Affirmed and Opinion Filed March 30, 2022

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-20-00214-CV

CRAIG STEVEN MACKENZIE, Appellant
V.
FARMERS TEXAS COUNTY MUTUAL INSURANCE COMPANY AND FEDERATED NATIONAL INSURANCE COMPANY, Appellees

On Appeal from the 101st Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-18-11384

MEMORANDUM OPINION

Before Justices Molberg, Nowell, and Goldstein
Opinion by Justice Nowell

Craig Steven MacKenzie appeals summary judgments granted in favor of Farmers Texas County Mutual Insurance Company (Farmers) and Federated National Insurance Company (FedNat). MacKenzie sued Farmers and FedNat seeking additional payments relating to damage to his vehicle after a collision. We conclude the trial court properly granted summary judgment for both defendants and affirm the trial court's judgment.[1]

[1] MacKenzie filed a notice of restricted appeal as to the summary judgment in favor of FedNat. However, that judgment was not final until the trial court granted summary judgment for Farmers.

Background

On July 28, 2017, MacKenzie's daughter was involved in a rear-end collision while driving his 2016 Mazda 6, which was insured by Farmers. FedNat insured the other car involved in the collision. Initially, MacKenzie's daughter told Farmers she did not want to use Farmers for repairs in order to avoid the deductible. She changed her mind and informed Farmers on August 28, 2017 to proceed with a claim.

On September 1, 2017, Farmers estimated repairs to the vehicle at $9,585.30. On September 6, 2017, Farmers declared the vehicle a total loss based on a market value report showing the actual cash value of the vehicle as $9,983.00. MacKenzie rejected Farmers's offer to pay the actual cash value plus taxes and license fees, less the deductible. On September 20, 2017, Farmers obtained an updated valuation report showing an actual cash value for the vehicle of $11,664.00. Farmers again declared the vehicle a total loss and offered to pay MacKenzie the new cash value, plus taxes, and fees, less the deductible. MacKenzie again rejected the offer and invoked the appraisal provision of the policy.

On October 11, 2017, MacKenzie's and Farmers's appraisers agreed on an actual cash value for the vehicle of $14,340.00 and signed an award. On October 16, 2017, Farmers notified MacKenzie that it determined the vehicle was a total loss and

MacKenzie filed a separate appeal from the final judgment. We consolidated the two appeals and treat this as an appeal from a final judgment incorporating both summary judgments. *See Webb v. Jorns*, 488 S.W.2d 407, 409 (Tex. 1972) (interlocutory order merges into final judgment and becomes final for purposes of appeal).

offered a payment of $14,269.25, representing the appraised cash value plus taxes and license fees and less the deductible. MacKenzie rejected this offer, saying he preferred to retain the vehicle and repair it. He proposed that Farmers pay the estimated repair costs plus any additional repair costs not included in the estimate, ship the vehicle to South Carolina where MacKenzie had moved, pay his appraisal costs of $630.00, and reimburse his rental car expenses of $2,250.00 plus additional rental car expenses for thirty days or until the vehicle was finally repaired. Farmers rejected the proposal, pointing out policy terms that each party would pay their own appraisal costs and the policy limit of $900.00 for rental car reimbursement.

On November 3, 2017, after further negotiations with MacKenzie, Farmers agreed to ship the vehicle to MacKenzie in South Carolina, reimburse his $630.00 out-of-pocket appraisal expense, pay the policy limits of $900.00 for rental car coverage, and, because MacKenzie elected to retain the vehicle, pay an owner retained settlement payment of $9,352.50, representing the appraised cash value plus taxes and license fees and less the deductible and the salvage value of the vehicle. Farmers delivered checks in these amounts to MacKenzie and presented summary judgment evidence that MacKenzie cashed all three checks on November 11, 2017.

MacKenzie filed suit against Farmers and FedNat on August 20, 2018. He alleged Farmers breached the policy and acted in bad faith in handling the claim. He sought to recover: repair costs for the vehicle (less the owner retained salvage payment he received from Farmers); loss of use damages for 214 days less the

$900.00 paid by Farmers; decreased property value as a result of Farmers declaring the vehicle a total loss; unjust enrichment damages for the premiums he continued to pay on the vehicle after the collision until the vehicle was repaired; and a 12% statutory penalty. MacKenzie's claim against FedNat was less clear. In his first amended petition, he alleged that Farmers informed him in August 2017 that FedNat had agreed to accept liability for the accident and Farmers encouraged him to settle the claim directly with FedNat. However, MacKenzie did not allege he filed a claim with FedNat or communicated with them in any way. In his second amended petition, he alleged in the alternative that Farmers engaged in bad faith by falsely representing to him that FedNat had agreed to accept liability for the accident.

