

Opinion issued December 23, 2010



In The
Court of Appeals
For The
First District of Texas

NO. 01-10-00115-CV

**DONALD WILLY, INDEPENDENT EXECUTOR OF THE ESTATE OF
JOAN SUSAN WILLY, DECEASED, Appellant**

V.

ROSETTA LEE WINKLER AND STANLEY WINKLER, Appellees

**On Appeal from the County Court No. 3
Fort Bend County, Texas
Trial Court Cause No. 08-CPR-020890A**

MEMORANDUM OPINION

Appellant, Donald J. Willy, Independent Executor of the Estate of Joan Susan Willy, deceased, challenges the trial court's rendition of summary judgment in favor of appellees, Rosetta Lee Winkler and Stanley Winkler, in Willy's declaratory judgment action against the Winklers. In three issues, Donald contends that the trial court erred in declaring that his deceased wife, Joan, held accounts with her mother, Rosetta, "in joint tenancy with rights of survivorship," in granting summary judgment in favor of the Winklers when the Winklers did not file a summary judgment motion, and in granting summary judgment on grounds that were not asserted in any summary judgment motion.

We reverse and remand.

Background

In his original petition, Donald alleged that in 1989, Joan and Rosetta created a joint account with AG Edwards, the account earned interest and "became community property under Texas law," the Willys paid all taxes on the account, Joan died in November 2007 with a will, the account became "property of the estate" under that will, and Donald was appointed independent executor of Joan's estate. Donald further alleged that after Joan's death, unbeknownst to him and pursuant to the Winklers' instructions, AG Edwards transferred the account to "the beneficial ownership of Rosetta." When Donald learned of this transfer, he notified AG Edwards of the dispute, and AG Edwards reversed the transfer.

Donald sought a declaration that the account was held in “joint tenancy,” the Winklers had no legal interest in the account, and the account belonged to Joan’s estate and passed pursuant to Joan’s will. He requested an injunction prohibiting the Winklers from receiving any asset subject to the lawsuit as well as damages for the “lost value” of the securities contained in the account. The Winklers filed a special appearance and answer, generally denying Donald’s allegations.

Donald subsequently filed a motion for partial summary judgment, seeking a declaration that Joan’s estate owned the accounts and that the accounts were not held in “joint tenancy with a right of survivorship.” He attached to his motion the governing AG Edwards account documents, which he asserted did not include language required by the Probate Code¹ to create a “right of survivorship in joint accounts.” Donald asserted that he had not signed any agreement consenting to Joan’s maintenance of a joint account with rights of survivorship with Rosetta and, under Texas law, the establishment of a “joint account by a parent with a child” evidenced Rosetta’s intent to make a gift of the account to Joan. Donald argued that this “presumption” was confirmed by his affidavit testimony that Joan’s social security number appeared on the account, the account income and transactions were reported to the IRS only under Joan’s social security and tax identification numbers, the Willys paid all taxes on the account in their joint tax return, and Joan

¹ See TEX. PROB. CODE ANN. § 439 (Vernon 2003).

managed the account, withdrew sums, and acted as the account's owner.

In their response to Donald's summary judgment motion, the Winklers asserted that the account agreement established a right of survivorship and Donald failed to present summary judgment evidence establishing a community interest in the account. They argued that if the account was a gift, then the account constituted Joan's separate property and Donald's consent was not necessary for Joan to maintain an account with her mother with a right of survivorship. In the final paragraph of their response, the Winklers asserted that "summary judgment [was] inappropriate" and "unresolved fact issues preclude[d]" the granting of summary judgment in Donald's favor. Significantly, they did not separately seek summary judgment, nor did they separately request that the trial court enter, as a matter of law, a declaration in their favor.

Nevertheless, the trial court, after considering Donald's summary judgment motion and the Winklers' response, entered a judgment declaring that the AG Edwards account and the American Funds account² were held by Joan and Rosetta

² In the factual background of his petition, Donald interchangeably referred to a single "account" and multiple "accounts," but only set forth facts related to an AG Edwards account. However, in both the opening paragraph and the prayer of his petition, Donald referred to, in addition to an "AG Edwards" account, an "American Funds" account. In his summary judgment motion and affidavit, Donald referred only to a single AG Edwards account. He did not refer to an American Funds account, and the only account agreement attached to his summary judgment motion concerned an AG Edwards account. In their summary judgment response, the Winklers referred only to a single AG Edwards account. In its

“in joint tenancy with rights of survivorship.” The trial court also declared that, upon Joan’s death, the accounts became Rosetta’s exclusive property, and it denied Donald’s request for injunctive relief and claim for damages for lost value.

Standard of Review

To prevail on a summary judgment motion, a movant has the burden of proving that it is entitled to judgment as a matter of law and there is no genuine issue of material fact. TEX.R. CIV. P. 166a(c); *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995). When deciding whether there is a disputed, material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985). Every reasonable inference must be indulged in favor of the non-movant and any doubts must be resolved in her favor. *Id.* at 549. We review declaratory judgments under the same standards as other judgments and decrees. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 37.010 (Vernon 2008); *Lidawi v. Progressive County Mut. Ins. Co.*, 112 S.W.3d 725, 730 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

judgment, the trial court made its declarations in favor of the Winklers regarding both an AG Edwards account and an American Funds account. In sum, the record before us does not establish on what basis the trial court made the declarations concerning an American Funds account. Because the summary judgment evidence related solely to an AG Edwards account, we generally refer to this account in this opinion, but we note, where appropriate, the inconsistencies between the judgment and the record.

