Affirmed and Opinion Filed August 30, 2017

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-14-00649-CV

B.C., Appellant
V.
STEAK N SHAKE OPERATIONS, INC., Appellee

On Appeal from the 380th Judicial District Court
Collin County, Texas
Trial Court Cause No. 380-02686-2012

OPINION ON REMAND

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

B.C. appeals the trial court's take-nothing summary judgment on her common-law assault claim against her former employer, Steak N Shake Operations, Inc. (SNS). On original submission, this Court concluded B.C.'s claim was barred as a matter of law by the Texas Commission on Human Rights Act.[1] *B.C. v. Steak N Shake Operations, Inc.*, 461 S.W.3d 928, 928 (Tex. App.—Dallas 2015). The Texas Supreme Court reversed our decision, concluding the claim was not preempted by the TCHRA, and remanded the case for us to consider the remaining issues. 512 S.W.3d 276, 285 (Tex. 2017). The issues that remain on appeal are (1) whether, under its traditional motion for summary judgment, SNS established as a matter of law that

[1] TEX. LAB. CODE ANN. §§ 21.001–.556 (West 2015 & Supp. 2016).

B.C.'s assault claim fits within a traditional exception to the Texas Workers' Compensation Act (TWCA) and (2) whether, under the no-evidence motion, B.C. produced more than a scintilla of evidence on each element of her claim. Because B.C. failed to file a timely response to the no-evidence motion, and the record does not show the trial court considered the late-filed response, we conclude the trial court properly granted summary judgment in favor of SNS. Accordingly, we affirm the trial court's judgment.

The supreme court summarized the facts of this case at length in its opinion, so we need not repeat them here. *See id.* at 277–79. SNS filed a combined traditional motion and no-evidence motion for summary judgment which was granted by the trial court. We review a trial court's granting of summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). When a trial court's order granting summary judgment does not specify the ground or grounds relied on for its ruling, we must affirm summary judgment if any of the grounds advanced is meritorious. *Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex. 1989).

No-evidence and traditional grounds for summary judgment may be combined in a single motion. *Binur v. Jacobo*, 135 S.W.3d 646, 650–51 (Tex. 2004); *Coleman v. Prospere*, 510 S.W.3d 516, 518 (Tex. App.—Dallas 2014, no pet.). The substance of the motion and not its form or the attachment of evidence determines whether the motion is a no-evidence, traditional, or combined motion. *Binur*, 135 S.W.3d at 650–51; *Coleman*, 510 S.W.3d at 518. When a party files both a no-evidence and a traditional motion for summary judgment, we first consider the no-evidence motion. *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004).

A no-evidence motion for summary judgment is essentially a motion for pretrial directed verdict and is governed by the standards of Texas Rule of Civil Procedure 166a(i). *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009). The motion must specifically state which elements of the nonmovant's claims lack supporting evidence. TEX. R. CIV. P. 166a(i); *Jose*

Fuentes Co., Inc. v. Alfaro, 418 S.W.3d 280, 283 (Tex. App.—Dallas 2013, pet. denied) (en banc). A no-evidence motion that only generally challenges the sufficiency of the nonmovant's case is fundamentally defective and cannot support summary judgment as a matter of law. *Id*. But, when a movant has filed a motion that identifies the elements for which it contends no supporting evidence exists, in a form that is neither conclusory nor a general no-evidence challenge, summary judgment must be rendered absent a timely and legally adequate response by the nonmovant. *Landers v. State Farm Lloyds*, 257 S.W.3d 740, 746 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (op. on reh'g).

In this case, SNS's no-evidence motion identified the elements of assault and asserted there is no evidence of any of these elements on either a direct or vicarious liability theory. B.C. has not argued the motion was legally insufficient. Rather, she argues she presented sufficient evidence on each element of her claim to defeat the motion and directs us to evidence contained in her response. SNS argues we cannot consider B.C.'s evidence because the response was not filed timely.

