Opinion issued June 30, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00553-CV

CARLOS MORALES, Appellant

V.

JP MORGAN CHASE BANK, N.A., Appellee

On Appeal from the County Court at Law Number 2
Montgomery County, Texas[1]
Trial Court Case No. 09-09-08967-CV

MEMORANDUM OPINION

This is an appeal from a summary judgment on a suit on a sworn account. We affirm.

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[1] The Texas Supreme Court transferred this appeal from the Court of Appeals for the Ninth District of Texas. Misc. Docket No. 10-9105 (Tex. June 21, 2010); *see* TEX. GOV'T CODE ANN. § 73.001 (Vernon 2005) (authorizing transfer of cases).

BACKGROUND

On September 16, 2009, Plaintiff/Appellee JP Morgan Chase Bank, N.A. ("Chase") sued Defendant/Appellant Carlos Morales, alleging he had defaulted on a note. The note was secured by a 2001 Ford Explorer, which Chase repossessed and sold. In the underlying suit, Chase sought the deficiency from the sale, as well as interest and attorney's fees.

Chase's petition was accompanied by a copy of the contract and an affidavit proving it up as a suit on a sworn account for liquidated damages under Texas Rule of Civil Procedure 185. In response, on October 19, 2009, appellant sent a letter to the court explaining that he purchased the vehicle for his daughter who was supposed to make the payments, that she ran into financial problems and that appellant did not have funds to pay the amount now due.

On February 10, 2010, the court issued a scheduling order setting a trial date of August 9, 2010. On February 15, 2010, Chase served requests for admissions on appellant. Appellant did not respond to these requests, so they were deemed admitted. TEX. R. CIV. P. 198.2(c).

A. Chase's Summary Judgment Motion

On March 23, 2010, Chase filed a motion for summary judgment, asserting three independent grounds: (1) that appellant's deemed admissions establish its right to summary judgment as a matter of law, (2) that the "pleadings, affidavits,

and exhibits filed herein show that there is no genuine issue as to any material fact between the parties," and (3) that summary judgment is supported by three attached affidavits supporting Chase's claim for damages and attorney's fees. Four exhibits were attached as evidence:

Exhibit A – deemed admissions

Exhibit B – affidavit by Mike Konrath, Assistant Vice President of JP Morgan Chase Bank, N.A., stating (1) Chase advanced credit to appellant for the account "as fully set forth in the statement or documents attached," (2) "numerous statements . . . were sent to [appellant] showing the balance due and requesting payment," (3) appellant owes "$11,033.99 after all lawful offsets and credits," and that (4) Konrath has "care, control and custody" of the true and correct attached records kept in the ordinary course of business related to the extension of credit[2]

Exhibit C – affidavit by James A. West, attorney, averring that all facts in the summary judgment motion are true, and that he made a demand for payment at least 30 days before filing a motion for summary judgment, which did not result in payment by appellant.

Exhibit D – affidavit by James A. West, attorney, proving up "usual and customary fees for services rendered and for services reasonably necessary [of] . . . $2,983.50"

[2] No documents were actually attached to this exhibit.

B. Appellant's Amended Answer, Motion to Strike Deemed Admissions, and Response to Chase's Motion for Summary Judgment.

On April 13, 2010, appellant filed an amended answer that included (1) a general denial, (2) a verified denial of suit on sworn account, (3) a pleading of the affirmative defense of limitations, (4) a request to strike deemed admissions, and (5) special exceptions. On the same day, appellant filed a response to Chase's motion for summary judgment. Appellant argued that (1) his deemed admissions could not be considered grounds for summary judgment because they should be withdrawn, (2) Konrath's affidavit cannot support summary judgment because it is not clear how Konrath obtained personal knowledge, (3) Chase should be required to show proof that appellant's debt was transferred from Chase Manhattan Bank USA N.A., the original maker, to Chase, the plaintiff in this suit, and (4) West's attorney's fees affidavit should not be accepted as evidence of a reasonable attorney's fee without a detailed description of the type of work done and the time needed to complete that work.

C. The Trial Court's Judgment and Appellant's Motion for New Trial

On April 26, 2010, the trial court granted Chase's motion for summary judgment—without specifying the grounds—and entered a final judgment in Chase's favor. On May 14, 2010, appellant filed a motion for new trial, arguing the trial court erred by not granting his motion to strike deemed admissions.

D. This appeal

Appellant appeals here, in four issues, arguing that the trial court (1) "err[ed] in granting summary judgment on the basis of an initially defective answer," (2) "err[ed] in granting summary judgment based on deemed admissions that either should have been withdrawn or were invalid legal conclusions," (3) "err[ed] in granting summary judgment based on an affidavit that is substantively defective," and (4) "err[ed] in granting summary judgment when Chase had failed to meet its burden of proof on an affirmative defense."

