Affirmed; Opinion Filed January 10, 2018.

In The

Court of Appeals

Fifth District of Texas at Dallas

No. 05-17-00118-CV

THOMAS J. GRANATA, II, Appellant

V.

MICHAEL KROESE AND JUSTIN HILL, Appellees

On Appeal from the 296th Judicial District Court
Collin County, Texas
Trial Court Cause No. 296-01005-2016

MEMORANDUM OPINION

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

Thomas J. Granata, II appeals the trial court's judgment granting Michael Kroese and Justin Hill's motion for summary judgment and awarding them damages of $220,000 plus interest on their suit for breach of a guaranty concerning a promissory note. Granata brings four issues on appeal contending the trial court erred by granting the motion for summary judgment because (1) the motion did not state a ground for summary judgment; (2) the only legal theory asserted in the motion was wrong as a matter of law; (3) appellees failed to present evidence in support of each element of their breach of contract claim; and (4) Granata's evidence created a fact issue that precluded summary judgment.

BACKGROUND

According to appellees' petition, they asserted a claim for breach of contract against Full Spectrum Diagnostics, LLC. That claim was settled before suit was filed by Full Spectrum

executing a promissory note for $270,000. Granata signed a statement at the end of the note stating, "I, Thomas J. Granata II, . . . hereby personally guaranty the amount indebted to the Lenders." Full Spectrum made one payment on the note in the amount of $50,000 but made no payments thereafter.

When the note came due and Full Spectrum failed to pay, appellees filed this suit alleging breach of contract against Full Spectrum for not paying the promissory note and against Granata for failing to pay Full Spectrum's indebtedness as he promised in the guaranty. Full Spectrum did not answer the suit, and appellees obtained a default judgment against it for $220,000. Granata answered, asserting affirmative defenses, including lack of consideration and failure of a condition precedent. Appellees moved for summary judgment against Granata on his guaranty of the promissory note. The trial court granted the motion for summary judgment and awarded appellees "monetary relief" of $220,000 plus interest.

STANDARD OF REVIEW

The standard for reviewing a traditional summary judgment is well established. *See Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985); *McAfee, Inc. v. Agilysys, Inc.*, 316 S.W.3d 820, 825 (Tex. App.—Dallas 2010, no pet.). The movant has the burden of showing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). In deciding whether a disputed material fact issue exists precluding summary judgment, evidence favorable to the nonmovant will be taken as true. *Nixon*, 690 S.W.2d at 548–49; *In re Estate of Berry*, 280 S.W.3d 478, 480 (Tex. App.—Dallas 2009, no pet.). Every reasonable inference must be indulged in favor of the nonmovant and any doubts resolved in its favor. *City of Keller v. Wilson*, 168 S.W.3d 802, 824 (Tex. 2005). We review a summary judgment de novo to determine whether a party's right to prevail is

established as a matter of law. *Dickey v. Club Corp.*, 12 S.W.3d 172, 175 (Tex. App.—Dallas 2000, pet. denied).

APPELLEES' SUMMARY JUDGMENT MOTION

Appellees' summary judgment motion is brief. Therefore, we set forth the relevant portions of the motion in full.

> ### Summary of the Motion
>
> Plaintiffs seek summary judgment on their claims against Thomas J. Granata, II because he guaranteed the debt of Full Spectrum Diagnostics, LLC. The default judgment was entered against Full Spectrum Diagnostics, LLC on June 1, 2016. Mr. Granata guaranteed the amount of indebtedness of Full Spectrum Diagnostics, LLC. Therefore, Plaintiffs are entitled to summary judgment against Mr. Granata.
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> . . . .
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> ### Undisputed Facts
>
> Mr. Granata guaranteed the promissory note made by Full Spectrum Diagnostics, LLC. Full Spectrum Diagnostics, LLC. only paid $50,000 of the note via a third party. The note was to be repaid by October 26, 2015. No payment has been forthcoming on said promissory note cents [sic] the $50,000 payment was made by the third-party.
>
> On June 1, 2016, the court entered a default judgment against Full Spectrum Diagnostics, LLC based on the promissory note in the amount of the unpaid principal balance of the note along with interest.
>
> ### Argument and Authorities
>
> The Court should grant the motion for summary judgment against Mr. Granata because Mr. Granata guaranteed the obligation of Full Spectrum Diagnostics, LLC. A default judgment was entered against that company for the promissory note Mr. Granata guaranteed. Therefore, the Court should grant the summary judgment against Mr. Granata for the same amount as the default judgment.
>
> ### Prayer
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> WHEREFORE, Plaintiffs request the Court enter a Summary Judgment corresponding to the default judgment entered against Full Spectrum Diagnostics, LLC as follows:
>
> a. Monetary relief of $220,000.00;

> b. Interest in the amount of $8,066.67 through February 25, 2016 and 8% interest on the monetary relief expressed above, compounded annually, until paid in full.

