

AFFIRMED; Opinion Filed November 3, 2016.



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-15-01065-CV

**J&K TILE CO., Appellant
V.
ARAMSCO INC., Appellee**

**On Appeal from the 191st Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-14-12725**

MEMORANDUM OPINION

Before Justices Francis, Stoddart, and Schenck
Opinion by Justice Stoddart

J&K Tile Co. appeals from an adverse summary judgment granted in favor of Aramsco Inc. In three issues, J&K Tile argues the trial court erred by entering summary judgment based on the evidence attached to the motion, by awarding attorney's fees, and by denying its motion for new trial. We affirm the trial court's judgment.

BACKGROUND

On October 31, 2014, Aramsco sued J&K Tile alleging it sold goods to J&K Tile and J&K Tile failed to pay the amounts due. Aramsco asserted a suit on a sworn account as well as claims for breach of contract and quantum meruit. On March 18, 2015, Aramsco served written discovery requests; J&K Tile never responded. Approximately seven months after filing suit, on May 13, 2015, Aramsco moved for summary judgment on its breach of contract claim relying, in

part, on deemed admissions. In support of its motion, Aramsco attached affidavits and the unanswered requests for admissions that it sent to J&K Tile. Aramsco set its motion for hearing on June 19, 2015, and notified J&K Tile of the hearing date.

On June 15, 2015, an attorney filed a notice of appearance on behalf of J&K Tile. He also filed an emergency motion for continuance of the June 19 summary judgment hearing. The record does not show J&K Tile set its motion for continuance for hearing or that the trial court ruled on the motion.

J&K Tile did not file a response to the motion for summary judgment and did not appear at the June 19 hearing despite proper notice. The trial court granted Aramsco's motion for summary judgment and ordered Aramsco recover \$22,377.91 plus interest and attorney's fees from J&K Tile. J&K Tile filed an emergency motion for new trial to set aside the summary judgment, which the trial court denied. This appeal followed.

LAW & ANALYSIS

We apply well known standards in our review of traditional summary judgment motions. *See Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985). The movant has the burden to demonstrate that no genuine issue of material fact exists and judgment should be rendered as a matter of law. TEX. R. CIV. P. 166a(c); *Nixon*, 690 S.W.2d at 548–49. We consider the evidence in the light most favorable to the nonmovant. *Murray v. Ford Motor Co.*, 97 S.W.3d 888, 891 (Tex. App.—Dallas 2003, no pet.). We credit evidence favorable to the nonmovant if a reasonable fact-finder could, and we disregard evidence contrary to the nonmovant unless a reasonable fact-finder could not. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). Within this framework, we review the trial court's summary judgment de novo. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010).

A. Summary Judgment Evidence

In its first issue, J&K Tile asserts the trial court erred by granting summary judgment based upon the documents attached to the motion. Aramsco attached a business records affidavit authenticating invoices and a ledger inquiry as well as the unanswered discovery requests made to J&K Tile to its motion for summary judgment. The discovery requests included requests for admission.

Because J&K Tile did not timely serve responses to Aramsco's requests for admissions, the requests were deemed admitted. *See* TEX. R. CIV. P. 198.2(c). In its motion for summary judgment, Aramsco asserted they were entitled to summary judgment because, among other things, the deemed admissions prove there is no genuine issue of material fact with regard to its breach of contract claim. Aramsco relied on deemed admissions to the following requests for admission:

1. J&K Tile Co. requested the ITEMS described on the invoice(s) attached as Exhibit "A".
2. J&K Tile Co. agreed to pay [Aramsco] for the ITEMS described on the invoices attached as Exhibit "A".
3. [Aramsco] delivered to J&K Tile Co. the ITEMS described on the invoices attached as Exhibit "A".
4. J&K Tile Co. received from [Aramsco] the ITEMS described on the invoices attached as Exhibit "A".
5. J&K Tile Co. accepted from [Aramsco] the ITEMS described on the invoices attached as Exhibit "A".
6. The correct balance owed by J&K Tile Co. for the ITEMS described on the invoice(s) attached as Exhibit "A" is \$22,377.91 after all just and lawful offsets, payments, and credits have been allowed.
7. [J&K Tile Co.] has refused and failed to pay the balance for the ITEMS described on the invoices attached as Exhibit "A", the amount being \$22,377.91.

