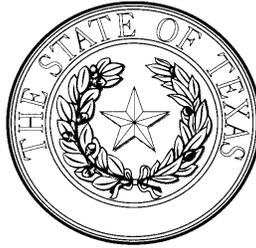


Opinion issued July 13, 2021



In The
Court of Appeals
For The
First District of Texas

NO. 01-19-00773-CV

MARK LEACH AND BRYAN BENOIT, Appellants

V.

TRIPLE-S TUBE SUPPLY, LP, Appellee

**On Appeal from the 61st District Court
Harris County, Texas
Trial Court Case No. 2019-26257**

MEMORANDUM OPINION

Appellee, Triple-S Tube Supply, LP (Triple-S), sued appellants, Mark Leach and Bryan Benoit, for breach of a guaranty agreement. The trial court rendered summary judgment in favor of Triple-S, and Leach and Benoit appeal, arguing that (1) Triple-S failed to include a necessary party in its petition and motion for

summary judgment and (2) genuine issues of material fact precluded the grant of summary judgment.

We conclude that Triple-S established its right to judgment as a matter of law against Leach and Benoit, and so we affirm.

Background

Leach and Benoit are both members and co-owners of a company called Breakwater Advanced Manufacturing, LLC (Breakwater). Breakwater applied for credit with Triple-S, and Leach and Benoit signed as personal guarantors on the Credit Agreement. The Credit Agreement provided, in relevant part, that “[i]n the event that Seller [Triple-S] agrees to sell Products to [Breakwater] on credit in any transaction, the Applicant agrees” to:

make full payment of the invoice amount to the remittance location specified on the invoice for all Products sold to Applicant on credit on or before the due date stated on the face of the invoice. If Applicant fails to do so, Applicant will be liable to Seller [Triple-S] for, in addition to the unpaid principal amount of said invoice: (i) all costs and expenses of collection incurred by Seller, including, without limitation, reasonable attorneys’ fees and court costs and (ii) interest on the unpaid balance of said invoice amount at the lesser of 1.5% per month or the highest lawful rate under applicable law, commencing on the first day after the due date until paid.

The Credit Agreement was signed by Bryan Benoit as an owner of Breakwater.

The Credit Agreement also included a clause labeled “Guarantee.”

The Guarantee, signed by both Leach and Benoit, stated:

In consideration of [Triple-S] extending credit to [Breakwater], each of the undersigned, jointly and severally, unconditionally guarantees and promises to pay [Triple-S], on demand any and all indebtedness of [Breakwater] to [Triple-S]. This is a continuing guarantee of payment, and the obligations created hereby are unaffected by any change in terms of the original indebtedness between [Triple-S] and [Breakwater] save that of payment. Texas law applies to this guaranty and venue shall lie in Harris County, Texas. This guarantee may not be revoked unless in writing and approved in writing by [Triple-S]. Individuals signing consent to [Triple-S's] use of consumer credit reporting agency's reports to assist in the evaluation of the credit of said guarantor of [Breakwater's] business debt.

Triple-S subsequently provided goods and services to Breakwater, and it provided multiple invoices noting that payment was due within 30 days from the dates on the invoices. Breakwater made one partial payment, leaving \$46,428.66, in unpaid invoices. Triple-S sent demand letters to Breakwater, Leach, and Benoit, but no further payments were made.

Triple-S then sued Leach and Benoit for "sums due and owing on a trade account with cause of action for breach of contract of guaranty." Under the cause of action for "breach of contract of guaranty," Triple-S alleged that Breakwater and its owners Leach and Benoit completed an "Application for Credit and Credit Agreement and Guarantee," which it referred to as the "Subject Contract." Triple-S asserted that the outstanding balance due and owing was \$46,428.66. Triple-S sought recovery of the unpaid amounts pursuant to the provisions of the Credit Agreement and Guarantee, plus prejudgment interest, costs, and attorney's fees

from Leach and Benoit. Breakwater was not named as a party in Triple-S's petition.

Triple-S moved for traditional summary judgment on its breach of contract claim, asserting that it sought to recover the unpaid balance based on the personal guaranty signed by both Leach and Benoit. As summary judgment evidence, Triple-S provided copies of the Credit Agreement, including the Guarantee, purchase orders and invoices, the demand letters, and an affidavit from Steven Crawford, the controller for Triple-S and the person responsible for collecting unpaid debts. Crawford averred that Breakwater requested products and services from Triple-S pursuant to the Credit Agreement as indicated in the purchase orders signed by Breakwater. Triple-S provided those services and materials and invoiced Breakwater for the costs. Crawford stated that Breakwater made one partial payment, leaving the balance of unpaid invoices at \$46,428.66. He stated that the records attached as evidence were kept by Triple-S in the regular course of business.

