Opinion issued July 26, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-21-00366-CV

ERNISHA BLACKMON, Appellant

V.

HOUSTON FEDERAL CREDIT UNION, Appellee

On Appeal from County Court at Law No. 5
Fort Bend County, Texas
Trial Court Case No. 19-CCV-065308

MEMORANDUM OPINION

Appellee Houston Federal Credit Union (HFCU) sued appellant Ernisha Blackmon, alleging that she breached her membership account agreement when she failed to maintain an adequate balance to cover her withdrawals and allowed the account to become overdrawn. HFCU moved for summary judgment on its

breach of contract claim, and the trial court granted HFCU's relief, awarding it $7,007.91 in damages plus attorney's fees and costs. Blackmon now appeals, arguing that the trial court erred in granting summary judgment.

We conclude that HFCU established that it was entitled to relief as a matter of law, and, thus, we affirm.

Background

Blackmon signed an HFCU Membership Account Card, in which she agreed to abide by the terms and conditions of the Membership and Account Agreement in order to maintain savings and checking accounts. She also agreed to receive overdraft protection services. Pursuant to this Agreement, HFCU maintained Blackmon's checking and savings account and provided banking services to her. Through November and December 2018, Blackmon failed to make sufficient deposits into her HFCU account to cover the withdrawals. As part of its banking services, HFCU advanced funds to cover the overdrawn amounts.

HFCU informed Blackmon that, as of November 8, 2018, her account had been overdrawn. She failed to cure the overdraft amounts. HFCU provided written notice informing her that, by failing to cure the overdrafts, she was in default of their Agreement. Blackmon failed to address the concerns in the notice, so HFCU accelerated the amounts due under the Agreement and declared the amount due and payable in full.

HFCU filed a is original petition alleging that Blackmon was in breach of the Agreement. It sought the negative balance due and owing plus attorney's fees. Blackmon failed to file an answer, and HFCU moved for default judgment. The trial court set a hearing on the motion for default judgment. HFCU failed to appear at the hearing. Blackmon, however, was present at the hearing, and the trial court denied the motion for default judgment.

HFCU then moved for summary judgment, arguing that it was entitled to judgment as a matter of law on its claim that Blackmon was in breach of the parties' Agreement. It supported its motion with the affidavit of Shalanie Virappen, the "AVP of Collections" at HFCU. Virappen averred that Blackmon had overdrawn her account and that HFCU had advanced funds to pay the over-drafted amounts under the terms of the Agreement. Virappen further stated that HFCU provided Blackmon with notice of her breach and that Blackmon failed to cure the overdraft, resulting in HFCU accelerating the maturity of the agreement and declaring the overdrawn amounts due and payable in full. Virappen averred that, after applying all credits and offsets, Blackmon's checking account remained overdrawn with a negative balance of $7,007.91. In addition to Virappen's affidavit, HFCU filed copies of the Agreement, the notice of default and intent to accelerate, the notice of acceleration sent to Blackmon, and a transaction summary showing the overdrafts incurred on Blackmon's account. HFCU also submitted an

affidavit and billing records in support of its claim for $1,320 attorney's fees. Blackmon did not file a response to the motion for summary judgment.

The trial court granted HFCU's summary judgment. The trial court awarded HFCU $7,007.91 in damages plus costs and attorney's fees. This appeal followed.

Summary Judgment

On appeal, Blackmon challenges the trial court's grant of summary judgment.

A. Standard of Review

We review a trial court's summary judgment de novo. *Lightning Oil Co. v. Anadarko E&P Onshore, LLC*, 520 S.W.3d 39, 45 (Tex. 2017). In conducting our review, we take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Id.*

To be entitled to a traditional summary judgment, the movant must show that there are no genuine issues as to any material facts and that the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Lightning Oil Co.*, 520 S.W.3d at 45. A plaintiff is entitled to traditional summary judgment on its own affirmative claim if it conclusively proves all essential elements of that claim. *Pelco Constr. Co. v. Chambers Cty.*, 495 S.W.3d 514, 520 (Tex. App.—Houston [1st Dist.] 2016, pet. denied). If the moving party carries this burden, the burden

shifts to the nonmovant to raise a genuine issue of material fact precluding summary judgment. *Lujan v. Navistar, Inc.*, 555 S.W.3d 79, 84 (Tex. 2018).

B. Analysis

To prevail on its breach of contract claim, HFCU had to conclusively prove the essential elements of that claim, which are: (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages sustained as a result of the breach. *AKIB Constr. v. Shipwash*, 582 S.W.3d 791, 806 (Tex. App.—Houston [1st Dist.] 2019, no pet.). HFCU provided competent evidence of each of these elements.