STANDARD OF REVIEW

Chase filed a traditional motion for summary judgment. *See* TEX. R. CIV. P. 166a(c). Under the traditional standard for summary judgment, a movant has the burden to show that no genuine issue of material fact exists and that the trial court should grant judgment as a matter of law. TEX. R. CIV. P. 166a(c); *KPMG Peat Marwick v. Harrison Cnty. Hous. Fin. Corp*., 988 S.W.2d 746, 748 (Tex. 1999). We view all evidence in a light favorable to the nonmovant and indulge every reasonable inference in the nonmovant's favor. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). When, as here, a trial court's order granting summary judgment does not specify the ground relied upon, we affirm the summary judgment if any of the summary judgment grounds is meritorious. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872–73 (Tex. 2000).

ANALYSIS

Chase argues that there are four independent bases for upholding the court's summary judgment: (1) appellant never properly filed a sworn denial; (2) appellant's deemed admissions supported each element of the summary judgment; (3) the Konrath affidavit supports summary judgment; and (4) appellant never properly raised an affirmative defense that would shift the burden to Chase.

Because we agree with Chase's last two contentions, we need not reach the issues of (1) whether appellant filed a proper sworn denial, or (2) whether the trial court abused its discretion by not striking appellant's deemed admissions.

A. Konrath's Affidavit

"To collect on a promissory note as a matter of law, the holder or payee need only establish that (1) there is a note; (2) he is the legal owner and holder of the note; (3) the defendant is the maker of the note; and (4) a certain balance is due and owing on the note." *Blankenship v. Robins*, 899 S.W.2d 236, 238 (Tex. App.—Houston [14th Dist.] 1994, no pet.) "When summary judgment proof establishes the above facts, the holder of the note is entitled to recover, unless the maker establishes a defense." *Id*.

In his third issue, appellant argues that Konrath's affidavit cannot support the trial court's summary judgment because (1) "it was not properly identified as evidence of liability," and (2) "it was conclusory." Konrath's affidavit states:

1. "My name is MIKE KONRATH, I am the ASSISTANT VICE PRESIDENT of JP MORGAN CHASE BANK, N.A., the Plaintiff herein. I am authorized to make this Affidavit and have personal knowledge of the facts stated herein. I am over 18 years of age and competent to give testimony. I have never been convicted of a felony or crime of moral turpitude and I am not disqualified from giving testimony in this matter now pending before the court."

2. "That the Plaintiff advanced credit to the or for the Defendant, CARLOS MORALES, for account number 10222120223605 as fully set forth in the statement or documents attached hereto."

3. "That numerous statements of account were sent to the Defendant showing the balance due and requesting payment."

4. "That the Defendant failed and refused to pay the account, and is indebted to Plaintiff in the sum of $11,933.99 after all lawful offsets and credits have been allowed."

5. "That Plaintiff, in the regular and ordinary course of its business, maintains records and its dealings with those to whom Plaintiff extends credit; that the records are made at or near the time of the transaction or events recorded and the records are made by those who have knowledge of the transactions or events recorded."

6. "I have care, control and custody of the records of the Defendant's account with Plaintiff and a true and correct copy of the records are attached hereto, showing that Defendant is indebted to Plaintiff, in the amount herein above stated."

1. Konrath's affidavit is evidence of liability

Appellant argues that Konrath's affidavit cannot support a liability finding because—although it was attached as summary judgment evidence—the "only explicit reference to this affidavit in the motion for summary judgment is language citing to the affidavit as evidence of Chase's damages." Chase's motion for summary judgment states that the "pleading, affidavits and exhibits filed herein show that there is no genuine issue as to any material fact between the parties, and

accordingly, Plaintiff is entitled to judgment against Defendant as a matter of law." The motion specifically references Konrath's affidavit with regard to damages, stating that in "support of Plaintiff's claim for damages against Defendant in the amount of $11,933.99 and for pre-judgment interest of 8.99% per annum thereon from August 11, 2009, until the date of this judgment is an affidavit of a representative of Plaintiff with a statement of account from the books and records of Plaintiff annexed thereto."

In support of his argument that Konrath's affidavit cannot be evidence of liability, appellant cites authority that (1) affidavits attached to a petition but neither attached to a motion for summary judgment nor incorporated by reference in the motion are not summary judgment evidence, *see Speck v. First Evangelical Lutheran Church of Houston*, 235 S.W.3d 811, 816 (Tex. App.—Houston [1st Dist.] 2007, no pet.), and (2) even documents filed with the trial court are not treated as summary judgment evidence if a motion or opposition does not cite to the specific evidence relied upon in the documents, *see Boeker v. Syptak*, 916 S.W.2d 59, 61 (Tex. App.—Houston [1st Dist.] 1996, no writ). According to appellant, "[a]pplying this law in the instant case," establishes that "the Konrath affidavit cannot be used to establish liability."

