

Affirmed and Memorandum Opinion filed April 7, 2011.



In The

Fourteenth Court of Appeals

NO. 14-10-00474-CV

JEFFREY PITSENBARGER, Appellant

V.

CYTEC INDUSTRIES, INC., Appellee

**On Appeal from the 412th District Court
Brazoria County, Texas
Trial Court Cause No. 39957**

MEMORANDUM OPINION

In this appeal from a grant of summary judgment, appellant Jeffrey Pitsenbarger contends that the trial court erred in granting appellee Cytec Industries, Inc.'s motion for summary judgment and in denying his motion for new trial. We affirm.

I

In 2006, Pitsenbarger sued Cytec for breach of contract arising out of alleged damage to a chemical trailer he owned in 2003. Cytec had rented the trailer from another company, Hub City Environmental, LLC, which apparently leased the trailer from Pitsenbarger.

After Cytec moved for summary judgment on the ground that Pitsenbarger had no contract with Cytec to support a breach-of-contract claim, Pitsenbarger amended his petition to assert that Hub City had assigned “all of its rights and interest in this litigation to Plaintiff Pitsenbarger.” In his second amended petition, Pitsenbarger specifically alleged that Cytec’s lease with Hub City provided that Cytec was liable to Hub City for “any damage to the trailer beyond normal wear and tear.” In turn, Hub City’s lease with Pitsenbarger provided that Hub City was liable to Pitsenbarger for any damages to the trailer beyond ordinary wear and tear. Thus, Pitsenbarger asserted that Cytec was liable to Pitsenbarger for Hub City’s alleged damages because Hub City “is required by contract to pay to Plaintiff Pitsenbarger damages for the damage to the trailer.” Pitsenbarger did not allege any other claims against Cytec.

In December 2009, Cytec filed a traditional and no-evidence motion for summary judgment. In the motion, Cytec asserted, among other things, that Pitsenbarger had no contract with Cytec, Hub City had no valid contract claim to assign, and there was no evidence supporting the elements of Pitsenbarger’s breach-of-contract claim. On February 24, 2010, the trial court granted Cytec’s motion. Pitsenbarger moved for a new trial, which the trial court denied. Pitsenbarger then filed a “Supplemental Motion for New Trial” which was set for hearing, but the trial court never expressly ruled on it. This appeal followed.

II

A

We review summary judgments de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). When a party seeks summary judgment on both traditional and no-evidence grounds, we first review the trial court’s summary judgment under the no-evidence standard of Texas Rule of Civil Procedure 166a(i). *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004). If the nonmovant fails to produce more than

a scintilla of evidence raising a genuine fact issue on the challenged elements of his claims, then there is no need to analyze whether the movant’s summary-judgment proof satisfied the traditional summary-judgment burden of proof under Texas Rule of Civil Procedure 166a(c). *Id.*

A traditional summary judgment under Rule 166a(c) is properly granted only when the movant establishes that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215–16 (Tex. 2003). In reviewing either a no-evidence or traditional summary-judgment motion, we must take as true all evidence favorable to the nonmovant and draw every reasonable inference and resolve all doubts in favor of the nonmovant. *Mendoza v. Fiesta Mart, Inc.*, 276 S.W.3d 653, 655 (Tex. App.—Houston [14th Dist.] 2008, pet. denied).

B

Initially, Cytec complains that Pitsenbarger waived his first issue because it is inadequately briefed. An appellate brief must contain, among other things, a statement of facts supported by references to the record and “a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record.” Tex. R. App. P. 38.1(g), (i). Parties asserting error on appeal must advance some specific argument and analysis showing that the record and the law support their contentions. *San Saba Energy, L.P. v. Crawford*, 171 S.W.3d 323, 338 (Tex. App.—Houston [14th Dist.] 2005, no pet.). An issue not supported by authority or references to the record is waived. *Nguyen v. Kosnoski*, 93 S.W.3d 186, 188 (Tex. App.—Houston [14th Dist.] 2002, no pet.). Nor is it the duty of an appellate court to perform an independent review of the summary-judgment record for evidence supporting an appellant’s position. *Priddy v. Rawson*, 282 S.W.3d 588, 595 (Tex. App.—Houston [14th Dist.] 2009, pet. denied).

