In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-23-00049-CV

ZEMOS LOGISTICS, LLC, Appellant

V.

BKT ENTERPRISES, Appellee

On Appeal from the 153rd District Court
Tarrant County, Texas
Trial Court No. 153-333669-22

Before Sudderth, C.J.; Birdwell and Walker, JJ.
Memorandum Opinion by Justice Walker

MEMORANDUM OPINION

In this commercial lease dispute, Appellant Zemos Logistics, LLC appeals the trial court's order granting summary judgment to Appellee BKT Enterprises. Zemos raises three issues on appeal: (1) fact issues remained as to BKT's capacity to enforce the lease; (2) fact issues remained as to Zemos's affirmative defenses of failure of consideration, frustration of purpose, and mutual mistake; and (3) the damages awarded to BKT were improper because the lease did not provide for an acceleration of rent. We will affirm.

I. BACKGROUND

In April 2021, Zemos (as lessee) entered into a three-year commercial lease with BKT (as lessor) under which Zemos would pay $7,500 in monthly rent. Zemos is a trucking operation and sought to use the leased premises (an empty surface lot in Dallas) to store its vehicles. The introductory paragraph of the lease states that "BKT Enterprises, a South Carolina corporation" was the lessor, but the notarized signature page attached to the lease refers to BKT as "BKT Enterprises a South Carolina LP."[1] Zemos agreed to lease the lot in "as is" condition. The lease is silent as to the issue of obtaining a certificate of occupancy. It likewise does not speak to the acceleration of rent upon default but does require BKT to mitigate damages and delineates how to apply proceeds obtained from reletting the premises.

[1]The word "corporation" was struck through and replaced with "LP."

Zemos missed rental payments in October and December of 2021, which it subsequently cured. In February 2022, Zemos informed BKT that it planned to vacate the leased premises by the end of March because it had not been able to obtain a certificate of occupancy and electrical permits from the City of Dallas (City). Zemos did not pay rent for March 2022 and never again paid rent to BKT. On April 21, 2022, BKT sent notice to Zemos that it was accelerating all rent due and demanding Zemos vacate the premises.[2]

On May 20, 2022, BKT sued Zemos for breach of the lease. The style on its original petition read "BKT Enterprises, Plaintiff," and the Parties section stated that "Plaintiff is a corporation organized under the laws of the State of South Carolina." Zemos filed an answer, which included verified denials specifically denying that the lease was supported by adequate consideration, that BKT had legal capacity to sue, that BKT was a proper party, and that BKT was incorporated as alleged. It also raised the affirmative defenses of frustration of purpose, impossibility/impracticability, mistake (mutual and unilateral), compliance with notice requirements, and failure to mitigate.

BKT then moved for traditional summary judgment on August 23, 2022. It attached the lease, documentation of missed rental payments, an email from the City regarding Zemos's certificate of occupancy application, numerous emails between

[2]There was an eviction suit filed which the parties appear to have settled by May 12, 2022.

Zemos and BKT, and a new lease executed between BKT and a new tenant to use the premises as a parking lot for its trucking operations.[3]

The email from the City—dated July 13, 2021—informed Zemos that the City had received Zemos's certificate of occupancy application, but that the application was incomplete and "must be completed." The City also informed Zemos that it needed to submit change-of-use documents for the application to be processed.

In a February 2022 email, Zemos's real estate agent sent the following email to BKT:

> I received a call from Zemos yesterday, they informed me that they are forced to move from [the leased premises] due to not being able to obtain a Certificate of Occupancy and electrical permit from the City of Dallas. They have suffered many incidents of their trucks being broken into, damaged[,] and some have been stripped of parts. They will be completely vacated by March 30, 2022.

In its motion, BKT sought $200,108.91 in damages: $15,000 for past missed rent, $195,000 for remaining rental payments which included an offset of $15,000 for rent obtained under the new lease, and prorated property taxes of $5,108.91. BKT also requested attorney's fees of $9,887, which it supported with an attorney's affidavit.

[3]The new lease had a two-month term (August and September of 2022) and a monthly rent of $7,500.