We disagree with appellant and hold that the Konrath affidavit could be considered by the trial court as evidence of both liability and damages. Chase

generally referenced the one-page affidavit as supporting summary judgment and specifically referenced the contents of the affidavit with reference to damages. This is not a case in which there were voluminous attachments with no specific reference to specific evidence as it related to a particular legal argument. Neither cases cited by appellant supports argument that the trial court could only consider the affidavit for damages, but not for evidence of liability.

2. Konrath's affidavit is not conclusory.

Appellant also argues that "Konrath's affidavit cannot serve as a basis for summary judgment for the additional reason that it is conclusory in that a number of conclusions rely upon documents that were not attached." Appellant acknowledges that this argument was not made in the trial court, but urges us to either (1) hold that the failure to attach documents rendered Konrath's affidavit conclusory, a substantive objection he claims that can be raised for the first time on appeal, or (2) overrule this Court's prior cases holding that the absence of referenced documents is a defect of form that must be preserved in the trial court.

In *Mathis v. Bocell*, 982 S.W.2d 52, 60 (Tex. App.—Houston [1st Dist.] 1998, no pet.)—a case in which medical records that an expert relied upon were not attached to the expert's summary-judgment affidavit—we addressed at length the split in authority among the courts of appeals about whether the failure to attach

exhibits to an affidavit is a defect as to form or substance, concluding it is a waivable defect in form:

> We believe that the best way to analyze these defects is on the basis of admissibility versus competency of evidence. A defect is substantive if the evidence is incompetent, and it is formal if the evidence is competent but inadmissible. *See* Address by Justice Sarah B. Duncan, *No–Evidence Motions for Summary Judgment: Harmonizing Rule 166a(i) and its Comment*, 21st Annual Page Keeton Products Liability and Personal Injury Law Conference (November 20–21, 1997) 25–26. Formal defects may be waived by failure to object, and if waived, the evidence is considered. Substantive defects are never waived because the evidence is incompetent and cannot be considered under any circumstances. *See* Address by Justice Sarah B. Duncan at 26 ("If evidence is incompetent, it necessarily has no probative value because it either does not relate to a controlling fact, or, if material, does not tend to make the existence of that fact more or less probable; therefore, there is no need to object to the erroneous introduction of incompetent evidence either to preserve the error in its admission or to ensure it is not treated as 'some evidence.'") (citing *Aetna Ins. v. Klein*, 160 Tex. 61, 325 S.W.2d 376 (1959)).

Id. Under *Mathis*, Konrath's failure to attach the records upon which he relied is a defect in form that was waived by the failure to object in the trial court. *Mathis* squarely applies and we will not revisit its holding here. *See*, *e.g.*, *Chase Home Fin., L.L.C. v. Cal W. Reconveyance Corp.*, 309 S.W.3d 619, 630 (Tex. App.—Houston [14th Dist.] 2010, no pet.) ("Absent a decision from a higher court or this court sitting en banc that is on point and contrary to the prior panel decision or an intervening and material change in the statutory law, this court is bound by the prior holding of another panel of this court.").

Appellant alternatively asks us to distinguish *Mathis* "to the extent that the referenced documents render statements in [Konrath's] affidavit conclusory." Specifically, he complains that the absence of the documents renders the following three statements conclusory: (a) "Plaintiff advanced credit to the or for the Defendant," (b) "numerous statements of account were sent to the Defendant showing the balance due and requesting payment," and (c) "Defendant failed and refused to pay the account, and is indebted to Plaintiff in the sum of $11,933.39 after all lawful offsets and credits have been allowed." We disagree.

Konrath, as vice-president of Chase, made his affidavit on personal knowledge, as the person with control and custody of the records of appellant's account, and he affirmatively represents that statements were sent to appellant, appellant refused to pay the account, and that $11,933.99 remains due after all lawful offsets have been allowed. Significantly, the documents that the affidavit references—the contract and a document reflecting the balance owed—were attached to Chase's petition and, as noted above, appellant waived any complaint about the documents not being physically attached to Konrath's affidavit. The "absence" of those documents—which were both on file with the trial court and previously served on the appellant—did not render Konrath's affidavit conclusory.

Appellant next asserts that Konrath's affidavit inadequately "explain[s] the basis for Konrath's knowledge about the account," and that the Konrath's

affidavit's statement that all "*lawful* offsets and credits have been allowed" is a legal conclusion that cannot be treated as summary judgment evidence. We disagree.

