COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00254-CV

RON LEWIS APPELLANT

V.

WILLIAM F. RUCKER, LAURA K. RUCKER, RUCKER MANAGEMENT LLC, WFR PARTNERS LP, TEXAS ENVIRONMENTAL TECHNOLOGIES, LLC, RUCKER PROPERTIES, LLC, R&R FAMILY MANAGEMENT, LLC, R&R FAMILY LP, QSR&B MANAGEMENT, LLC, QSR&B PROPERTIES LP, AND HERBERT S. BEASLEY APPELLEES

FROM THE 348TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 348-265084-13

MEMORANDUM OPINION[1]

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[1] *See* Tex. R. App. P. 47.4.

I. Procedural Background

On March 27, 2013, pro se Appellant Ron Lewis filed his original petition, alleging various causes of action against Appellees William F. Rucker, Laura K. Rucker, Rucker Management LLC, WFR Partners LP, Texas Environmental Technologies, LLC, Rucker Properties, LLC, R&R Family Management, LLC, R&R Family LP, QSR&B Management, LLC, QSR&B Properties LP, and Herbert S. Beasley. Although he attempted to file the lawsuit as an expedited action under rule of civil procedure 169, he did not affirmatively plead, as required by the rule, that he sought "only monetary relief aggregating $100,000 or less, including damages of any kind, penalties, costs, expenses, pre-judgment interest, and attorney's fees" in order to invoke the rule 169 expedited action process.[2]

In his original petition, Lewis also stated that, "[n]o service of process is necessary at this time." Although the record is silent as to when Appellees were actually served, Lewis admits that at least a year passed before he served them. And, at least by August 1, 2014, when Appellee William Rucker sought injunctive relief in his amended original petition, the case became ineligible for the expedited action process provided for in rule 169.

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[2]Instead, Lewis simply "request[ed] that this case be conducted under Discovery Control Plan Level 1 pursuant to Rule 190.2 of the Texas Rules of Civil Procedure as an **Expedited Action under Rule 169** of the Texas Rules of Civil Procedure."

On February 22, 2016, Appellees filed a no-evidence motion for summary judgment, challenging at least one element of every cause of action Lewis asserted against them. On April 13, 2016, Appellees filed a traditional motion for summary judgment.

Lewis filed his response to the no-evidence summary judgment motion on May 5, 2016, and his response to the traditional motion for summary judgment on June 3, 2016. On June 10, 2016, the trial court heard both motions, as well as the objections filed by Appellees as to Lewis's summary judgment evidence. Eleven days later, on June 21, the trial court signed a final order granting both the no-evidence and the traditional summary judgment motions and sustaining Appellees' objections to Lewis's summary judgment evidence.

II. Discussion

Lewis raises three issues on appeal. We take each in turn.

A. Issue One – Adequate Time for Discovery

In his first issue, Lewis complains that the trial court granted the no-evidence summary judgment before an adequate time for discovery had passed. *See* Tex. R. Civ. P. 166a(i) (providing that "[a]fter [an] adequate time for discovery, a party . . . may move for summary judgment on the ground that 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"). Lewis frames his issue as follows:

> Did the court abuse its discretion in entertaining and then granting Appellees' motion for a no-evidence summary judgment when Appellees had not meaningfully responded to old discovery requests or discovery requests served by Appellant served after new counsel, Appellant and the court agreed to reopen discovery?

The answer is no. The trial court did not abuse its discretion.

The lawsuit was filed in March 2013 and, according to Lewis, Appellees were served by April 2014. The summary judgment motion was filed approximately two years after Appellees had answered and appeared in the lawsuit, and the record does not indicate that there was any period of abatement.

Whether the process of discovery in a lawsuit is cooperative or contentious, absent complexity of the lawsuit or extreme circumstances—neither of which are present here—two years of unabated procedural history is generally considered an adequate time to conduct it. *See generally In re Guardianship of Patlan*, 350 S.W.3d 189, 196–97 (Tex. App.—San Antonio 2011, no pet.) (holding two years between filing of lawsuit and filing of motion adequate); *Mulcahy v. Wal-Mart Stores, Inc.*, No. 02-10-00074-CV, 2010 WL 5118199, at *2 (Tex. App.—Fort Worth Dec. 16, 2010, no pet.) (mem. op.) (holding fifteen months from date lawsuit was filed adequate); *Madison v. Williamson*, 241 S.W.3d 145, 155 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (holding one year adequate); *LaRue v. Chief Oil & Gas, L.L.C.*, 167 S.W.3d 866, 872–73 (Tex. App.—Fort Worth 2005, no pet.) (holding one year and eight months after filing of original petition adequate); *McMahan v. Greenwood*, 108 S.W.3d 467, 498 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (op. on reh'g) (holding 28

months—including a 16-month bankruptcy stay—adequate); *Rest. Teams Int'l, Inc. v. MG Sec. Corp.*, 95 S.W.3d 336, 339–41 (Tex. App.—Dallas 2002, no pet.) (holding seven months adequate). *But see McInnis v. Mallia*, 261 S.W.3d 197, 200, 203 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (holding in legal malpractice action—a suit-within-a-suit—that six months was not an adequate time for discovery).

