rights to property arising from such surrender or payment." *Id.* § 6332(e) (West 2002).

In light of the discharge provided by 26 U.S.C.A. section 6332, Woodforest's decision to transfer the balance of Greene's account to the IRS cannot be the legal cause of Greene's alleged damages. *See Gym-N-I Playgrounds, Inc. v. Snider*, 220 S.W.3d 905, 914 (Tex. 2007) (concluding that contractual language negated causation element of plaintiff's claims as a matter of law). Furthermore, even if the statute is not sufficiently

broad to discharge Woodforest for its conduct prior to its receipt of the levy, a matter we need not decide, Greene offered no evidence of any consequential damages.

We conclude that Greene's response presented no competent summary judgment evidence to raise a genuine issue of material fact that he had been damaged by Woodforest's breach. *See* TEX. R. CIV. P. 166a(i); *Ford Motor Co.*, 135 S.W.3d at 600. The trial court properly granted Woodforest's no-evidence summary judgment motion.[1] We affirm the trial court's judgment.

AFFIRMED.

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HOLLIS HORTON
Justice

Submitted on December 31, 2009
Opinion Delivered April 8, 2010
Before McKeithen, C.J., Kreger and Horton, JJ.

[1]The remainder of Greene's arguments concern matters unrelated to Woodforest's no-evidence motion for summary judgment or Greene's response. Accordingly, we need not reach Greene's additional arguments to resolve this appeal. *See* TEX. R. APP. P. 47.1.