In response, Zemos attached the affidavits of its owner, Robert Otondi,[4] and its attorney, Michael Wortham. Otondi attested that

- Zemos needed a certificate of occupancy to use and have electricity turned on at the leased premises;
- the leased premises was in a "somewhat high[-]crime" area, thus Zemos had installed an electric gate "for efficient operations and to secure the [leased premises]";
- Zemos filed an application for a certificate of occupancy with the City and was required to submit a site plan for the certificate to be processed and the use of the premises changed;
- Zemos asked BKT for a site plan but was not provided one;
- Zemos's real estate agent and BKT's leasing agent both attempted to obtain the certificate of occupancy "on [Zemos's] behalf" but were unsuccessful;
- "[o]ccupying the premises without a certificate of occupation could be a criminal offense";
- Zemos's use of the leased premises was prevented without its fault and both it and BKT believed that Zemos would be able to obtain a certificate of occupancy from the City;
- Zemos did not receive the use of the leased premises as bargained for;

[4]BKT filed objections to various statements from Otondi's affidavit, which the trial court overruled in its order granting summary judgment. In its Appellee's brief, BKT asks this court to sustain these objections. We cannot reach this issue because BKT did not file a notice of appeal or a cross-appeal. *See Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 171 (Tex. 2004); *see also* Tex. R. App. P. 25.1(c) ("A party who seeks to alter the trial court's judgment or other appealable order must file a notice of appeal. . . . The appellate court may not grant a party who does not file a notice of appeal more favorable relief than did the trial court except for just cause.").

- BKT "never represented itself to Zemos as [an] LP," and the addition of "LP" on the lease's signature page was made after Zemos had first signed the lease; and

- Zemos "intended to contract with BKT, a South Carolina corporation, as clearly stated in the" lease.

Wortham attested that entity searches on the South Carolina and Texas secretaries of state websites returned no results for a South Carolina corporation named BKT Enterprises. He attached documentation showing that BKT was instead registered as a limited partnership in South Carolina and as a foreign limited partnership in Texas.[5]

In its summary-judgment response, Zemos argued, among other things, that fact issues existed as to its affirmative defenses and BKT's capacity to file suit and also that BKT had not adequately mitigated its damages.

The trial court granted BKT's motion in full, which included awards for damages of $200,108.91 and attorney's fees of $9,887.[6] Zemos filed a motion for new trial and, alternatively, to modify the judgment, but this motion was overruled by operation of law. This appeal followed.

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[5]The Texas Secretary of State entry also lists a fictitious name: "SC BKT Enterprises, L.P."

[6]Specifically, the order grants judgment to "Plaintiff BKT Enterprises."

II. STANDARD OF REVIEW

We review a summary judgment de novo. *Travelers Ins. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). We consider the evidence presented in the light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if reasonable jurors could and disregarding evidence contrary to the nonmovant unless reasonable jurors could not. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). We indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *20801, Inc. v. Parker*, 249 S.W.3d 392, 399 (Tex. 2008). A plaintiff is entitled to summary judgment on a cause of action if it conclusively proves all essential elements of the claim. *See* Tex. R. Civ. P. 166a(a), (c); *MMP, Ltd. v. Jones*, 710 S.W.2d 59, 60 (Tex. 1986).

III. DISCUSSION

A. BKT'S CAPACITY

In its first issue, Zemos argues that summary judgment was improper because it raised a fact issue concerning BKT's capacity to enforce the lease. In Zemos's view, because there was a "contradiction" between the name used by BKT in its petition ("[BKT Enterprises] . . . a corporation organized under the laws of the State of South Carolina") and the name it used in the lease and elsewhere in the record (*e.g.,* "BKT Enterprises, a South Carolina LP" or, simply, "BKT Enterprises"), a fact issue remained as to what entity was entitled to recover under the lease. Specifically, Zemos argues that this confusion raised the question of whether privity of contract—

which must exist to recover on a breach of contract claim—existed between the plaintiff and the lessor. We hold that Zemos waived this issue.

"Incapacity does not render a suit void." *Duradril, L.L.C. v. Dynomax Drilling Tools, Inc.*, 516 S.W.3d 147, 157 (Tex. App.—Houston [14th Dist.] 2017, no pet.). A challenge to a plaintiff's right to maintain suit in the capacity in which it sues is properly raised by a verified motion to abate or plea in abatement, or else it is waived. *Hunt v. City of Diboll*, 574 S.W.3d 406, 435 (Tex. App.—Tyler 2017, pet denied). "Texas courts have held that arguing lack of capacity in an answer, plea to the jurisdiction, motion for summary judgment, or motion to dismiss does not properly raise the issue." *Id.* (collecting cases); *see Duradril*, 516 S.W.3d at 157 ("This rule favors abatement over dismissal because abatement affords corporations an opportunity to cure the defect."); *see also* Tex. R. Civ. P. 90 (providing that "[e]very defect, omission, or fault in a pleading either of form or of substance" not brought to the trial court's attention by written special exception "shall be deemed to be waived by the party seeking reversal on such account").

