Opinion issued August 27, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00023-CV

DANIEL S. DUNCAN AND TRAVIS A. BRYAN, Appellants

V.

EDUCAP, INC., Appellee

On Appeal from County Civil Court at Law No. 4
Harris County, Texas
Trial Court Case No. 1091932

MEMORANDUM OPINION

In this restricted appeal, appellants, Daniel S. Duncan and Travis A. Bryan (collectively, "appellants"), challenge the trial court's rendition of summary judgment in favor of appellee, Educap, Inc. ("Educap"), in Educap's suit against appellants to collect on a promissory note. In three issues, appellants contend that

the trial court erred in granting Educap's second summary-judgment motion and denying Bryan's counter-summary-judgment motion.

We affirm.

Background

In its petition, Educap alleged that in June 2005, appellants executed and delivered to Educap a "combined private education loan application and promissory note." Educap owns the promissory note and was entitled to receive payment from appellants under its terms. Educap made the loan, but appellants defaulted on the payments they owed under the loan's terms. Appellants owed Educap $14,910.98. Educap sued appellants to collect on the promissory note, seeking monies owed under the combined private education loan application and promissory note.

Appellants answered, asserting numerous affirmative defenses, including that Educap's claim was barred by the statute of limitations.

On September 8, 2017, Educap moved for summary judgment on its claim to collect on the promissory note, arguing that it was entitled to judgment as a matter of law because it had established that it owned the combined private education loan application and promissory note, appellants had signed the note, appellants failed to pay the monies owed under the note, and a certain balance was due and owing on the note. Educap also moved for summary judgment, asserting that there was no evidence of certain essential elements of appellants' affirmative defenses, including

their affirmative defense of statute of limitations. Educap attached certain exhibits to its summary-judgment motion.

On October 20, 2017, Duncan responded to Educap's summary-judgment motion and filed a no-evidence counter-summary-judgment motion. On October 24, 2017, Bryan likewise responded to Educap's summary-judgment motion and filed a counter-summary-judgment motion, arguing that he was entitled to summary judgment as a matter of law because Educap's claim was time barred based on the applicable statute of limitations.

On December 12, 2017, the trial court signed a "Final Summary Judgment," granting Educap's motion, ordering that Educap recover from Duncan and Bryan, jointly and severally, the amount due on the account, including principal, interest, and late fees, and awarding post-judgment interest and attorney's fees. The judgment recited: "All relief not expressly granted is denied. This judgment finally disposes of all claims and parties and is appealable."

On January 11, 2018, Bryan moved for new trial and for reconsideration of the trial court's summary judgment in favor of Educap. He asserted that Educap failed to serve him with sufficient notice of the submission date for its summary-judgment motion and reiterated the limitations arguments he raised in his counter-summary-judgment motion.

About a month later, the trial court granted Bryan's motion for new trial and vacated its December 12, 2017 final judgment. Following that ruling, Educap filed a second summary-judgment motion that was substantially the same as its first summary-judgment motion. As to appellants' affirmative defense of statute of limitations, Educap asserted:

> The limitations period for this contract action is six years because the note is a negotiable instrument. TEX. BUS. & COM. CODE ANN. § 3.118 (West 2014). . . . Defendants' last payment on the account was 01/10/2014 and suit was filed on 04/12/2017.
>
> Defendants, Travis A. Bryan and Daniel S. Duncan, have presented no evidence that . . . any claims are barred by the statute of limitations.

Appellants did not respond to Educap's second summary-judgment motion.

On July 9, 2018, the trial court granted Educap's second summary-judgment motion.

Bryan moved for new trial on August 17, 2018, after the trial court's plenary power had expired. Appellants both filed notices of restricted appeal on January 9, 2019.

Restricted Appeal

A restricted appeal is a direct attack on a judgment. *Roventini v. Ocular Scis., Inc.*, 111 S.W.3d 719, 721 (Tex. App.—Houston [1st Dist.] 2003, pet. denied). To prevail on a restricted appeal, appellants must show that: (1) they filed notice of the restricted appeal within six months after the judgment was signed; (2) they were

parties to the underlying lawsuit; (3) they did not participate in the hearing that resulted in the judgment complained of and did not timely file any postjudgment motion or request for findings of fact and conclusions of law; and (4) error is apparent on the face of the record. *Alexander v. Lynda's Boutique*, 134 S.W.3d 845, 848 (Tex. 2004); *see* TEX. R. APP. P. 30.