FedNat filed a traditional motion for summary judgment on the grounds that Texas is not a direct action state and an injured party may not sue the alleged tortfeasor's liability insurer directly; there was no contractual relationship between MacKenzie and FedNat; and FedNat, as insurer of the other driver, owed no legal duty to MacKenzie. MacKenzie responded to the motion, claiming it was "fatally flawed" due to typographical errors and argued there was a fact issue because of his allegation that Farmers told him FedNat had agreed to accept liability for the accident. The trial court heard the motion on September 18, 2019 and took it under advisement. FedNat then filed an amended motion for summary judgment to correct the typographical errors identified by MacKenzie and a notice of hearing for October 14, 2019. The notice, however, referred to the "Traditional Motion for Summary

Judgment" not the amended motion. MacKenzie filed a response to the amended motion and an objection to the notice of the new hearing as insufficient notice of a hearing on the amended motion. The trial court granted FedNat's amended motion for summary judgment on October 14, 2019 after the hearing.

Farmers filed its motion for summary judgment on January 16, 2020. Farmers argued that its payment of the appraisal award and MacKenzie's acceptance of that payment estopped him from maintaining a breach of contract or bad faith claim against Farmers. Farmers also argued MacKenzie had no claim for rental car reimbursement because Farmers paid the policy limits of $900.00, and he had no claim for unjust enrichment or diminution of value damages. MacKenzie filed a cross-motion for summary judgment and argued he conclusively established Farmers's liability. He attached several documents to the cross-motion, but the documents were not sworn or supported by an affidavit. MacKenzie also filed a response to Farmers's motion for summary judgment but did not include an affidavit or sworn or certified copies of the documents referred to in the response. The trial court granted Farmers's motion for summary judgment on February 26, 2020 and rendered a final judgment.

Standard of Review

We review the trial court's summary judgment de novo. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). A party moving for traditional summary judgment has the burden to prove that there is no genuine issue

of material fact and it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). A defendant moving for summary judgment must either (1) disprove at least one essential element of the plaintiff's causes of action as a matter of law or (2) plead and conclusively establish each essential element of an affirmative defense. *See Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995). Once the movant establishes its right to summary judgment as a matter of law, the burden shifts to the non-movant to present evidence raising a genuine issue of material fact, thereby precluding summary judgment. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979); *Talford v. Columbia Med. Ctr. at Lancaster Subsidiary, L.P.*, 198 S.W.3d 462, 464 (Tex. App.—Dallas 2006, no pet.). "When reviewing a summary judgment, we take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor." *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005).

MacKenzie is pro se. We liberally construe pro se pleadings and briefs; however, we hold pro se litigants to the same standards as licensed attorneys and require them to comply with applicable laws and rules of procedure. *Mansfield State Bank v. Cohn*, 573 S.W.2d 181, 184–85 (Tex. 1978). To do otherwise would give a pro se litigant an unfair advantage over a litigant who is represented by counsel.

Harris v. Showcase Chevrolet, 231 S.W.3d 559, 561 (Tex. App.—Dallas 2007 no pet.).

Analysis

A. Farmers's Motion for Summary Judgment

In his first issue, MacKenzie contends the trial court erred by granting Farmers's traditional motion for summary judgment. He argues that Farmers's grounds for summary judgment are not supported by his pleadings, Farmers failed to negate at least one essential element of his claim, and he raised a genuine issue of material fact.

Farmers sought summary judgment on the grounds that its payment of the appraisal award after MacKenzie elected to retain the vehicle estopped him from maintaining a breach of contract claim against Farmers and that there can be no claim for bad faith absent a breach of contract claim. Farmers presented summary judgment evidence of the following:

- The terms of the policy;
- MacKenzie invoked the appraisal process under the policy, both parties selected independent appraisers, the appraisers agreed on the actual cash value of the vehicle and issued an appraisal award;
- Farmers offered the appraised actual cash value of the vehicle plus taxes and license fees and less the deductible;
- MacKenzie rejected the offer, elected to retain the vehicle, demanded payment of the repair costs, shipment of the vehicle to South Carolina, reimbursement of his appraisal costs, and over $3000 for rental car reimbursement;
- On November 3, 2017, Farmers agreed to ship the vehicle to South Carolina and tendered checks to MacKenzie for the appraisal award

plus taxes and license fees and less the deductible and the salvage value, $900 representing the policy limit for rental car coverage, and $630 representing MacKenzie's claimed out-of-pocket appraisal costs; and

- MacKenzie cashed all three checks and received the vehicle in South Carolina.

