**REVERSE AND REMAND and Opinion Filed November 27, 2018**

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

**No. 05-17-01218-CV**

**MACK R. CHRISTIAN, Appellant**
**V.**
**VENEFITS, LLC F/K/A VENSURANCE, LLC, VIKASH JAIN, AND CHRIS WRBA, Appellees**

**On Appeal from the 429th Judicial District Court**
**Collin County, Texas**
**Trial Court Cause No. 429-05467-2016**

## MEMORANDUM OPINION

Before Justices Bridges, Francis, and Lang-Miers
Opinion by Justice Francis

The question in this case is whether an interlocutory default judgment against a non-answering corporate defendant can serve as the basis to impose liability on the corporation's former president, an answering defendant in the same suit, under section 171.255 of the Texas Tax Code and also defeat the former president's affirmative claims against third parties. We conclude it cannot. Accordingly, we reverse the trial court's judgment and remand for further proceedings.

VIPCO Advisors, Inc. and Venefits, LLC[1] are companies involved in the processing and underwriting of insurance. In June 2016, Venefits acquired a 51 percent interest in VIPCO in

[1] The original plaintiff in this suit was Vensurance, LLC. During the course of litigation, Vensurance changed its name to Venefits, and the trial court granted Vensurance's motion to substitute Venefits as plaintiff. For clarity, we refer to the party only as Venefits for events occurring both before and after the substitution.

exchange for $300,000. An addendum attached to the stock purchase and conveyance agreement set out a payment schedule under which Venefits paid $100,000 at closing, $50,000 on August 1, and $30,000 in each of the next five months. The addendum also provided that once Venefits paid $150,000, any subsequent payments were due only if VIPCO met certain recruiting goals. Venefits named Vikash Jain as chairman of VIPCO's board of directors and appointed appellee Chris Wrba as chief executive officer. After the sale, Mack R. Christian remained president of the company and had a 21 to 22 percent ownership.

Three months later, in September, Jain discovered VIPCO failed to file a franchise tax report due in May 2016 and had forfeited its right to transact business in Texas. By that time, Venefits had paid $180,000 toward the purchase price. On December 12, 2016, Venefits sued VIPCO, Christian, and three other officers/directors of VIPCO to recover damages for breach of contract, fraud, and breach of fiduciary duty. As to the breach of contract, Venefits alleged it fully performed all conditions, covenants and promises under the contract to be performed on its part, but "[d]efendants failed to honor the contract payment obligations in breach of the contract."[2] Venefits alleged VIPCO was a forfeited Texas corporation as defined by section 171.2515 of the tax code and the named officers/directors, including Christian, were liable for its debts under section 171.255. Venefits pleaded for actual damages and attorney's fees. It did not request any equitable relief.

Christian was the only defendant to file an answer, which included a general denial, verified denials, and affirmative defenses. On the same day, he moved for summary judgment on all causes of action. The trial court granted his motion on the fraud and breach of fiduciary duty claims but denied the motion on the breach of contract, leaving that claim at issue.

[2] As to fraud, Venefits alleged the "Defendants" made material, false representations "concerning the funds" it advanced. As to breach of fiduciary duty, Venefits alleged Defendants breached a fiduciary duty by accepting the advanced funds without providing Venefits with an interest and/or an interest with any value in VIPCO.

Shortly after, Venefits filed a motion for default judgment against VIPCO and the three officers/directors who had not answered the suit. The motion expressly excluded Christian. Venefits sought a default judgment on the fraud and breach of contract claims, but conceded its breach of fiduciary duty claim was not viable.

Two days later, Christian filed a third-party petition for breach of contract against Jain and Wrba seeking to hold them liable under the same tax forfeiture statute used by Venefits. He alleged that Jain and Wrba, in their capacities as an officer or director of VIPCO, approved a compensation contract with him to serve as president, but VIPCO failed to pay.

The trial court granted Venefits's motion for default judgment against VIPCO and the non-answering officers/directors and, following a hearing on unliquidated damages, rendered a "Final Default Judgment." The judgment recited the trial court's finding that the non-answering defendants were "liable for the claims asserted in the Plaintiff's Original Petition" and rescinded the contract. The trial court rendered judgment in the amount of $187,994.33 and awarded pre- and post-judgment interest. The court reserved the issue of attorney's fees "for further ruling."

After the default judgment ruling, Venefits, Jain, and Wrba jointly filed a motion for summary judgment against Christian. Venefits moved for traditional summary judgment on its claim against Christian arising out of the stock purchase agreement; Jain and Wrba moved for no-evidence summary judgment on Christian's claim against them for breach of his compensation agreement.