But more to the point, because Lewis failed to file an affidavit explaining the need for further discovery or a verified motion for continuance of the summary judgment hearing, he cannot now complain on appeal that he was denied sufficient time to conduct discovery. *Tenneco Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 647 (Tex. 1996) (holding that "[w]hen a party contends that it has not had an adequate opportunity for discovery before a summary judgment hearing, it must file either an affidavit explaining the need for further discovery or a verified motion for continuance").

We overrule Lewis's first issue.

B. Issue Two – The No-Evidence Motion for Summary Judgment

1. Defect in Lewis's Affidavit

In his second issue, Lewis queries,

> Did this court err in sustaining Appellees' objections to the fact affidavit Appellant produced to support Appellant's response to the no-evidence motion? And, should the 348th Court have allowed Appellant an opportunity to cure any defects in his affidavit?

Appellees raised five objections to Lewis's affidavit in response to their motion for summary judgment. The first, and most basic, objection was that Lewis did not "affirmatively show that he [was] competent to testify to the matters stated therein." *See* Tex. R. Civ. P. 166a(f) (providing that supporting and opposing affidavits "shall show affirmatively that the affiant is competent to testify to the matters stated therein"). Because Lewis failed to affirmatively show his competence to testify to the matters stated in his affidavit, the trial court did not err by sustaining Appellees' first objection. *See id.* But the question remains as to whether the trial court denied Lewis an opportunity to cure the defect.

Appellees filed their objections to Lewis's affidavit and summary judgment evidence on May 10. The summary judgment hearing occurred 31 days later, on June 10. The trial court ruled on the summary judgment motion and the objections 11 days after the hearing, on June 21. According to the record, during that 42-day span, Lewis did not file a new or amended affidavit or a motion seeking an opportunity to cure the defect. Therefore, the trial court did not, as Lewis contends, deny him an opportunity to cure the defect. Rather, Lewis did not avail himself of the opportunity that he had to cure the defect. The trial court did not err by failing to grant relief that Lewis did not request. *Barnes v. Athens*, No. 02-12-00173-CV, 2012 WL 4936624, at *2 (Tex. App.—Fort Worth Oct. 18, 2012, no pet.) (mem. op.).

2. Defect in Lewis's Presentation of Evidence

But even assuming the trial court erred by striking Lewis's summary judgment evidence, we agree with Appellees that Lewis failed to carry his summary judgment burden to demonstrate a genuine issue of material fact by including voluminous summary judgment evidence in his response without any explanation as to the claims or points to which the evidence related.

While Lewis attached a substantial volume of evidence to his response, he failed to apply the evidence to the specific causes of action or elements of the claims that were challenged. Instead, after devoting five pages of his response to attacks on the timing and sufficiency of the motion itself, Lewis offered three sentences to explain, in a conclusory fashion, that his summary judgment proof raised a material fact issue to preclude summary judgment. He then attached a four-and-a-half-page affidavit—the bulk of which appeared to be copied verbatim from his live pleading—along with more than 300 pages of unauthenticated, unsworn documents.

Once Appellees alleged in their no-evidence motion for summary judgment that there was no evidence of one or more essential elements of Lewis's claims, the burden shifted to Lewis to point out evidence that raised a genuine issue of material fact on each of the challenged elements. *See Payne v. Highland Homes, Ltd.*, No. 02-14-00067-CV, 2016 WL 3569533, at *4 (Tex. App.—Fort Worth June 30, 2016, no pet.) (mem op.). And we have held that a nonmovant cannot discharge that burden by filing voluminous summary judgment evidence

with a response that states generally that a genuine fact issue has been raised as to each element. *Id.* For a response to be adequate, it must include "some form of discussion in its response that raises issues of material fact on [each of] the challenged elements." *Id.* As our sister court has explained, to allow a nonmovant to skirt this obligation would mean that

> the trial court would have the onerous task of searching the summary-judgment evidence to see if a genuine issue of fact had been raised as to each challenged element. Such a holding would place an unreasonable burden on the trial court and would violate the requirement of Rule 166a(i) that the response must point out evidence that raises a genuine issue of fact as to each challenged element.

San Saba Energy, L.P. v. Crawford, 171 S.W.3d 323, 331 (Tex. App.—Houston [14th Dist.] 2005, no pet.). We agree with this analysis and add that to hold otherwise would likewise place an unreasonable burden on appellate courts to search through voluminous summary judgment evidence to determine whether the trial court, in discharging its onerous task, missed proof of facts that had been raised as to each challenged element. Because Lewis did not meet his obligation to point out evidence that raised a genuine issue of material fact on each of the challenged elements, we hold that the trial court did not err by granting Appellees' no-evidence motion for summary judgment.

For these reasons, we overrule Lewis's second issue.

C. Issue Three – Traditional Motion for Summary Judgment

Because Appellees' no-evidence summary judgment disposed of all of Lewis's claims, and given our disposition above on Lewis's first two issues, we

need not reach his third issue, which challenges the trial court's granting of Appellees' traditional motion for summary judgment. *See* Tex. R. App. P. 47.1.

III. Conclusion

Having overruled Lewis's dispositive issues, we affirm the trial court's judgment.

/s/ Bonnie Sudderth

BONNIE SUDDERTH
JUSTICE

PANEL: WALKER, SUDDERTH, and PITTMAN, JJ.

DELIVERED: September 21, 2017