

Motion for Rehearing Denied. Affirmed and Memorandum Opinion of January 25, 2011, Withdrawn and Substitute Memorandum Opinion filed March 8, 2011.



In The

Fourteenth Court of Appeals

NO. 14-09-01004-CV

JAMES G. STRACHAN, Appellant

V.

FIA CARD SERVICES, A/K/A BANK OF AMERICA, Appellee

**On Appeal from the County Court at Law No. 2
Fort Bend County, Texas
Trial Court Cause No. 08-CCV-037650**

SUBSTITUTE MEMORANDUM OPINION¹

A consumer appeals the trial court's order granting summary judgment in favor of a credit-card company that brought suit against him, alleging breach of contract arising out of his failure to repay debt on a consumer-credit account. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

As reflected in the live pleadings, appellee FIA Card Services, N.A., a/k/a Bank of America brought suit against appellant James G. Strachan, alleging breach of contract for

¹ This court's memorandum opinion issued January 25, 2011, is withdrawn, and this substitute memorandum opinion is issued in its place. Appellant James G. Strachan's motion for rehearing is overruled.

Strachan's failure to repay cash advances FIA Card Services made to Strachan under an agreement for consumer credit. FIA Card Services filed a motion for summary judgment with two supporting exhibits: (1) Exhibit A, which consisted of an affidavit of an agent of FIA Card Services and an attached copy of the applicable written agreement between the parties, and (2) Exhibit B, an affidavit pertaining to attorney's fees.

In response, Strachan, acting pro se, asserted that the trial court lacked jurisdiction because FIA Card Services failed to attach a valid contract that served as the basis for the claim either to the live pleadings or to the motion for summary judgment. Strachan objected to the affidavit in Exhibit A (attached to FIA Card Service's motion for summary judgment), contending that the affidavit is invalid because the affiant was not identified in the jurat. Without a valid affidavit, Strachan asserted, the attached agreement was unsworn and could not be used in support of the motion for summary judgment. Strachan also argued that jurisdiction was "fabricated" because the agreement was unsigned. Strachan argued that inasmuch as FIA Card Services was relying on invalid evidence, the trial court should dismiss for lack of jurisdiction because FIA Card Services presented no justiciable issue to the court. Strachan also urged the trial court to deny the motion for summary judgment because the motion had no evidentiary support.

The trial court set a hearing on the motion for November 10, 2009. Strachan filed a document entitled, "Defendant's Request to Take Judicial Notice," requesting that the trial court take judicial notice of the following:

Having verified for the Court on October 29, 2009 that Plaintiff's Motion for Summary Judgment set for hearing on November 10, 2009[,] is based on an invalid Affidavit filed on December 8, 2008, Defendant does not intend to participate in said Plaintiff's hearing, should it be held as scheduled.

On the hearing date, the trial court signed an order granting summary judgment in favor of FIA Card Services.

ISSUES AND ANALYSIS

On appeal, Strachan challenges the trial court's jurisdiction. In addition, he asserts that FIA Card Services's supporting affidavit is "void and invalid" and, for this reason, the trial court should not have granted summary judgment. Finally, Strachan asserts that the trial court erred in failing to have a court reporter make a record of the summary-judgment proceedings.

Did the trial court err in not dismissing the case for lack of jurisdiction?

In his second issue,² Strachan claims that the trial court should have dismissed the case for lack of jurisdiction, apparently on the basis that FIA Card Services did not provide evidence in support of its breach-of-contract claim. Strachan points to FIA Card Services's live pleadings, original petition, and summary-judgment motion as lacking evidentiary support, which, according to Strachan, shows that FIA Card Services has failed to allege a controversy that could be resolved by judicial relief. Strachan asserts that because there was no justiciable interest for the trial court to decide, the trial court should have dismissed the case for lack of jurisdiction.