Attached to the motion was Christian's deposition establishing he was president of VIPCO at the time the stock purchase agreement was entered; affidavits by Jain attaching Christian's third-party petition and the stock purchase agreement; an affidavit by James Lowe, the registered agent for VIPCO, attaching the state comptroller's notice of forfeiture to VIPCO; and the trial court's default judgment rescinding the stock purchase agreement and awarding damages to Venefits.

As its ground for summary judgment, Venefits argued:

> Plaintiff, Venefits, LLC, is entitled to summary judgment on its cause of action for breach of contract against defendant Mack R. Christian because the Court has already established the existence of a breach by VIPCO Advisors, Inc., and Mack R. Christian, as an owner and the President of VIPCO, is not entitled to the protection of a corporation because no corporation existed at the time of the breach.
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> It is undisputed that VIPCO [A]dvisors breached the Purchase Agreement with Plaintiff, it is undisputed that VIPCO Advisors had forfeited its right to transact business in the State of Texas at the time it entered into the Purchase Agreement, it is undisputed that VIPCO Advisors had not revived its right to transact business at the time of the breach of that same Agreement, it is undisputed that VIPCO's breach created damages exceeding $180,000, and it is undisputed that Mack R. Christian was and is an owner and officer of VIPCO Advisors, Inc. In accordance with Texas Tax Code §171.255, each director or officer of the corporation is liable for this debt.

As grounds for summary judgment on Christian's third-party claim for breach of contract, Jain and Wrba argued Christian "failed to present a valid contract to the Court and has admitted that there was no such contract," citing pages of Christian's deposition testimony in which Christian admitted there was no written contract for his compensation. Jain and Wrba argued that Christian "has no such evidence of an agreement." They also contended that because the stock purchase agreement was rescinded by the trial court, any agreement by VIPCO to pay Christian "is of no concern" to Jain and Wrba.

Christian filed special exceptions and a response to the motion for summary judgment supported by his sworn declaration. Christian argued that Venefits, not VIPCO, breached the contract in this case by failing to pay the amounts owed. Christian attested that VIPCO performed its obligations, met its recruiting goals, and ultimately generated 900 life insurance policies for a Venefits affiliate that continued to generate a profit for Venefits. But, according to Christian, Venefits ceased paying VIPCO under the stock purchase agreement. And because Venefits ceased paying VIPCO, VIPCO could not pay its agents. Christian stated that at the time of Venefits's breach, Venefits controlled a majority of VIPCO's shares, and Jain and others associated with

Venefits had control of VIPCO's papers, bank accounts, and assets. Consequently, VIPCO could not seek any redress for Venefits's breaches of contract.

Christian argued the default judgment rendered against VIPCO did not preclude him from contending that VIPCO did not breach the stock purchase agreement. He conceded that "there does not appear to be any case discussing whether a default judgment against a corporation is binding on an officer for whom liability is asserted pursuant to Section 171.255 of the Texas Tax Code when that officer contends, in the same action, that no breach by the corporation ever occurred." But he contended that because section 171.255 is to be strictly construed, and because the section expressly provides that a director or officer's liability is determined "in the same manner and to the same extent as if the director or officer were a partner and the corporation were a partnership," he should be permitted to contend and offer evidence that VIPCO did not breach the contract and that no debt was created or incurred for purposes of section 171.255. As for his claims against Jain and Wrba, Christian asserted their no-evidence motion should be denied because there is evidence on each element of his breach of contract claim and attached his declaration for supporting evidence.

The trial court granted appellees' summary judgment motion in its entirety. In an order dated September 21, 2017, the trial court ruled that (1) Venefits was entitled to judgment against Christian for the amount of the default judgment against VIPCO under tax code section 171.255, and (2) as a matter of law, Christian could not recover on his third-party claim for breach of contract.

In support of its first ruling, the court recited that its default order rescinded the stock purchase agreement and further stated that "the Court has entered a Default Judgment against Defendant VIPCO essentially implementing VIPCO's debt during the forfeiture period into an Order and Judgment of this Court." The court, construing Christian's response as an "argument

to essentially disregard" section 171.255 and "apply general partnership law," stated it was unpersuaded by the argument and rendered judgment against Christian in the full amount of the default judgment against VIPCO.

Second, the court ruled that because its default order rescinded the stock purchase agreement, Jain and Wrba were never directors or officers of VIPCO. Consequently, Jain and Wrba could not be held liable under tax code section 171.255 for amounts due Christian under his employment agreement. This appeal followed.