A response to a motion for summary judgment, including opposing summary judgment evidence, may be filed no later than the seventh day before the date of the hearing "[e]xcept on leave of court." TEX. R. CIV. P. 166a(c); *see also Landers*, 257 S.W.3d at 745. If the response is late, the record must contain an affirmative indication that the trial court permitted the late filing or the response is a nullity. *K-Six Television, Inc. v. Santiago*, 75 S.W.3d 91, 96 (Tex. App.—San Antonio 2002, no pet.). If the record contains nothing indicating the trial court considered a late-filed response, we presume the trial court did not consider it, and the response will not be considered on appeal. *Benchmark Bank v. Crowder*, 919 S.W.2d 657, 663 (Tex. 1996).

Here, the summary judgment hearing was held on January 22, 2014, and B.C.'s response to the motion for summary judgment was filed six days earlier, on January 16, 2014.

Consequently, her response was not timely, and SNS objected to the trial court's consideration of B.C.'s evidence on that basis. Nevertheless, B.C. argues the following language of the order granting summary judgment contains an "affirmative indication" that the trial court considered her evidence: "After considering the pleadings, evidence, and arguments of counsel, the Court finds that the Motion should be granted." She suggests the word "evidence" shows the trial court considered all evidence, including her late-filed evidence. But B.C. has not cited, and we have not found, an opinion concluding a trial court's statement that it considered "evidence" was an adequate indication in the record that the court considered late-filed responsive evidence. *See Neimes v. Ta*, 985 S.W.2d 132, 138 (Tex. App.—San Antonio 1998, pet. dism'd by agr.) (explaining trial court may memorialize its permission by separate order, a recital in summary judgment order, or oral ruling contained in reporter's record of hearing); *see generally* Judge David Hittner & Lynne Liberatto, *Summary Judgments in Texas: State and Federal Practice*, 52 HOUS. L . REV. 773, 803 (2015).

The record shows SNS moved for traditional and no-evidence summary judgment in one document and filed a 226-page appendix of evidence to support its traditional motion. Thus, the trial court's statement that it considered the evidence indicates nothing more than the trial court considered SNS's appendix of evidence in conjunction with the traditional motion. We could reach a different conclusion had SNS filed only a no-evidence motion without any supporting evidence or if the trial court stated that it considered the response to SNS's motion. Neither, however, is the case. On the record before us, we cannot conclude the trial court's order contained any "affirmative indication" that it considered B.C.'s late-filed evidence or granted B.C. leave to late-file her response and evidence.[2] Accordingly, we presume the trial court did

[2] To the extent B.C. relies on the word "pleadings" to encompass her response, the law is clear that a summary judgment response is not a pleading. *See In re S.A.P.*, 156 S.W.3d 574, 576 n.3 (Tex. 2005); *K.W. Ministries, Inc. v.*

not consider her response or evidence and exclude them from our review. *Benchmark Bank*, 919 S.W.2d at 663.

Because B.C.'s response to the no-evidence motion was untimely and the record does not contain any indication the trial court granted leave for the late filing or considered the response in rendering its decision, B.C. failed to meet her burden under rule 166a(i) to affirmatively raise an issue of fact on the challenged elements of her claim. The absence of a timely and legally adequate response to the no-evidence motion required the trial court to grant summary judgment in favor of SNS. *See Landers*, 257 S.W.3d at 746.

The dissent in this case reaches a different result, concluding the evidence presented by SNS in support of its traditional motion for summary judgment rendered its no-evidence motion "legally defective or insufficient." Although B.C. does not make this argument, the dissent cites *Binur v. Jacobo* for the proposition that SNS's evidence must be examined to determine if it creates a fact issue precluding no-evidence summary judgment even though B.C. did not file a timely response. *See Binur*, 135 S.W.3d at 651. We conclude, as other courts have, that *Binur* should not be read this broadly. *See Gallien v. Goose Creek Consol. Indep. Sch. Dist.*, No. 14–11–00938–CV, 2013 WL 1141953, at *4 (Tex. App.—Houston [14th Dist.] Mar. 19, 2013, pet. denied) (mem. op.); *Dyer v. Accredited Home Lenders, Inc.*, No. 02–11–00046–CV, 2012 WL 335858, at *4–5, (Tex. App.—Fort Worth Feb. 2, 2012, pet. denied) (mem. op.).