Triple-S further asserted in its motion for summary judgment that these documents established its right to recover the amount due from Leach and Benoit. Breakwater accepted goods and materials from Triple-S, and, under the Credit Agreement, agreed to pay for those services in accordance with the invoices. Both Leach and Benoit personally guaranteed the debts of Breakwater under the Credit

Agreement and Guarantee, which they asserted was a valid and enforceable contract. Breakwater failed to pay the amounts due, and Leach and Benoit had likewise failed to pay despite receiving demands from Triple-S. Triple-S contended that the failure to pay was a breach of the Credit Agreement and Guarantee, resulting in damages of the principal amount due, \$46,428.66, plus interest and attorney's fees. Triple-S also provided the discovery responses from Leach and Benoit, in which Leach admitted that he signed the "Guarantee" in the Credit Agreement, that Breakwater requested and received the materials and services delivered by Triple-S, and that he did not communicate to Triple-S any objection to the goods or services provided prior to the filing of the lawsuit.

Leach and Benoit responded, arguing that Triple-S had failed to demonstrate its entitlement to judgment as a matter of law on its breach of contract claim. Specifically, they asserted that Triple-S did not prove that the Guarantee was valid and enforceable as a matter of law, that they had received any consideration for the purported guaranty, or that the Guarantee obligated them to pay the amounts listed in the invoices. They also argued that Triple-S did not prove that it had performed its obligations under the Credit Agreement. Finally, they argued that Triple-S was not entitled to summary judgment because it failed to address their affirmative defenses. The only evidence provided with the response was Leach's affidavit,

which stated that the facts set out in the summary-judgment response were within his personal knowledge and were true.

The trial court granted the motion for summary judgment. It ordered Leach and Benoit, jointly and severally, to pay the past due amount of \$46,428.66, plus interest and attorney's fees. This appeal followed.

Summary Judgment

On appeal, Leach and Benoit assert that the trial court erred in granting summary judgment in favor of Triple-S.

A. Standard of Review

“We review a trial court’s summary judgment de novo.” *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). “We review the evidence presented in the motion and response in the light most favorable to the party against whom the summary judgment was rendered, crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not.” *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009).

When reviewing a summary judgment, we must (1) take as true all evidence favorable to the nonmovant and (2) indulge every reasonable inference and resolve any doubts in the nonmovant’s favor. *Bush v. Loan Oak Club, LLC*, 601 S.W.3d 639, 646 (Tex. 2020). In a traditional summary-judgment motion, the movant has

the burden to show that no genuine issue of material fact exists and that the trial court should grant judgment as a matter of law. TEX. R. CIV. P. 166a(a), (c); *KPMG Peat Marwick v. Harrison Cty. Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). If the movant meets its summary-judgment burden, the burden shifts to the nonmovant, who bears the burden to raise a genuine issue of material fact precluding summary judgment. *Lujan v. Navistar Fin. Corp.*, 433 S.W.3d 699, 704 (Tex. App.—Houston [1st Dist.] 2014, no pet).

B. Proper Party

In their first issue, Leach and Benoit argue that the trial court erred in granting summary judgment because, pursuant to Texas Rule of Civil Procedure 39, Breakwater was a necessary party in the litigation. *See* TEX. R. CIV. P. 39(a) (requiring joinder of party if complete relief cannot be accorded in his absence or if he claims interest in subject of action and is so situated that disposition in his absence may impair or impede his ability to protect that interest or leave any parties subject to substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest); *see also id.* R. 31 (“No surety shall be sued unless his principal is joined with him. . .”).

A guaranty is a promise to a creditor by a third party to pay a debt on behalf of a principal if the principal defaults on the original obligation. *Chahadeh v. Jacinto Med. Grp., P.A.*, 519 S.W.3d 242, 246 (Tex. App.—Houston [1st Dist.]