In five issues, Christian asserts the trial court erred by rendering summary judgment because (1) VIPCO's default did not preclude him from defending against Venefits's claims after he appeared and answered in the suit; (2) his liability cannot be based on the breach of a rescinded contract; (3) the stock purchase agreement was not a "debt of the corporation" under Texas Tax Code § 171.255 because it was an equity agreement to purchase stock; (4) the court refused to consider his summary judgment evidence showing that no breach of contract occurred; and (5) the judgment on his third-party claim was based on a default judgment that did not involve any of the parties to the third-party claim. We begin with the trial court's summary judgment in Venefits's favor, holding Christian, as a former officer, liable for VIPCO's debts under section 171.255 of the tax code.

We review the grant of traditional summary judgment de novo. *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013). 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); *State v. Ninety Thousand Two Hundred Thirty-Five Dollars and No Cents in U. S. Currency ($90,235)*, 390 S.W.3d 289, 292 (Tex. 2013). In deciding whether a disputed material fact issue exists precluding summary judgment, evidence favorable to the nonmovant will be taken as true. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985); *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 against the motion. *City of Keller v. Wilson*, 168 S.W.3d 802, 824 (Tex. 2005). The function of summary judgment is not to deprive a litigant of the right to a full hearing on the merits of any real issue of fact, but to eliminate patently unmeritorious claims and untenable defenses. *See Gulbenkian v. Penn*, 252 S.W.2d 929, 931 (Tex. 1952). A summary judgment provides a method of summarily terminating a case when it clearly appears that only a question of law is involved and no genuine issue of fact remains. *See Gaines v. Hamman*, 358 S.W.2d 557, 563 (Tex. 1962).

Chapter 171 of the Texas Tax Code governs franchise taxes for business organizations. Under section 171.251, the comptroller is required to forfeit the corporate privileges of a corporation on which the franchise tax is imposed if the corporation fails to file the required report, pay the tax imposed or penalty relating to that tax, or permit the comptroller to examine its corporate records. TEX. TAX CODE ANN. § 171.251 (West 2015). If the corporate privileges of a corporation are forfeited, the corporation shall be denied the right to sue or defend in a court of this State, and each director or officer of the corporation is liable for a debt of the corporation as provided by section 171.255. *Id*. § 171.252. This liability extends to debt of the corporation that is created or incurred in Texas after the date on which the report, tax, or penalty is due and before the corporate privileges are revived. *Id*. § 171.255(a); *Trammell v. Galaxy Ranch School, L.P. (In re Trammell)*, 246 S.W.3d 815, 821 (Tex. App.—Dallas 2008, no pet.). The liability of a director or officer is in the same manner and to the same extent as if the director or officer were a partner and the corporation was a partnership. TEX. TAX CODE ANN. § 171.255(b). The statute provides exceptions to liability that are not at issue here. *See* TEX. TAX CODE ANN. § 171.255(c).

The officers or directors are not necessary parties to a suit against the corporation for indebtedness because they are not personally liable for the damages assessed against the

corporation based on a contract. *Trammell,* 246 S.W.3d at 822. Rather, if the directors and officers are personally liable, it is a statutory liability through the force of section 171.255. *Id*. Further, the statutory liability of the directors and officers for a debt created or incurred by the corporation when its corporate privileges were forfeited can be enforced without making the corporation a party to the lawsuit against the corporate directors and officers. *Id*. at 822–23. Often, after entry of judgment against the corporation, a plaintiff files a suit against a director or officer, seeking to hold that director or officer personally liable for a corporate debt under section 171.255. *See id*. (citing generally *Williams v. Adams*, 74 S.W. 437, 439 (Tex. App.—Corpus Christi 2002, pet. denied)).

In his first issue, Christian argues the trial court erred in concluding he is personally liable under section 171.255 of the tax code for the default judgment Venefits obtained against VIPCO, its subsidiary. He contends the default of a non-answering party does not bind an answering party in the same suit or deny that party an opportunity to assert defenses and directs us to cases in other areas of the law involving vicarious or derivative liability applying this principle. *See e.g., Mayfield v. Hicks*, 575 S.W.2d 571 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.); *Winnard v. J. Grogan Enters., LLC*, No. 05-10-00802-CV, 2012 WL 1604907, at *2 (Tex. App.—Dallas Apr. 30, 2012, no pet.) (mem. op.); *Brazos Valley Cmty. Action Agency v. Robinson*, 900 S.W.2d 843, 845–46 (Tex. App.—Corpus Christi 1995, writ denied). Having reviewed these cases, we agree.