(Citations to exhibits omitted.)

EXISTENCE OF A SUMMARY JUDGMENT GROUND

In his first issue, Granata contends the trial court erred by granting the motion for summary judgment because the motion failed to state a ground for summary judgment.

When a defendant moves for summary judgment, he must state specific grounds for relief. TEX. R. CIV. P. 166a(c); *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 341 (Tex. 1993). "The term 'grounds' means the reasons that entitle the movant to summary judgment, in other words, 'why' the movant should be granted summary judgment." *Garza v. CTX Mortg. Co., L.L.C.*, 285 S.W.3d 919, 923 (Tex. App.—Dallas 2009, no pet.). If the grounds for summary judgment are not clear, the general rule is that the nonmovant must specially except to preserve error. *See Harwell v. State Farm Mut. Auto. Ins. Co.*, 896 S.W.2d 170, 175 (Tex. 1995) (citing *McConnell*, 858 S.W.2d at 342). However, the nonmovant need not object if the grounds for summary judgment are not expressly presented in the motion itself, rendering the motion insufficient as a matter of law. *See McConnell*, 858 S.W.2d at 342. Grounds are sufficiently specific if they give "fair notice" to the nonmovant. *Bever Props., L.L.C. v. Jerry Huffman Custom Builder, L.L.C.*, 355 S.W.3d 878, 889 (Tex. App.—Dallas 2011, no pet.).

Appellees' motion for summary judgment did not have a section expressly setting forth "summary judgment grounds." Instead, the "Argument & Authorities" section set forth the reason the trial court should grant the motion for summary judgment:

> The Court should grant the motion for summary judgment against Mr. Granata because Mr. Granata guaranteed the obligation of Full Spectrum Diagnostics, L.L.C. A default judgment was entered against that company for the promissory note Mr. Granata guaranteed. Therefore, the Court should grant the summary judgment against Mr. Granata for the same amount as the default judgment.

The argument set forth the basis for the summary judgment, i.e., that Granata was liable as a guarantor of Full Spectrum's obligation on the promissory note and that a default judgment had been rendered against Full Spectrum on the promissory note, which established Full Spectrum's liability on the obligation that Granata had guaranteed. We conclude Granata had fair notice of the ground on which appellees moved for summary judgment.

Granata also argues the motion did not identify the cause of action upon which judgment is sought. Appellees pleaded one cause of action against Granata: breach of contract for failing to fulfill his guaranty of Full Spectrum's obligation on the promissory note. Appellees' motion for summary judgment was clear that was the subject of their suit against Granata.

Granata also argues the motion did not "identify how any of the evidence meets or conclusively establishes the required the [sic] elements of a cause of action." We disagree. The argument, while concise, discusses the evidence (the promissory note including Granata's guaranty and the default judgment against Full Spectrum), and the legal consequences (liability for breach of the guaranty) are apparent from the context of the motion.

Granata also argues the motion did not "otherwise give the Appellant notice of the basis upon which summary judgment was sought." The motion sought summary judgment against Granata on one basis—that Granata was liable as guarantor of Full Spectrum's obligation on the note, which was established by the default judgment. Whether that ground authorized the summary judgment is a different matter not relevant to this issue.

