In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00056-CV

DALE MANNING, APPELLANT

V.

MELODY BRANUM D/B/A TASCOSA HOT SAUCE, APPELLEE

On Appeal from the 251st District Court
Potter County, Texas
Trial Court No. 102984-C, Honorable Ana Estevez, Presiding

September 18, 2017

MEMORANDUM OPINION

Before CAMPBELL and PIRTLE and PARKER, JJ.

Appellant Dale Manning appeals a take-nothing summary judgment in favor of appellee Melody Branum. We will reverse the judgment of the trial court and remand the case for further proceedings.

Background

Manning had an agreement with Tascosa Tortilla Factory under which he made wholesale sales of chips and hot sauce. The written agreement was dated May 3,

1999, and entitled "Exclusive Sales Agreement." It identified Tascosa Tortilla Factory as "Company."

Under the agreement the Company promised to "make available to [Manning] an adequate supply of chips and hot sauce" and "to assist [Manning] by advice, instruction and full cooperation in every possible way." Manning in turn agreed to "work diligently and with [his] best efforts to sell chips and hot sauce . . . and otherwise promote the business of Company in serving the public to the end that each of the parties may derive the greatest profit possible."

The agreement provided Manning would be allowed a profit on sales to certain businesses and paid weekly commissions on sales to other businesses. The duration of the agreement was "for so long as this Company remains in business." The agreement further provided if "the Company is sold" Manning would have an option to purchase or a right of first refusal. The agreement was signed by "Tascosa Tortilla Factory, Company by: Jeff White" and Manning d/b/a Heritage Foods.

At the time of the agreement, White was married to Branum. They divorced in 2003. According to their decree, Branum's employer was "Tascosa Tortilla Company" located at 1110 S. Johnson, Amarillo, Texas. The decree awarded Branum as her sole and separate property the "business known as Tascosa Tortilla Company, including but not limited to all furniture, equipment, inventory, cash, receivables, accounts, goods, and supplies; all personal property used in connection with the operation of the business; and all rights and privileges, past, present, or future, arising out of or in connection with the operation of the business." When Branum took over the business

Manning provided her a copy of the agreement. She told Manning she would honor the agreement and expressed no objection to its terms and conditions.

Prior to her divorce and acquisition of Tascosa Tortilla Company Branum, then Melody White, filed an assumed name certificate as a sole proprietor doing business as Tascosa Hot Sauce. The stated duration of the assumed name was from June 8, 2002, until June 8, 2012. In August 2007, a certificate of formation of a limited liability company known as Tascosa Hot Sauce, LLC, was filed. It listed Branum and Stefanie Orick as managers. In September 2011, Branum filed an assumed name certificate continuing her use of the name Tascosa Hot Sauce.

The summary judgment record also contains copies of internet advertisements for a product known as "Tascosa Hot Sauce." One ad, dated July 30, 2015, and bearing Branum's name as "president," states among other things: "A small tortilla factory developed the original Tascosa Hot Sauce has been a small town business for more than 50 years." The text continues, "The Original Tascosa Hot Sauce originated in a small, family owned tortilla factory, Tascosa Tortilla Company in 1957 in Amarillo, Texas. Melody Branum the founder of Tascosa Hot Sauce refined the original family recipe and developed a Mild and Extra Hot recipe. Tascosa Hot Sauce began commercial wholesale distribution in the mid-90's and we've been Tascosa-ing' taste buds all over the country ever since. . . . 50 years of sales and service is evidence of the consistent quality and taste."

By email dated April 4, 2013, Branum notified Manning their business relationship was terminated. Manning filed suit against Branum in August 2014 alleging

breach of contract and that she engaged in fraudulent transfers.[1] Branum answered and brought a counterclaim seeking declaratory relief.

Manning responded to Branum's traditional motion for summary judgment with evidence. Neither party objected to the other's summary judgment evidence and the trial court's order indicates it considered the evidence. Without specifying a basis, the trial court granted summary judgment in Branum's favor on her defensive grounds but denied summary judgment on her declaratory-judgment counterclaim. The court severed Branum's counterclaim and rendered final judgment that Manning take nothing. This appeal followed.

Analysis

Through one issue containing multiple subparts Manning argues the trial court erred in granting summary judgment for Branum.[2]

An appellate court reviews a trial court's summary judgment de novo. *Valence Operating Co. v. Dorsett,* 164 S.W.3d 656, 661 (Tex. 2005); *Provident Life & Accident Ins. Co. v. Knott,* 128 S.W.3d 211, 215 (Tex. 2003). Summary judgment is proper if the record presents no disputed issues of material fact and the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Knott,* 128 S.W.3d at 215-16. When reviewing a summary judgment, a court takes as true all evidence favorable to the nonmovant, and indulges every reasonable inference and resolves any doubt in

[1] Manning limits his appellate challenge to the grant of summary judgment on his breach of contract claim.