The policy provides that if the parties do not agree on the amount of the loss, they may agree to an appraisal of the loss. Each party selects an appraiser and if the appraisers cannot agree on the amount of the loss, they will select an umpire and submit their differences to the umpire. "A written decision agreed to by any two will be binding." The policy also provides that any payment Farmers makes "when we deem the car to be a total loss, will be reduced by the value of the salvage when you or the owner of the car retains the salvage."

Appraisal clauses in insurance policies are binding and enforceable and every reasonable presumption will be indulged to sustain an appraisal award. *Franco v. Slavonic Mut. Fire Ins. Ass'n,* 154 S.W.3d 777, 786 (Tex. App.—Houston [14th Dist.] 2004, no pet.). The effect of an appraisal provision is to estop one party from contesting the issue of damages in a suit on the insurance contract, leaving only the question of liability for the court.[2] *Wells v. American States Preferred Ins. Co.*, 919 S.W.2d 679, 683 (Tex. App.—Dallas 1996, writ denied). When an insurer makes timely payment of a binding and enforceable appraisal award, and the insured accepts the payment, the insured is "estopped by the appraisal award from

[2] After receiving clarification that MacKenzie's daughter added collision and rental car coverage on the day before the accident, Farmers did not dispute the issue of coverage.

maintaining a breach of contract claim against [the insurer]." *Franco*, 154 S.W.3d at 787. Furthermore, in most circumstances, an insured may not prevail on a bad faith claim without first showing that the insurer breached the contract. *Bernstien v. Safeco Ins. Co. of Ill.*, No. 05-13-01533-CV, 2015 WL 3958282, at *2 (Tex. App.—Dallas June 30, 2015, no pet.) (mem. op.); *Gates v. State Farm County Mut. Ins. Co. of Texas*, 53 S.W.3d 826, 830 (Tex. App.—Dallas 2001, no pet.). To recover any damages beyond policy benefits, the statutory violation or bad faith must cause an injury that is independent from the loss of benefits. *In re State Farm Mut. Auto. Ins. Co.*, 629 S.W.3d 866, 872–73 (Tex. 2021) (orig. proceeding); *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 499–500 (Tex. 2018); *Nat'l Sec. Fire & Cas. Co. v. Hurst*, 523 S.W.3d 840, 848 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

MacKenzie argues Farmers's motion is not supported by his live pleading and did not negate an element of MacKenzie's claim. However, Farmers raised the affirmative defense of estoppel and moved for summary judgment on the ground that payment of the appraisal award estopped MacKenzie from raising his claims. Because Farmers moved for summary judgment on an affirmative defense, its burden was to establish the elements of that defense, not to negate an element of MacKenzie's claims. *See Centeq Realty*, 899 S.W.2d at 197.

MacKenzie next argues that Farmers did not pay the appraisal award because it reduced the appraisal amount by the owner-retained-salvage value. He also argues the appraisal award states, "any reduction for salvage retention would be based on

agreement between the vehicle owner and insurance carrier." He contends he never agreed to Farmers's reduction for salvage retention and therefore Farmers did not comply with the terms of the appraisal award. However, the policy expressly states that any payment when Farmers deems the vehicle a total loss "will be reduced by the value of the salvage when you or the owner of the car retains the salvage." It is undisputed that MacKenzie chose to retain the vehicle. Thus, by terms of his insurance policy with Farmers, MacKenzie did agree to the reduction for the salvage value of the vehicle. Moreover, the summary judgment evidence showed Farmers paid the appraisal award less the salvage value and MacKenzie accepted that payment. On appeal, MacKenzie claims he never agreed on the amount of the salvage value of the vehicle; yet he accepted Farmers's tendered payment and presented no summary judgment evidence raising a genuine issue of fact as to the salvage value of the vehicle.

