In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-15-00061-CV

A.J.P. OIL COMPANY, LLC, D/B/A GRAPELAND FUEL & BBQ
AND ANDREW J. PATTON, Appellants

V.

VELVIN OIL COMPANY, INC., Appellee

On Appeal from the 4th District Court
Rusk County, Texas
Trial Court No. 2014-362

Before Morriss, C.J., Moseley and Burgess, JJ.
Memorandum Opinion by Chief Justice Morriss

MEMORANDUM OPINION

Velvin Oil Company, Inc., was awarded summary judgment against A.J.P. Oil Company, LLC, d/b/a Grapeland Fuel & BBQ, as the primary account obligor, and against Andrew J. Patton, as guarantor, without filing any special summary judgment evidence and in spite of a verified denial by the defendants to Velvin's complaint on a sworn account. Because Velvin Oil's verified information in its suit on sworn account is not summary judgment evidence, we reverse Velvin's summary judgment and remand this case to the trial court for further proceedings.

Velvin Oil began delivering fuel to AJP Oil under a credit agreement dated June 6, 2012 (hereinafter the Agreement). Patton personally guaranteed payment and performance by AJP Oil under the Agreement. This apparently amicable business relationship began experiencing problems when Velvin Oil allegedly delivered a shipment of tainted diesel fuel to AJP Oil in December 2013. Nevertheless, fuel deliveries continued until April 2014, as the parties sought to resolve their differences. In late 2014, Velvin Oil filed a suit on sworn account against AJP Oil and Patton, alleging damages totaling $32,676.71.[1] AJP Oil and Patton originally filed an unverified answer generally denying Velvin Oil's allegations and specifically pleading that the account had been paid in full, and, in response, Velvin Oil moved for summary judgment based

[1]Velvin Oil's original petition alleged that it had delivered the goods and services described in the attached verified account to AJP Oil and Patton at an agreed price and that Patton had guaranteed the payment and performance of AJP Oil. Attached to the petition was the affidavit of the agent for Velvin Oil attesting that AJP Oil owed Velvin Oil the sum of $32,676.71, as evidenced by the account attached to the affidavit. The agent also attested that the account was just and true, due, and that all just and lawful offsets, payments, and credits had been allowed. Attached to the affidavit was an account that listed two invoices, in the respective amounts of $27,102.96 and $27,377.56, one payment in the amount of $23,938.78, some added finance charges, and a resulting balance of $32,676.71 owing on the account. Also attached to the affidavit were the two invoices and one delivery ticket. It is uncontested that the petition meets the requirements of Rule 185. *See* TEX. R. CIV. P. 185.

on the pleadings. Although AJP Oil and Patton then filed a verified amended answer, the trial court nevertheless granted summary judgment for Velvin Oil, awarding $32,676.71 in damages, plus attorney fees. In this appeal, AJP Oil and Patton contend that their verified amended answer precluded Velvin Oil's entitlement to summary judgment based on its sworn account.[2] We agree.

In their first amended original answer, filed April 6, 2015, AJP Oil and Patton generally denied Velvin Oil's allegations. In addition, the amended answer added paragraphs 1 and 2:

> 1. Defendants have paid in full the account the subject of Plaintiff's suit, more specifically with check number 2902, dated April 29, 2014, in the amount of Fifty[-] Four Thousand[,] Four Hundred Eighty[,] and 52/100 Dollars ($54,480.52).
>
> 2. Defendants specially deny that the finance charges listed in Plaintiff's sworn account are due and owing. More specifically, [the Agreement] credit terms and conditions on which Plaintiff's claim is based state that finance charges are due if the balance is not paid by the end of the month following the statement date. Defendant paid the charges made the basis of this suit before the end of the month following the statement dates.

