

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-11-00020-CV

GAYLE F. SHARP, Appellant

V.

TERRY MITCHELL ACREMAN, Appellee

On Appeal from the 411th District Court
Polk County, Texas
Trial Cause No. 24109

MEMORANDUM OPINION

Gayle F. Sharp, an employee of the Texas Department of Criminal Justice, appeals from a summary judgment granted by the trial court in favor of Terry Mitchell Acreman, an inmate. Acreman sued Sharp, in his individual capacity, for theft of Acreman's property under the Texas Theft Liability Act; negligent supervision of inmates who packed Acreman's property for transfer to another unit; violations of Acreman's federal and state constitutional rights; retaliation for Acreman's filing of grievances; and loss of earnings. Essentially, Acreman complained that "Officer Sharp deprived plaintiff of his property by letting his support service inmates (SSI's) pack plaintiff's property and steal

plaintiff's materials and tools." See Tex. Civ. Prac. & Rem. Code Ann. §§ 134.001-.005 (West 2011). Sharp's answer denied the allegations and asserted affirmative defenses.

Acreman's motion for summary judgment asserted that Sharp failed to answer Acreman's first set of interrogatories, that Sharp is liable for the loss of Acreman's property and for \$400 in actual damages, and that Sharp is liable for Acreman's lost earnings. Sharp did not file a response to the summary judgment motion. The trial court signed a summary judgment awarding Acreman monetary damages. We reverse the trial court's judgment and remand the case for further proceedings.

STANDARD OF REVIEW

A movant for a traditional summary judgment must establish there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Western Invs., Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005). We review the summary judgment de novo, consider the evidence in the light most favorable to the non-movant, and indulge every reasonable inference and resolve any doubts in the non-movant's favor. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). If a plaintiff moves for summary judgment on his own causes of action, he must present competent summary judgment evidence establishing as a matter of law each element of his causes of action. See Tex. R. Civ. P. 166a(c); *MMP, Ltd. v. Jones*, 710 S.W.2d 59, 60 (Tex. 1986); *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979). The non-movant's failure to respond cannot supply by default the summary

judgment proof necessary to establish the movant's right. *Clear Creek Basin Auth.*, 589 S.W.2d at 678. Summary judgments must stand on their own merits. *Id.*

ANALYSIS

In a suit under the Theft Liability Act, a person who has sustained damages resulting from theft may recover from “a person who commits theft, the amount of actual damages found by the trier of fact and, in addition to actual damages, damages awarded by the trier of fact in a sum not to exceed \$1,000[.]” Tex. Civ. Prac. & Rem. Code Ann. § 134.005(a). Section 134.002 of the Act states that “[t]heft’ means unlawfully appropriating property or unlawfully obtaining services” as described by various named sections of Chapter 31 (“Theft”) of the Penal Code. *Id.* § 134.002. Under the theft statute applicable here, “[a] person commits an offense if he unlawfully appropriates property with intent to deprive the owner of property.” *See* Tex. Penal Code Ann. § 31.03(a) (West 2011).

Among other arguments, Sharp asserts on appeal that Acreman has not established the element of intent in the theft claim. *See id.*; *see also* *Byrd v. State*, 336 S.W.3d 242, 251 (Tex. Crim. App. 2011) (“A person commits theft if he unlawfully appropriates property with intent to deprive the owner of property.”). In his motion for summary judgment, Acreman did not allege or offer evidence to establish that Sharp intentionally deprived Acreman of his property.

Acreman also pleaded a cause of action against Sharp for negligent supervision of the inmates who allegedly packed Acreman's property for transfer. Acreman's petition contains a conclusory statement that Sharp permitted the inmates to steal his property, but Acreman presented no evidence supporting that claim in his motion for summary judgment.

Additionally, Acreman alleged his constitutional due process rights were violated because he was deprived of his property. Section 501.007 of the Texas Government Code supplies an administrative remedy for inmates whose property has been damaged or lost. *See* Tex. Gov't Code Ann. § 501.007 (West 2004). The record does not establish that Acreman used the administrative remedy. *See In re Jones*, No. 01-08-00729-CV, 2010 WL 987723, at *4 (Tex. App.—Houston [1st Dist.] Mar. 18, 2010, no pet.) (mem. op.).

At the hearing on the summary judgment motion, the parties indicated Sharp had filed answers to interrogatories, though the answers were apparently untimely filed and the subject of a motion to compel. Interrogatories are a tool of discovery. *See* Tex. R. Civ. P. 192.1(d), 192.3(a), 197.1. The Rules of Civil Procedure provide remedies for a party's failure to timely answer interrogatories. Tex. R. Civ. P. 193.6, 215.1, 215.2. By itself, the failure to timely answer interrogatories does not constitute proof as a matter of law of the elements of a cause of action. *See* Tex. R. Civ. P. 166a.

In his motion for summary judgment, Acreman stated a dollar amount for his claimed lost earnings, but he did not establish Sharp caused the loss of those earnings. In

his petition, he stated that the unit to which he was transferred had no craft shop. If Acreman is claiming he did not earn money because his property was gone, his motion for summary judgment did not establish that claim.

Finally, in an amended petition, Acreman pleaded a cause of action for retaliation. He did not offer any evidence supporting his claim.

Acreman has not conclusively established each element of his causes of action. We reverse the trial court's summary judgment and remand the case to the trial court for further proceedings.

REVERSED AND REMANDED.

DAVID GAULTNEY
Justice

Submitted on September 6, 2011
Opinion Delivered September 29, 2011

Before McKeithen, C.J., Gaultney and Kreger, JJ.