MacKenzie asserts he raised a genuine issue of material fact sufficient to defeat summary judgment. However, the record shows that neither his response nor his cross-motion for summary judgment were supported by affidavits. While he attached several documents to the response and cross-motion, they were not sworn or authenticated. Documents submitted as summary judgment proof must be sworn to or certified. TEX. R. CIV. P. 166a(f); *Holmes v. S. Methodist Univ.*, No. 05-11-01178-CV, 2013 WL 1857932, at *3 (Tex. App.—Dallas May 1, 2013, no pet.) (mem. op.). Unauthenticated or unsworn documents are not competent summary

judgment evidence. *Univ. of Tex. at Dallas v. Addante*, No. 05-20-00376-CV, 2021 WL 4772931, at *8 (Tex. App.—Dallas Sept. 8, 2021, no pet.) (mem. op.); *Holmes*, 2013 WL 1857932, at *3; *Heirs of Del Real v. Eason*, 374 S.W.3d 483, 487 (Tex. App.—Eastland 2012, no pet.); *see Blanche v. First Nationwide Mortg. Corp.*, 74 S.W.3d 444, 451 (Tex. App.—Dallas 2002, no pet.) (holding complete absence of authentication is defect of substance and may be raised for the first time on appeal). Because none of the documents attached to MacKenzie's response or cross-motion for summary judgment were authenticated, he did not produce any summary judgment evidence raising a genuine issue of material fact.

Based on the summary judgment record, we conclude Farmers established its estoppel affirmative defense. *See Wells*, 919 S.W.2d at 683. Because MacKenzie's two liability theories are defeated by the estoppel affirmative defense and he raised no genuine issue of material fact on either claim, the trial court correctly granted summary judgment for Farmers. We need not address Farmers's grounds for summary judgment on MacKenzie's damage claims for loss-of-use damages, restitution for unjust enrichment,[3] and diminished value. *See Case Corp. v. Hi-Class Bus. Sys. of Am., Inc.*, 184 S.W.3d 760, 784 (Tex. App.—Dallas 2005, pet. denied) ("In the absence of liability, the issue of damages becomes immaterial.").

We overrule MacKenzie's first issue.

[3] *See Richardson Hosp. Auth. v. Duru*, 387 S.W.3d 109, 114 (Tex. App.—Dallas 2012, no pet.) (noting unjust enrichment is not an independent cause of action).

B. FedNat's Motion for Summary Judgment

In his second issue, MacKenzie contends the trial court erred by granting FedNat's motion for summary judgment. He argues the motion was fatally flawed, he raised a genuine issue of material fact, he requested a continuance, and he did not receive 21 days' notice of the hearing on the amended motion.

Regarding the "fatally flawed" argument, in the opening sentence and the final prayer of the motion FedNat mistakenly referred to itself as "Northland." In its argument that plaintiff lacks standing to bring a direct action, FedNat mistakenly stated "no judgment has been entered against Martinez nor has any liability agreement been reached." MacKenzie argues that there is no Northland or Martinez involved in this case and therefore the motion is "fatally flawed." We disagree. These references are obvious typographical errors and do not affect the substance of the motion. FedNat correctly identified itself in the caption, title, and elsewhere in the body of the motion. And the context of the argument mentioning Martinez makes clear that FedNat was referring to its insured, Quiana Lee Green, who was correctly identified several times in the rest of the motion. Such minor, technical typographical errors are not fatal. Further, FedNat corrected these typographical errors in its amended motion for summary judgment. Other than the corrections, the amended motion is the same as the original. FedNat also gave MacKenzie additional time to respond to the amended motion, which he did, and nothing in the record indicates MacKenzie was misled or prejudiced by the errors.

Turning now to whether MacKenzie raised a genuine issue of material fact, we look to his pleading to determine what facts are material to his claim against FedNat. In his original petition, MacKenzie alleged the driver who caused the accident, Quiana Lee Green, was insured by FedNat. A heading in the pleading stated MacKenzie has been damaged by Farmers and by FedNat. The pleading then itemized the damages MacKenzie claimed against Farmers. MacKenzie later amended his pleading and his live pleading at the time of the FedNat summary judgment alleged:

> On or about August 25, 2017, *Pro Se* Plaintiff was informed by Defendant Farmers that Defendant FedNat "had agreed to accept liability for the accident", and Farmers encouraged *Pro Se* Plaintiff to contact FedNat "to settle the claim directly with FedNat".[4]

In sum, MacKenzie's allegations regarding FedNat are simply that FedNat insured the other driver in the accident and that Farmers represented to him that FedNat agreed to accept liability.

