Opinion issued January 31, 2011

In The
Court of Appeals
For The
First District of Texas

NO. 01-09-00371-CV

CLIFTON SCHOEN D/B/A TEXAS BULKHEAD AND CONSTRUCTION, Appellant

V.

REDWOOD CONSTRUCTION, INC., Appellee

On Appeal from the 152nd District Court
Harris County, Texas
Trial Court Cause No. 2006-46363

MEMORANDUM OPINION

Clifton Schoen, d/b/a Texas Bulkhead and Construction, appeals a final take-nothing summary judgment in favor of Redwood Construction, Inc. Raising three issues, Schoen asserts that: (1) the trial court abused its discretion by

permitting Redwood to file its summary-judgment motion after the docket-control order deadline; (2) the trial court abused its discretion in permitting Redwood to file an amended answer after the docket-control order deadline; and (3) the trial court erred in rendering summary judgment on the basis of res judicata and collateral estoppel. We affirm.

Statement of Facts

FPA Waterfront Associates hired Redwood Construction, Inc. as the general contractor for a refurbishment project for one of its properties, Waterfront Apartments. Redwood subsequently invited Schoen to bid as a subcontractor for a portion of the work, including labor and material to install a bulkhead, boardwalk, and decking. On May 7, 2004, Schoen submitted and Redwood accepted a bid for $179,057.60 and work began in May 2004 and continued through August 2004. Throughout this time, Schoen furnished labor and materials to install 520 linear feet of vinyl bulkhead and 3,120 square feet of boardwalk, as well as decking and other materials and labor. Redwood paid Schoen's invoices until late July; however, the final three invoices dated 7-28-04, 8-19-04, and 8-20-04, totaling $94,062.80, were not paid.

Seeking recovery of the $94,062.80 owed, Schoen filed suit against Redwood in late 2005,[1] raising claims of breach of contract, action on a sworn account, and quantum meruit. At the time of trial on May 31, 2006, Schoen's complaint had been amended to include FPA Waterfront Associates as a defendant, and since Redwood had yet to have been served, Schoen proceeded to a bench trial against FPA Waterfront Associates alone. Redwood was thereafter "nonsuited" on June 20, 2006.[2]

On December 29, 2008, the trial court signed findings of fact and conclusions of law in the "First Lawsuit," stating that Schoen had failed to comply with material obligations of his subcontract with Redwood, Schoen failed to substantially perform his obligations under the subcontract, the work that Schoen had done was of no benefit and had no value, and the failure to pay the balance of the subcontract price was excused by Schoen's failure to comply with material obligations of the contract. The trial court's conclusions of law recited that Schoen failed to provide consideration for the obligation to pay Schoen for the amounts sued for and Schoen was not entitled to recovery under quantum meruit (among

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1 *Schoen v. Redwood Constr., Inc.*, No. 2005-00555 (152d Dist. Ct., Harris County, Tex. filed 2005).

2 This was technically a voluntary dismissal of claims, rather than a nonsuit. *See C/S/ Solutions, Inc. v. Energy Maint. Servs. Grp. LLC*, 274 S.W.3d 299, 306–07 (Tex. App.—Houston [1st Dist.] 2008, no pet.).

other reasons[3]) because he was fully paid for materials and FPA Waterfront Associates did not benefit from his labor. Several weeks later, on February 2, 2009, the trial court signed a take-nothing judgment in favor of FPA Waterfront Associates in the "First Lawsuit."

Schoen's second suit in pursuit of the $94,062.80 was filed against Redwood on July 28, 2006 with claims identical to those previously asserted: breach of contract, action on a sworn account, and quantum meruit. On March 6, 2009, Redwood amended its answer, asserted the affirmative defenses of res judicata and collateral estoppel, based on the trial court's judgment in the "First Lawsuit." Redwood also filed a motion for traditional summary judgment grounded on these same affirmative defenses. Schoen objected that both Redwood's amended answer and motion for summary judgment were time-barred because the trial court's docket-control order set a March 7, 2008 deadline for pleadings and a February 8, 2008 deadline for filing summary-judgment motions. Schoen further contended that the affirmative defense of res judicata was inapplicable since Redwood was not a party to the prior suit against FPA Waterfront Associates and the

[3] The trial court additionally concluded that Schoen could not recover against FPA Waterfront Associates under quantum meruit because he had an express contract with Redwood. The court also made conclusions of law that, in addition to a failure of consideration, Schoen was not entitled to recover from FPA Associates under his theories of contract or sworn account because Schoen had no contract with FPA Waterfront Associates, but only with Redwood.

collateral-estoppel defense was inapplicable because the second suit involved a completely different cause of action and claim for recovery.

On April 3, 2009, the trial court heard and granted Redwood's motion for traditional summary judgment, specifically stating that it was granting Redwood leave to file amended pleadings, deeming Redwood's amended answer timely filed, and rendering a take-nothing judgment in favor of Redwood.

Discussion

Schoen raises three issues. First, that the trial court erred in allowing Redwood to file a summary-judgment motion after the deadline set by the trial court's docket-control order. Second, that the trial court erred in permitting the filing of a motion for summary judgment based on the affirmative defenses of res judicata and collateral estoppel because these defenses were raised in a pleading filed after the pleadings deadline. Third, that summary judgment was improper because res judicata and collateral estoppel were inapplicable under the facts of this case.

A. Standard of Review

We review a trial court's decision to grant a motion for summary judgment de novo. *See Tex. Mun. Power Agency v. Pub. Util. Comm'n*, 253 S.W.3d 184, 192, 199 (Tex. 2007). Absent specification of the grounds upon which summary judgment was rendered, we must affirm the summary judgment if any of the

grounds in the summary judgment motion are meritorious. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000).