HFCU provided a copy of the HFCU Membership Account Card signed by Blackmon, in which she agreed to abide by the terms and conditions of the Membership and Account Agreement. It provided Virappen's affidavit stating that HFCU provided the membership account and banking services to Blackmon, and averring that Blackmon failed to maintain an adequate balance to cover the checks and other withdrawals made from her account. Virappen stated that HFCU provided overdraft protection as provided for by the parties' Agreement, advancing the money to pay the withdrawals on Blackmon's account. Virappen averred that the amount still due and owing, following proper notice to Blackmon and accounting for all credits and offsets, was $7,007.91. This affidavit was supported

by a transaction summary from Blackmon's account and copies of the notices provided to Blackmon.

This evidence demonstrates that HFCU and Blackmon had an agreement, that HFCU performed by providing account and banking services, that Blackmon breached this agreement by failing to cure the overdrafts made on her account, and that HFCU suffered damages in the amount that the account remained overdrawn, $7,007.91. *See id.* We hold that HFCU conclusively proved all essential elements of its claim. *See* TEX. R. CIV. P. 166a(c); *Lightning Oil Co.*, 520 S.W.3d at 45; *Pelco Constr. Co.*, 495 S.W.3d at 520. The burden thus shifted to Blackmon to raise a genuine issue of material fact precluding summary judgment. *See Lujan*, 555 S.W.3d at 84. Blackmon, however, did not file a response or provide any summary judgment evidence. Accordingly, we hold that the trial court correctly granted HFCU's motion for summary judgment.

On appeal, Blackmon asserts several arguments for the first time on appeal. She argues that HFCU erred in depositing money into her account. Blackmon also argues that HFCU represented to her during settlement discussions that it would accept payment of $4,000 rather than the full amount due. We observe, however, that, as a prerequisite to presenting a complaint for appellate review, the record must show that a complaint was made to the trial court by a timely request, objection, or motion. TEX. R. APP. P. 33.1(a)(1). In the context of summary

judgments, a nonmovant must present any issues that would defeat the movant's entitlement to summary judgment expressly in their written response. *Frazer v. Tex. Farm Bureau Mut. Ins. Co.*, 4 S.W.3d 819, 824–25 (Tex. App.—Houston [1st Dist.] 1999, no pet.); *see McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 341, 343 (Tex. 1993) ("A motion must stand or fall on the grounds expressly presented in the motion."). Any issues, except legal sufficiency, not expressly presented by the nonmovant to the trial court in a written response may not be considered as grounds for reversal on appeal. *Frazer*, 4 S.W.3d at 825; *see City of Hous. v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678–79 (Tex. 1979) (holding plaintiff was not entitled to defeat summary judgment where it raised fact issue for first time on appeal which was not expressly presented to trial court).

Blackmon also argues that the trial court abused its discretion when it did not dismiss the lawsuit after HFCU's counsel failed to appear at the hearing on HFCU's motion for default judgment. Blackmon failed to file a motion requesting such a dismissal, nor can she show that the trial court abused its discretion in refusing to act sua sponte to dismiss the case following HFCU's failure to appear on one occasion.[1] *See, e.g.*, *MacGregor v. Rich*, 941 S.W.2d 74, 75 (Tex. 1997)

[1] To the extent that Blackmon attempted to raise additional complaints in her appellate brief, such as an argument that there was a mistake related to the performance of the parties under the Agreement or that the trial court was biased against her, we conclude that these complaints were not adequately briefed. Bare assertions of error, made without appropriate argument, analysis, explanation, or

(holding that decision to dismiss case for want of prosecution rests within sound discretion of trial court, and we will disturb this decision only if it amounts to clear abuse of discretion).

We conclude that the trial court properly granted HFCU's motion for summary judgment because HFCU established that it was entitled to recover on its breach of contract claim as a matter of law.

Conclusion

We affirm the judgment of the trial court.

Richard Hightower
Justice

Panel consists of Justices Landau, Hightower, and Rivas-Molloy.

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legal support, are insufficient to present the claim for relief to this Court. *See, e.g.*, TEX. R. APP. P. 38.1(i) (requiring that appellant's brief "contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record"); *Tesoro Petroleum Corp. v. Nabors Drilling USA, Inc.*, 106 S.W.3d 118, 128 (Tex. App.—Houston [1st Dist.] 2002, pet. denied) (holding that "brief conclusory statements, unsupported by legal citations" are insufficient to present contention of error).