In *Binur*, the supreme court disapproved appellate court decisions that disregarded or recharacterized motions for no-evidence summary judgment if they attached evidence. *See Binur*, 135 S.W.3d at 651. In doing so, the court stated that "if a motion brought solely under subsection (i) attaches evidence, that evidence should not be considered unless it creates a fact

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Auction Credit Enters., LLC, No. 05-14-01392-CV, 2016 WL 1085227, at *3 (Tex. App.—Dallas Mar. 21, 2016, no pet.) (mem. op.).

question." *Id*. The court said nothing in *Binur* about considering evidence submitted as part of a combined motion for traditional and no-evidence summary judgment when determining the propriety of the no-evidence motion. *See Dyer*, 2012 WL 335858, at *4. More importantly, the court said nothing that would indicate the nonmovant was relieved of her burden under rule 166a(i) to timely respond to the no-evidence motion and direct the court to the evidence she believes creates a fact issue. Although the nonmovant may not be required to re-submit the evidence already proffered by the movant, she must, at a minimum, file a timely response identifying the portions of the movant's evidence she is relying on to show a fact issue exists. *Cf. Campbell v. Mortg. Elec. Registration Sys. Inc.*, No. 03–11–00429–CV, 2012 WL 1839357, at * 4 (Tex. App.—Austin May 18, 2012, pet. denied) (mem. op.)

The dissent contends the evidence creating a fact issue in this case was pointed out to the trial court by the movant as part of its motion for traditional summary judgment and this was sufficient. This conclusion does not take into account the fact that the trial court, in considering a combined traditional and no-evidence summary judgment motion, should first address the no-evidence motion. *Cf. Ridgway*, 135 S.W.3d at 600; *Blackard v. Fairview Farms Land Co., Ltd.*, 346 S.W.3d 861, 867 (Tex. App.—Dallas 2011, no pet.). If the nonmovant fails to adequately respond to the no-evidence motion, as was the case here, the trial court need never reach the traditional motion and, therefore, never examine the evidence "pointed to" by the movant.

Additionally, even if the movant identifies evidence that arguably creates a fact issue, it is not appropriate for the court to make those arguments on behalf of the nonmovant and deny the motion for no-evidence summary judgment on that basis. It is the nonmovant's burden under rule 166a(i) to identify evidence and explain why it demonstrates that a fact issue exists. Requiring the court to independently determine whether the movant's evidence supports the nonmovant puts the court in the improper position of advocate for the nonmovant.

We recognize, as other courts have, the apparent injustice in allowing a no-evidence summary judgment to stand when "the record discloses not only that evidence exists to support the challenged element, but that the evidence was before the trial court." *See Dyer*, 2012 WL 335858 at *3. But both the language of the summary judgment rule, and the impropriety of asking the trial court to take on the nonmovant's burden of identifying fact issues, dictates the result. *Id*. We conclude the trial court did not err in granting a no-evidence summary judgment in favor of SNS. Our disposition of this issue makes it unnecessary to address B.C.'s other arguments.

We affirm the trial court's judgment.

/Molly Francis/
MOLLY FRANCIS
JUSTICE

Evans, J., dissenting.

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Court of Appeals
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JUDGMENT

B.C., Appellant

No. 05-14-00649-CV V.

STEAK N SHAKE OPERATIONS, INC., Appellee

On Appeal from the 380th Judicial District Court, Collin County, Texas
Trial Court Cause No. 380-02686-2012.
Opinion delivered by Justice Francis.
Justices Evans and Stoddart participating.

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

It is **ORDERED** that appellee STEAK N SHAKE OPERATIONS, INC. recover its costs of this appeal from appellant B.C.

Judgment entered August 30, 2017.