

Reversed and Remanded Memorandum Opinion filed October 28, 2010.



In The

Fourteenth Court of Appeals

NO. 14-09-00297-CV

R.K. DHINGRA, TRUSTEE A/K/A RAKESH KUMAR DHINGRA, Appellant

V.

**LAGUNA TOWNHOMES COMMUNITY ASSOCIATION OF HOUSTON, INC.,
Appellee**

**On Appeal from the County Civil Court at Law No. 1
Harris County, Texas
Trial Court Cause No. 917,759**

MEMORANDUM OPINION

A homeowners' association sued one of its property owners on a breach of contract. The trial court granted summary judgment in favor of the homeowners' association, awarding damages and attorney's fees. Appealing pro se, the property owner contends summary judgment was erroneous because of contested issues of fact. We agree and reverse.

BACKGROUND

R.K. Dhingra, Trustee a/k/a Rakesh Kumar Dhingra (“Dhingra”) purchased property in a townhome community managed by the Laguna Townhomes Community Association of Houston, Inc. (“Laguna”). The conveyance was made subject to a declaration of covenants, conditions, and restrictions. The declaration gives Laguna the authority to levy annual and special assessments against each of its property owners. Laguna can also charge interest, other costs, and reasonable attorney’s fees, all of which are secured by a continuing lien against the property.

In April 2008, Laguna sued Dhingra to foreclose on its lien and collect on unpaid assessments and other charges. Laguna subsequently moved for summary judgment on September 26, 2008, alleging various amounts of damages. Laguna claimed that its actual damages as of September 1, 2008 amounted to \$1,961.90. Laguna sought, however, \$2,173.54 in expected damages “[a]s of the [October] date of submission/hearing.” The difference would account for October’s monthly assessment of \$191.64 and, presumably, two late fees of \$10 each, one for both September and October, with each being assessed on the sixteenth day of the month.

The summary judgment evidence consisted of an affidavit from Harrison Smith, Laguna’s records custodian; a copy of the special warranty deed showing ownership over the property in “R.K. Dhingra, Trustee”; a copy of Dhingra’s account history with Laguna; and an affidavit from Laguna’s counsel attesting to the reasonableness of his \$2,280 in attorney’s fees and private process costs. The account history shows charges and credits between September 30, 2006 and September 1, 2008. Though current through September 23, 2008, the account history does not reflect a late charge for the month of September 2008.

Dhingra filed a controverting affidavit stating that the amount of damages claimed in Smith's affidavit did not match the numbers in the account history. Dhingra's affidavit also pointed out that the claim for attorney's fees incorrectly reflected charges that he did not owe.

The trial court granted Laguna's motion for summary judgment in October 2008. On appeal, Dhingra challenges the conclusory allegations of Laguna's damages and attorney's fees, as well as the basis for his personal liability. Laguna did not submit a brief in response.

DISCUSSION

A. Standard of Review

We review a trial court's 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 a traditional motion for summary judgment, the movant bears the burden of showing that no genuine issue of material fact exists and that the trial court must grant a judgment as a matter of law. TEX. R. CIV. P. 166a(c); *KPMG Peat Marwick v. Harrison County Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). We review the evidence in a light favorable to the nonmovant and indulge every reasonable inference in the nonmovant's favor. *Dorsett*, 164 S.W.3d at 661; *Knott*, 128 S.W.3d at 215; *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997).

Summary judgments must stand on their own merits. *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000). The nonmovant has no burden to respond to a traditional summary judgment unless the movant conclusively establishes its cause of action. *See id.*; *Rhône-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 222–23 (Tex. 1999); *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979).