Granata asserts in his reply brief that the motion fails to present a ground for summary judgment because the motion does not identify the elements of the claim on which appellees moved for summary judgment. In support of this argument, Granata relies on *ExxonMobil Corp. v. Lazy R Ranch, LP*, 511 S.W.3d 538 (Tex. 2017), which stated, "A motion for summary judgment must state the specific grounds entitling the movant to judgment, identifying or

addressing the cause of action or defense and its elements." *Id.* at 545–46. Granata complains that the motion did not identify the cause of action and its elements; however, *ExxonMobil* is satisfied if the motion *addresses* the cause of action and its elements. In this case, where only one cause of action was alleged against Granata, the entire motion addressed the cause of action. To prevail on a motion for summary judgment against the guarantor of a promissory note, the plaintiff must establish (1) the existence and ownership of the guaranty; (2) plaintiff's performance of the terms of the guaranty; (3) the occurrence of the condition on which liability is based; and (4) the guarantor's failure or refusal to perform the promise. *Vince Poscente Int'l, Inc. v. Compass Bank*, 460 S.W.3d 211, 214 (Tex. App.—Dallas 2015, no pet.). Appellees' motion addressed at least some of these elements. The statement, "Mr. Granata guaranteed the obligation of Full Spectrum Diagnostics, LLC" addresses the existence of the guaranty. The statement, "A default judgment was entered against [Full Spectrum] for the promissory note Mr. Granata guaranteed" addresses the occurrence of the condition on which liability is based, namely, Full Spectrum's default on the note and Granata's guaranty of Full Spectrum's indebtedness on the note. The statement, "No payment has been forthcoming on said promissory note cents [sic] the $50,000 payment" addresses the guarantor's failure or refusal to perform the promise. Therefore, the motion complies with the requirement that it address the cause of action and its elements.

We conclude the motion for summary judgment presented the ground on which appellees sought summary judgment. We overrule Granata's first issue.

SOUNDNESS OF THE LEGAL THEORY

In his second issue, Granata contends the trial court erred by granting summary judgment because "the only legal theory asserted in the motion . . . is wrong as a matter of law." Appellees' legal theory was that Granata was liable to them because he guaranteed Full

Spectrum's performance of the note, Full Spectrum failed to pay, and appellees' obtained a default judgment against Full Spectrum establishing Full Spectrum's liability on the note. Granata argues this theory is wrong because a guarantor who has notice of the action against the principal and participates in the suit is not bound by a default judgment against the guarantor under the doctrine of collateral estoppel. *See Mayfield v. Hicks*, 575 S.W.2d 571, 574 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.). Granata argues that the default judgment against Full Spectrum should not have precluded him from presenting all defenses that he or Full Spectrum had to the note.

Appellees' motion for summary judgment did not assert collateral estoppel, nor did it assert that Granata was barred from presenting defenses. Instead, it asserted that Granata was liable as a guarantor because he signed as a guarantor of Full Spectrum's obligations on the note, Full Spectrum failed to pay, and Full Spectrum's obligation to pay was established by the default judgment. We overrule Granata's second issue.

EVIDENCE OF APPELLEES' PERFORMANCE

In his third and fourth issues, Granata contends the trial court erred by granting appellees' motion for summary judgment because (3) appellees did not present evidence supporting all elements of their cause of action and (4) Granata presented evidence raising a fact question that precluded summary judgment.

Granata asserts that appellees failed to prove they performed the contract by paying or providing value to Full Spectrum of $270,000. Granata points out that he pleaded in his answer that appellees did not perform the condition precedent of tendering $270,000; therefore, appellees had the burden of proving compliance with the condition precedent. However, the promissory note had no condition precedent requiring appellees to tender $270,000 to Full Spectrum, and no summary judgment evidence indicated that appellees' tender of that sum to

Full Spectrum was a condition precedent to enforcement of the note and guaranty. Instead, the note stated, "FOR VALUE RECEIVED, The Borrower promises to pay to the Lender at such address as may be provided in writing to the Borrower, the principal sum of $270,000.00 . . . ." The statement in the note, "FOR VALUE RECEIVED," is evidence that Full Spectrum received consideration in exchange for the note. *See Wilson & Wilson Tax Servs., Inc. v. Mohammed*, 131 S.W.3d 231, 242 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

Granata argues he presented contrary evidence, namely, the affidavit of his trial attorney stating Granata specifically denied:

> that the agreement upon which Plaintiff sues was supported by any consideration as alleged in Plaintiff's Original Petition. The performance promised by the Plaintiff in exchange for defendant's obligation did not occur as promised. Specifically, the value or benefit received to the promisor in the amount of $270,000.00 did not occur.