Attached to the amended answer was the affidavit of Patton, individually and as agent for AJP Oil, attesting that, on his personal knowledge, "[e]very statement contained in paragraphs 1 and 2 of [the amended answer was] true and correct." On that same date, AJP Oil and Patton filed their response to the motion for summary judgment asserting that genuine issues of fact existed regarding their defense of payment, whether the finance charges were due and owing, and the

[2]AJP Oil and Patton also asserted that the trial court erred in granting summary judgment since (1) a genuine issue of material fact exists regarding their affirmative defense of payment and (2) a genuine issue of material fact exists regarding the reasonableness of Velvin's attorney fees. Alternatively, AJP Oil and Patton assert that the trial court erred in denying their motion for new trial since a previously filed suit involving the same parties and subject matter was pending in another county. Since our resolution of their first point of error requires remand for a new trial, we need not address these other points.

reasonableness of Velvin's attorney fees. In support of their response, AJP Oil and Patton attached the affidavits of Patton and the defendants' trial attorney.[3] Patton's affidavit set forth the factual statements to which he attested in the amended answer and attached AJP Oil's check number 2902, dated April 29, 2014, in the amount of $54,480.52,[4] and made payable to Velvin Oil. The back of the check also shows that the check was "[d]eposited to the account of the within named payee" on May 27, 2014. Also attached to the affidavit was a copy of the Agreement.

On June 4, 2015, the trial court granted Velvin Oil's motion for summary judgment and entered final judgment for Velvin Oil against AJP Oil and Patton in the amount of $32,676.71, attorney fees in the amount of $10,892.24, and pre-judgment and post-judgment interest.

A traditional motion for summary judgment may be granted only when the movant establishes that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009); *Rhine v. Priority One Ins. Co*., 411 S.W.3d 651, 657 (Tex. App.—Texarkana 2013, no pet.). We review the grant of a motion for summary judgment de novo "to determine whether a party's right to prevail is established as a matter of law." *Lamar Corp. v. City of Longview*, 270 S.W.3d 609, 613 (Tex. App.—Texarkana 2008, no pet.); *see Nash v. Beckett*, 365 S.W.3d 131, 136 (Tex. App.—Texarkana 2012, pet. denied) (citing *Mann*, 289 S.W.3d at 848). On appeal, the burden remains with the movant to show that there is no material fact issue and that the movant is entitled to judgment as a matter of law. *Limestone Prods. Distrib., Inc. v. McNamara*, 71 S.W.3d 308, 311

[3]The affidavit of AJP Oil and Patton's trial attorney challenged the sufficiency of Velvin Oil's attorney-fee evidence.

[4]This amount corresponds to the total amount of the two invoices attached to Velvin Oil's sworn account.

(Tex. 2002) (per curiam); *Rhone–Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999). In our review of the grant of a traditional summary judgment, we take as true all evidence favorable to the non-movant and indulge every reasonable inference and resolve any doubts in the non-movant's favor. *McNamara*, 71 S.W.3d at 311; *Steel*, 997 S.W.2d at 223; *Rhine*, 411 S.W.3d at 657.

Generally, the non-movant's "written answer or response to the motion must fairly apprise the movant and the court of the issues the non-movant contends should defeat the motion." *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (1999). However, if the grounds expressly claimed by the movant in the motion are legally insufficient, the trial court may not grant summary judgment, even if this ground is not expressly raised by the non-movant in the response. *See id.* As the Texas Supreme Court has explained,

> The trial court may not grant a summary judgment by default . . . when the movant's summary judgment proof is legally insufficient. The movant still must establish his entitlement to a summary judgment on the issues expressly presented to the trial court by conclusively proving all essential elements of his cause of action or defense as a matter of law.

Id.

In this case, Velvin Oil's sole ground for summary judgment was based on the sworn account and the insufficiency of AJP Oil's and Patton's unverified answer. A suit on a sworn account is based on Rule 185 of the Texas Rules of Civil Procedure, "a rule of procedure with regard to evidence necessary to establish a prima facie right of recovery." *Rizk v. Fin. Guardian Ins. Agency, Inc.*, 584 S.W.2d 860, 862 (Tex. 1979) (citing *Meaders v. Biskamp*, 316 S.W.2d 75 (Tex. 1958)). If an action "is founded on an open account . . . on which a systematic record has

