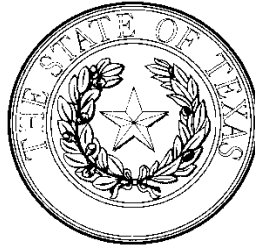


Opinion issued August 11, 2020



**In The
Court of Appeals
For The
First District of Texas**

NO. 01-19-00064-CV

**BRADLEY J. FISH, INC. D/B/A SULLAIR OF HOUSTON, Appellant
V.
LESAR ELECTRIC & DESIGN LLC, Appellee**

**On Appeal from the 151st District Court
Harris County, Texas
Trial Court Case No. 2018-08280**

MEMORANDUM OPINION

Appellant, Bradley J. Fish, Inc., doing business as Sullair of Houston (“Sullair”), challenges the trial court’s rendition of summary judgment in favor of appellee, Lesar Electric & Design LLC (“Lesar”), in Lesar’s suit against it for breach

of contract. In four issues, Sullair contends that the trial court erred in granting Lesar summary judgment.

We affirm.

Background

In its second amended petition, Lesar, a licensed electrical contractor, alleged that in 2017, it and Sullair entered into two contracts for Lesar to perform electrical work. Sullair paid Lesar twenty-five percent of the balance due under each contract as a down payment on each contract and agreed to pay the remaining seventy-five percent owed when work was complete. Lesar performed and completed the work under the contracts, but Sullair did not pay the remaining \$68,289 owed to Lesar and did not respond to Lesar's written demand for payment. Lesar brought a breach-of-contract claim against Sullair for the amount it was owed under the contracts.

In its second amended answer, Sullair "denie[d] that it had a contract with Lesar." Instead, Sullair alleged that it signed contracts with Phillip Rodriguez and Aaron Burns, who represented themselves as being partners providing services under the trade name "Lesar Electric & Design." Sullair also alleged that neither Lesar nor Rodriguez and Burns had filed "the Texas Assumed Name Certificate as required by Texas law" and that Lesar was not "in good standing with the Texas Comptroller of Public Accounts and as such ha[d] forfeited its right to do business

in the State of Texas, including the right to file litigation in Texas courts.” Sullair also asserted the affirmative defense of payment.

Lesar moved for summary judgment on its breach-of-contract claim, arguing that it was entitled to judgment as a matter of law because it entered two contracts with Sullair, Lesar performed under the contracts, Sullair breached the contracts by failing to pay Lesar for its work, and Lesar sustained damages a result of Sullair’s breach.

Lesar attached copies of its contracts with Sullair as exhibits to its summary-judgment motion. The two contracts are written on letterhead listing “Lesar Electric and Design” at the top and Lesar’s address—12917 Ellen Lane, Houston, Texas 77615—at the bottom. Each contract begins: “Lesar Electric & Design (‘LED’) appreciates the opportunity to provide an estimated bid (which is good for 15 days) for the above referenced project. Below you will find the breakdown for our pricing.” Each contract contains a lump-sum bid, outlines the scope of the work to be performed, and sets forth pricing qualifications and payment terms. The “payment terms” section provides:

Unless otherwise stated or written in the Request for Proposal/Quote, the following payment terms will be adhered to. Lesar Electric & Design will invoice in the following manner. Invoice 1 will consist of all material labor and taxes for the entire project based on the bid proposal (LED requires payment of 25% prior to mobilization). A final invoice will be sent after the original job is complete based on job phase completion if these terms are part of the original job scope and/or change orders to the original job scope. Payment of the final invoice

(75%) is due upon completion of the project. This bid is based on 25% of the value of the contract to be paid before mobilization.

Each contract closes with the following language:

Customer Acceptance

By signing this document I do hereby authorize Lesar Electric & Design to proceed with the work as stated in the “Scope of Work”. I have made the entire bid document to include the “Exceptions & Assumptions” and “Payment Terms”, and I accept them as they are written.

If you have any additional questions, please contact Phillip Rodriguez at 281-[XXX-XXXX] or Aaron Burns at 713-[XXX-XXXX].

Below appears a signature line and date which were completed by Sullair’s vice president, Brad Bonnecaze.

Lesar also attached as exhibits to its summary-judgment motion a copy of an Assumed Name Certificate, filed with the Harris County Clerk, authorizing use of the name “Lesar Electric & Design” for the period from April 11, 2016 to April 1, 2026; and a copy of an Application for Reinstatement and Request to Set Aside Revocation or Forfeiture filed with the Texas Secretary of State on May 18, 2018, accompanied by a May 17, 2018 tax clearance letter showing Lesar “ha[d] met all franchise tax requirements and [was] eligible for reinstatement.”