In *Mayfield,* the owner/plaintiff sued a principal and the principal's guarantors on a claim for breach of a lease agreement. The guarantors answered, but the principal did not. The owner obtained a default judgment against the principal, and the trial court then directed a verdict for the owner against the guarantors on the basis of the default judgment. *Mayfield*, 575 S.W.2d at 573.

This Court reversed, holding that when a guarantor has notice of the action against his principal and takes part in the suit, he is not bound by the adjudication of the principal's liability

by a default judgment against the principal in the same action. *Id*. at 574. This is true, the court said, because the guarantor may have had no authority to answer in the principal's behalf or to defend in the name of his principal. *Id*.

The Corpus Christi court of appeals followed *Mayfield* in a wrongful death and survivor action involving the vicarious liability of an employer for its defaulting employee. *See Brazos Valley*, 900 S.W.2d at 845. There, the plaintiff's wheelchair-bound mother was fatally injured when the bus driver for the defendants attempted to unload her from the bus. *Id*. at 844. The plaintiff sued the driver and his employers for negligence and gross negligence. The bus driver did not answer, and the plaintiff obtained a $1 million default judgment against him. The trial court severed the claim. *Id*. The plaintiff then moved for summary judgment against the remaining answering defendants, contending the default judgment established all facts necessary to prove liability. As proof, they offered the default judgment, the petition, the severance order, and the final judgment against the bus driver. The trial court granted the summary judgment. *Id*.

On appeal, the Corpus Christi court first noted that within the context of a wrongful death and survival action, no Texas appellate court had addressed the procedural maneuvers employed in the case to obtain summary judgment. *Id*. at 845. Then, relying on this Court's opinion in *Mayfield*, the court reversed the summary judgment. *Id*. Compelled in part by the "lack of fairness," the court held the defendants were not bound by the adjudication of the bus driver's liability by a default judgment where they answered and participated but were not given notice or the opportunity to defend their interests. *Id*. The court noted there was no affirmative evidence in the record establishing derivative liability, making the lack of fairness "even easier to identify" than in *Mayfield*, where the obligor/surety relationship had been established. As in *Mayfield*, the *Brazos Valley* court noted that the defendants had no authority to answer on behalf of the bus driver or defend in her name. As the court said:

> We are unwilling to recognize the fundamentally unfair use of a default judgment in this case to bind an employer with an employee's default. While this court advocates the implementation of methods which enhance the efficiency of the courts, this particular "fast track" trial strategy bypasses rudimentary elements of fairness which we will neither permit nor advocate.

*Id*. at 845–46.

The *Winnard* case relied on both *Mayfield* and *Brazos Valley* in rejecting a similar use of a default judgment. In *Winnard*, Stanley D. Winnard sued J. Grogan Enterprises and its employee, James Losoya, alleging Losoya acted negligently and fraudulently in notarizing his forged signatures and Grogan was vicariously liable for Losoya's actions. *See Winnard*, 2012 WL 1604907, at *1. Losoya did not file an answer, and the trial court rendered a default judgment against him. Winnard's claims against Grogan were tried in a bench trial, after which the trial court rendered a take-nothing judgment. *Id*.

On appeal, Winnard argued in part that Grogan's liability was established by the default judgment against Losoya and all allegations made against Losoya, including his negligence and fraud, were deemed admitted. Thus, Winnard argued, he was not required to present proof of Losoya's negligence or fraud in the trial of Grogan. *Id*. at *2. This Court disagreed, concluding the deemed admissions did not bind Grogan because Grogan answered the petition, participated in the trial, and maintained its right to defend itself against Winnard's allegations. As did the court in *Brazos Valley*, this Court stated it was "unwilling to recognize the fundamentally unfair use of a default judgment in this case to bind an employer with an employee's default." 2012 WL 1604907, at *2.

As in the cases above, we too are unwilling to recognize the use of a default judgment against a non-answering corporation to impose personal liability on a former officer under section 171.255 under the circumstances presented here.

Section 171.255 is intended to hold officers and directors liable who "have abused the corporate privilege by continuing to create and incur debts after the franchise tax is delinquent (ultimately leading to forfeiture of those privileges) and are, therefore, 'culpable.'" *PACCAR Fin. Corp. v. Potter*, 239 S.W.3d 879, 883 (Tex. App.—Dallas 2007, no pet.). But because section 171.255 is penal in nature, it should be "strictly construed to protect those individuals against whom liability is sought." *Rossman v. Bishop Colo. Retail Plaza, L.P.*, 455 S.W.3d 797, 802 (Tex. App.—Dallas 2015, pet. denied) (quoting *PACCAR*, 239 S.W.3d at 882).