Exhibit A to the requests for admission includes invoices from Aramsco to J&K Tile and a printout from a ledger inquiry. The balance at the bottom of the ledger inquiry shows \$22,377.91 due. These are the same invoices that Aramsco attached to its motion for summary judgment.

The elements Aramsco had to conclusively establish to obtain summary judgment on its breach of contract claim are (1) the existence of a valid contract, (2) performance or tendered performance by the plaintiff, (3) breach of the contract by the defendant and (4) damages resulting from the breach. *See Woodhaven Partners, Ltd. v. Shamoun & Norman, L.L.P.*, 422 S.W.3d 821, 837 (Tex. App.—Dallas 2014, no pet.). Through the deemed admissions, Aramsco satisfied each of these elements. In light of the deemed admissions, we conclude the trial court did not err by granting Aramsco’s motion for summary judgment. We overrule J&K Tile’s first issue.

B. Attorney’s Fees

In its second issue, J&K Tile argues the trial court erred by awarding attorney’s fees based upon a no-evidence conclusory affidavit. Citing *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757 (Tex. 2012), J&K Tile asserts the trial court erred by not using the lodestar method for calculating attorney’s fees and asserts the fees were not supported by adequate documentation. Applying the lodestar method, J&K Tile argues the evidence is insufficient because Aramsco’s attorney did not submit his billing records or give detailed testimony about the hours expended on each task.

As this Court previously explained, in *El Apple*, the supreme court addressed the evidence necessary to support an award of attorney’s fees under the federal lodestar method of awarding fees for claims under the Texas Commission on Human Rights Act. *Metroplex Mailing Servs., LLC v. RR Donnelley & Sons Co.*, 410 S.W.3d 889, 900 (Tex. App.—Dallas 2013, no pet.) (citing *El Apple*, 370 S.W.3d 760). “Nowhere in *El Apple* did the court conclude that all attorney’s fees recoveries in Texas would thereafter be governed by the lodestar approach.” *Id.* This Court has declined to require the lodestar approach for all attorney fee recoveries since *El Apple*. *See Halsey v. Halter*, 486 S.W.3d 184, 187 (Tex. App.—Dallas 2016,

no pet.) (mem. op.); *Venture v. UTSW DVA Healthcare, LLP*, No. 05-14-00774-CV, 2015 WL 5783696, at *10 (Tex. App.—Dallas Oct. 5, 2015, pet. filed) (mem. op.); *Metroplex Mailing Servs.*, 410 S.W.3d at 900. The record in the case before us does not show that the lodestar method was statutorily required or that Aramsco chose to prove up attorney’s fees using this method. See *Long v. Griffin*, 442 S.W.3d 253, 253 (Tex. 2014) (per curiam) (referring to party “choosing” the lodestar method of proving attorney’s fees); *Halsey*, 486 S.W.3d at 187; *Venture*, 2015 WL 5783696, at *10. We conclude J&K Tile has not shown the trial court erred by not calculating attorney’s fees based on this method.

In a non-lodestar case, “an attorney’s testimony about his experience, the total amount of fees, and the reasonableness of the fees charged is sufficient to support an award.” *Classic Superroof LLC v. Bean*, No. 05–12–00941–CV, 2014 WL 5141660, at *9 (Tex. App.—Dallas Oct. 14, 2014, pet. denied) (mem. op.) (quoting *In re A.B.P.*, 291 S.W.3d 91, 99 (Tex. App.—Dallas 2009, pet. denied)); see also *Garcia v. Gomez*, 319 S.W.3d 638, 641 (Tex. 2010) (attorney’s brief testimony about experience, total amount of fees, and that total amount of fees was reasonable and necessary is “some evidence” of reasonable attorney’s fee).

