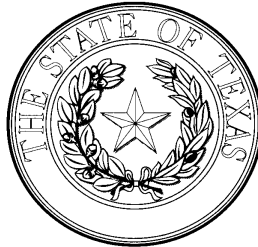


Opinion issued February 22, 2018



In The
Court of Appeals
For The
First District of Texas

NO. 01-17-00110-CV

BARRY W. KOCH, Appellant
V.
KENNETH GOOGANS, Appellee

On Appeal from the 215th District Court
Harris County, Texas
Trial Court Case No. 2016-05073

MEMORANDUM OPINION

In this contract dispute, appellant Barry W. Koch challenges the trial court's take-nothing summary judgment in favor of appellee Kenneth Googans. Among other things, Koch argues that Googans failed to conclusively establish the affirmative defense of novation when the summary-judgment evidence instead

showed the parties' original contract was amended. Reviewing the summary judgment de novo, we conclude that Googans did not conclusively prove his affirmative defense.

We reverse the judgment of the trial court and remand for further proceedings.

Background

In December 2013, appellee Kenneth Googans entered into a settlement agreement with the partners of Glacier Financial Partners, which included appellant Barry W. Koch. Googans made some payments in accordance with the agreement, but he defaulted in May 2015. In the summer of 2015, the parties amended the 2013 settlement agreement to reduce the monthly payments and extend the time period for repayment. The 2015 amendment stated: "With the exception of the foregoing amendments, all terms of the Agreement remain unchanged and in full force and effect." Koch alleges that Googans defaulted again in late 2015.

The following year, Koch sued Googans for breach of contract. In his original petition, Koch alleged that Googans breached the 2013 settlement agreement, but he made no allegations about the 2015 amendment. Googans pleaded the affirmative defense of novation, asserting that the 2013 settlement

agreement was altered by the 2015 amendment. Googans then filed a motion for summary judgment on the grounds of novation.

Koch subsequently amended his petition to allege that Googans had breached the 2013 settlement agreement as amended in 2015. He also alleged that the unmodified portions of the 2013 settlement agreement remained in effect. Koch did not file a response to the motion for summary judgment.

Two weeks after Koch's amended petition was filed, the trial court granted summary judgment to Googans based on the sole ground of novation. The court denied a motion to reconsider its ruling, and Koch appealed.

Analysis

On appeal, Koch argues that the court erred by granting summary judgment. Googans characterizes the court's judgment as a "default summary judgment," and he argues that the court ruled correctly after Koch failed to file a response to the motion for summary judgment.

We review a trial court's ruling on a motion for summary judgment de novo. *See Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013). A movant seeking a traditional summary judgment must show "there is no genuine issue as to any material fact" and that it is "entitled to judgment as a matter of law." TEX. R. CIV. P. 166a(c); *see Amedisys, Inc. v. Kingwood Home Health Care, LLC*, 437 S.W.3d 507, 512 (Tex. 2014). Because the movant must prove conclusively that he

is entitled to summary judgment, a trial court may not grant a traditional motion for summary judgment based on the nonmovant's failure to respond. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979). "The nonmovant has no burden to respond to a summary judgment motion unless the movant conclusively establishes its cause of action or defense." *Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 222–23 (Tex. 1999). "Summary judgments must stand on their own merits, and the non-movant's failure to answer or respond cannot supply by default the summary judgment proof necessary to establish the movant's right." *Clear Creek Basin Auth.*, 589 S.W.2d at 678; see *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 343 (Tex. 1993).

The sole ground raised by the motion for summary judgment was the affirmative defense of novation. Googans argued in the trial court that Koch's breach of contract claim was based on a breach of the 2013 settlement agreement, and that the 2015 amendment extinguished his obligations under that document.

"Novation is the substitution of a new agreement between the same parties or the substitution of a new party on an existing agreement." *New York Party Shuttle, LLC v. Bilello*, 414 S.W.3d 206, 214 (Tex. App.—Houston [1st Dist.] 2013, pet. denied). When there has been a novation, only the new agreement is enforceable. *Id.* To succeed on a motion for summary judgment based on novation, the movant must show conclusively (1) the existence of a previous, valid

obligation; (2) a mutual agreement of the parties to a new contract; (3) the extinguishment of the old contract; and (4) the validity of the new contract. *Id.*

Googans's summary-judgment evidence consisted of his affidavit, the 2013 settlement agreement, and the 2015 amendment. The 2015 amendment did not extinguish the 2013 settlement agreement. The 2015 amendment stated: "With the exception of the foregoing amendments, all terms of the Agreement remain unchanged and in full force and effect." Nothing in Googans's affidavit contradicted this.

In addition, at the time of the summary-judgment hearing, Koch's live pleading was his amended petition. An amended petition replaces the original or prior pleading. TEX. R. CIV. P. 65. The trial court is required to consider summary judgment evidence and "the pleadings . . . of the parties . . . on file at the time of the hearing." TEX. R. CIV. P. 166a(c). At the time of the hearing, Koch's pleading alleged a breach of the 2013 settlement agreement "as amended by the 2015 Amendment."

Googans's own summary-judgment evidence contradicted the "extinguishment of the old contract" element of novation. Thus, Googans did not meet his burden to prove conclusively that he was entitled to judgment on his affirmative defense as a matter of law.

Googans nevertheless contends that the court did not err. He argues that because Koch did not respond to the summary-judgment motion in the trial court, he has waived his arguments on appeal. This argument lacks merit, as “the non-movant needs no answer or response to the motion to contend on appeal that the grounds expressly presented to the trial court by the movant’s motion are insufficient *as a matter of law* to support summary judgment.” *Clear Creek Basin Auth.*, 589 S.W.2d at 678. Koch argues that Googans did not establish his entitlement to summary judgment as a matter of law. He is not barred from making that argument in this court because he filed no response in the trial court.

Googans also argues that the trial court was not required to consider Koch’s amended petition because he did not bring it to the trial court’s attention by responding to the motion for summary judgment. However, the trial court is required to consider pleadings that are “on file at the time of the hearing.” *See* TEX. R. CIV. P. 166a(c). Koch’s amended petition was on file two weeks prior to the time specified for the summary-judgment hearing.

The trial court erred by granting summary judgment because Googans did not prove conclusively the affirmative defense of novation. We sustain Koch’s first issue, making it unnecessary for us to address his remaining issue. *See* TEX. R. APP. P. 47.1.

Conclusion

We reverse the judgment of the trial court, and we remand the case for further proceedings.

Michael Massengale
Justice

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