

Reverse and Render and Opinion Filed May 31, 2018



In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00473-CV

TIMOTHY JOHN WHALEN AND THE WHALEN LAW FIRM, PLLC, Appellant
V.
CHARLES WILLIAM JOHNSON, Appellee

On Appeal from the 68th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-14-04182

MEMORANDUM OPINION

Before Justices Bridges, Myers, and Schenck
Opinion by Justice Bridges

Timothy John Whalen and the Whalen Law Firm, PLLC, appeal the trial court's take-nothing judgment on Whalen's suit on sworn account against Charles William Johnson. In a single issue, Whalen argues he was entitled to judgment on his suit on sworn account because Johnson failed to file a sworn denial pursuant to rule of civil procedure 185. We reverse the trial court's judgment and render judgment in favor of Whalen.

In April 2104, Johnson sued Whalen alleging he retained Whalen to represent him in two underlying cases which were later consolidated. Among other things, Johnson alleged Whalen filed a motion to withdraw "due to money issues" even though Whalen had not issued an invoice or demanded a payment. The trial court signed an order of withdrawal, and Whalen subsequently sent Johnson a bill totaling \$23,000 for legal services. Johnson alleged claims of malpractice;

breach of contract; and breach of fiduciary duty in relation to overcharges, unauthorized actions, and failure to account.

Whalen filed an answer and, among other things, a counterclaim in the form of a suit on sworn account. The suit on sworn account was supported by a copy of the client agreement between Whalen and Johnson, itemized billing statements showing \$21,031.00 in legal fees provided by Whalen, and a \$2679.54 invoice for expenses. Also attached as an exhibit was Whalen's verified statement that the facts stated were within his personal knowledge; the claim on sworn account was just and true; the account was due; and all just and lawful offsets, payments, and credits had been allowed. Whalen concluded that the exact amount due was \$23,710.54 in legal fees and expenses plus \$10,669.72 in interest and penalty pursuant to contract. Johnson did not file a sworn denial of the counterclaim.

Following a trial before the court in July 2015, Whalen filed a "motion for directed verdict." Among other things, Whalen asserted he was entitled to judgment as a matter of law on his suit on sworn account. In a brief in support of the motion for directed verdict, Whalen argued Johnson's failure to file a "special verified denial of the account" barred Johnson from disputing receipt of the services or the correctness of the charges brought in the suit on sworn account.

On December 21, 2015, the trial court signed a judgment awarding Johnson, among other things, \$100,000 in exemplary damages. On January 11, 2016, the trial court signed a final order that vacated the December 21, 2015 judgment and substituted the January 11, 2016 order as the judgment of the court. The January 11, 2016 final order denied all claims between the parties and ordered the parties take nothing and bear their own costs and expenses. This appeal followed.

In a single issue, Whalen argues he was entitled to judgment on his suit on sworn account because Johnson failed to file a sworn denial pursuant to rule of civil procedure 185. Texas Rule of Civil Procedure 185 provides that, when an action is founded on an open account on which a

systematic record has been kept and is supported by an affidavit, the account shall be taken as prima facie evidence of the claim, unless the party resisting the claim files a written denial under oath. *See* TEX. R. CIV. P. 185; *Panditi v. Apostle*, 180 S.W.3d 924, 926 (Tex. App.—Dallas 2006, no pet.). The account must show with reasonable certainty the name, date, and charge for each item, and provide specifics or details as to how the figures were arrived at. *Id.*; *see Abe I. Brillling Ins. Agency v. Hale*, 601 S.W.2d 403, 404 (Tex. Civ. App. —Dallas 1980, no writ). Also, a suit on a sworn account must be accompanied by the affidavit of the plaintiff, his agent, or his attorney taken before an officer authorized to administer oaths. *Id.*; *see* TEX. R. CIV. P. 185. The affidavit must state the following: (1) the claim is within the knowledge of the affiant; (2) the claim is just and true; (3) the account is due; and (4) all just and lawful offsets, payments, and credits have been allowed. *Id.*; *see* TEX. R. CIV. P. 185. If there is a deficiency in the plaintiff's sworn account, the account will not constitute prima facie evidence of the debt. *Id.*

A defendant resisting a suit on a sworn account must comply with the rules of pleading and timely file a verified denial or he will not be permitted to dispute the receipt of the services or the correctness of the charges. *Id.*; *see* TEX. R. CIV. P. 93(10), 185; *Vance v. Holloway*, 689 S.W.2d 403, 404 (Tex. 1985). A defendant's sworn denial must be written and verified by an affidavit. *Panditi*, 180 S.W.3d at 926; *see* TEX. R. CIV. P. 185, 93(10). However, a defendant is not required to file a sworn denial if the plaintiff's suit on a sworn account was not properly pleaded. *Id.*

Attached to Whalen's pleading asserting counterclaims, including a suit on sworn account, was a billing statement addressed to Johnson, dated March 6, 2012. The statement describes legal services rendered from June 29, 2011 through September 29, 2011. This statement lists the date and type of legal services rendered, the total number of hours spent on those legal services, the total fees for the professional services, and the total amount owed. The billing statement lists the total fees owed as \$21,031. In a separate invoice, Whalen itemized fees and expenses totaling

\$2679.54. Also attached to Whalen's counterclaim was Whalen's verified statement that the facts stated were within his personal knowledge; the claim on sworn account was just and true; the account was due; and all just and lawful offsets, payments, and credits had been allowed. Whalen concluded that the exact amount due was \$23,710.54 in legal fees and expenses plus \$10,669.72 in interest and penalty pursuant to contract.

Whalen's billing statements and verified statement complied with the requirements of rule 185. *See Id.*; TEX. R. CIV. P. 185. As a result, Johnson was required to file a verified denial. *Id.*; *see* TEX. R. CIV. P. 185, 93(10). Johnson did not file a verified denial, and he was precluded from denying "the claim, or any item therein." *See* TEX. R. CIV. P. 185. Pursuant to the rules applicable to a sworn account, Whalen presented a prima facie case and was not required to offer additional proof that the fees were reasonable and necessary and assessed at the usual and customary rate. Accordingly, we conclude the trial court erred in failing to enter judgment in Whalen's favor on his suit on sworn account. We sustain Whalen's single issue.

We reverse the trial court's judgment and render judgment that Whalen recover from Johnson \$23,710.54 in legal fees and expenses plus \$10,669.72 in interest and penalty pursuant to contract.

/David L. Bridges/
DAVID L. BRIDGES
JUSTICE



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

JUDGMENT

TIMOTHY JOHN WHALEN AND THE
WHALEN LAW FIRM, PLLC, Appellants

No. 05-16-00473-CV V.

CHARLES WILLIAM JOHNSON,
Appellee

On Appeal from the 68th Judicial District
Court, Dallas County, Texas
Trial Court Cause No. DC-14-04182.
Opinion delivered by Justice Bridges.
Justices Myers and Schenck participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** and judgment is **RENDERED** that:

Timothy John Whalen and the Whalen Law Firm PLLC recover from Charles William Johnson \$23,710.54 in legal fees and expenses plus \$10,669.72 in interest and penalty pursuant to contract.

It is **ORDERED** that appellants TIMOTHY JOHN WHALEN AND THE WHALEN LAW FIRM, PLLC recover their costs of this appeal from appellee CHARLES WILLIAM JOHNSON.

Judgment entered May 31, 2018.