Strachan does not cite any legal authority supporting his claim that a plaintiff is required to marshal its evidence in a petition in order to assert a justiciable controversy. Even if we were to presume for the sake of argument that the evidence in question were defective or insufficient to prove the matters in issue, that would only mean that the claims failed for lack of evidence or that the claims were without merit but it would not mean that the trial court lacked jurisdiction to hear them. In its live pleadings, FIA Card Services asserted a claim for breach of contract against Strachan, alleging Strachan failed to pay the amounts advanced under the parties' agreement. This contractual dispute is a justiciable controversy over which the trial court would have proper subject matter jurisdiction. *See, e.g., Maan v. First ATM,*

² Strachan asserts his jurisdictional challenge in his second issue; we address the jurisdictional issue first.

Inc., No. 03-06-00698-CV, 2008 WL 5210923, at *1–3 (Tex. App.—Austin Dec. 12, 2008, no pet.) (mem. op.) (determining that claims involving breach of contract, fraud, and fraudulent inducement were not moot and that a live justiciable controversy existed even if appellant claimed to have satisfied the judgment amount after the writ of execution issued).³ Therefore, jurisdiction was not improper based on the lack of a justiciable controversy. We overrule Strachan’s second issue.

Did the trial court err in granting summary judgment?

In his first issue, Strachan asserts the trial court should not have granted summary judgment in favor of FIA Card Services because he raised an issue of material fact.

In the context of a traditional motion for summary judgment, if the movant’s motion and summary-judgment evidence facially establish its right to judgment as a matter of law, the burden shifts to the nonmovant to raise a genuine, material fact issue sufficient to defeat summary judgment. *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000). In our de novo review of the trial court’s summary judgment, we consider all the evidence in the light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006). The evidence raises a genuine issue of fact if reasonable and fair-minded jurors could differ in their conclusions in light of all of the summary-judgment evidence. *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007). When, as in this case, the order granting summary judgment does not specify the grounds upon which the trial court relied, we must

³ Section 25.0811(2) of the Texas Government Code establishes County Court at Law Number 2 of Fort Bend County, Texas. TEX. GOV’T CODE ANN. § 25.0811(2) (West 2004). Statutory county courts at law generally have statutorily prescribed jurisdiction in civil cases in which the matter in controversy exceeds \$500 but does not exceed \$100,000, excluding interest, damages and penalties, and attorney’s fees, as alleged on the face of the petition. *See id.* § 25.0003(c)(1) (West Supp. 2009); *Smith v. Clary Corp.*, 917 S.W.2d 796, 798 (Tex. 1996). As reflected by the pleadings, FIA Card Services alleged an amount in controversy of \$30,811.49, which is within the jurisdictional limits. *See* TEX. GOV’T CODE ANN. § 25.0003(c)(1). The trial court had jurisdiction.

affirm the summary judgment if any of the independent summary-judgment grounds is meritorious. *See FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000).

According to the summary-judgment proof submitted by FIA Card Services in support of its motion, the parties entered into an agreement by which FIA Card Services made cash advances either as actual cash or as payment for purchases made by Strachan from third parties. Under the agreement, by accepting each cash advance, and without objecting to any of the charges, Strachan became bound to pay the principal balance, which he failed to do. As pertinent to this appeal, supporting proof in the form of a copy of the agreement and an affidavit of an FIA Card Services's agent accompanied the motion.

Strachan asserts that the affidavit in FIA Card Services's Exhibit A is "void and invalid" and claims the affidavit does not identify the affiant, the affidavit is unsworn, and the affiant's signature is illegible. According to Strachan, because the affidavit is defective, the attached agreement is not authenticated and cannot be used as evidentiary support. Objections to defects in the form of a summary-judgment affidavit must be asserted in the trial court. *Dolcefino v. Randolph*, 19 S.W.3d 906, 925 (Tex. App.—Houston [14th Dist.] 2000, pet denied). Although the record reflects that Strachan raised these issues as to the form of the affidavit in the trial court via his response to FIA Card Services's motion, the record does not reflect that Strachan obtained a ruling or that the trial court refused to rule on his objections to this evidence. *See id.* Therefore, Strachan has not preserved error on his complaints about the form of affidavit. *See id.*