While Zemos raised the alleged capacity defect in its answer and summary-judgment response, it did not present it to the trial court via a motion to abate or special exception as required to preserve the issue for appeal. Therefore, Zemos waived its first issue.[7]

[7]Even had Zemos preserved the issue for appeal, its own judicial admissions established that the plaintiff-BKT had capacity to maintain suit under the lease. *See*

B. ZEMOS'S AFFIRMATIVE DEFENSES

In its second issue, Zemos argues that summary judgment was improper because fact issues remained as to its affirmative defenses of failure of consideration, frustration of purpose, and mutual mistake. We disagree.

If a nonmovant relies on an affirmative defense to oppose a summary-judgment motion, he must come forward with summary-judgment evidence that is sufficient to raise a fact issue on each element of the defense to avoid summary judgment. *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984).

1. Failure of Consideration

Zemos contends that the summary-judgment evidence showed that it was unable to use the leased premises legally or in a commercially viable manner because of a supervening event: its inability to obtain a certificate of occupancy. According to Zemos, this raised at least a fact issue as to whether there was a failure of

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Holy Cross Church of God in Christ v. Wolf, 44 S.W.3d 562, 568 (Tex. 2001) ("A judicial admission that is clear and unequivocal has conclusive effect and bars the admitting party from later disputing the admitted fact."). "A party has capacity to sue when [it] has legal authority to act . . . [and] the lack of capacity to sue pertains to the legal right to prosecute a lawsuit in one's own name." *Cadle Co. v. Lobingier*, 50 S.W.3d 662, 669 (Tex. App.—Fort Worth 2001, pet. denied). In its summary-judgment response, Zemos conceded that it had entered into the lease with the plaintiff-BKT, that the plaintiff-BKT was the entity that had prepared and executed the lease as the lessor, and that no South Carolina entity named BKT Enterprises, Inc. existed so as to cause confusion about the proper plaintiff. Thus, Zemos's own judicial admissions established that no fact issue existed regarding what entity could maintain suit under the lease and that plaintiff-BKT was the correct entity to sue. *See Wolf*, 44 S.W.3d at 568 (holding that appellant's judicial admissions contained in its summary-judgment response precluded its appellate argument to the contrary).

consideration—a defense that Zemos says would totally bar the enforcement of its obligations under the lease.

A failure of consideration occurs when, due to a supervening cause after an agreement has been reached, the promised performance fails. *Bassett v. Am. Nat. Bank*, 145 S.W.3d 692, 696 (Tex. App.—Fort Worth 2004, no pet.). The affirmative defense defeats summary judgment if the nonmovant presents evidence that it did not receive the consideration set forth in the agreement. *Id.* Failure of consideration can be total or partial. *Cheung-Loon, L.L.C. v. Cergon, Inc.*, 392 S.W.3d 738, 748 (Tex. App.—Dallas 2012, no pet.). A total failure of consideration is grounds for cancellation or recission of the agreement, thus constituting a defense to a contract action. *Id.* However, a partial failure of consideration does not invalidate the agreement and prevent recovery thereon, rather it entitles the party alleging failure of consideration to a claim for damages or offset. *Id.*; *Carter v. PeopleAnswers, Inc.*, 312 S.W.3d 308, 312 (Tex. App.—Dallas 2010, no pet.); *Parsley v. Rowley*, No. B14-90-01040-CV, 1992 WL 45791, at *3 (Tex. App.—Houston [14th Dist.] 1992, writ denied) (not designated for publication); *see Estate of Menifee v. Barrett*, 795 S.W.2d 810, 815 (Tex. App.—Texarkana 1990, no pet.) (explaining that, because the appellant continued to accept the bargained-for consideration, its "remedy would have been to sue" for money damages rather than seeking to have the agreement rescinded altogether).

