AFFIRM; and Opinion Filed March 27, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00984-CV

STEVEN S. SIMS, Appellant

V.

ROSALINE D. SIMS, Appellee

On Appeal from the 14th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-16-03445

MEMORANDUM OPINION

Before Justices Lang-Miers, Fillmore, and Stoddart
Opinion by Justice Lang-Miers

Appellant Steven S. Sims, appearing pro se, appeals the trial court's summary judgment in favor of appellee Rosaline D. Sims.[1] In eight issues, Steven argues that the trial court erred in granting summary judgment. We affirm.

BACKGROUND

Steven filed for divorce from Rosaline. A trial court issued a final decree of divorce, which Steven signed and agreed to in form and substance. Subsequently, Steven filed this suit against Rosaline, alleging claims including defamation and personal injury and requesting damages and exemplary damages. Rosaline filed a motion for traditional summary judgment, arguing that

[1] For clarity, we refer to the parties by their first names.

Steven's claims were barred by res judicata and the statute of limitations. Steven did not file a response to the motion or request a continuance. The trial court found that summary judgment "should be and is entered on [Rosaline's] affirmative defenses stated in her motion" and granted Rosaline's motion for summary judgment. Steven filed a "Request for Rehearing and Motion for New Trial." The trial court denied the motion for new trial. Steven then filed this appeal. He also filed a motion for sanctions against Rosaline and her attorney.

PRESERVATION

In his eight issues on appeal, Steven challenges "THE LEGAL AND FACTUAL SUFFICIENCY OF THE COURT'S FINDINGS AT SUMMARY JUDGMENT" because he claims Rosaline and her counsel were spoliating evidence and he argues that the trial court erred by not establishing a discovery control plan before holding a summary judgment hearing, by failing "TO NOTICE THE IMPROPER SCHEDULING AND NOTICE OF HEARING OF SUMMARY JUDGMENT[,]" by not allowing time for him to address and correct special exceptions, by not allowing additional and adequate time for discovery, and by improperly granting summary judgment when conflicting statements in Rosaline's answer and motion for summary judgment raised a fact issue. Steven also argues that "THE TRIAL JUDGE ABUSED ITS AUTHORITY BY RENDERING A SUMMARY JUDGMENT WHEN THE APPELLANT HAD NO EVIDENCE TO PRESENT AT THE HEARING" and that "THE EXCLUSION OF THE EVIDENCE IS CONTRADICTORY TO THE RULINGS ESTABLISHED BY THE SUPREME COURT[.]"[2]

Central to this appeal, as we noted, Steven did not file a response to Rosaline's motion for summary judgment. "A non-movant must present its objections to a summary judgment motion

[2] In the table of contents and issues presented sections of his brief, Steven states his eight issues as constitutional issues, but he does not discuss constitutional issues in the argument of his brief.

expressly by written answer or other written response to the motion in the trial court or that objection is waived." *D.R. Horton-Tex., Ltd. v. Markel Int'l Ins. Co.*, 300 S.W.3d 740, 743 (Tex. 2009); *see* TEX. R. CIV. P. 166a(c) ("Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal."). And although Steven filed a motion for new trial,[3] "a party who fails to expressly present to the trial court any written response in opposition to a motion for summary judgment waives the right to raise any arguments or issues post-judgment." *Unifund CCR Partners v. Weaver*, 262 S.W.3d 796, 797 (Tex. 2008); *see Kelley-Coppedge, Inc. v. Highlands Ins. Co.*, 980 S.W.2d 462, 467 (Tex. 1998) (concluding party waived issue in opposition to summary judgment when the party asserted the issue for the first time in a motion for new trial). However, "the non[-]movant need not have answered or responded to the motion to contend that the movant's summary judgment proof is insufficient as a matter of law to support summary judgment." *Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999).