Konrath's position as vice-president of Chase and as the person with care, custody and control of the records demonstrates a sufficient basis for his personal knowledge, absent controverting evidence. *E.g.*, *Requipco, Inc. v. Am-Tex Tank & Equip., Inc.*, 738 S.W.2d 299, 301 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.) (affidavit by former president of creditor company stating that he had personal knowledge of facts stated therein was sufficient to show personal knowledge, "[i]n the absence of any evidence to the contrary"); *American 10-Minute Oil Change, Inc. v. Metropolitan Nat'l Bank-Farmers Branch*, 783 S.W.2d 598, 601 (Tex. App.—Dallas 1989, no pet.) (summary-judgment affidavit made on bank vice-president's personal knowledge, which identified the note, the principal balance, and the interest owed after allowing for all offsets, payments and credits was not conclusory when no controverting affidavit was presented to raise a fact issue).

In support of his argument that Konrath's reference to "*lawful* offsets and credits" is "nothing more than a legal conclusion and cannot be treated as summary judgment evidence," appellant cites *Rizkallah v. Conner*, 952 S.W.2d 580, 587 (Tex. App.—Houston [1st Dist.] 1997, no pet.). In *Rizkallah*, this Court held that

statements in a summary-judgment affidavit that the defendant was "negligent," that the defendant engaged in "deceptive trade practices," and that plaintiff incurred additional costs "because of the negligent and deceptive manner in which defendant made the repairs" were "legal conclusions" that "cannot be considered as support for . . . summary judgment." 952 S.W.2d at 587.

The language that appellant challenges as conclusory is found in Rule 185, which provides a prima facie case for a suit on a sworn account may be made with an affidavit by a party, the party's agent, or the party's attorney "to the effect that such claim is, within the knowledge of affiant, just and true, that it is due, and that all just and lawful offsets, payments and credits have been allowed." *See* TEX. R. CIV. P. 185. An affidavit containing this "lawful offsets and credits" language has previously been found to be "not conclusory, and . . . sufficient to support a summary judgment motion." *See Albright v. Regions Bank*, No. 13-08-262-CV, 2009 WL 3489853, at *4 (Tex. App.—Corpus Christi, Oct. 29, 2009, no pet.) (mem. op.). Even if inclusion of the word "lawful" represented a legal conclusion within the meaning of the *Rizkallah*, an affidavit containing superfluous conclusory statements may still support summary judgment if the remainder of the affidavit is sufficient. *Marshall v. Sackett*, 907 S.W.2d 925, 933 (Tex. App.—Houston [1st Dist.] 1995, no writ). This Court has previously held that an affidavit stating that "all off-sets, credits, and charges" have been credited is not conclusory and is

sufficient to support summary judgment. *See Wilkins & Bookman v. Monex Leasing*, No. 01-96-00783-CV, 1997 WL 335735, at *2 (Tex. App.—Houston [1st Dist.] 1997, June 19, 1997, no writ) (not designated for publication).

Because Konrath's affidavit could properly be considered by the trial court as evidence of liability, and because it is not conclusory, we overrule appellant's third issue.

B. Affirmative Defense

In his fourth point, appellant asserts that "[e]ven if Morales' answer is insufficient to constitute a verified denial of the sworn account claim or the Konrath affidavit is treated as valid summary judgment evidence, he retained at least one defense that precluded summary judgment." Specifically, appellant claims that his statement in his amended answer that "I do not remember receiving a notice from anyone informing me how the car in question was disposed of . . ." suffices as an allegation that "Chase failed to give notice of intended disposition under Tex. Bus. & Com. Code § 9.629(b)." Thus, appellant argues, the burden shifted to Chase to establish the disposition was conducted property, which Chase failed to do in its summary judgment.

In response, Chase correctly notes that appellant never "place[d] the issue of compliance with the UCC in question." "The belief of an affiant is insufficient to defeat a summary judgment motion." *Trans-Continental Fin. Corp. v. Summit*

Nat'l Bank, 761 S.W.2d 575, 577 (Tex. App.—Fort Worth 1988, no pet.). "Instead, the statements contained within the affidavit must be so direct and unequivocal that perjury can be assigned against the affiant if the statement is false." *Id*. Appellant's statement that he did not remember receiving information about disposition of the collateral, without more, is insufficient to shift the burden to Chase to demonstrate compliance with the notice of disposition requirement under the applicable statutes. We overrule appellant's fourth issue.

CONCLUSION

We overrule appellant's third and fourth issue. In light of our disposition of these issues, we need not reach appellant's first and second issue. We affirm the trial court's judgment.

Sherry Radack
Chief Justice

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