[2] *See Malooly Bros, Inc. v. Napier,* 461 S.W.2d 119, 121 (Tex. 1970) (point of error on appeal stating simply that trial court erred by granting summary judgment "allow[s] argument as to all the possible grounds upon which summary judgment should have been denied").

favor of the nonmovant. *Valence Operating Co.,* 164 S.W.3d at 661; *Knott,* 128 S.W.3d at 215. If the trial court did not specify a basis for granting summary judgment, the judgment will be affirmed if any ground asserted in the motion has merit. *Star-Telegram, Inc. v. Doe,* 915 S.W.2d 471, 473 (Tex. 1995); *Wall v. Cypress 9 Holdings, LLC,* No. 07-14-00362-CV, 2016 Tex. App. LEXIS 5417, at *6-7 (Tex. App.—Amarillo May 23, 2016, no pet.) (mem. op.).

On a traditional motion for summary judgment, the movant bears the initial burden of conclusively negating at least one essential element of a claim or defense on which the nonmovant has the burden of proof. TEX. R. CIV. P. 166a(c); *Science Spectrum, Inc. v. Martinez,* 941 S.W.2d 910, 911 (Tex. 1997). Only if the movant satisfies this burden does the burden shift to the nonmovant to produce evidence demonstrating a genuine issue of material fact as to the challenged element or elements in order to defeat the summary judgment. *See Walker v. Harris,* 924 S.W.2d 375, 377 (Tex. 1996).

A party moving for summary judgment on an affirmative defense bears the burden of conclusively proving all elements of the defense. *Integrated of Amarillo, Inc. v. Pinkston-Hollar Constr. Servs.,* No. 07-11-0422-CV, 2013 Tex. App. LEXIS 4216, at *5 (Tex. App.—Amarillo Apr. 2, 2013, pet. denied) (mem. op.) (citing *Rhone-Poulenc, Inc. v. Steel,* 997 S.W.2d 217, 223 (Tex. 1999)); *Britton v. Gomez,* No. 02-15-00355-CV, 2016 Tex. App. LEXIS 7186, at *3 (Tex. App.—Fort Worth July 7, 2016, no pet.) (mem. op.).

Did Manning Plead Himself Out of Court?

Branum's first ground for summary judgment was based on allegations in Manning's live petition. Branum asserted Manning could not recover on his breach-of-contract claim because his live petition admitted a valid, enforceable contract did not exist between him and Branum. This is so, Branum explained, by virtue of the allegations in Manning's live petition that the agreement was between Manning and Jeff White d/b/a Tascosa Tortilla Factory; the agreement was to continue as long as Tascosa Tortilla Factory remained in business; Jeff White no longer did business as Tascosa Tortilla Factory; and Manning sued Branum rather than White.

"Assertions of fact, not plead in the alternative, in the live pleadings of a party are regarded as formal judicial admissions." *Holy Cross Church of God in Christ v. Wolf,* 44 S.W.3d 562, 568 (Tex. 2001) (citing *Houston First Am. Sav. v. Musick,* 650 S.W.2d 764, 767 (Tex. 1983)). "A judicial admission that is clear and unequivocal has conclusive effect and bars the admitting party from later disputing the admitted fact." *Id.* "Although pleadings generally do not constitute summary judgment proof, if a plaintiff's pleadings contain judicial admissions negating a cause of action, summary judgment may properly be granted on the basis of the pleadings." *Simmons v. Elmow Holdings, Inc.,* No. 02-08-00027-CV, 2008 Tex. App. LEXIS 5199, at *9 (Tex. App.—Fort Worth July 10, 2008, pet. denied) (mem. op.).

We can see no merit to Branum's ground that Manning plead himself out of court. Assuming Manning judicially admitted facts that might have negated his contract breach claim, a matter we do not decide, the pleadings' assertions of fact were not the only pertinent assertions in the summary judgment record. In his summary-judgment

affidavit, Manning stated that he gave Branum a copy of the agreement when she took over the business known as Tascosa Tortilla Factory. Branum told Manning she would honor the contract. And there appears no dispute that she did so, at least for a time, because the parties continued doing business together until 2013. Thus, summary judgment evidence controverting Manning's claimed judicial admission appears in the record.[3]

Moreover, reviewing Branum's ground seeking summary judgment based on Manning's pleadings, we must accept as true the allegations of fact alleged in Manning's live petition and view them in the light most favorable to Manning. *See Natividad v. Alexsis, Inc.,* 875 S.W.2d 695, 699 (Tex. 1994) (summary judgment on a pleading deficiency). Considering the facts alleged and their reasonable inferences in the light most favorable to him, *id.*, the pleading may reasonably be read to allege that Branum acquired Tascosa Tortilla Factory from White in their divorce proceeding and she continued the business, with Manning continuing also to perform services according to the terms of his agreement.