We agree that Pitsenbarger has failed to adequately brief his first issue. In his statement of facts, Pitsenbarger cites Hub City’s one-page assignment¹ and Pitsenbarger’s response to Cytec’s first motion for summary judgment—which is not the motion the trial court granted. Pitsenbarger then directs this court to “look at the attachments to Cytec’s own motion[,] which establish more than a scintilla of evidence as to the existence of a contract, breach and damages to the trailer.” In the argument section of his brief, aside from several citations to the no-evidence summary-judgment standard of review, the entirety of Pitsenbarger’s argument consists of the assertion that he “filed a Response to Defendants’ No[-]Evidence Motion for Summary Judgment that pointed out the facts that showed more than a scintilla of evidence as well as did the Defendant’s own motion when the exhibits are reviewed.” Pitsenbarger fails to provide any supporting arguments, authorities, or citations to particular facts that might raise a genuine issue of material fact as to the elements of his claim. Therefore, his issue is waived. *See* Tex. R. App. P. 38.1(g), (i); *San Saba Energy, L.P.*, 171 S.W.3d at 338; *Nguyen*, 39 S.W.3d at 188.

Additionally, as Cytec points out, a party appealing a trial court’s order granting summary judgment bears the burden to bring forward the record of the summary-judgment evidence to provide the appellate court with a basis to review his claim of harmful error. *See Enter. Leasing Co. v. Barrios*, 156 S.W.3d 547, 549 (Tex. 2004) (per curiam); *Mallios v. Standard Ins. Co.*, 237 S.W.3d 778, 781 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). If the pertinent summary-judgment evidence the trial court considered is not included in the appellate record, an appellate court may presume that the omitted evidence supports the trial court’s judgment and affirm the grant of summary judgment on that basis. *Mallios*, 237 S.W.3d at 782 (citing *Enter. Leasing Co.*, 156 S.W.3d at 549–50).

¹ Hub City’s assignment reflects an assignment of “any claims and/or causes of action . . . that it may have against Cytec Industries, Inc.” arising from “damages it may have suffered due to the injury and damages” to Pitsenbarger’s trailer. Notably, although Pitsenbarger alleges that his breach-of-contract claim is based on provisions of leases with both Hub City and Cytec, no lease or other contract appears anywhere in the record.

Although Pitsenbarger directs us to his response to Cytec’s motion, the record contains neither the response nor any evidence that might have been filed in support of the response. If Pitsenbarger intends to refer to his cited response to the earlier-filed motion, that response would not be part of the record considered by the trial judge for the second summary-judgment motion. And, although it appears from the record that Pitsenbarger may have filed an amended response to Cytec’s no-evidence and traditional motion for summary judgment, that document is not in the record, either. The only responsive document in the record is Pitsenbarger’s “First Supplement to First Amended Response to the Defendant’s No-Evidence and Traditional Motion for Summary Judgment,” which merely attaches a copy of the assignment from Hub City. Thus, we may apply the presumption that the omitted documents support the trial court’s judgment and affirm the trial court’s grant of summary judgment on that basis as well. *See id.* In any event, we note that Hub City’s assignment, without more, is insufficient to raise a genuine fact issue in response to Cytec’s no-evidence challenge to each of the elements of Cytec’s breach-of-contract claim.

Because the trial court could have properly granted summary judgment based on the no-evidence portion of Cytec’s motion, the trial court did not err in granting Cytec’s motion for summary judgment.

We therefore overrule Pitsenbarger’s first issue.

III

In his second issue, Pitsenbarger contends the trial court improperly denied his motion for new trial. We review a trial court’s denial of a motion for new trial for abuse of discretion. *Dir., State Employees Workers’ Comp. Div. v. Evans*, 889 S.W.2d 266, 268 (Tex. 1994); *Stevens v. Anatolian Shepherd Dog Club of Am., Inc.*, 231 S.W.3d 71, 77 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). An abuse of discretion occurs when a court acts in an arbitrary or unreasonable manner, or without reference to guiding

rules and principles. *Downer v. Aquamarine Operators*, 701 S.W.2d 238, 241–42 (Tex. 1985).

Pitsenbarger argues that he requested an opportunity to file a supplemental response including sections from the Code of Federal Regulations for the trial court’s consideration, and the trial court abused its discretion by not considering all of the evidence.² Pitsenbarger does not cite any relevant authority or explain how the regulations raise a genuine fact issue on each of the elements of his breach-of-contract claim. Therefore, we hold that the trial court did not abuse its discretion by denying Pitsenbarger’s motion for new trial.

* * *

We overrule Pitsenbarger’s issues and affirm the trial court’s judgment.

/s/ Jeffrey V. Brown
Justice

Panel consists of Justices Brown, Boyce, and Jamison.

² Pitsenbarger makes no reference to his original motion for new trial, in which he asserted that the motion would be supplemented with an affidavit that would establish certain facts. The record contains no such affidavit.