Appellants state in their notices of appeal that neither "participate[d] either in person or through counsel in the hearing that resulted in the judgment." Educap contests these statements, pointing out that its second summary-judgment motion is substantially the same as its first and appellants participated below by filing responses to Educap's first summary-judgment motion. But in its order granting Educap's second summary-judgment motion, the trial court interlineated: "Defendant[s] filed no response."

We must liberally construe the non-participation requirement for restricted appeals in favor of the right to appeal. *Pike–Grant v. Grant*, 447 S.W.3d 884, 886 (Tex. 2014). The question is whether appellants participated in the "decision-making event" that resulted in the judgment adjudicating appellants' rights. *Texaco, Inc. v. Cent. Power & Light Co.*, 925 S.W.2d 586, 589 (Tex. 1996); *In re B.H.B.*, 336 S.W.3d 303, 305 (Tex. App.—San Antonio 2010, pet. denied). Because the trial court vacated its December 12, 2017 judgment granting Educap's first summary-judgment motion and expressly found that appellants did not respond

to Educap's second summary-judgment motion, we conclude that appellants' responses to the first summary-judgment motion do not constitute participation for purposes of their restricted appeal.

Although review by restricted appeal affords review of the entire case and thus permits the same scope of review as an ordinary appeal, the face of the record must reveal the claimed error. *See Norman Commc'ns, Inc v. Tex. Eastman Co.*, 955 S.W.2d 269, 270 (Tex. 1997). "[E]rror that is merely inferred [from the record] will not suffice." *Ginn v. Forrester*, 282 S.W.3d 430, 431 (Tex. 2009).

The face of the record, for purposes of a restricted appeal, consists of all the papers on file in the appeal, including the reporter's record, as they existed in the trial court when the trial court entered its judgment. *In re E.K.N.*, 24 S.W.3d 586, 590 (Tex. App.—Fort Worth 2000, no pet.). While the record contains Bryan's untimely motion for new trial, it was not before the trial court; and as a result, we do not consider it in determining whether there is error on the face of the record. *See Moritz v. Preiss*, 121 S.W.3d 715, 720–21 (Tex. 2003). A motion for new trial filed after trial court loses plenary power is a nullity and does not preserve issues for appellate review. *See id.*

Summary Judgment

In a portion of their first issue, appellants argue that the trial court erred in denying Bryan's counter-motion for summary judgment because Educap "failed to

respond to the argument in [Bryan's motion] that [its] claim was . . . governed by [a] four[-]year limitations period that had expired at the time [Educap] filed [its] lawsuit." But Bryan's counter-summary-judgment motion was disposed of by the trial court's December 12, 2017 final judgment, which denied "all relief not expressly granted" and disposed of "all claims and parties," and the trial court vacated that judgment when it granted Bryan's motion for new trial. *See Roccaforte v. Jefferson Cty.*, 341 S.W.3d 919, 924 (Tex. 2011). As a result, this portion of appellants' first issue presents nothing for review.

In the remaining portion of their first issue and in their second and third issues, appellants argue that the trial court erred in granting Educap's second motion for summary judgment because "Educap's lawsuit is [not] subject to [a] six[-]year statute of limitations," "Educap's claim is barred by [a] four[-]year statute of limitations," and Bryan's "filing of bankruptcy and subsequent trustee payments [did not] serve to restart the applicable limitations period."

We review a trial court's decision to grant summary judgment de novo. *Tex. Mun. Power Agency v. Pub. Util. Comm'n of Tex.*, 253 S.W.3d 184, 192 (Tex. 2007). In conducting our review, we take as true all evidence favorable to the nonmovants, and we indulge every reasonable inference and resolve any doubts in the nonmovants' favor. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005); *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex.