Strachan also refers to his response to FIA Card Services's motion for summary judgment as raising a genuine issue of material fact. In this response, Strachan provided no evidence other than his own verified response. Neither a motion for summary judgment nor a response, even if sworn, can ever be proper summary-judgment proof. *Quanain v. Frasco Rest. & Catering*, 17 S.W.3d 30, 42 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (op. on reh'g). Because a verified response is not proper summary-judgment proof and Strachan

failed to produce any evidence in response to the motion, Strachan did not raise a material fact issue. FIA Card Services was entitled to summary judgment. *See id.* We overrule Strachan’s first issue.

Did the trial court err in failing to have a record made of the summary-judgment proceedings?

In his third issue, Strachan asserts the trial court should have had a reporter’s record made of the summary-judgment proceedings on November 10, 2009, as Strachan previously had requested. Strachan asserts that inasmuch as he did not attend the hearing, he was prejudiced by the absence of the record because he cannot determine whether FIA Card Services testified or whether the trial court applied an erroneous legal concept in granting the summary-judgment motion.

An oral hearing is not required for summary judgment. *Martin v. Martin, Martin & Richards, Inc.*, 989 S.W.2d 357, 359 (Tex. 1998) (per curiam). Indeed, the Texas Rules of Civil Procedure expressly provide that “[n]o oral testimony shall be received at the hearing.” TEX. R. APP. P. 166a(c). For this reason, a summary-judgment hearing is generally not transcribed. Instead, the trial court rules based on the issues and evidence submitted in proper written form. As one court has noted, to “permit ‘issues’ to be presented orally would encourage parties to request that a court reporter record summary[-]judgment hearings, a practice neither necessary, nor appropriate to the purposes of such hearing.” *El Paso Assocs., Ltd. v. J.R. Thurman & Co.*, 786 S.W.2d 17, 19 (Tex. App.—El Paso 1990, no pet.). Because a motion for summary judgment is submitted on written proof, a transcript of the summary-judgment hearing is not necessary to appeal a summary judgment that was granted based on an “erroneous legal concept,” as Strachan asserts. And, in any event, Strachan failed to preserve error as to any such complaint.

To preserve error for appellate review, a party must object to the court reporter’s failure to record the proceedings. *See* TEX. R. APP. P. 33.1(a); *Reyes v. Credit Based Asset Servicing & Securitization*, 190 S.W.3d 736, 740 (Tex. App.—San Antonio 205, no pet.). As

a general rule, an appellate court may consider a case based only upon the appellate record on file, which must reflect that a complaint was made to the trial court by a timely request, objection, or motion. *See* TEX. R. APP. P. 33.1(a). Although Strachan claims he was prejudiced by the absence of the reporter's record, Strachan, himself, acknowledges that he was not present for the hearing on November 10, 2009, and therefore failed to preserve error by objecting to the absence of a court reporter or to the court reporter's failure to record the proceeding. Likewise, the clerk's record contains no motion or written objection regarding the court reporter's failure to make a record and no ruling by the trial court on the issue. *See Reyes*, 190 S.W.3d at 740. Even without the reporter's record of the hearing, Strachan has not demonstrated any error in connection with the summary-judgment proceedings or the trial court's ruling. *See King v. Wells Fargo Bank, N.A.*, 205 S.W.3d 731, 733 (Tex. App.—Dallas 2006, no pet.). Strachan has failed to preserve this issue for appellate review. *See Reyes*, 190 S.W.3d at 740. We therefore overrule Strachan's third issue.

The trial court's judgment is affirmed.

/s/ Kem Thompson Frost
Justice

Panel consists of Justices Anderson, Frost, and Brown.