been kept, and is supported by [an] affidavit of the party, his agent or attorney," then the account "shall be taken as prima facie evidence." TEX. R. CIV. P. 185. If "the defendant fails to file a sworn denial of the account, then no further evidence is required." *Brown Found. Repair & Consulting, Inc. v. Friendly Chevrolet Co.*, 715 S.W.2d 115, 116 (Tex. App.—Dallas 1986, writ ref'd. n.r.e.) (citing *Airborne Freight Corp. v. CRB Mkt., Inc.*, 566 S.W.2d 573, 575 (Tex. 1978). However, when the defendant timely files a verified denial of the correctness of the account, the evidentiary effect of the sworn account is destroyed, and the plaintiff must put on further proof of his claim. *Rizk*, 584 S.W.2d at 862; *Woodhaven Partners, Ltd. v. Shamoun & Norman, L.L.P.*, 422 S.W.3d 821, 833 (Tex. App.—Dallas 2014, no pet.); *S. Mgmt. Servs., Inc. v. SM Energy Co.*, 398 S.W.3d 350, 354 (Tex. App.—Houston [14th Dist.] 2013, no pet.); *Norcross v. Conoco, Inc.*, 720 S.W.2d 627, 629–30 (Tex. App.—San Antonio 1986, no writ). If a verified denial has been filed, a plaintiff may still prevail on a motion for summary judgment if the plaintiff puts on competent summary judgment evidence showing entitlement to judgment as a matter of law. *Woodhaven Partners, Ltd.*, 422 S.W.3d at 834. However, if a verified denial has been filed and the plaintiff fails to offer summary judgment evidence to establish the account, summary judgment is improper. *See Rizk*, 584 S.W.2d at 863; *Norcross*, 720 S.W.2d at 632.

Velvin Oil acknowledges that AJP Oil and Patton filed an amended answer in which they assert that they paid the account and deny that the finance charges were due and owing. Parties may amend their pleadings without leave of court if they are filed at least seven days before trial. *See* TEX. R. CIV. P. 63. A summary judgment proceeding is a trial for the purposes of Rule 63. *Goswami v. Metropolitan Sav. & Loan Ass'n*, 751 S.W.2d 487, 490 (Tex. 1988). Here, the

amended answer, which was filed more than seven days before the motion was decided, was timely filed. Therefore, it was part of the record to be considered by the trial court. *See id.* Nevertheless, Velvin Oil contends that the affidavit attached to the amended answer was not sufficient since it did not contain facts, and is therefore not proper summary judgment evidence, citing *Fisher v. Yates*, 953 S.W.2d 370 (Tex. App.—Texarkana 1997), *pet. denied*, *Yates v. Fisher*, 988 S.W.2d 730 (Tex. 1998) (per curiam), *Gen. Elec. Supply Co. v. Gulf Electroquip, Inc.*, 857 S.W.2d 591 (Tex. App.—Houston [1st Dist.] 1993, writ denied). However, neither *Fisher* nor *Gulf Electroquip, Inc.*, addressed the sufficiency of a verified denial under Rule 185. Rather, both of these cases concerned the requirements for affidavits under Rule 166a and correctly stand for the proposition that, to be competent summary judgment evidence, "an affidavit must be made on personal knowledge, set forth facts which would be admissible in evidence, and show the affiant's competency." *Fisher*, 953 S.W.2d at 383 (citing TEX. R. CIV. P. 166a(f)); *see Gulf Electroquip, Inc.*, 857 S.W.2d at 598. Our holding in *Fisher* was based on the specific language of Rule 166a(f), which requires that an affidavit in a summary judgment proceeding "set forth such facts as would be admissible in evidence," TEX. R. CIV. P. 166a(f); *Fisher*, 953 S.W.2d at 383. Therefore, we also held that, for summary judgment purposes, it is not sufficient for the affidavit to simply adopt the factual allegations set forth in pleadings. *Fisher*, 953 S.W.2d at 383.