If there was any failure of consideration here, it was at best partial. There is no dispute that the consideration under the lease agreement was the rent paid to BKT in exchange for Zemos's possession of the leased premises. The summary-judgment evidence established that Zemos possessed the leased premises for approximately thirteen months and paid rent for all but two of those months. Therefore, because any failure of consideration could only have been partial, Zemos was entitled by way of its failure-of-consideration defense not to invalidate the lease and prevent BKT's claim, but rather to make its own claim for damages against BKT or for offset against BKT's potential recovery on its breach of contract claim. *See Cheung-Loon, L.L.C.*, 392 S.W.3d at 748.

But Zemos has never argued a partial failure of consideration nor made any counterclaim for damages or request for offset against BKT's recovery. Instead, Zemos has always contended—as it does on appeal—that the consideration it bargained for "failed completely." In other words, Zemos's only argument is that summary judgment was improper because it raised a fact issue as to whether the consideration totally failed and that, because of this total failure, the lease was invalidated, thereby discharging Zemos from its lease obligations.

However, because this is not a case of complete failure of consideration, Zemos's argument necessarily fails, and we hold that no fact issue existed regarding its entitlement to this affirmative defense. This portion of Zemos's second issue is overruled.

2. Frustration of Purpose

Next, Zemos argues that it raised a fact issue that the lease's purpose—legal and commercial use of the leased premises—was frustrated by its inability to secure a certificate of occupancy.

Frustration of purpose—sometimes described as "impossibility of performance" or "commercial impracticability"—may be an excuse to contractual performance "if an event occurs and the contract was made on the basic assumption that the event would not occur." *Philips v. McNease*, 467 S.W.3d 688, 695–96 (Tex. App.—Houston [14th Dist.] 2015, no pet.); *see Centex Corp. v. Dalton*, 840 S.W.2d 952, 954 (Tex. 1992); Restatement (Second) of Contracts §§ 261, 265 (Am. Law Inst. 1981). In the lease-agreement context, "if a lessee, without fault, is denied useful possession of the leased property, the purpose of the lease agreement is so frustrated as to discharge the lessee of his obligation further to pay rent." *Tuloma Rigging, Inc. v. Barge & Crane Rentals, Div. of Hous. Shell & Concrete, Div. of McDonough Co.*, 460 S.W.2d 510, 513 (Tex. App.—Houston [14th Dist.] 1970, no writ); *see* Restatement (Second) of Contracts § 265 ("Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.").

"Texas has recognized three contexts in which the excuse may be available: (1) the death or incapacity of a person necessary for performance, (2) the destruction or deterioration of a thing necessary for performance, and (3) a change in the law that prevents a person from performing." *Philips*, 467 S.W.3d at 696; *see Centex Corp.*, 840 S.W.2d at 954 (explaining that "the performance of a contract is excused by a supervening impossibility caused by the operation of a change in the law"); *Tractebel Energy Mktg., Inc. v. E.I. Eu Pont De Nemours & Co.*, 118 S.W.3d 60, 65 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

Thus, to defeat summary judgment on this defense, Zemos needed to raise fact issues about whether, (1) through no fault of its own, (2) an event occurred after the execution of the lease that (3) denied its useful possession of the leased premises. We hold that Zemos failed to raise a fact issue related to its fault in being unable to obtain the certificate of occupancy.

The Dallas City Code provides that a person may be "criminally responsible" if they "use or occupy . . . a building, a portion of a building, or land without obtaining a certificate of occupancy from the building official in compliance with Section 306 . . . of Chapter 52" of the city code. DALL., TEX., CODE §§ 51A-1.103–.104 (2023), https://dallascityhall.com/government/pages/city-codes.aspx. Section 306 of Chapter 52 provides that "a person seeking a certificate of occupancy shall submit an application to the building official," which must include "any other information, plans, . . . or supporting documents the building official deems necessary." *Id.*

§ 52.306.3.1. Such an application expires and is "void *ab initio*" if "no action is taken by the applicant before the 30th day after the building official gives the applicant written notice that additional information, plans, . . . or supporting documents are necessary for issuance of the certificate of occupancy . . . ." *Id.* § 306.4.2(2).

