

Reversed and Remanded and Memorandum Opinion filed March 8, 2011.



In The

Fourteenth Court of Appeals

NO. 14-10-00111-CV

RANDALL PATTERSON, Appellant

V.

CITY OF BRENHAM, TEXAS, Appellee

**On Appeal from the 21st District Court
Washington County, Texas
Trial Court Cause No. 34262**

MEMORANDUM OPINION

Randall Patterson appeals from the trial court's grant of the City of Brenham, Texas's motion for summary judgment. Patterson, a former city employee, filed the present lawsuit seeking to have the court order Brenham to make payments to Patterson's account with Texas Municipal Retirement Services (TMRS). We reverse the trial court's judgment and remand for further proceedings in accordance with this opinion.

Background

The City of Brenham released Randall Patterson from his employment in May 2005. Afterwards, the parties signed a release agreement under which Brenham agreed to pay Patterson \$36,947.87 and Patterson allegedly agreed to waive some potential claims against Brenham.

After signing the agreement, Patterson sought to have Brenham make payments to the United States Internal Revenue Service (IRS) and TMRS based on the amount he had received under the agreement. The IRS issued a letter ruling in Patterson's favor, explaining that the sum he received under the agreement met the IRS definition of "wages," and thus federal withholding was required on the amount. After the IRS denied Brenham's request for reconsideration in a second letter ruling, Brenham amended Patterson's 2005 W-2 form to add the amount paid him under the agreement and did not appeal to the federal district court as it was entitled to do.

When Brenham refused to also make a deposit into Patterson's TMRS account, Patterson brought the present lawsuit, seeking a writ of mandamus to force Brenham to make a contribution of \$4,618. Both sides filed motions for summary judgment. In its motion, Brenham raised two grounds for summary judgment: (1) that Patterson had waived any right to the TMRS contribution by signing the release agreement; and (2) that the payment under the agreement was not "compensation" as that term is defined by section 851.001(6) of the Texas Government Code, and thus no TMRS contribution was required under sections 855.403 through .406. Tex. Gov't Code §§ 851.001(6), 855.403–.406.¹ The trial court granted Brenham's motion without specifying a basis for doing so.

¹ As relevant to our analysis here, section 851.001(6) defines "compensation" as "the sum of payments made to an employee for performance of personal services, as certified on a written payroll of an employing department" Tex. Gov't Code §§ 851.001(6).

Brenham refers in its motion to an attached copy of the release agreement; however, the appellate record indicates that in fact no copy was attached to the motion. The only apparent attachment to the motion as filed was an affidavit from the Brenham city manager, Terry K. Roberts. In his affidavit, Roberts basically averred that all facts stated in the motion were true but provided no basis for such knowledge.

The only copy of the release agreement contained in the record appears to have been filed separately from the motion for summary judgment and after the date on which the motion was filed. It is a free-floating document, without a filing letter or motion attached. It is file-marked with a date and time that matches the file mark on the court's signed judgment (November 19, 2009, 1:57 p.m.). Patterson states in his reply brief that the summary-judgment hearing was at 10:30 that same morning, but there is no evidence in the record to establish the time of the hearing.

As mentioned, Patterson also filed a motion for summary judgment. The record, however, contains no indication that the trial court ruled on this motion or even that the court was aware of the motion. In its final judgment, the court expressly referenced, and ruled upon, only Brenham's motion. In the conclusion of his initial brief, Patterson suggested that his motion should have been granted. However, as Brenham points out in its brief, Patterson has not raised any issues or points of error asserting that the trial court erred in refusing to grant his motion; all issues are directed to the court's granting of Brenham's motion. Additionally, in the prayer at the end of his reply brief, Patterson simply asked this court to reverse and remand the judgment. Accordingly, we will limit our consideration in this appeal to the trial court's grant of Brenham's motion for summary judgment.

Analysis

We review a grant of traditional summary judgment under a de novo standard. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). We take as true all evidence favorable to the nonmovant and indulge every reasonable inference

and resolve any doubts in the nonmovant's favor. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). The movant bears the burden of showing that there are no genuine issues of material fact and it is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c). Where, as here, a trial court grants summary judgment without specifying the grounds therefore, we must affirm the judgment if any of the grounds presented in the motion is meritorious. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872–73 (Tex. 2000).

