Majority and Concurring Opinions filed January 26, 2017.

In The

Fourteenth Court of Appeals

NO. 14-14-00981-CV

APRIL BROWN, DAVID RAFFERTY, STEVE GANN, KATHY HILTON, IRENE GARCIA AND STEVE STUCKEY, Appellants

V.

WILLIAM HENSLEY, TOM JENKINS, TROY JONES, DAVID MARKS, BARNARD PEARL, THOMAS WALSH, STAN WILLIAMS, JACK EREIRA AND ANDREW ROSENBERG, Appellees

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On Appeal from the 127th District Court
Harris County, Texas
Trial Court Cause No. 2010-56653B

C O N C U R R I N G O P I N I O N

I agree that the trial court's order granting traditional summary judgment against all claims of the individual current and former Board members should be affirmed; however, I disagree that the Board members conclusively established each element of their affirmative defense of immunity under the Texas Charitable

Immunity and Liability Act. I would instead conclude that the Board members disproved at least one essential element of each of the owners' causes of action, affirm on that ground, and not reach the issue of the Board members' affirmative defense of immunity.[1]

The Board members attached to their motion as summary judgment evidence eight pages from the deposition of April Brown.[2] The motion also contained a vague reference to an affidavit identified only as "affidavit of Tom Jenkins already on file before this Court."[3] Although it may be possible under certain circumstances to incorporate previously filed evidence into a motion for summary judgment, I would conclude that this vague reference to an unknown document does not suffice. *See generally Rogers v. RREF II CB Acquisitions, LLC*, No. 13-15-00321-CV, 2016 WL 6804451, at *7 (Tex. App.—Corpus Christi Nov. 17, 2016, no pet.) (citing *Ramirez v. Colonial Freight Warehouse Co.*, 434 S.W.3d 244, 252 (Tex. App.—Houston [1st Dist.] 2014, pet. denied), and *Steinkamp v. Caremark*, 3 S.W.3d 191, 194 (Tex. App.—El Paso 1999, pet. denied)).

To establish their affirmative defense of immunity under the Act, the Board members were required to conclusively prove that each was a volunteer, the

[1] The owners argue that the trial court erred when it granted the motion for various reasons, including that "statutory immunity does not apply to any of the claims made," citing Texas Civil Practice and Remedies Code section 84.007(b). I would broadly construe the owners' issue as a complaint that the evidence supporting the motion was insufficient as a matter of law. *See Margetis v. Frost Nat'l Bank*, No. 02-12-00027-CV, 2012 WL 4936611, at *2 (Tex. App.—Fort Worth Oct. 18, 2012, no pet.). Because I conclude that, as to the Board members' affirmative defense, the motion was insufficient as a matter of law, I would not reach the owners' argument under 84.007(b).

[2] Although the deposition testimony is not clear, April Brown seems to claim that her allegations against the Board members arise from certain decisions made by the Board.

[3] In their motion, immediately after mentioning the Jenkins' affidavit, the Board members requested the trial court take "judicial notice of those pleadings." The motion, however, does not identify what "pleadings" are being referenced or how they relate, if at all, to Jenkins' affidavit.

Association was a qualified organization as defined by the Act,[4] and their actions were in the course and scope of their duties and functions.[5] *See* Tex. Civ. Prac. & Rem. Code §§ 84.003(1)(C), (2), 84.004(a). Although the majority concludes that there is no dispute that the Association qualified as a charitable organization under the Act and that the Board members were volunteers, I disagree that the Board members brought forth summary judgment evidence conclusively establishing these facts.

We review a trial court's decision to grant a traditional motion for summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). Only if a movant's motion and summary judgment proof facially establish its right to judgment as a matter of law will the burden shift to the non-movant to raise a material fact issue sufficient to defeat summary judgment. *Quanaim v. Frasco Rest. & Catering*, 17 S.W.3d 30, 41–42 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (citing *HBO, A Div. of Time Warner Entm't Co. v. Harrison*, 983 S.W.2d 31, 35 (Tex. App.—Houston [14th Dist.] 1998, no pet.)). If the movant fails to prove as a matter of law each essential element of the asserted affirmative defense, summary judgment is improper. *Rodriguez v. Lockhart Contracting Servs., Inc.*, 499 S.W.3d 48, 53 (Tex. App.—San Antonio 2016, no pet.). A plaintiff need not even file a response to a defendant's motion for summary judgment if the defendant does not meet his or her burden. *E.g., Grynberg v. Grey Wolf Drilling Co.*, 296 S.W.3d 132, 136-37 & n.13 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

The Board members provided definitions for the elements of their

[4] The majority outlines the definitions from the Act relevant to the first two elements. *Maj. Op.* at 8-9.

[5] April Brown's deposition testimony was germane to the third element.

affirmative defense in their motion; however, it is well settled that neither the motion for summary judgment, nor the response, even if sworn, is ever proper summary judgment proof. *See Quanaim*, 17 S.W.3d at 42. Even if it were proper summary judgment evidence, the motion provides insufficient facts to establish the elements.

Although I disagree with the majority's conclusion that the Board members conclusively proved their immunity under the Act, I would nonetheless affirm the trial court's summary judgment based on the ground that as a matter of law, the owners cannot establish any of their claims supporting personal liability against the Board members individually. For these reasons, I respectfully concur.

/s/ Martha Hill Jamison
Justice

Panel consists of Justices Jamison, Donovan, and Brown (Donovan, J., majority).