Finally, Lesar attached to its summary-judgment motion the affidavit of Otilia Saldivar, identified on the Harris County Clerk and Texas Secretary of State filings as Lesar’s “Managing Member.” She averred that:

- She is “the sole manager and member of” Lesar;
- Lesar does business under the name of “Lesar Electric & Design” and has done so since its formation as a limited liability company in April 2016;
- Lesar “employs . . . Phillip Rodriguez and formerly employed Aaron Burns.” She “never authorized [Rodriguez] or [Burns] to enter into a partnership using the name ‘Lesar Electric & Design’”;
- Burns’s “job with Lesar . . . was to originate new clients and jobs, for which he was compensated by commission after costs”;
- “Lesar . . . did the work for Bradley J. Fish, Inc. / Sullair of Houston, but was not paid in full. At this time, \$68,289.00 remains unpaid”; and
- Lesar “never authorized [Burns] or ASE Construction Services to accept payment on behalf of Lesar . . . or to tell others that such payments should be made.”

In response to Lesar’s summary-judgment motion, Sullair challenged Lesar’s capacity to sue, asserting that the Texas Secretary of State had revoked its corporate status for failure to pay franchise taxes. Sullair also asserted the affirmative defenses of partnership by estoppel and payment, stating that it had satisfied its obligations under the contracts by making payments “to AES Construction the trade name of Aaron Burns.”¹ Sullair attached to its response the affidavit of Bonnecaze, its vice president. Bonnecaze stated:

¹ To its response, Sullair attached as exhibits copies of checks that were made out to “ASE Construction Services” and signed by Sullair.

. . . Rodriguez and . . . Burns repeatedly referred to each other as their “business partner” in my presence and in connection with the work performed. [Sullair] contracted with the partnership of . . . Rodriguez and . . . Burns for the construction work that is claimed by [Lesar], a third party to the contract.

Lesar replied to Sullair’s summary-judgment response on September 28, 2018, two days before the submission date for its summary-judgment motion. Relying on exhibits attached to Lesar’s summary-judgment motion, the reply addressed the affirmative defenses of partnership by estoppel and payment raised in Sullair’s response.

The trial court granted Lesar summary judgment on October 9, 2018. Sullair moved for a new trial, which was overruled by operation of law.

Standard of Review

We review a trial court’s decision to grant summary judgment de novo. *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). In conducting our review, we take as true all evidence favorable to the non-movant, and we indulge every reasonable inference and resolve any doubts in the non-movant’s favor. *Valence Operating*, 164 S.W.3d at 661; *Knott*, 128 S.W.3d at 215. 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).

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. *See* 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 own claim, it must conclusively prove all essential elements of its cause of action. *Rhône-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999). If the plaintiff meets its burden, then the burden shifts to the non-movant to raise a genuine issue of material fact precluding summary judgment. *See Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995); *Transcont'l Ins. Co. v. Briggs Equip. Tr.*, 321 S.W.3d 685, 691 (Tex. App.—Houston [14th Dist.] 2010, no pet.). The evidence raises a genuine issue of fact if reasonable and fair-minded fact finders could differ in their conclusions in light of all the summary-judgment evidence. *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007).

Standing

In its first issue, Sullair argues that the trial court erred in granting Lesar summary judgment because it challenged Lesar's standing and capacity under the contracts "as not being a proper party," which was an essential element of recovery on Lesar's breach-of-contract claim. Sullair admits that "[i]f the contract[s]

identified ‘Lesar Electric & Design[] LLC’ as a party and the lawsuit named ‘Lesar Electric & Design[] LLC’ as [the] [p]laintiff, then no fact issue [would be] presented.” But Sullair denies that it contracted with Lesar; rather, it asserts that it contracted with Rodriguez and Burns, a partnership doing business as “Lesar Electric & Design.” (Internal quotations omitted.)

A party to a contract has standing to maintain a suit on the contract. *Ameripath, Inc. v. Hebert*, 447 S.W.3d 319, 336 (Tex. App.—Dallas 2014, pet. denied). A plaintiff alleging a breach-of-contract claim must prove: (1) the existence of a valid contract; (2) performance or tendered performance; (3) the defendant’s breach; and (4) damages as a result of the breach. *Taber v. Tex. Inpatient Consultants*, 555 S.W.3d 382, 385 (Tex. App.—Houston [1st Dist.] 2018, pet. denied). “A breach of contract occurs when a party fails to perform an act that it has expressly or impliedly promised to perform.” *Id.* (internal quotation omitted).

Here, the contracts signed by Sullair expressly direct payment to Lesar Electric & Design. In accordance with the contracts, Sullair made down payments to Lesar Electric & Design before the work began. Sullair asserts that “[t]he omission of the LLC on the face of the contract[s] together with the names of the natural persons as the signing party and authorized contact persons” raise a fact issue as to whether there was a partnership between Burns and Rodriguez. But the contracts themselves indisputably direct Sullair to pay Lesar Electric & Design.