With respect to one issue—issue six—Steven argues on appeal that:

> APPELLANT PRESERVED THE ISSUE OF NOT HAVING DEPOSITIONS AT SUMMARY JUDGMENT HEARING, WHEN THE TRIAL JUDGE STATED,
>
> **"YOU SAID THAT YOU HAD TWO INDIVIDUALS THAT YOU WISHED TO DEPOSE THAT WILL ESTABLISH YOUR CLAIM OF DEFAMATION. MY QUESTION IS: WHY DID YOU NOT TAKE THOSE DEPOSITIONS?" (RR: 5, 6, 7)**
>
> THEREFORE, THE TRIAL COURT SHOULD HAVE ALLOWED MORE TIME TO GATHER DISCOVERY.

[3] In his motion for new trial, Steven argued that Rosaline was not entitled to summary judgment "because there is still evidence yet to be gathered," "depositions have not been taken[,]" "affidavits have not been obtained," Steven "did not have sufficient notice of hearing[,]" and "the trial court's ruling was in error" and "the error probably caused the rendition of an improper judgment." In addition, he argued that, "where a tort involves a continuing or repeated injury, the limitations period does not begin to run until the date of the last injury or the date the tortious acts cease[,]" the limitations period runs "from the date the injury was discovered" under the discovery rule, Rosaline engaged in "not just bad conduct during the course of a marriage, but abusive conduct going far beyond the trials of everyday life" through which she intentionally or recklessly inflicted emotional distress, her conduct was "highly culpable[,]" and there was a fiduciary relationship between the parties. Steven argued that "[e]videntiary particulars would prove with factual specificity the intensity and duration of emotional distress." Steven also stated in his motion for new trial that he "also claims or intends to claim" false imprisonment, loss of consortium, the tort of outrage, and intentional or reckless misrepresentation.

But reference to the trial court's statement does not show that appellant "expressly presented" the issue regarding the absence of depositions to the trial court "by written motion, answer or other response[.]" As a result, it may not be considered on appeal as a ground for reversal. *See* TEX. R. CIV. P. 166a(c).

In his first issue, Steven states that he "CHALLENGES THE LEGAL AND FACTUAL SUFFICIENCY OF THE COURT'S FINDINGS AT SUMMARY JUDGMENT IN FAVOR OF THE APPELLEE WHEN THE APPELLEE AND OPPOSING COUNSEL ARE SPOLIATING EVIDENCE" and argues that "EXCLUDING DISCOVERY EVIDENCE PROBABLY CAUSED THE RENDITION OF AN IMPROPER JUDGMENT OR PREVENTED THE APPELLANT FROM PROPERLY PRESENTING THE CASE TO THE COURT."[4] He discusses fraudulent concealment and alleges that Rosaline "HAD THE FIXED PURPOSE OF MISLEADING THE COURT IN MIND WHEN CONCEALING THE WRONG." But he does not analyze the claimed legal insufficiency of the evidence, does not cite authority or state the standard of review concerning the legal sufficiency of the evidence, and does not provide citations to the record that support a sufficiency complaint. TEX. R. APP. P. 38.1(i) ("The brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record."). As a result, we conclude that Steven has not raised an issue challenging the sufficiency of the evidence in this appeal. *See Brown v. Bank of Am., N.A.*, No. 01-14-00725-CV, 2015 WL 4760201, at *5–6 (Tex. App.—Houston [1st Dist.] Aug. 13, 2015, no pet.) (mem. op.) (holding any issue in the appellants' brief that could be construed as legal-sufficiency challenge to no-evidence summary judgment was inadequately briefed); *Teter*, 261 S.W.3d at 799 (concluding appellant waived legal sufficiency complaints to traditional summary judgment).

[4] Because Steven did not file a response to Rosaline's summary judgment motion, "on appeal he may attack only the legal sufficiency of the evidence to support summary judgment." *See Teter v. Comm'n for Lawyer Discipline*, 261 S.W.3d 796, 799 (Tex. App.—Dallas 2008, no pet.).