Unlike Rule 166a, there is no requirement that an affidavit in support of a verified denial under Rule 185 set forth facts as would be admissible in evidence. Rather, under Rule 185, a party opposing a sworn account is required only to "file a written denial, under oath." TEX. R. CIV. P. 185. Under Rule 185, no particular form is required for the sworn denial. *Canter v. Easley*,

787 S.W.2d 72, 74 (Tex. App.—Houston [1st Dist.] 1990, writ denied). It is sufficient that the affidavit recite under oath that the factual statements contained in the answer are true and correct and that it is based on the affiant's personal knowledge. *See Rizk*, 584 S.W.2d at 862–63 (affidavit stating that "the facts and statements contained [in the answer] are true and correct of [affiant's] own personal knowledge" sufficient verified denial under Rule 185); *Canter*, 787 S.W.2d at 73–74 (affidavit stating that "all of the allegations and statements of fact contained in [defendant's original answer] are true and correct" meets requirements of Rule 185); *Norcross*, 720 S.W.2d at 629–30, 632 (affidavit reciting that affiant "has read and fully understands the above and foregoing allegations set out in paragraph II of Defendant's First Amended Original Answer" and that "from personal knowledge that said allegations are true and correct" sufficient verified denial under Rule 185). In this case, Patton, individually and as agent for AJP Oil, swore on his personal knowledge that the statements contained in paragraph 1, which stated that the account had been paid in full, and paragraph 2, which denied that the finance charge was due and owing, of the amended answer were true and correct. Alleging that the account has been paid in full necessarily denies that the account is just and that it is due and owing. *See Basse Truck Line, Inc. v. Strickland Transp. Co.*, 359 S.W.2d 477, 479 (Tex. Civ. App.—El Paso 1962, no writ); *Moore v. McKinney*, 151 S.W.2d 255, 257–58 (Tex. Civ. App.—El Paso 1941, no writ). Therefore, we find that AJP Oil and Patton timely filed a verified denial of the account, as required by Rule 185.[5]

[5]Velvin Oil also cites *Oliver v. Carter & Company Irr., Inc.*, No. 08-01-00446-CV, 2002 WL 1301568 (Tex. App.—El Paso June 13, 2002, no pet.) (not designated for publication), in support of its argument. However, the El Paso court held that the verification in *Oliver* was insufficient because the affiants had failed to swear under oath that the facts alleged in the answer were *true*. *Id.* at *5. In this case, Patton swore under oath that the allegations in the amended answer were true and correct.

Since AJP Oil and Patton timely filed a verified denial of the account, the evidentiary effect of Velvin's sworn account was destroyed. *Rizk*, 584 S.W.2d at 862; *Woodhaven Partners, Ltd.*, 422 S.W.3d at 833; *SM Energy Co.*, 398 S.W.3d at 354; *Norcross*, 720 S.W.2d at 629. To be entitled to summary judgment, Velvin was required to support its motion with sufficient summary judgment evidence of each element of its cause of action[6] to establish its entitlement to judgment as a matter of law. *Rizk*, 584 S.W.2d at 862; *Woodhaven Partners, Ltd.*, 422 S.W.3d at 833; *SM Energy Co.*, 398 S.W.3d at 354; *Norcross*, 720 S.W.2d at 630. No summary judgment evidence was offered by Velvin Oil in support of its motion; therefore, it failed to establish that it was entitled to judgment as a matter of law. Under these circumstances, Velvin Oil was not entitled to summary judgment. *See Rizk*, 584 S.W.2d at 863; *Norcross*, 720 S.W.2d at 632. We sustain this point of error.

We reverse the trial court's judgment and remand this case to the trial court for further proceedings consistent with this opinion.

Josh R. Morriss III
Chief Justice

Date Submitted: January 8, 2016
Date Decided: February 5, 2016

[6]The elements of a suit on account include: "(1) that there was a sale and delivery of merchandise or services; (2) that the amount of the account is just in that the prices charged are in accordance with the agreement and they are the usual, customary and reasonable prices for such merchandise or services, and (3) that the account balance is unpaid." *Norcross*, 720 S.W.2d at 632 (citing *Airborne Freight Corp. v. CRB Mktg., Inc.*, 566 S.W.2d 573 (Tex. 1978)).