Attached to Aramsco’s motion for summary judgment was an affidavit from Aramsco’s attorney, Lawrence Falli. The affidavit provided the number of hours Falli worked on the case, his hourly rate, and descriptions of the work performed. The affidavit states that \$3,500 is a “reasonable, necessary, usual, and customary fee for services already performed and for an additional 20 hours of services required to abstract the judgment, perform postjudgment discovery, and/or to satisfy the judgment by writ of execution and other procedures.” Falli stated that if J&K Tile unsuccessfully appeals the judgment to the court of appeals, his reasonable attorney’s fees would be \$10,000 and if the judgment is unsuccessfully appealed to the Texas Supreme Court, then a reasonable fee would be an additional \$10,000. Falli averred he is

familiar with attorney's fees customarily charged in Texas counties and his fees in this case are consistent with those charged in the area for similar work by an attorney of his experience, reputation, and ability. The trial court's judgment awards \$3,500 in attorney's fees as well as an additional \$10,000 if Aramsco is successful in the court of appeals and another \$10,000 if Aramsco is successful at the Texas Supreme Court.

The evidence provided by Falli through his affidavit is uncontroverted. Based on the information provided in Falli's affidavit, including his sworn statement that his fees were "reasonable, necessary, usual, and customary," we conclude the evidence is legally sufficient to support the award of attorney's fees. We overrule J&K Tile's second issue.

C. Motion for New Trial

In its third issue, J&K Tile argues the trial court erred by denying its motion for new trial to allow the case to be decided on its merits. J&K Tile asserts its motion for new trial included all of the factors in *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124 (Tex. 1939). However, the Texas Supreme Court has held "that *Craddock* does not apply to a motion for new trial filed after judgment has been granted on a summary-judgment motion to which the nonmovant failed to timely respond when the movant had an opportunity to seek a continuance or obtain permission to file a late response." *Carpenter v. Cimarron Hydrocarbons Corp.*, 98 S.W.3d 682, 686 (Tex. 2002); *see also Lemp v. Floors Unlimited, Inc.*, No. 05-03-01674-CV, 2004 WL 1691113, at *1 (Tex. App.—Dallas July 29, 2004, no pet.) (mem. op.). J&K Tile had an opportunity to seek a continuance and took advantage of that opportunity by filing a motion for continuance. The record does not show that J&K Tile set the motion for hearing or obtained a ruling on its motion. J&K Tile does not argue on appeal that the trial court erred by not granting a continuance. The summary judgment hearing was not delayed. Because J&K Tile

had an opportunity to seek a continuance under the rules, *Craddock* does not apply to its motion for new trial. *See Carpenter*, 98 S.W.3d at 686; *Lemp*, 2004 WL 1691113, at *1.

We review the trial court's denial of a motion for new trial for an abuse of discretion. *Chambers v. Allstate Ins. Co.*, No. 05-15-01076-CV, 2016 WL 3208710, at *6 (Tex. App.—Dallas June 9, 2016, pet. filed) (citing *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 813 (Tex. 2010)). A trial court abuses its discretion if it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law or if it fails to analyze the law correctly or apply the law correctly to the facts. *Id.* (citing *In re Cerberus Capital Mgmt., L.P.*, 164 S.W.3d 379, 382 (Tex. 2005)).

Because we determine that the trial court properly granted summary judgment, we conclude J&K Tile has not shown that the trial court abused its discretion by failing to grant a new trial. *See Drake v. Consumers County Mut. Ins.*, No. 05-13-00170-CV, 2015 WL 2182682, at *10 (Tex. App.—Dallas May 8, 2015, pet. denied) (mem. op.). We overrule J&K Tile's third issue.

CONCLUSION

We affirm the trial court's judgment.

/Craig Stoddart/

CRAIG STODDART
JUSTICE

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

J&K TILE CO., Appellant

No. 05-15-01065-CV V.

ARAMSCO INC., Appellee

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Opinion delivered by Justice Stoddart.

Justices Francis and Schenck participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee Aaramsco, Inc. recover its costs of this appeal from appellant J&K Tile Co.

Judgment entered this 3rd day of November, 2016.