Sullair points to no authority that Lesar had any obligation to identify its corporate form or its formal corporate name in the contracts. The appearance of Rodriguez's and Burns's names in the contracts does not raise a fact issue as to Lesar's corporate form or whether payment was due to Burns or Rodriguez and not Lesar Electric & Design. Corporations can act only through individuals. *Tri v. J.T.T.*, 162 S.W.3d 552, 562 (Tex. 2005).

Sullair cites *Smith v. CDI Rental Equipment, Ltd.* for the proposition that a “company is prohibited from maintaining an action in a Texas court arising out of a contract or act in which an assumed name was used until an assumed name certificate has been filed.” 310 S.W.3d 559, 564 (Tex. App.—Texarkana 2010, no pet.) (citing Act of May 23, 1977, 65th Leg., R.S., ch. 403, § 1, 1977 TEX. GEN. LAWS 1095, 1100–01, *repealed by* Act of May 15, 2007, 80th Leg., R.S., ch. 885, § 2.01, 2007 TEX. GEN. LAWS 1905, 1935 (current version at TEX. BUS. & COM. CODE ANN. § 71.201)). Lesar filed with its summary-judgment motion its Assumed Name Certificate showing that Lesar was certified to do business as “Lesar Electric & Design.” The valid assumed name certificate provided with Lesar's summary-judgment motion conclusively shows that Lesar had standing to sue in its corporate name. Thus, we hold that the trial court did not err in granting Lesar summary judgment.

We overrule Sullair's first issue.

Tax Code

In its third issue, Sullair argues that the trial court erred in granting Lesar summary judgment because “Lesar . . . forfeited its right to do business in Texas under [Texas] Tax Code section 171.252.”

Under Texas law, a corporation that has forfeited its corporate privileges is denied the right to sue in state court unless its corporate privileges are revived. *See* TEX. TAX CODE ANN. § 171.252(1). But “[t]he purpose of [section 171.252] is to enforce collection of state franchise taxes, not to prohibit a corporate cause of action.” *Flameout Design & Fabrication, Inc. v. Pennzoil Caspian Corp.*, 994 S.W.2d 830, 839 (Tex. App.—Houston [1st Dist.] 1999, no pet.). A corporation’s payment of delinquent taxes and reinstatement of status will relate back and revive whatever rights the corporation had when the suit was previously filed. *Bluebonnet Farms, Inc. v. Gibraltar Sav. Ass’n*, 618 S.W.2d 81, 85 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref’d n.r.e.).

Here, Lesar provided evidence showing that it had paid its tax debt and had applied to have its corporate privileges reinstated while its suit was pending in the trial court, showing that it had legal capacity to sue Sullair. *See id.* (payment of taxes relates back to filing of lawsuit). We conclude that Lesar’s payment of its tax debt renders moot Sullair’s argument that “Lesar . . . forfeited its right to do business in

Texas under [Texas] Tax Code section 171.252.” We hold that the trial court did not err in granting Lesar summary judgment.

We overrule Sullair’s third issue.

Ambiguity

In its second issue, Sullair argues that that the trial court erred in granting Lesar summary judgment because the contracts were ambiguous as Lesar was identified solely as “Lesar Electric & Design” in the contracts.

Sullair did not present this argument to the trial court, but “[p]atent ambiguity of a contract may be considered for the first time on appeal from a motion for summary judgment.” *Arredondo v. City of Dall.*, 79 S.W.3d 657, 666 (Tex. 2002).

“Deciding whether a contract is ambiguous is a question of law for the court.” *N. Shore Energy, L.L.C. v. Harkins*, 501 S.W.3d 598, 602 (Tex. 2016). If a contract is worded so that it can be given a definite meaning, then it is unambiguous, and we construe it as a matter of law. *El Paso Field Servs., L.P. v. MasTec N. Am., Inc.*, 389 S.W.3d 802, 806 (Tex. 2012). We do so without considering parol evidence. *See David J. Sacks, P.C. v. Haden*, 266 S.W.3d 447, 450–51 (Tex. 2008). A contract is not ambiguous merely because the parties disagree as to its meaning. *Seagull Energy E&P, Inc. v. Eland Energy, Inc.*, 207 S.W.3d 342, 345 (Tex. 2006). If, however, after applying the pertinent rules of construction, the contract is subject to two or more reasonable interpretations, then it is ambiguous and creates a fact issue

regarding the parties' intent. *El Paso Field Servs.*, 389 S.W.3d at 806. Only if a contract is ambiguous may we consider the parties' interpretation and consider extraneous evidence to determine the true meaning of the contract. *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 333–34 (Tex. 2011).