Summary Judgment

In his second and third issues, Donald argues that the trial court erred in granting summary judgment in favor of the Winklers because they did not move for summary judgment and the trial court's summary judgment was based on grounds that were not asserted in any summary judgment motion.

A trial court may not grant summary judgment in favor of a party that does not properly move for it by motion. *See Teer v. Duddleston*, 664 S.W.2d 702, 703 (Tex. 1984); *Sw. Invs. Diversified, Inc. v. Estate of Mieszkuć*, 171 S.W.3d 461, 468 n.15 (Tex. App.—Houston [14th Dist.] July 26, 2005, no pet.); *see also Young v. Hodde*, 682 S.W.2d 236, 237 (Tex. 1984) (per curiam) (agreeing with court of appeals that “trial court erred in rendering the take-nothing judgment against” defendant’s counterclaim “in the absence of a motion for summary judgment by [the plaintiff] seeking that relief”); *Hodde v. Young*, 672 S.W.2d 45, 47 (Tex. App.—Houston [14th Dist.] 1984, writ ref’d n.r.e.) (stating that “summary judgment may be granted only in favor of a party who has moved for summary judgment and whose evidence offered in support of the motion establishes the movant’s right to judgment as a matter of law”). Moreover, it is well settled that a trial court cannot grant a summary-judgment motion on grounds not presented in a motion. *See Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009).

Here, Donald was the only movant for summary judgment below, and he

sought only a partial summary judgment in regard to his declaratory judgment action. Donald's only summary judgment evidence pertained to an AG Edwards account. Although there are pleadings related to an American Funds account and the trial court's judgment provides a declaration related to an American Funds account, there is no summary judgment evidence related to any American Funds account. Moreover, Donald did not seek summary judgment on his other claims, including his claim for damages for the alleged lost value of securities in the account or accounts.

Most significantly, the Winklers did not move for summary judgment, and they did not request in a summary judgment motion that the trial court make the declarations that it ultimately made in its final judgment. In fact, in their summary judgment response, the Winklers argued that summary judgment was not appropriate because there were fact issues that could not be properly resolved by summary judgment. The Winklers also did not seek summary judgment on Donald's claims for injunctive relief or damages resulting from the alleged loss of value in securities. Yet, the trial court entered summary judgment in the Winkler's favor, declaring that both accounts were subject to Rosetta's exclusive control and denying Donald's other claims for relief. Accordingly, we hold that the trial court erred in granting summary judgment in favor of the Winklers, who never moved for the judgment entered by the trial court. *See Teer*, 664 S.W.2d at 703.

We sustain Donald’s second and third issues.³

³ Having sustained Donald’s second and third issues, we do not reach the parties’ primary dispute on appeal, which concerns whether the account agreement was sufficient to confer a right of survivorship under section 439(a) of the Texas Probate Code, which provides, in part,

Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties against the estate of the decedent if, by a written agreement signed by the party who dies, the interest of such deceased party is made to survive to the surviving party or parties. Notwithstanding any other law, an agreement is sufficient to confer an absolute right of survivorship on parties to a joint account under this subsection if the agreement states in substantially the following form: “On the death of one party to a joint account, all sums in the account on the date of the death vest in and belong to the surviving party as his or her separate property and estate.” A survivorship agreement will not be inferred from the mere fact that the account is a joint account

TEX. PROB. CODE ANN. § 439(a); *see also Holmes v. Beatty*, 290 S.W.3d 852, 858 (Tex. 2009) (distinguishing between statutory requirements for survivorship agreement between non-spouses under section 439 of Probate Code and statutory requirements for survivorship agreement between spouses under section 452 of Probate Code; describing the statutory requirements for spouse agreements as being “less restrictive” than statutory requirements for non-spouse agreements); *Stauffer v. Henderson*, 801 S.W.2d 858, 863–65 (Tex. 1990) (holding that non-spouses could only establish survivorship rights using section 439(a)’s language or language substantially similar to it and that court could not consider extrinsic evidence to ascertain parties’ intent).

Conclusion

We reverse the judgment of the trial court and remand for further proceedings consistent with this opinion.⁴

Terry Jennings
Justice

Panel consists of Justices Jennings, Alcala, and Sharp.

⁴ We recognize that, although the denial of summary judgment is ordinarily not appealable, a court may review such a denial when both parties moved for summary judgment and the trial court granted one and denied the other. *See Tex. Mun. Power Agency v. Pub. Util. Comm'n of Tex.*, 253 S.W.3d 184, 192 (Tex. 2007). When a court of appeals reviews competing motions for summary judgment, the court must review the summary judgment evidence presented by each party, determine all questions presented, and render the judgment that the trial court should have rendered. *Id.* Here, however, because the parties did not file competing summary judgment motions, we do not consider the trial court's ruling, which constituted an effective denial of Donald's summary judgment motion. Rather than file a competing summary judgment motion, the Winklers contended that summary judgment was not appropriate.