2003). If a trial court grants summary judgment without specifying the grounds for granting the motion, we must uphold the trial court's judgment if any of the asserted grounds are meritorious. *Beverick v. Koch Power, Inc.*, 186 S.W.3d 145, 148 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

A party seeking summary judgment may combine in a single motion a request for summary judgment under the no-evidence standard with a request for summary judgment as a matter of law. *Binur v. Jacobo*, 135 S.W.3d 646, 650–51 (Tex. 2004). To prevail on a matter-of-law summary-judgment motion, a movant has the burden of establishing 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 a plaintiff moves for summary judgment on its claim, it must establish its right to summary judgment by conclusively proving all the elements of its cause of action as a matter of law. *Rhône-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999); *Anglo-Dutch Petroleum Int'l, Inc. v. Haskell*, 193 S.W.3d 87, 95 (Tex. App.—Houston [1st Dist.] 2006, pet. denied). Once the plaintiff meets its burden, the burden shifts to the nonmovants to raise a genuine issue of material fact precluding summary judgment. *See Transcon. Ins. Co. v. Briggs Equip. Tr.*, 321 S.W.3d 685, 691 (Tex. App.—Houston [14th Dist.] 2010, no pet.); *see also Gutierrez v. Draheim*, No. 01-14-00267-CV, 2016 WL 921470, at *1 (Tex. App.—Houston [1st Dist.] Mar. 10, 2016, no pet.) (mem. op.). The evidence

raises a genuine issue of fact if reasonable and fair-minded jurors could differ in their conclusions in light of all of the summary-judgment evidence. *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007).

To prevail on a no-evidence summary-judgment motion, the movant must establish that there is no evidence to support an essential element of the nonmovants' claim or affirmative defense on which the nonmovant would have the burden of proof at trial. *See* TEX. R. CIV. P. 166a(i); *Fort Worth Osteopathic Hosp., Inc. v. Reese*, 148 S.W.3d 94, 99 (Tex. 2004); *Hahn v. Love*, 321 S.W.3d 517, 523–24 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). The burden then shifts to the nonmovants to present evidence raising a genuine issue of material fact as to each of the elements challenged in the motion. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006); *Hahn*, 321 S.W.3d at 524. A no-evidence summary-judgment may not be granted if the nonmovants bring forth more than a scintilla of evidence to raise a genuine issue of material fact on the challenged elements. *See Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004). More than a scintilla of evidence exists when the evidence "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997) (internal quotations omitted). The trial court must grant a no-evidence motion for summary judgment if the movant asserts that there is no evidence of one or more specified elements of the nonmovants' claim

or defense on which the nonmovant would have the burden of proof at trial and the nonmovants fail to file a timely response or fail to produce summary-judgment evidence raising a genuine issue of material fact on each challenged element. *See* TEX. R. CIV. P. 166a(i); *Lockett v. HB Zachry Co.*, 285 S.W.3d 63, 67 (Tex. App.—Houston [1st Dist.] 2009, no pet.).

To prevail on a summary-judgment motion, a plaintiff seeking to collect on a promissory note must prove: (1) the existence of the promissory note in question, (2) that the parties sued signed the note, (3) that the plaintiff is the owner or holder of the note, and (4) that a certain balance is due and owing on the note. *Wells Fargo Bank, N.A. v. Ballestas*, 355 S.W.3d 187, 191 (Tex. App.—Houston [1st Dist.] 2011, no pet.); *Leavings v. Mills*, 175 S.W.3d 301, 309 (Tex. App.—Houston [1st Dist.] 2004, no pet.). Educap established as a matter of law the elements of their claim to collect on a promissory note, which appellants do not challenge on appeal.

As a no-evidence ground for summary judgment, Educap asserted that appellants "presented no evidence that . . . any [of Educap's] claims [were] barred by the statute of limitations." This assertion shifted the burden to appellants to present evidence raising a genuine issue of material fact as to their affirmative defense of statute of limitations. *See Tamez*, 206 S.W.3d at 582; *Hahn*, 321 S.W.3d at 524. Because appellants did not file a response to Educap's second summary-judgment motion, appellants did not meet their burden, and the trial court

was required to grant summary judgment in favor of Educap. *See* TEX. R. CIV. P. 166a(i); *Lockett*, 285 S.W.3d at 67.

For these reasons, we conclude that the trial court did not err in granting Educap's second summary-judgment motion. We thus hold that no error is apparent on the face of the record.

We overrule appellants' first, second, and third issues.

Conclusion

We affirm the judgment of the trial court.

Julie Countiss
Justice

Panel consists of Justices Keyes, Goodman, and Countiss.