Sullair's assertion that Lesar's use of its trade name in its contracts renders the contracts ambiguous is unavailing. It is well settled that

[m]odern law has departed from the strict rules of the common law as to use of the corporate name. As corporations are now able to contract almost as freely as natural persons, it is held that a departure from the strict name of a corporation will not avoid its contract if its identity substantially appears.

Hous. Land & Loan Co. v. Danley, 131 S.W. 1143, 1145 (Tex. Civ. App. 1910, no writ) (internal quotations omitted); *see also W.B. Clarkson & Co. v. Gans S.S. Line*, 187 S.W. 1106, 1110 (Tex. Civ. App.—Galveston 1916, writ ref'd) (observing “[i]t has long been settled that it is not necessary, in order that a corporation may be bound by its contracts, that the contract shall be made in its exact corporate name” and “when the true name is to be collected from the instrument involved, or is shown by proper averments, the contract is not invalidated thereby” (internal quotations omitted)).

Sullair made its initial payment to “Lesar Electric & Design” as required by the contracts' payment terms, and Lesar accepted payment under that name. Ultimately, Lesar filed suit under its legal name as required by Texas Rule of Civil

Procedure 28, and the sole difference between Lesar's assumed name and its legal name is the addition of "LLC" at the end of its legal name. The Assumed Name Certificate, attached as an exhibit to Lesar's summary-judgment motion, establishes that "Lesar Electric & Design" and "Lesar Electric & Design LLC" are in fact the same entity.

Nothing shows that the parties modified the contract terms. As noted before, any confusion Sullair may have had as to Lesar's form as a business entity does not raise a fact issue as to whether the contracts required Sullair to pay the balance owed to "Lesar Electric & Design." And Sullair's assertion that Burns and Rodriguez represented themselves to be a partnership is immaterial to whether the contracts contained an ambiguity in identifying the payee. *See Lost Maples Gen. Store, LLC v. Ascentium Capital, LLC*, No. 14-18-00215-CV, 2019 WL 1966671, at *5 (Tex. App.—Houston [14th Dist.] May 2, 2019, no pet.) (mem. op.) ("Assuming without deciding that partnership by estoppel is a viable theory," party asserting partnership by estoppel "has the burden of establishing the following elements: (1) a representation that the one sought to be bound is a partner, and (2) the one to whom the representation is made relied on the representation."). Sullair asserts that Burns and Rodriguez represented themselves to be "a partnership operating under the trade name of Lesar Electric & Design," but even if true, the payee did not change: the contracts still required Sullair to pay Lesar Electric & Design. And Sullair does not

show that reliance on any representation led it to pay “ASE Construction” or “AES Construction” instead of Lesar Electric & Design in accordance with the contracts. Thus, we conclude that contracts unambiguously require Sullair to pay Lesar.

We hold that the trial court did not err in granting Lesar summary judgment.

We overrule Sullair’s second issue.

Summary-Judgment Evidence

In its fourth issue, Sullair argues that that the trial court erred in granting Lesar summary judgment because Lesar improperly filed new summary-judgment evidence and argument with its reply on the October 1, 2018 submission date for Lesar’s summary-judgment motion.

Texas Rule of Civil Procedure 166a(c) states that “[e]xcept on leave of court . . . [a summary-judgment] motion and any support . . . shall be filed and served at least twenty-one days before” the hearing on the summary-judgment motion. TEX. R. CIV. P. 166a(c). Local Rule 3.3 of the Civil Trial Division for Harris County District Courts provides that any response to a motion “shall be filed at least two working days before the date of submission, except on leave of court.” Harris Cty. (Tex.) Civ. Dist. Ct. Loc. R. 3.3.

Contrary to Sullair's argument that the trial court erred in granting Lesar summary judgment because its reply to Sullair's response was untimely, the record shows otherwise. Lesar's reply to Sullair's response was date-stamped September 28, 2018 and was filed in compliance with the local rule.

Sullair also asserts that purportedly late-filed summary-judgment evidence accompanied Lesar's reply, but we do not find it in the record. In any event, "[i]t is well established that . . . unless there is a basis in the record to conclude that untimely material was filed with leave of court, we presume the trial court did not consider it." *Envtl. Procedures, Inc. v. Guidry*, 282 S.W.3d 602, 612 (Tex. App.—Houston [14th Dist.] 2009, pet. denied); *see also INA of Tex. v. Bryant*, 686 S.W.2d 614, 615 (Tex. 1985) (where nothing appeared of record to indicate that late filing of summary-judgment response was with leave of court, it was presumed that trial court did not consider response). Because nothing in the record indicates that the trial court considered any purportedly late-filed summary-judgment evidence, we conclude that Sullair has failed to show that any error has occurred. We hold that the trial court did not err in granting Lesar summary judgment.

We overrule Sullair's fourth issue.

Conclusion

We affirm the judgment of the trial court.

Julie Countiss
Justice

Panel consists of Justices Kelly, Landau, and Countiss.