

Opinion issued July 28, 2020



In The
Court of Appeals
For The
First District of Texas

NO. 01-19-00267-CV

TEXAS GENERAL HOSPITAL GP, LLC, Appellant
V.
XTANT MEDICAL, INC., Appellee

On Appeal from the 17th District Court
Tarrant County, Texas¹
Trial Court Case No. 017-298434-18

MEMORANDUM OPINION

¹ Pursuant to its docket equalization authority, the Supreme Court of Texas transferred this appeal to this Court. *See* Misc. Docket No. 19–9022 (Tex. Mar. 26, 2019); *see also* TEX. GOV'T CODE ANN. § 73.001 (authorizing transfer of cases). We are unaware of any conflict between the precedent of the Court of Appeals for the Second District and that of this Court on any relevant issue. *See* TEX. R. APP. P. 41.3.

Appellant, Texas General Hospital GP, LLC (“Texas General”), challenges the trial court’s rendition of summary judgment in favor of appellee, Xtant Medical, Inc. (“Xtant”), in Xtant’s suit against it for breach of contract, on a sworn account, and, alternatively, for quantum meruit. In two issues, Texas General contends that the trial court erred in granting Xtant summary judgment.

We affirm.

Background

In its petition, Xtant alleged that it is a wholesaler, distributor, and manufacturer of custom-designed spinal implants which are used in spinal surgeries. Texas General entered into an agreement for Xtant to provide it with surgical implants for its patients. At first, Texas General paid for the implants it used, but then stopped making payments. Eventually, Texas General became \$588,780 in arrears. Xtant brought claims against Texas General for breach of contract, on a sworn account, and, alternatively, for quantum meruit.

Texas General answered, generally denying the allegations in Xtant’s petition and asserting certain affirmative defenses.

Xtant moved for summary judgment, arguing that it was entitled to judgment on its claims against Texas General as a matter of law because it could prove that Texas General ordered and was provided \$588,780 in surgical implants and it refused to pay. Xtant also asserted that Texas General had a contractual obligation

to pay Xtant's reasonable attorney's fees. On January 7, 2019, Xtant served Texas General "through the court's e-filing system" with its summary-judgment motion and a notice that a hearing on its motion would take place on February 11, 2019.²

Texas General did not respond to Xtant's summary-judgment motion.

At the February 11, 2019 hearing, Xtant's counsel appeared. When Texas General's counsel did not appear, the trial court telephoned Texas General's counsel's office. Office staff informed the court that counsel was unavailable and asked for a continuance but failed to explain the reason for counsel's absence or for needing a continuance. The trial court did not continue the hearing. The trial court admitted into evidence an email from Xtant's counsel dated January 7, 2019, which provided Texas General with a copy of Xtant's summary-judgment motion and stated: "Although you are counsel of record in this matter, you do not appear to be registered to receive service copies via e-filing. Accordingly, attached is your service copy. The court has February 11, 2019, at 1:30 p.m. available for a hearing on the attached [m]otion."³ The trial court also admitted into evidence an email from Xtant's counsel dated January 10, 2019, which provided Texas General with a copy of its notice of hearing on its summary-judgment motion and stated: "Although you

² See TEX. R. CIV. P. 21a.

³ See *id.*

are counsel of record in this matter, you do not appear to be registered to receive service copies via e-filing. Accordingly, attached is your service copy.”⁴

After hearing Xtant’s arguments and reviewing the evidence, the trial court granted Xtant summary judgment. Texas General did not move for new trial or seek any other post-judgment relief from the trial court.

Preservation of Error

In its first issue, Texas General argues that the trial court erred in granting Xtant summary judgment because Texas General did not respond to the summary-judgment motion or appear at the hearing due to a clerical error.

Texas General, however, did not file a motion for continuance before the summary-judgment motion was granted and did not move for any post-judgment relief. “In an appeal from a summary judgment, issues to be reviewed by the appellate court must have been actually presented to and considered by the trial court.” *Travis v. City of Mesquite*, 830 S.W.2d 94, 100 (Tex. 1992); *see* TEX. R. APP. P. 33.1; *see also Tyhan, Inc. v. Cintas Corp. No. 2*, No. 01-18-00027-CV, 2018 WL 5539419, at *1 (Tex. App.—Houston [1st Dist. Oct. 30, 2018, no pet.] (mem. op.) (if party seeks new trial on ground on which evidence must be heard by trial court, party must obtain hearing on new-trial motion to preserve error); *Rios v. Tex. Bank*, 948 S.W.2d 30, 32 (Tex. App.—Houston [14th Dist.] 1997, no writ) (appellant

⁴ *See id.*

that had time to file motion for continuance of summary-judgment hearing before hearing date but did not do so failed to preserve complaint of late notice for appellate review).

Because Texas General did not respond to Xtant's summary-judgment motion and sought no relief from the summary judgment in the trial court, we hold that nothing is before us for review.

In its second issue, Texas General argues that the trial court erred in granting Xtant summary judgment because "issues of material fact are in dispute regarding Xtant's claims previously released in a prior settlement agreement."

Texas General does not cite anything in the appellate record showing that it presented this issue to the trial court, and we find no evidence of a settlement agreement before the trial court. *See* TEX. R. APP. P. 38.1(g), (i). Texas General has attached a purported February 7, 2017 settlement agreement to its brief, but "it is axiomatic that we may not consider a document cited in a brief if it is not formally included in the record on appeal." *Ahmed v. Sosa*, 514 S.W.3d 894, 896 (Tex. App.—Fort Worth 2017, no pet.); *see WorldPeace v. Comm'n for Lawyer Discipline*, 183 S.W.3d 451, 465 n.23 (Tex. App.—Houston [14th Dist.] 2005, pet. denied) ("We cannot consider documents attached as appendices to briefs and must consider a case based solely upon the record filed."); *see also* TEX. R. APP. P. 34.1 (appellate record consists of the clerk's record and, if necessary to the appeal, the

reporter's record); *Marshall v. Hous. Auth. of City of San Antonio*, 198 S.W.3d 782, 789 (Tex. 2006) (“[W]e do not consider factual assertions that appear solely in briefs and are not supported by the record.”).

Texas General did not present its settlement-and-release argument to the trial court, and no settlement agreement was before the trial court or included in the record. We thus hold that Texas General failed to preserve this issue for appellate review.

Conclusion

We affirm the judgment of the trial court.

Julie Countiss
Justice

Panel consists of Justices Keyes, Goodman, and Countiss.