To the extent the trial court based its grant of summary judgment on Branum's first ground, it erred.

[3] This is not an instance like that described in *Marshall v. Vise*, in which the party relying on its opponent's pleadings as judicial admissions of fact prevents the admission of controverting evidence. 767 S.W.2d 699, 700 (Tex. 1989); *see Hurlbut v. Gulf Atl. Life Ins. Co.,* 749 S.W.2d 762, 765 (Tex. 1987) (finding it unnecessary to determine if the plaintiffs' pleadings clearly and unequivocally conceded facts amounting to a judicial admission because the "defendants did not stand on this alleged admission").

Existence of a Contract between Branum and Manning

For her second summary judgment ground, Branum asserted her proof was conclusive that no valid contract existed between her and Manning because she was not a party to the agreement and the agreement terminated by its own terms.

To establish this ground, Branum pointed to the agreement and argued the agreement was between "Jeff White d/b/a Tascosa Tortilla Factory" and Manning. But the agreement states it was between Tascosa Tortilla Factory and Manning. It used the shorthand reference "Company" to identify Tascosa Tortilla Factory, and was signed "Tascosa Tortilla Factory, Company by Jeff White." Branum further urged the agreement continued "for so long as [Jeff White d/b/a Tascosa Tortilla Factory] remains in business." The agreement actually states, it "and the association created thereby, shall continue for so long as this Company remains in business." As noted, in the agreement, "Company" means Tascosa Tortilla Factory.

Branum also relied on her own affidavit. *See* TEX. R. CIV. P. 166a(c) (a summary judgment may be based on the uncontroverted testimonial evidence of an interested witness if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and readily could have been controverted). In pertinent part the affidavit states:

> I am over the age of 21, am of sound mind, and competent to make this affidavit. I have personal knowledge of the facts stated herein and they are true and correct.
>
> I do not now and have never operated as Tascosa Tortilla Factory. Tascosa Tortilla Factory was a d/b/a of Jeff White. Jeff White walked away and ceased operating Tascosa Tortilla Factory in 2001, and to the best of my knowledge, he has not resumed operating under that name.

> Further, to the best of my knowledge, Tascosa Tortilla Factory does not do business in any manner and wholly ceased operating in 2001.
>
> * * *
>
> I . . . have never had a written agreement with [Manning].
>
> * * *
>
> [Tascosa Hot Sauce, LLC] . . . had a business relationship with [Manning], though it was never memorialized in writing. [Manning] never had a written contract with Tascosa Hot Sauce, LLC, including the document over which he now sues.
>
> * * *
>
> I, individually or through the d/b/a Tascosa Hot Sauce have neither made nor received any promises, benefits, or consideration of any kind from [Manning] consistent with the [agreement].
>
> * * *
>
> I am not now and have never been a party to the [agreement]. I have not ratified or purchased it, nor has it been assigned to me.

We first note that, other than those of its first substantive paragraph, the affidavit's statements are merely factual and legal conclusions. *See Choctaw Props., L.L.C. v. Aledo Indep. Sch. Dist.,* 127 S.W.3d 235, 241 (Tex. App.—Waco 2003, no pet.) ("A conclusory statement is one that does not provide the underlying facts to support the conclusion. . . . A conclusory statement may set forth an unsupported legal conclusion or an unsupported factual conclusion") (citations and internal quotation marks omitted)). Conclusory evidence is no evidence, and will not support judgment as a matter of law. *See Schindler v. Baumann,* 272 S.W.3d 793, 796 (Tex. App.—Dallas 2008, no pet.); *see also Texas Division-Tranter, Inc. v. Carrozza,* 876 S.W.2d 312, 314 (Tex. 1994) (per curiam); *Davis v. Dillard's Dep't Store, Inc.,* No. 11-06-00027-CV, 2008 Tex. App. LEXIS 3201, at *3-5 (Tex. App.—Eastland May 1, 2008, no pet.) (mem. op.).

