Opinion issued August 4, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00718-CV

QB INVESTMENTS, LLC, Appellant

V.

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, Appellee

On Appeal from the 270th District Court
Harris County, Texas
Trial Court Case No. 2009-44895

MEMORANDUM OPINION

This case involves a first-party property insurance coverage dispute arising from the denial of appellant QB Investments, LLC's claim of loss for a November 2008 warehouse fire. QB Investments appeals from a final summary judgment in

favor of appellee Certain Underwriters at Lloyd's, London. QB Investments argues that its summary judgment evidence raised a question of material fact as to whether an endorsement requiring it to install and maintain a central fire alarm was part of the policy when the fire occurred. It further contends that Lloyd's failed to establish the applicability of the endorsement as a matter of law. We affirm.

Background

QB Investments purchased property in Houston, Texas in October 2008. It also obtained an insurance policy for the period of October 28, 2008, to October 28, 2009, from Lloyd's through the insurer's United States underwriting agent AVERCO. Lloyd's issued the policy binder on October 27. The binder provided to QB Investments includes the policy number, coverage limits, deductible amounts, and some of the applicable endorsements and exclusions. While a number of endorsements are specifically set out, including the standard endorsement clause and an electronic data endorsement, the binder states: "OTHER ENDORESEMENTS MAY APPLY."

The actual policy, which QB Investments received at a later date, includes an endorsement not listed in the binder. The policy states that it provides coverage for "specified causes of loss," including fire losses. The policy also includes an endorsement that requires QB Investments to maintain a fire alarm system and limits any obligation Lloyd's might have to pay for fire loss under certain

conditions. Clause A of the "Protective Safeguards" endorsement requires QB Investments, "[a]s a condition of [coverage for fire loss], . . . to maintain [a Central Station FIRE Alarm]." Clause B further provides that:

> [Lloyd's] will not pay for loss or damage caused by or resulting from fire if, prior to the fire, [QB Investments]:
>
> 1. Knew of any suspension or impairment in any protective safeguard listed in the Schedule above and failed to notify us of that fact; or
>
> 2. Failed to maintain any protective safeguard listed in the Schedule above, and over which you had control, in complete working order.

On November 20, 2008, after the binder had issued but before QB Investments received the actual policy, fire damaged a warehouse on the property. It is undisputed that the central station fire alarm was not installed at the time of the fire.

QB Investments claimed a loss under the policy. Lloyd's denied the claim on the grounds that the policy required QB Investments to maintain a central station fire alarm on the property and that: (1) "QB [Investments] knew of impairments . . . and failed to notify [Lloyd's] of them," and (2) "had control over its own premises and equipment but failed to maintain a central station fire alarm in 'complete working order.'"

After its claim was denied, QB Investments sued Lloyd's for breach of contract. Lloyd's moved for summary judgment, arguing that it was entitled to

deny coverage of the claim because QB Investments did not perform a condition precedent under the policy by failing to maintain a central station fire alarm as required in the "Protective Safeguards" endorsement. In response, QB Investments argued that Lloyd's was not entitled to summary judgment because the protective safeguards endorsement was not listed in the binder, and therefore it was not part of the policy in effect at the time of the fire. QB Investments attached deposition testimony which it argued created a fact issue about the applicability of the endorsement. Alternatively, it also argued that Lloyd's had failed to conclusively establish the applicability of the endorsement. In support of this position, it attached an affidavit to establish that Lloyd's had been notified through an agent that there was no central station fire alarm and that QB Investments contracted with a fire alarm installation company on October 29, 2009.

After considering the evidence submitted by the parties, the trial court granted summary judgment in favor of Lloyd's. On appeal, QB Investments contends that the trial court erred because a question of material fact had been raised as to whether the protective safeguards endorsement was part of the policy when the fire occurred and because Lloyd's failed to establish the applicability of the endorsement as a matter of law.

Analysis

We review a trial court's summary-judgment decision de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). To prevail on summary judgment, the movant has the burden of proving that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985); *see* TEX. R. CIV. P. 166a(c). A defendant is entitled to summary judgment based on an affirmative defense if it conclusively proves all the essential elements of the defense as a matter of law. *See, e.g.*, *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995). In deciding whether there is a disputed issue of material fact precluding summary judgment, we take as true evidence favorable to the nonmovant, indulging every reasonable inference and resolving any doubts in its favor. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). A matter is conclusively established if reasonable people could not differ as to the conclusion to be drawn from the evidence. *City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005).

I. The binder

In its first issue, QB Investments argues that summary judgment was improper because there are genuine issues of material fact "concern[ing] whether or not the [protective safeguards fire alarm endorsement] was even part of the

binder." Relying on the Texas Supreme Court's decision in *Ranger County Mutual Insurance Co. v. Chrysler Credit Corp.*, 501 S.W.2d 295 (Tex. 1973), QB Investments contends that the terms included in the binder are controlling because the policy had not yet issued, and therefore Lloyd's was precluded from denying its claim. Lloyd's argues in response that the terms and conditions of the actual policy are controlling and that the binder is to be construed in accordance with the terms and conditions of the standard form of policy in use by the insurer. *See id.* at 298 ("As long as a binder is in effect, the insured may look to the form of the contemplated policy for coverage, duration, cancellation, and other terms.").