FedNat moved for summary judgment arguing that Texas does not allow a direct action by a plaintiff against a tortfeasor's insurer. FedNat argued that MacKenzie's suit was an improper direct action and there was no judgment or agreement establishing the alleged tortfeasor's liability. It also argued that a party may move for summary judgment on the basis that the nonmovant has no viable

[4] After the trial court granted FedNat's motion for summary judgment MacKenzie amended this statement to add an alternative allegation that "in the absence of any agreement by FedNat accepting liability for the accident" Farmers acted in bad faith by misrepresenting the existence of FedNat's acceptance of liability.

cause of action. As evidence, FedNat submitted the affidavit of a claims representative authenticating its policy with Green and stating that FedNat did not issue a policy of insurance to MacKenzie.

"In Texas, the general rule . . . is that an injured party cannot sue the tortfeasor's insurer directly until the tortfeasor's liability has been finally determined by agreement or judgment." *In re Essex Ins. Co.*, 450 S.W.3d 524, 525 (Tex. 2014) (orig. proceeding) (per curiam) (quoting *Angus Chem. Co. v. IMC Fertilizer, Inc.*, 939 S.W.2d 138, 138 (Tex. 1997) (per curiam)); *see also State Farm Cty. Mut. Ins. Co. of Tex. v. Ollis*, 768 S.W.2d 722, 723 (Tex. 1989) (per curiam) ("However, [the plaintiff] cannot enforce the policy directly against the insurer until it has been established, by judgment or agreement, that the insured has a legal obligation to pay damages to the injured party."). "This well-settled rule is based on sound public policy favoring prevention of the conflict of interest that could arise if a third-party claimant were permitted to sue an insurer before obtaining judgment against the insured." *Pain Control Inst., Inc. v. GEICO Gen. Ins. Co.*, 447 S.W.3d 893, 898 (Tex. App.—Dallas 2014, no pet.). We agree with FedNat that MacKenzie's suit is an attempted direct action and is barred by the no-direct-action rule unless an exception to the rule applies.

MacKenzie claims he raised a genuine issue of material fact based on his affidavit where he merely repeated the allegation in his petition that *Farmers* told him FedNat had agreed to accept liability for the accident. FedNat's policy states

that "no legal action may be brought against **us** until **we** agree in writing that the **insured person**, as defined in Part I, has an obligation to pay or until the amount of that obligation has been determined by judgment after trial." MacKenzie's argument is based on what a Farmers representative told him; but MacKenzie did not allege and presented no summary judgment evidence of a written agreement by FedNat that Green had an obligation to pay damages. MacKenzie's statement that a third party represented to him that FedNat agreed to accept liability fails to raise a genuine issue of material fact as to the existence of the condition in the policy that FedNat agree in writing that Green had an obligation to pay. *See Ollis*, 768 S.W.2d at 723 (holding settlement agreement did not satisfy requirement of written agreement that insured was obligated to pay damages to plaintiff). Because no exception to the no-direct-action rule applies here, we conclude that summary judgment for FedNat was proper. *See In re Essex*, 450 S.W.3d at 525.

MacKenzie next argues the trial court should have granted a continuance and ordered FedNat to respond to his discovery requests. In the body of his response to FedNat's motion for summary judgment, MacKenzie requested a continuance of approximately five months because FedNat had not responded to his discovery requests. In his September 9, 2019 declaration attached to the response, MacKenzie stated that he served discovery requests to FedNat on March 20, 2019 but had not received any responses despite his "repeated efforts to secure same." On appeal, MacKenzie argues that it is likely he would have adduced additional evidence that

FedNat agreed to accept liability for the accident if the trial court had granted the continuance and ordered FedNat to respond to discovery.

We review a trial court's decision to grant or deny a motion for continuance of a summary judgment hearing for an abuse of discretion. *Cooper v. Circle Ten Council Boy Scouts of Am.*, 254 S.W.3d 689, 696 (Tex. App.—Dallas 2008, no pet.) (citing *Tenneco, Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 647 (Tex. 1996)). Rule 166a(g) permits a trial court to grant a continuance to a party opposing a motion for summary judgment if that party files an affidavit setting forth the reasons the party cannot present the facts necessary to respond to the motion. TEX. R. CIV. P. 166a(g). An affidavit seeking a continuance to obtain additional evidence must describe the evidence sought, explain its materiality, and demonstrate that the party requesting the continuance has used due diligence to timely obtain the evidence. *Oglesby v. Richland Trace Owners Ass'n, Inc.*, No. 05-19-01457-CV, 2021 WL 3412451, at *2 (Tex. App.—Dallas Aug. 4, 2021, no pet.) (mem. op.). In deciding whether a trial court abused its discretion by denying a motion for continuance, we examine various factors such as the length of time the case has been on file, the materiality and purpose of the discovery sought, and whether the party seeking the continuance has exercised due diligence to obtain the discovery sought. *See Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 161 (Tex. 2004).