2017, no pet.); see *Republic Nat'l Bank of Dall. v. Nw. Nat'l Bank of Fort Worth*, 578 S.W.2d 109, 114 (Tex. 1978). “The law recognizes two distinct types of guaranty: a guaranty of collection (or conditional guaranty) and a guaranty of payment (or unconditional guaranty).” *Chahadeh*, 519 S.W.3d at 246 (quoting *Cox v. Lerman*, 949 S.W.2d 527, 530 (Tex. App.—Houston [14th Dist.] 1997, no pet.)). A guaranty of collection is an undertaking of the guarantor to pay if the debt cannot be collected from the primary obligor using reasonable diligence, and it requires the lender to pursue the principal debtor before collecting. *Id.* In contrast, an unconditional guaranty or guaranty of payment is an obligation to pay the debt when due if the debtor does not and requires no condition precedent to its enforcement against the guarantor other than a default by the principal debtor. *Id.* at 246–47. “The terms of a guaranty agreement determine whether the guaranty is a guaranty of collection or of payment.” *Id.* at 247.

Here, Leach and Benoit made an unconditional guaranty to pay. The Guarantee provided that Leach and Benoit, jointly and severally, “unconditionally guarantee[d] and promise[d] to pay [Triple-S], on demand any and all indebtedness of [Breakwater] to [Triple-S].” A guarantor of payment is primarily liable and waives any requirement that the holder of the note take action against the maker as a condition precedent to his liability on the guaranty. *Hopkins v. First Nat'l Bank at Brownsville*, 551 S.W.2d 343, 345 (Tex. 1977) (per curiam); *Chahadeh*, 519

S.W.3d at 247; *Lavender v. Bunch*, 216 S.W.3d 548, 552 (Tex. App.—Texarkana 2007, no pet.); *Cox*, 949 S.W.2d at 530. The lender may bring an action against the guarantor of payment without joining the principal debtor. *Ferguson v. McCarrell*, 582 S.W.2d 539, 541–42 (Tex. Civ. App.—Austin 1979), *writ ref'd n.r.e.*, 588 S.W.2d 895 (Tex. 1979) (per curiam); *Lavender*, 216 S.W.3d at 552; *see also Chahadeh*, 519 S.W.3d at 247 (“A guarantor of payment is thus akin to a co-maker in that the holder of the note can enforce it against either party.”) (quoting *Cox*, 949 S.W.2d at 530).

Because Leach and Benoit signed a personal, unconditional guaranty of payment, Triple-S was entitled to seek recovery of the debt without joining Breakwater. *See Chahadeh*, 519 S.W.3d at 247; *Cox*, 949 S.W.2d at 530.

We overrule Leach and Benoit’s first issue.

C. Judgment as a Matter of Law

In their second issue, Leach and Benoit argue that the trial court erred in granting summary judgment because Triple-S “did not meet its burden on the elements of breach of guaranty claim against” them and, thus, Triple-S failed to establish its right to judgment as a matter of law.

According to its petition and motion for summary judgment, Triple-S sued Leach and Benoit for breach of a contract of guaranty. A breach of contract claim requires proof of (1) the existence of a valid contract; (2) the plaintiff’s

performance, or tender of performance, as the contract required; (3) the defendant's breach by failure to perform, or to tender performance, as the contract required; and (4) damages to the plaintiff resulting from the breach. *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 501 n.21 (Tex. 2018). Specifically in the context of a breach of a guaranty, a party must show proof of (1) the existence and ownership of a guaranty contract; (2) the terms of the underlying contract by the holder; (3) the occurrence of the conditions upon which liability is based; and (4) the failure or refusal to perform by the guarantor. *Chahadeh*, 519 S.W.3d at 246; *Lee v. Martin Marietta Materials Sw., Ltd.*, 141 S.W.3d 719, 720 (Tex. App.—San Antonio 2004, no pet.).

Leach and Benoit assert that Triple-S failed to assert and prove “the occurrence of the conditions upon which liability is based,” arguing that the summary-judgment evidence “failed to demonstrate any basis to impute liability against [Leach and Benoit].” We disagree. The Credit Agreement provided that “[i]n the event that [Triple-S] agrees to sell Products to [Breakwater] on credit in any transaction,” Breakwater would “make full payment of the invoice amount to the remittance location specified on the invoice for all Products sold to Applicant on credit on or before the due date stated on the face of the invoice.” The Guarantee included in the Credit Agreement provided that Leach and Benoit “unconditionally guarantee[d] and promise[d] to pay [Triple-S], on demand any

and all indebtedness of [Breakwater] to [Triple-S].” Based on the plain language of the contract, Leach’s and Benoit’s liability is based on Triple-S’s making a demand on them to pay “any and all indebtedness” of Breakwater. Triple-S provided competent summary-judgment evidence, in the form of affidavit testimony, purchase orders, invoices, and demand letters, showing that Triple-S provided goods and services to Breakwater on credit and invoiced the company for the costs of the goods and services. The invoices required Breakwater to pay within 30 days, but Breakwater failed to pay the amounts due. Triple-S made demand for payment to Breakwater, Leach, and Benoit, but they failed to pay. This evidence conclusively established all elements of Triple-S’s claim for breach of a contract of guaranty by Leach and Benoit. *See Chahadeh*, 519 S.W.3d at 246.