Thus, under the Dallas City Code, Zemos—the occupier of the leased premises and applicant who sought the certificate of occupancy—was responsible for submitting to the City all information needed to obtain the certificate. The summary-judgment evidence established that Zemos applied for the certificate and that the City requested further information (including a site plan) to process the application. However, Zemos conceded that it never submitted a site plan but argues that BKT was to blame for this failure because it did not provide Zemos with the plan. But nothing in the lease or other summary-judgment evidence required BKT to provide Zemos with a site plan or to take any action to help Zemos obtain the certificate. Further, there is no evidence that Zemos was actually denied a certificate of occupancy—only that it failed to complete the application, thus rendering the application expired and void after thirty days. *See id.*

Accordingly, we overrule this portion of Zemos's second issue because the evidence established that Zemos *was* at fault for failing to secure the certificate, and thus, no fact issue existed on this element of its frustration-of-purpose defense.

3. Mutual Mistake

Zemos next argues that it raised fact issues as to its defense of mutual mistake. It contends that the parties contracted under the mutual belief that the leased premises "could be legally and viably used" as a parking lot when, in actuality, Zemos's inability to secure a certificate of occupancy rendered that belief mistaken.

Pursuant to the doctrine of mutual mistake, a contract may be avoided when the parties to the agreement contracted under a misconception or ignorance of a material fact. *Williams v. Gash*, 789 S.W.2d 261, 264 (Tex. 1990); *Hardy v. Bennefield*, 368 S.W.3d 643, 650 (Tex. App.—Tyler 2012, no pet.); *see* Restatement (Second) of Contracts § 152. "A material fact is one that involves the subject matter and substance of the contract." *Hardy*, 368 S.W.3d at 650. For the defense of mutual mistake to be sustained, there must be fact issues raised to show that all contractual parties acted under the same understanding of the same material fact. *Id.*

Zemos failed to raise a fact issue that the premises could not be legally and viably used as a parking lot. As discussed above, the summary-judgment evidence established that Zemos applied for and failed to complete the certificate of occupancy application. But there is no evidence to suggest that Zemos was or may have been denied a certificate had it properly applied for one. There is no evidence that Zemos was ever notified—by the City, BKT, or any other entity—that it could not use the premises as a parking lot. And the evidence established that Zemos *did* use the premises as a parking lot for approximately a year before deciding—on its own

prerogative—to leave the premises. Tellingly, BKT relet the premises to another trucking company that then used them as a parking lot. Put differently, Zemos did not raise a fact issue showing that a misconception existed about whether it could secure a certificate of occupancy because the record is silent about whether the City did or even would have denied Zemos the certificate.[8]

For these reasons, we overrule this portion of Zemos's second issue.

C. ACCELERATION OF ALL RENT OWED

In its third issue, Zemos argues that the trial court's summary judgment should be reversed because the lease "did not provide for acceleration of all rent owed" and, thus, BKT's damages award was improper. We overrule this issue because Zemos waived it for appellate review.

"A non-movant must present its objections to a summary[-]judgment motion expressly by written answer or other written response to the motion in the trial court or that objection is waived." *D.R. Horton-Tex., Ltd., v. Markel Intern. Ins. Co.*, 300 S.W.3d 740, 743 (Tex. 2009); *see* Tex. R. Civ. P. 166a(c) ("[T]he adverse party, not later than seven days prior to the day of hearing may file and serve opposing affidavits or other written response. . . . Issues not expressly presented to the trial court by written motion, answer[,] or other response shall not be considered on appeal as

[8]Hypothetically, had Zemos actually been denied the certificate by the City or received some other indication that a certificate could not issue, Zemos may have made some headway on its mutual-mistake defense. But these are not the facts presented here.

grounds for reversal."). An issue not raised in a summary-judgment response remains waived on appeal even if the non-movant subsequently raised it in a motion for new trial. *Kelley-Coppedge, Inc. v. Highlands Ins. Co.*, 980 S.W.2d 462, 467 (Tex. 1998).

Concerning damages, Zemos raised only one issue in its summary-judgment response: that BKT did not adequately mitigate its damages by finding a new tenant for the leased premises. It was not until its motions for new trial and to modify the judgment that it argued—as it now does on appeal—that BKT's summary-judgment damages award was improper because the lease did not allow for acceleration of all rent owed. Because Zemos did not raise this objection in its response to BKT's motion for summary judgment, it waived this issue, and we may not consider it on appeal. *Id.*

IV. CONCLUSION

Having overruled all of Zemos's issues, we affirm the trial court's judgment.

/s/ Brian Walker

Brian Walker
Justice

Delivered: December 7, 2023