Granata asserts this affidavit created a fact question on the essential element of whether appellees conclusively proved they performed under the contract. This affidavit was filed in support of Granata's answer to provide verification for Granata's affirmative defense of lack or failure of consideration for the promissory note. *See* TEX. R. CIV. P. 93(9). However, Granata did not attach the affidavit to his summary judgment response, he did not incorporate it by reference into his response, and he did not refer to in his response. For an affidavit filed with a pleading to be considered in a summary judgment proceeding, it must be incorporated by reference or attached to the motion or response and be identified as supporting evidence in the motion or response. *Speck v. First Evangelical Lutheran Church of Houston*, 235 S.W.3d 811, 816 (Tex. App.—Houston [1st Dist.] 2007, no pet.). Because Granata did not attach the affidavit to his response to the motion for summary judgment, incorporate it by reference, or even mention it in the response, the affidavit was not part of the summary judgment evidence. *Id.*; *see also Boeker v.*

Syptak, 916 S.W.2d 59, 61–62 (Tex. App.—Houston [1st Dist.] 1996, no writ); *Sugarland Bus. Ctr., Ltd. v. Norman*, 624 S.W.2d 639, 642 (Tex. App.—Houston [14th Dist.] 1981, no writ).[1]

We conclude appellees presented evidence that Full Spectrum received value for the promissory note[2] and that Granata failed to present any controverting evidence raising a fact question on that issue. We overrule Granata's third and fourth issues.

CONCLUSION

We affirm the trial court's judgment.

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/Lana Myers/
LANA MYERS
JUSTICE

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[1] The court in *Sugarland Business Center* based its decision on the reasoning in *Hidalgo v. Surety Savings & Loan Ass'n*, 462 S.W.2d 540, 545 (Tex. 1971):

> On balance, we are convinced that orderly judicial administration will be better served in the long run if we refuse to regard pleadings, even if sworn, as summary judgment evidence. Taking this course will make for more orderly trials with fewer problems for courts and attorneys. If we took the opposite course, we would be confronted with constant problems concerning whether there was an adequate showing that the person making oath was personally acquainted with the facts and was competent to testify to the facts alleged.
>
> The trial process includes both the pleading and the trial stages, whether the trial stage be in summary or conventional trial proceedings. If trial judges will be diligent in requiring in summary judgment proceedings that trial be on independently produced proofs, such as admissions, affidavits and depositions, the rule we have here approved should present no problems.

In his reply brief, Granata asserts there is no requirement that affidavits on file with the court be attached to the summary judgment motion. *See* TEX. R. CIV. P. 166a(c). In general, Granata is correct. However, as discussed above, affidavits attached to pleadings, such as the verification of a specific denial under rule 93, are different because pleadings are not summary judgment evidence. As the courts have pointed out, an affidavit attached to a pleading becomes summary judgment evidence only if it is attached to or incorporated into the summary judgment motion or response. None of the cases Granata cited concerned affidavits attached to pleadings. Also, even if the affidavit could be considered summary judgment evidence without being attached to or incorporated into the motion, the trial court would not have considered it unless it was referenced in the motion or response. Neither Granata nor appellees referred to the affidavit in the summary judgment proceedings. *See Fed. Home Loan Mortg. Corp. v. Pham*, 449 S.W.3d 230, 236 (Tex. App.—Houston [14th Dist.] 2014, no pet.) ("Generally, a trial court may not consider summary judgment evidence not referenced in or incorporated into the motion.").

[2] Granata asserts in his reply brief concerning the third issue that appellees' motion did not move for summary judgment on the element of their performance under the guaranty. However, that is a different matter from the issue in appellant's opening brief, whether appellees failed to present evidence they performed under the guaranty. Granata could have presented this issue in his opening brief. Having failed to do so, he may not raise it for the first time in his reply brief. *Stovall & Assocs, P.C. v. Hibbs Fin. Ctr., Ltd.*, 409 S.W.3d 790, 803 (Tex. App.—Dallas 2013, no pet.). Accordingly, it is not properly before us, and we do not address it.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

THOMAS J. GRANATA, II, Appellant

No. 05-17-00118-CV V.

MICHAEL KROESE AND JUSTIN HILL, Appellees

On Appeal from the 296th Judicial District Court, Collin County, Texas
Trial Court Cause No. 296-01005-2016.
Opinion delivered by Justice Myers. Justices Bridges 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 appellees MICHAEL KROESE AND JUSTIN HILL recover their costs of this appeal from appellant THOMAS J. GRANATA, II.

Judgment entered this 10th day of January, 2018.