Additionally, although Steven mentioned "Craddock" without citation in his motion for new trial,[5] he did not base his argument in his motion for new trial and does not base his appeal upon the standard in *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124, 126 (Tex. 1939). Under *Craddock*, a default judgment should be set aside and a new trial ordered in any case in which the failure of the defendant to answer before judgment was not intentional or the result of conscious indifference on his part, but was due to an accident or a mistake, provided the motion for new trial sets up a meritorious defense and is filed at a time when the granting thereof will occasion no delay or otherwise work an injury to the plaintiff. *Craddock*, 133 S.W.2d at 126. *Craddock* involved a default judgment after a defendant failed to answer; we apply the same standard to "default" summary judgments. *See Mosser v. Plano Three Venture*, 893 S.W.2d 8, 10 (Tex. App.—Dallas 1994, no writ).

But regardless, *Craddock* does not apply. The supreme court has stated that its purpose "in adopting the *Craddock* standard was to alleviate unduly harsh and unjust results at a point in time when the defaulting party has no other remedy available." *Carpenter v. Cimarron Hydrocarbons Corp.*, 98 S.W.3d 682, 686 (Tex. 2002) (citing *Craddock*, 133 S.W.2d at 126). When the rules of civil procedure provide a party a remedy, *Craddock* does not apply. *Id.* Steven stated at the hearing on the motion for summary judgment that he received a letter from Rosaline's counsel stating that her counsel had "filed a motion and had the date and the time for me to be here." He also acknowledged that the letter from Rosaline's counsel stated: "Mr. Sims, please find the attached summary judgment and brief in support thereof. Please provide dates of availability for a hearing on the matter." Because Steven was aware of the summary judgment motion and the

[5] In his motion for new trial, Steven mentions "Craddock" one time—the only time it is mentioned in the record or on appeal—as follows:

> The plaintiff should be given a new trial or reversal of summary judgment when no evidence has been gathered to support the pleadings that there is no genuine issue of material fact. Therefore, the defense is not entitled to summary judgment as a matter of law. Under the Craddock Rule, the evidence could not have been discovered through due diligence prior to the ruling on the summary judgment motion.

date and time of the hearing or the proposal to set a hearing, if he was unable to prepare his response, then the rules allowed him to seek a continuance or obtain permission to file a late response. *See* TEX. R. CIV. P. 166a(c), (g); *Carpenter*, 98 S.W.3d at 685–86; *Lemp v. Floors Unlimited, Inc.*, No. 05-03-01674-CV, 2004 WL 1691113, at *1 (Tex. App.—Dallas Jul. 29, 2004, no pet.) (mem. op.). As a result, he had the opportunity to seek relief under the rules, but he did not do so, and *Craddock* does not apply to his motion for new trial. *See Carpenter*, 98 S.W.3d at 686, *Lemp*, 2004 WL 1691113, at *1.

Consequently, Steven did not expressly present to the trial court any written response in opposition to Rosaline's motion for summary judgment and has waived his complaints for appeal. *See Unifund*, 262 S.W.3d at 797; *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979).

We resolve Steven's eight issues against him.

MOTION FOR SANCTIONS

Steven filed a motion for sanctions under rule of appellate procedure 52.11. *See* TEX. R. APP. P. 52.11. He argues that this court should impose sanctions against Rosaline and her attorney "FOR FAILING TO ACT IN GOOD FAITH IN AN ORIGINAL PROCEEDING."[6] Rule 52.11 does not apply because this is an appeal rather than an original proceeding. *See id.* We deny Steven's motion.

[6] Rule 52.11 allows a court to impose sanctions on a party or attorney "who is not acting in good faith" in an original proceeding. *See id.*

CONCLUSION

We resolve Steven's eight issues against him and affirm the trial court's judgment. We deny Steven's motion for sanctions.

/Elizabeth Lang-Miers/
ELIZABETH LANG-MIERS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

STEVEN S. SIMS, Appellant	On Appeal from the 14th Judicial District Court, Dallas County, Texas
No. 05-16-00984-CV V.	Trial Court Cause No. DC-16-03445. Opinion delivered by Justice Lang-Miers,
ROSALINE D. SIMS, Appellee	Justices Fillmore and Stoddart participating.

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

Judgment entered this 27th day of March, 2018.