Although MacKenzie's affidavit described the types of discovery requests sent to FedNat, he did not describe the substance of the evidence he sought to acquire

through the discovery requests or its materially. MacKenzie's affidavit does not explain his diligence in seeking to obtain the evidence other than a conclusory reference to his "repeated efforts to secure same." Further, the case had been on file for over a year at the time of MacKenzie's request for a continuance. On this record, we cannot conclude the trial court abused its discretion by denying the request for a continuance. *Id*.

MacKenzie contends FedNat's amended motion for summary judgment was not properly before the court and that he did not receive 21 days' notice of the hearing on that motion because the notice of hearing served with the amended motion referred to the traditional motion for summary judgment, not the amended motion for summary judgment.

FedNat filed its amended motion for summary judgment on the day of the hearing on its original motion. MacKenzie equates the amended motion with a pleading amendment under Tex. R. Civ. P. 63 and argues FedNat was required to seek leave of court before filing the amended the motion for summary judgment within seven days of the hearing on the original motion for summary judgment. While a summary judgment hearing is a trial for purposes of Rule 63, that rule applies to pleadings in the technical sense of Rule 45, that is the petition and answer. *See* TEX. R. CIV. P. 63 (leave of court required to file pleadings within seven days of trial); *id*. 45 (pleadings in district and county court shall be by petition and answer). Pleadings are composed of petitions and answers and define the issues upon which

the parties go to trial. *Rupert v. McCurdy*, 141 S.W.3d 334, 339 (Tex. App.—Dallas 2004, no pet.). A motion is an application for an order and is not at the same level as a pleading. *Jobe v. Lapidus*, 874 S.W.2d 764, 765–66 (Tex. App.—Dallas 1994, writ denied). Motions are not the functional equivalents of pleadings because insufficient similarities exist between a motion and a pleading to allow them to carry the same legal significance. *Rupert*, 141 S.W.3d at 339. Therefore, Rule 63 did not require FedNat to seek leave of court before filing the amended motion.

Moreover, MacKenzie failed to show he was surprised by the amended motion, which merely corrected technical defects in the original motion that he pointed out. The October 14, 2019 summary judgment order states that the court granted the amended motion for summary judgment. Thus, we presume the court granted leave to amend if leave was required. *See Goswami v. Metropolitan Sav. & Loan Ass'n*, 751 S.W.2d 487, 490 (Tex. 1988) ("[I]n the absence of a sufficient showing of surprise by the opposing party, the failure to obtain leave of court when filing a late pleading may be cured by the trial court's action in considering the amended pleading."). We conclude the trial court properly considered the amended motion for summary judgment.

As to the notice of hearing filed with the amended motion, MacKenzie claims he was surprised but offers no support for that claim. The objection he filed to the notice of hearing indicated he was aware the notice likely was intended to apply to the amended motion and he filed a timely response to the amended motion. Because

he was not deprived of the opportunity to file a timely response to the amended motion we cannot conclude the trial court abused its discretion by impliedly overruling his objection to the notice of hearing. *See Goode v. Avis Rent-A-Car, Inc.*, 832 S.W.2d 202, 204 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (holding that where summary judgment nonmovant timely filed response to summary judgment motion, sufficient notice was established despite trial court's failure to sign notice).

We overrule MacKenzie's second issue.

Conclusion

Having overruled MacKenzie's issues on appeal, we affirm the trial court's judgment.

/Erin A. Nowell//
ERIN A. NOWELL
JUSTICE

200214f.p05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

CRAIG STEVEN MACKENZIE,
Appellant

No. 05-20-00214-CV V.

FARMERS TEXAS COUNTY MUTUAL INSURANCE COMPANY AND FEDERATED NATIONAL INSURANCE COMPANY, Appellees

On Appeal from the 101st Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-18-11384.
Opinion delivered by Justice Nowell.
Justices Molberg and Goldstein participating.

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

It is **ORDERED** that appellee FARMERS TEXAS COUNTY MUTUAL INSURANCE COMPANY AND FEDERATED NATIONAL INSURANCE COMPANY recover their costs of this appeal from appellant CRAIG STEVEN MACKENZIE.

Judgment entered this 30th day of March, 2022.