Moreover, Branum's affidavit is not the only summary judgment proof in the record. The evidence shows that Branum acquired the business Tascosa Tortilla Company in her 2003 divorce. The evidence does not conclusively establish the distinction Branum attempts to draw between the Tascosa Tortilla *Company* Branum received and the company described as Tascosa Tortilla *Factory* in the agreement with Manning. There is evidence also that Manning provided Branum with a copy of his 1999 agreement, that she agreed to honor its terms without objection, and that they thereafter did business together under the agreement's terms until 2013. Viewing that evidence in the light most favorable to Manning, we must conclude that the trial court erred if it based its ruling on Branum's second summary judgment ground.

Failure of Consideration

Branum's next ground for summary judgment was on the affirmative defense of failure of consideration. "[A] failure of consideration occurs when, because of some supervening cause arising after the contract is formed, the promised performance fails." *Cheung Loon, LLC v. Cergon, Inc.,* 392 S.W.3d 738, 747 (Tex. App.—Dallas 2012, no pet.). As noted, it was Branum's burden as movant on an affirmative defense to conclusively prove each element of the defense. In this respect she directs us to the following statement in her affidavit. "I . . . have neither made nor received any promises, benefits, or consideration of any kind from [Manning] consistent with the [agreement]." Suffice it to say, Branum's affidavit statement is a mere conclusion and thus no evidence of failure of consideration. To the extent the trial court based its ruling on Branum's failure of consideration defense, it erred.

Statute of Limitations

Branum's next ground for summary judgment was that Manning's suit was barred by operation of the statute of limitations. The four-year residual limitations period of Civil Practice and Remedies Code section 16.051 applies to a breach of contract action. TEX. CIV. PRAC. & REM. CODE ANN. § 16.051 (West 2015); *Stine v. Stewart,* 80 S.W.3d 586, 592 (Tex. 2002); *West v. Proctor,* 353 S.W.3d 558, 564 (Tex. App.—Amarillo 2011, pet. denied). In her summary judgment evidence, Branum points to excerpts from Manning's deposition which, she contends, indicate the contract was breached no later than 2008 yet suit was not filed until 2014.

The statutory limitations period runs from the day the cause of action accrues. TEX. CIV. PRAC. & REM. CODE ANN. § 16.051; *Via Net v. TIG Ins. Co.,* 211 S.W.3d 310, 315 (Tex. 2006). A cause of action for breach of contract accrues when a party is injured by the actions or omissions of another. *Barker v. Eckman,* 213 S.W.3d 306, 311 (Tex. 2006) (citing *Moreno v. Sterling Drug, Inc.,* 787 S.W.2d 348, 351 (Tex. 1990) ("A cause of action can generally be said to accrue when the wrongful act effects an injury")). "A party breaches a contract by failing to perform when that party's performance is due." *E.P. Towne Ctr. Partners, L.P. v. Chopsticks, Inc.,* 242 S.W.3d 117, 123 (Tex. App.—El Paso 2007, no pet.).

In his response to Branum's summary judgment motion, Manning asserted the 1999 agreement was an installment contract of the type described in *Davis Apparel v. Gale-Sobel, A Division of Angelica Corp.* 117 S.W.3d 15, 18 (Tex. App.—Eastland 2003, no pet.). Under such contracts, requiring fixed, periodic payments, a separate cause of action arises for each missed payment. *Id*. In such instances, the party

claiming injury has four years from each breach to bring suit. *F.D. Stella Prods. Co. v. Scott,* 875 S.W.2d 462, 465 (Tex. App.—Austin 1994, no writ). "Thus, a suit for the breach of a contract requiring payment in periodic installments may include all payments due within the four-year statute of limitations period, even if the initial breach was beyond the limitations period." *Spin Doctor Golf, Inc. v. Paymentech, L.P.,* 296 S.W.3d 354, 362 (Tex. App.—Dallas 2009, pet. struck). "Recovery of any payment more than four years overdue is barred." *Id.*

Again taking as true all evidence favorable to Manning, and indulging every reasonable inference and resolving any doubts in his favor, we do not agree that dismissal of Manning's entire case was supported on the basis of a limitations defense. Manning was to be paid weekly commissions which he alleges were not paid according to the terms of the agreement. In his brief Manning states, "This case is identical to the *Davis Apparel* case; and therefore, [Manning] is entitled to sue for four (4) years of back commissions." To the extent the trial court relied on Branum's statute of limitations defense to render judgment on Manning's entire case, the court erred.

Conclusion

Having found none of the grounds Branum urged authorized summary judgment on Manning's entire case and a take-nothing judgment, we reverse the judgment of the trial court and remand the case for further proceedings.

James T. Campbell
Justice