Under the traditional summary-judgment standard, the movant has the burden to show that no genuine issues of material fact exist and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985). In deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the nonmovant will be taken as true, every reasonable inference indulged in favor of the nonmovant, and any doubts resolved in its favor. *Nixon*, 690 S.W.2d at 548–49. If the motion involves the credibility of affiants, or the weight to be given to evidence, the motion should not be granted. *Great Am. Reserve Ins. Co. v. San Antonio Plumbing Supply Co.*, 391 S.W.2d 41, 47 (Tex. 1965); *Tabor v. Med. Ctr. Bank*, 534 S.W.2d 199, 200 (Tex. Civ. App.—Houston [14th Dist.] 1976, no writ). A defendant moving for a traditional summary judgment must conclusively negate at least one essential element of each of the plaintiff's causes of action or conclusively establish each element of an affirmative defense. *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997). After a defendant has done so, the burden then shifts to the plaintiff to produce evidence creating a fact issue on the element or defense in order to defeat the summary judgment. *See Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996).

B. Trial Court's Discretion in Enforcing Scheduling Orders

Schoen's first two issues involve the trial court's enforcement of its docket-control order, specifically the deadlines for amended pleadings and summary-judgment motions. Absent cites to any authority to support his position, Schoen argues that the court's consideration of Redwood's summary-judgment motion and amended answer filed after the docket-control order deadlines was time barred.

A trial court must allow the parties to amend their pleadings up to the deadline for amending pleadings. TEX R. CIV. P. 63. Even after the time for filing amended pleadings has past, the trial court must grant leave to file an amended pleading unless (1) the party opposing the amendment presents evidence of surprise or prejudice, or (2) the amendment asserts a new cause of action or defense and thus is prejudicial on its face, and the opposing party objects to the amendment. *G.R.A.V.I.T.Y. Enters. v. Reece Supply C*o., 177 S.W.3d 537, 542 (Tex. App.—Dallas 2005, no pet). In these two situations, the decision to allow or deny the amendment rests with the sound discretion of the trial court, and that decision will not be overturned unless it constitutes a clear abuse of discretion. *Id.* at 542.

A trial court is also given wide discretion in managing its docket and enforcing scheduling orders and retains authority under Rule 166 to modify a

scheduling order to prevent manifest injustice. *See* TEX R. CIV. P. 166; *Clanton v. Clark*, 639 S.W.2d 929, 931 (Tex. 1982); *Trevino v. Trevino*, 64 S.W.3d 166, 170 (Tex. App.—San Antonio 2001, no pet.). By setting the summary judgment for submission, the trial court implicitly modified the docket-control order. *Trevino*, 64 S.W.3d at 170). We will not interfere with the exercise of the trial court's discretion in these respects absent a showing of clear abuse. *Clanton*, 639 S.W.2d at 931.

The scheduling and docketing order at issue is dated August 11, 2007. In the record are three joint motions for continuance in which both parties repeatedly asked the trial court to continue the case until at least 120 days after the judgment in the "First Lawsuit," acknowledged that the resolution of that case "would likely be determinative of some or all of the issues in this lawsuit," and requested the issuance of a new scheduling/docketing order. The record in this case reflects that the affirmative defenses of res judicata and collateral estoppel did not become available to Redwood until after the judgment in the "First Lawsuit" became final on March 4, 2009. The amended answer and the summary judgment were filed two days later. It was within the discretion of the trial court to permit the filing of the amended answer raising the newly available affirmative defenses, *see G.R.A.V.I.T.Y. Enters.*, 177 S.W.3d at 542, and to permit the filing of a motion for summary judgment based on the newly amended answer. *See* TEX R. CIV. P. 166;

Clanton, 639 S.W.2d at 931; *Trevino*, 64 S.W.3d at 170. Under the circumstances of this case, no abuse of discretion is show.

We overrule Schoen's first two issues.

C. Applicability of Res Judicata or Collateral Estoppel

Schoen's final issue asserts that the trial court erred in rendering summary judgment on the basis of either res judicata or collateral estoppel. We consider first whether summary judgment was proper on the collateral-estoppel ground.

The doctrine of collateral estoppel precludes litigation of ultimate issues of fact actually litigated and essential to the judgment in the prior suit. *Getty Oil Co. v. Ins. Co. of N. Am.*, 845 S.W.2d 794, 801 (Tex. 1992). It is not necessary that parties be identical in both suits; it is only necessary that the party against whom collateral estoppel is being asserted had a full and fair opportunity to litigate the issue. *See Eagle Props., Ltd. v. Scharbauer*, 807 S.W.2d 714, 721 (Tex. 1990). In its findings of facts in the "First Lawsuit," the trial court found that Redwood's failure to pay the balance of the subcontract price was excused by Schoen's failure to comply with material obligations of the contract and that the work that Schoen had done was of no benefit and had no value. The trial court used these factual findings to determine that Schoen had provided no consideration for any contract and that there was no basis for recovery in quantum meruit. These factual findings would preclude any recovery under any of the causes of action asserted against

Redwood. Because Schoen was attempting to relitigate issues already decided against it in the "First Lawsuit," we hold that summary judgment could be properly granted under the doctrine of collateral estoppel.

Having determined that summary judgment was proper on the collateral-estoppel ground, we need not consider the applicability of the doctrine of res judicata. We hold that the trial court did not err in granting Redwood's motion for summary judgment. We overrule Schoen's third issue.

Conclusion

We affirm the judgment of the trial court.

Jim Sharp
Justice

Panel consists of Chief Justice Radack and Justices Bland and Sharp.