B. Proof of Damages and Attorney's Fees

In his first and second issues, Dhingra contends that the summary judgment evidence fails to support Laguna's claim for damages and attorney's fees. The asserted cause of action is essentially one for breach of the declaration. To prevail on a breach of contract claim, Laguna bears the burden of conclusively proving actual damages sustained by the breach. *M7 Capital LLC v. Miller*, 312 S.W.3d 214, 220 (Tex. App.—Houston [14th Dist.] 2010, pet. denied). Interested parties may submit affidavits in support of a motion for summary judgment, but the affidavits must set forth facts, not legal conclusions. TEX. R. CIV. P. 166a(f); see *Mercer v. Daoran Corp.*, 676 S.W.2d 580, 583 (Tex. 1984). A legal conclusion is a statement that does not provide the underlying facts to support the conclusion. *1001 McKinney Ltd. v. Credit Suisse First Boston Mortgage Capital*, 192 S.W.3d 20, 27 (Tex. App.—Houston [14th Dist.] 2005, no pet.). To serve as competent summary judgment evidence, all statements in the affidavit must instead be "clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and [susceptible of being] readily controverted." TEX. R. CIV. P. 166a(c).

We conclude that Laguna failed to carry its burden of producing competent summary judgment evidence. The affidavit of Harrison Smith provides as follows:

7. After all lawful offsets and credits there remains due and owing the Association by Dhingra the sum of \$1,961.90 (*which excludes attorneys fees and costs in this litigation from Defendant's ledger referenced in paragraph 8 below*) which represents maintenance assessments, special assessments and related costs *incurred through September 1, 2008*, by Dhingra on Lot No. 54 located within the Association; an additional monthly assessment of \$191.64 accrues each month beginning October 1, 2008, together with a monthly late fee of \$10.00 if not paid by the 16th of the month beginning September 15, 2008.
8. The Association, on its own and through its attorneys, have demanded in writing that Dhingra pay these monies that are due and

owing. *As of the date of submission/hearing* [see ¶7 above], Dhingra has failed and refused, and continues to fail and refuse, to pay *the sum of \$2,173.54*, for which Dhingra is contractually obligated to pay the Association under the Declaration and its amendments. A true and correct copy of Dhingra’s account is attached as Exhibit “A-2.”

The attached account history shows charges and credits between September 30, 2006 and September 1, 2008, with an ending balance of \$4,024.99. The account history also itemizes the amounts due for maintenance fees, legal fees, late charges, interest, and credits. The affidavit does not, however, explain how Laguna arrived at any of the amounts it claims as damages. After reviewing the account history, we are unable to mathematically match the account numbers with the amount of actual damages Laguna claims in the affidavit.¹ Laguna also claims that its expected damages should amount to \$2,173.54 by the October hearing on the motion for summary judgment, a figure that would include an additional monthly assessment and two late fees for September and October. Even if we were to disregard the conclusory claim for actual damages, Laguna’s claim for expected damages would still be unsupported by the facts because the account history, which is current through September 23, 2008, shows no late fee assessed on September 16.

¹ The account history shows a zero balance due on June 15, 2007. If we add up all the charges from that point forward, deducting payments made and attorney’s fees, the amount due would be \$1,524.90, not \$1,961.90.

Maintenance Assessments	\$2,835.08
Late Charges	110.00
Misc. Process Fees	50.42
Interest	37.40
Subtotal	\$3,032.90
Credits	1,508.00
Subtotal	\$1,524.90
Legal Fees	2,500.09
Total Balance	\$4,024.99

Complicating matters further is the award for attorney's fees. The affidavit from Laguna's counsel asserts \$2,280 in legal fees, but the account history reveals charges of over \$2,500. If Dhingra's credits were partially used to compensate Laguna's attorneys, as this discrepancy might suggest, then Laguna has the burden of showing how those credits were allocated. As it stands though, the evidence is wholly open to speculation as to how Laguna reached final figures for any of its claims. Because the evidence is not competent under Rule 166a(c) and because Laguna provides no other factual basis for its assertions, we must reverse the trial court's grant of summary judgment.

CONCLUSION

Dhingra submitted three issues on appeal. We sustain the first and second, and do not reach the merits on the third. Therefore, the trial court's grant of summary judgment is reversed and remanded.

/s/ Tracy Christopher
Justice

Panel consists of Justices Brown, Sullivan, and Christopher.