VIPCO failed to file its annual franchise tax report due on May 16, 2016, and as of that date, lost its ability to transact business in Texas. The following month, Venefits purchased a majority stake in the corporation, learned in September the corporation had forfeited its right to transact business, and sued VIPCO, Christian, and the other officers/directors on December 12, 2016. Because VIPCO had forfeited its corporate privileges, the plain language of the statute denied it the right to defend the suit. *See* TEX. TAX CODE ANN. § 171.252.[3] Even if we construed the statute to allow VIPCO the right to defend itself, however, there is nothing in the record to suggest Christian had the authority to answer on behalf of VIPCO. Venefits owned the majority stake in VIPCO. And even if Christian, as president, would have had the authority to file an answer on VIPCO's behalf (or ensure the franchise tax issue was resolved), he testified he resigned his role as president in late November or early December 2016, which would have been before the lawsuit was filed.

[3] Despite the clear language of the statute, some courts have concluded this provision does not preclude a corporation that has forfeited its corporate privileges from defending claims against it or appealing an adverse judgment. *See e.g., Zaidi v. Shah*, 502 S.W.3d 434, 443 (Tex. App.—Houston [14th Dist.], pet. denied) ("Despite the statute's language, it has long been established that when such a taxable entity has been sued, the plaintiff must still prove its case, and the entity may raise defenses and introduce evidence that 'negatives the plaintiff's case.'"); *Super Ventures, Inc. v. Chaudhry*, 501 S.W.3d 121, 127–28 (Tex. App.—Fort Worth 2016, no pet.); *Cruse v. O'Quinn*, 273 S.W.3d 766, 770 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (concluding law firm's forfeiture of corporate charter did not strip it of right to appeal, despite section 171.252); *Mello v. A.M.F. Inc.*, 7 S.W.3d 329, 331 (Tex. App.—Beaumont 1999, pet. denied) (noting statute has "historically been limited to prohibit defendants from bringing cross actions, not from merely defending lawsuits").

Just as the defendants in *Mayfield*, *Brazos Valley*, and *Winnard* were unfairly disadvantaged by use of a default judgment to impose vicarious liability against them, despite the fact that all had answered the lawsuits and were ready to defend, so is Christian. Christian was the only defendant to file an answer. Moreover, he successfully defended against two causes of action, and challenged the summary judgment at issue here. In his response, he raised certain defenses that the trial court did not consider. This procedure seems even more unfair because the default judgment was interlocutory and thus subject to reconsideration by the trial court at any time before final judgment. *See Soliz v. Cofer*, No. 03-01-00246-CV, 2002 WL 821909, at *5 (Tex. App.—Austin May 2, 2002, pet. denied). That the trial court did not reconsider its ruling is irrelevant.

To prevail on summary judgment, Venefits was required to prove each element of its claim against Christian. The default judgment provided insufficient proof. Accordingly, we conclude the trial court erred in granting summary judgment in Venefits's favor. We sustain the first issue. Having so concluded, we need not decide issues two, three, and four.

In his fifth issue, Christian challenges the trial court's summary judgment in favor of Jain and Wrba on his claim for breach of a compensation agreement. In its judgment, the trial court noted that it had previously rescinded the contract between VIPCO and Venefits and "restored the parties to the same position as if the Contract never existed." The court then explained that because Christian's claims relied "entirely on the existence" of that contract, summary judgment was appropriate in favor of Jain and Wrba. Having concluded the default judgment was not sufficient summary judgment proof, it cannot provide the basis for the summary judgment on Christian's affirmative claims against Jain and Wrba. We sustain the fifth issue.

We reverse the trial court's judgment and remand for further proceedings consistent with this opinion.

/Molly Francis/
MOLLY FRANCIS
JUSTICE

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# Court of Appeals
# Fifth District of Texas at Dallas

## JUDGMENT

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| MACK R. CHRISTIAN, Appellant<br><br>No. 05-17-01218-CV V.<br><br>VENEFITS, LLC F/K/A VENSURANCE LLC, VIKASH JAIN, AND CHRIS WRBA, Appellees | On Appeal from the 429th Judicial District Court, Collin County, Texas<br>Trial Court Cause No. 429-05467-2016.<br>Opinion delivered by Justice Francis; Justices Bridges and Lang-Miers participating. |

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** and this cause is **REMANDED** to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that appellant MACK R. CHRISTIAN recover his costs of this appeal from appellees VENEFITS, LLC F/K/A VENSURANCE LLC, VIKASH JAIN, AND CHRIS WRBA.

Judgment entered this November 27, 2018.