Leach and Benoit further argue on appeal that the trial court erred in granting summary judgment because Triple-S “did not sue Breakwater as a party to the litigation for breach of contract, and did not sue [Leach and Benoit] for breach of a guaranty, asserting the elements for breach of contract only.” We note, however, that the Guarantee here is a type of contract. Both the pleadings and motion for summary judgment make clear that Triple-S sought recovery from Leach and Benoit for breach of the Guarantee contained within the Credit Agreement. The arguments and evidence presented by Triple-S in its motion for summary judgment conclusively established each element of its claim of breach

under both the general breach of contract elements and the elements relating specifically to breach of a guaranty.

Specifically, Triple-S established the existence of a valid contract—the Credit Agreement—which contained a valid Guarantee that Leach and Benoit would pay Triple-S for Breakwater’s indebtedness. *See Menchaca*, 545 S.W.3d at 501 n.21 (stating that first element of breach of contract claim is existence of valid contract); *Chahadeh*, 519 S.W.3d at 246 (providing, in context of breach of guaranty agreement, that plaintiff must demonstrate existence and ownership of guaranty contract).

The Credit Agreement and Guarantee likewise established the “terms of the underlying contract by the holder,” setting out the conditions for performance. *See Chahadeh*, 519 S.W.3d at 246. Crawford’s affidavit and the supporting purchase orders and invoices, together with Leach’s admissions that Breakwater requested and received the materials and services delivered by Triple-S, demonstrate that Triple-S performed as the contract required and that Breakwater, Leach, and Benoit failed to perform. *See Menchaca*, 545 S.W.3d at 501 n.21 (providing that breach of contract claim requires proof that plaintiff performed and that defendant breached); *Chahadeh*, 519 S.W.3d at 246 (providing that breach of guaranty requires proof of occurrence of conditions upon which liability is based and failure or refusal to perform by guarantor). And Crawford’s affidavit and the

accompanying records established that Triple-S suffered damages of \$46,428.66 in unpaid invoices, plus interest, attorneys' fees, and costs based on Leach and Benoit's failure to fulfill their obligations under the Guarantee. *See Menchaca*, 545 S.W.3d at 501 n.21 (breach of contract requires proof of damages resulting from breach).

Because Triple-S conclusively established each element of its claim of breach, the burden then shifted to Leach and Benoit to raise a genuine issue of material fact precluding summary judgment. *See Lujan*, 433 S.W.3d at 704. This shifting burden includes the obligation for Leach and Benoit to raise a genuine issue of material fact on each element of any affirmative defense that might have prevented the trial court from rendering judgment on Triple-S's breach of contract claim. *See id.* (explaining shifting burdens in summary judgment context and stating that, to defeat summary judgment by raising affirmative defense, nonmovant must do more than just plead defense; he must come forward with sufficient evidence to raise genuine issue of material fact on each element of his affirmative defense).

Leach and Benoit assert that issues of fact remain regarding whether Triple-S properly tendered performance to Breakwater, whether Breakwater had accepted or rejected the materials or services, whether Breakwater had a viable legal defense or excuse, whether Breakwater had disputed the price of the materials and services,

and whether Breakwater was entitled to an offset. Neither Leach nor Benoit, however, presented any summary judgment evidence raising a fact issue on any of these grounds. The only evidence presented by Leach and Benoit was Leach's conclusory affidavit stating generally that the facts alleged in the pleadings and response were true and within his personal knowledge. "A mere pleading or a response to the summary judgment motion does not satisfy this burden of coming forward with sufficient evidence to prevent summary judgment." *Am. Petrofina, Inc. v. Allen*, 887 S.W.2d 829, 830 (Tex. 1994); *see also Laidlaw Waste Sys. (Dall.), Inc. v. City of Wilmer*, 904 S.W.2d 656, 660 (Tex. 1995) (noting that "[g]enerally, pleadings are not competent evidence, even if sworn or verified"); *Nguyen v. Citibank N.A.*, 403 S.W.3d 927, 931 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (affidavits containing conclusory statements that fail to provide underlying facts to support their conclusions are not proper summary-judgment evidence).

We overrule Leach's and Benoit's second issue.

Conclusion

We affirm the judgment of the trial court.

Richard Hightower
Justice

Panel consists of Justices Kelly, Landau, and Hightower.