As stated above, the two grounds for judgment presented in Brenham's motion were: (1) that Patterson waived his rights by signing the release agreement; and (2) that the payment under the agreement was not compensation under applicable law. Among his four issues on appeal, Patterson asserts that Brenham failed to present conclusive evidence regarding the contents of the release agreement or the nature of the payment to Patterson under that agreement.²

Indeed, the record on appeal does not demonstrate that the release agreement itself was submitted to the court prior to the court's signing the judgment. We cannot determine whether the trial court relied on the subsequently filed agreement; the record provides no indication that the trial court granted leave to file the agreement after the motion itself was filed or considered the late-filed agreement. *See Heartland Holdings, Inc. v. U.S. Trust Co. of Tex. N.A.*, 316 S.W.3d 1, 14 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (explaining that a trial court may consider late-filed summary judgment evidence so long as it affirmatively indicates in the record that it accepted or considered the evidence.). Brenham purported to quote selected portions of the release in its motion, but it did not attach the document itself or a copy. Under these circumstances, we do not

² In his four issues Patterson generally argues that the trial court erred in granting Brenham's motion for summary judgment because (1) Patterson provided evidence that the alleged severance payment to him was reported as wages for federal purposes, (2) Brenham is collaterally estopped from claiming that the payment was not wages, (3) the doctrine of quasi-estoppel prevents Brenham from claiming that the payment was not wages, and (4) Patterson did not waive or release his rights to any TMRS benefits.

consider the purported copy of the release agreement that was filed separately from the motion for summary judgment.

Furthermore, even if the portions of the agreement quoted in the motion could be reviewed as summary-judgment evidence, we cannot properly interpret the agreement in the absence of the entire agreement. *See Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983)³; *see also Wheeler v. White*, 314 S.W.3d 225, 229–30 (Tex. App.—Houston [14th Dist.] 2010, pet. denied) (holding that under certain very limited circumstances [not at issue in this case], a portion of a document could be interpreted even when the remainder of the document was not in evidence); *see also Wheeler*, 314 S.W.3d at 232–39 (Frost, J., dissenting) (arguing for an even more restrictive rule).

In his affidavit attached to Brenham’s motion, the Brenham city manager purported to verify all factual statements in the brief, but he gave no basis for having knowledge of the facts presented. *See Southtex 66 Pipeline Co., Ltd. v. Spoor*, 238 S.W.3d 538, 542–43 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (“Merely reciting that an affidavit is made on personal knowledge is insufficient. Instead, the affidavit must go further and disclose the basis on which the affiant has personal knowledge of the facts asserted.”).

In the absence of the entirety of the release agreement in evidence, it is impossible to know exactly what Patterson released or waived in signing the agreement. There is also scant evidence in the record regarding the nature of the payments to Patterson made pursuant to the agreement. Attached to Patterson’s response to Brenham’s motion for

³ The *Coker* court explained as follows:

In construing a written contract, the primary concern of the court is to ascertain the true intentions of the parties as expressed in the instrument. To achieve this objective, courts should examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless. No single provision taken alone will be given controlling effect; rather, all the provisions must be considered with reference to the whole instrument.

650 S.W.2d at 393.

summary judgment are two letters from the IRS. In the letter regarding Brenham's request to reconsider the IRS's original holding, the IRS representative laid out Brenham's argument that the payments were strictly for settlement of legal disputes and not wages. However, as the letter explains, the IRS rejected this position based on an internal regulation. This letter is certainly not conclusive evidence in Brenham's favor on the nature of the payments.⁴

In the absence of conclusive evidence establishing either of Brenham's grounds for traditional summary judgment, the trial court erred in granting Brenham's motion. We sustain Patterson's issues to the extent that he has asserted that Brenham failed to meet its burden of showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. Because we sustain the issues on this basis, we need not address the remaining arguments.

We reverse the trial court's judgment and remand for further proceedings in accordance with this opinion.

/s/ Martha Hill Jamison
Justice

Panel consists of Justices Brown, Boyce, and Jamison.

⁴ In support of his description of the payments, Patterson offered a copy of his revised W-2 form, a series of emails he purportedly wrote to Brenham officials, the IRS determination letters, and a letter from TMRS. However, we need not determine the value of this evidence because Brenham failed to meet its summary-judgment burden by producing evidence in support of its position.