"An insurance binder is a contract that provides insurance coverage pending the issuance of an original insurance policy . . . ." *See* TEX. INS. CODE ANN. § 549.001(2) (West 2009). It is well established that coverage provided under a binder is determined based on reference to the terms and conditions contained in the standard form of policy in use by the insurer at the time the binder is issued. *See id.* The party seeking to enforce the policy must allege and prove that it is entitled to recover under the terms of the policy. *Id.* (citing *Wann v. Metro. Life Ins. Co.*, 41 S.W.2d 50, 52 (Tex. Comm'n App. 1931, holding approved); *Equitable Assurance Soc'y of U.S. v. Nelson*, 396 S.W.2d 517, 518 (Tex. Civ. App.—Fort Worth 1965, no writ)).

In support of its position, Lloyd's attached the following exhibits to its motion for summary judgment: the affidavit of John J. Clark, the authorized underwriting agent for Lloyd's; a transcript from the deposition testimony of James McNutt, QB Investment's insurance agent; the transcript of Jo Nell Salling's deposition; a copy of the binder; and a copy of the policy issued to QB Investments. As discussed above, it is undisputed that the policy actually contains the protective safeguards endorsement, and while the endorsement is not specifically referenced in the binder, the binder states that other endorsements may apply. In his affidavit, Clark averred that the endorsement was included in the actual policy, and despite its omission from the text of the binder, it was always deemed included. He also stated that the protective safeguards endorsement "was among the terms and conditions contained in the ordinary form of policy usually issued by the underwriters at Lloyd's," and that "[t]he underwriters . . . would not have issued a policy to QB Investments, LLC without [the endorsement]" because part of the property was used for the storage and handling of chemicals. Both McNutt and Salling also testified that they knew that the endorsement would be included in the policy and they understood that Lloyd's would deny coverage for any fire loss if a central station fire alarm were not installed and maintained by QB Investments.

In its response, QB Investments argued that there was conflicting testimony regarding the protective safeguards endorsement. In support of its motion, QB Investments attached a transcript of the deposition of Leland Smith, corporate representative for Lloyd's. Smith testified that the binder should contain the endorsements listed in the policy. QB Investments contends that this testimony conflicts with Clark's statement that the binder need not include all the endorsements listed in the policy. While its response highlighted an apparent conflict in the testimony of key witnesses, QB Investments failed to show that the endorsement was not part of the standard policy used by Lloyd's. *See Ranger Cnty. Mut. Ins.Co,* 501 S.W.2d at 298. Accordingly, we hold that the protective safeguards fire alarm endorsement was part of the policy when the fire occurred and that Lloyd's was not liable under the policy unless QB Investments demonstrated that it complied with the terms of the endorsement. QB Investments's first issue is overruled.

II. Applicability of endorsement

In its second issue, QB Investments contends that Lloyd's failed to conclusively establish the applicability of the protective safeguards fire alarm endorsement. It argues that "the evidence before this Court proves that the exclusion is inapplicable," and "there is at the very least, a fact issue, if the endorsement is deemed to be part of the binder." The entire argument presented by

QB Investments is less than a page long, and it contains no citation to legal authority.

While this Court recognizes its obligation to construe the rules of appellate procedure "reasonably, yet liberally, so that the right to appeal is not lost by imposing requirements not absolutely necessary to effect the purpose[s] of the rule[s]," *Republic Underwriters, Insurance Co. v. Mex-Tex, Inc.*, 150 S.W.3d 423, 427 (Tex. 2004) (quoting *Verburgt v. Dorner*, 959 S.W.2d 615, 616–17 (Tex. 1997) (internal quotation marks omitted)), we are not required or permitted to assume the advocate's responsibility for developing arguments on appeal. *Jordan v. Jefferson Cnty.*, 153 S.W.3d 670, 676 (Tex. App.—Amarillo 2004, pet. denied); *see also* TEX. R. APP. P. 38.9. The Rules of Appellate Procedure require that appellate briefs "contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(i). QB Investments was required to provide us with a discussion of the relevant facts and authorities relied upon as may be required to maintain the point at issue. *Tesoro Petroleum Corp. v. Nabors Drilling USA, Inc.*, 106 S.W.3d 118, 128 (Tex. App.—Houston [1st Dist.] 2002, pet. denied) (citing *Franklin v. Enserch, Inc.*, 961 S.W.2d 704, 711 (Tex. App.—Amarillo 1998, no pet.)). "This is not done by merely uttering brief conclusory statements, unsupported by legal citation[]." *Id.* Accordingly, we hold that QB Investments has inadequately briefed this issue and,

thus, waived it. *See* TEX. R. APP. P. 38.1(i); *see also Stephens v. Dolcefino*, 126 S.W.3d 120, 129–30 (Tex. App.—Houston [1st Dist.] 2003), *pet. denied*, 181 S.W.3d 741 (Tex. 2005).

Conclusion

We affirm the judgment of the trial court.

Michael Massengale
Justice

Panel consists of Justices Jennings, Bland, and Massengale.