

Affirmed and Memorandum Opinion filed March 7, 2017.



In The

Fourteenth Court of Appeals

NO. 14-15-01030-CV

DEK-M NATIONWIDE, LTD, Appellant

V.

**DAVID HILL INDIVIDUALLY & D/B/A DOH OIL CO., CASSIE
MOSELEY, DAVID MOSELEY AND COLORADO COUNTY CENTRAL
APPRAISAL DISTRICT, Appellees**

**On Appeal from the 2nd 25th District Court
Colorado County, Texas
Trial Court Cause No. 23,859**

M E M O R A N D U M O P I N I O N

After the Colorado County Appraisal District obtained a delinquent-tax judgment against royalty-interest owner Walter Willis, Willis gave a security interest in the property to a creditor. Before the District sold the property, Willis's creditor purported to sell the property to its affiliated company DEK-M

Nationwide LTD at a non-judicial foreclosure sale for a nominal sum. DEK-M then sued the District and those who bought the property at the District's sale.

DEK-M now appeals the summary judgment rendered against it on its trespass-to-try-title, quiet-title, equitable-lien, conversion, unjust-enrichment, and declaratory-judgment claims. Because DEK-M has not challenged all of the grounds on which the trial court may have rendered summary judgment against it, we affirm the trial court's judgment.

I. Background

After Walter Willis failed to pay the taxes owed on his royalty interests in three tracts, the District sued Willis to collect the delinquent taxes and to foreclose on its tax lien against the property. While the tax suit was pending, Kenneth D. Eichner, P.C. ("the Creditor") sued Willis for non-payment for its services. The Creditor won its suit and filed an abstract of judgment in Colorado County. A few months later, the District obtained a judgment against Willis.

Less than three weeks after the court rendered judgment for the District in the delinquent-tax suit, Willis purported to give the Creditor security interests in the royalty interests. The Creditor recorded the security agreement and the deed of trust.

Nothing further happened for two years. In January 2013, however, the trustee on the Creditor's deed of trust began the nonjudicial-foreclosure process, and a few weeks later, the District obtained an order of sale. On February 5, 2013, the trustee on the Creditor's deed of trust sold the property to its affiliated company DEK-M.¹ The District posted its notice of sale the next day.

¹ Kenneth D. Eichner is the president both of Kenneth D. Eichner, P.C. and of DEK-M's general partner.

About three weeks after DEK-M's deed was recorded, the District sold the royalty interests. David Hill, individually and d/b/a DOH Oil Co., bought the royalty interest in one tract, and David and Cassie Moseley bought the royalty interests in the two remaining tracts. We refer to Hill and the Moseleys collectively as "the Buyers." Two months after DEK-M recorded its deed, the Buyers recorded their deeds to the same property.

When DEK-M attempted to collect the royalty payments and learned that the payments instead were being made to the Buyers, it sued the District and the Buyers.² DEK-M asserted claims against the Buyers for trespass to try title, or in the alternative, to quiet title and for an equitable lien. DEK-M also alleged that the Buyers converted the royalty payments or were unjustly enriched by receiving them. Against the District, DEK-M sought only declarations that the tax-foreclosure sale did not transfer title; that DEK-M is entitled to the royalty payments; and that the District failed to comply with notice provisions under the Tax Code.

The District filed a motion for traditional and no-evidence summary judgment. The Buyers adopted an earlier summary-judgment motion filed by the District, and sought summary judgment on two additional grounds. After granting the District's and the Buyers' motions without stating the grounds on which it relied, the trial court signed a final judgment.

II. Analysis

If a party successfully moves for summary judgment on multiple grounds and the trial court does not specify the grounds on which it relied, we will uphold the ruling unless the appellant negates every ground on which the judgment could

² Other defendants were non-suited.

have been granted. *See DeWolf v. Kohler*, 452 S.W.3d 373, 388 (Tex. App.—Houston [14th Dist.] 2014, no pet.); *Wilkinson v. USAA Fed. Sav. Bank Trust Servs.*, No. 14-13-00111-CV, 2014 WL 3002400, at *5 (Tex. App.—Houston [14th Dist.] July 1, 2014, pet. denied) (mem. op.). This rule is dispositive of DEK-M’s appeal.

The District sought summary judgment on multiple grounds, not all of which were limited to specific claims:

- The District maintained that DEK-M’s conversion claim must fail because conversion requires proof that the claimant owned the property or had a superior right to possession. The District reasoned that DEK-M could not make this showing because, for the reasons stated above, DEK-M did not own the property.
- The District argued that DEK-M also could not show that it had a superior right to possession because the judgment in the delinquent-tax suit had “all the force and effect of a writ of possession as between the parties to the foreclosure suit and any person claiming under the defendant to such suit by any right acquired pending such suit.” TEX. R. CIV. P. 310.
- In response to DEK-M’s allegations that its lack of notice of the tax sale violated its right to due process, the District cited section 34.01 of the Tax Code, under which only the defendant to the tax suit is required to be notified of the tax sale. *See* TEX. TAX CODE ANN. § 34.01(c) (West Supp. 2016). Section 34.01 further provides that lack of notice “is insufficient by itself” to invalidate the property’s sale or the conveyance of title by the sale. *See id.* § 34.01(d).

- Regarding title to the royalty interests, the District sought summary judgment on the ground that the delinquent-tax suit and the tax sale were conducted in accordance with the Texas Property Tax Code, and any acquisition of the property was subject to the delinquent-tax judgment. The District pointed out that, with exceptions inapplicable here, a tax lien takes priority over the claims of the property owner’s creditors. *See* TEX. TAX CODE ANN. § 32.05 (West 2015).
- The District similarly argued that under the doctrine of res judicata, the judgment in the tax suit precludes the claims of those in privity with Willis, and that DEK-M is in privity with Willis as his successor in interest. *See Amistadt v. United States Brass Corp.*, 919 S.W.2d 644, 652–53 (Tex. 1996).
- Finally, the District argued that all of DEK-M’s claims were barred by accord and satisfaction and by the election of remedies. In support of this position, the District asserted that DEK-M could not claim ownership of the property through Willis’s Creditor because the Creditor applied to receive the excess proceeds of the tax sale, from which the Creditor was fully compensated for any outstanding lien against the property.³

These grounds were raised in the District’s original and amended summary-judgment motions. The Buyers adopted the District’s original summary-judgment motion, and additionally argued that DEK-M had waived any objection to the tax sale and was estopped to assert any such objection.

³ Because DEK-M amended its petition after the District and the Buyers moved for summary judgment, we do not address grounds raised in the summary-judgment motions that were responsive only to claims that DEK-M omitted from its live pleading.

On appeal, DEK-M failed to challenge in its opening brief all of the grounds on which the trial court may have granted summary judgment. In its opening brief, DEK-M argued that the trial court erred in granting summary judgment because (a) DEK-M acquired superior title by recording its deed before the Buyers purchased the property at the tax sale, and (b) it was deprived of due process because it was not given actual notice of the pending tax sale. But, DEK-M did not address the grounds raised in the District’s and the Buyers’ summary-judgment motions that their affirmative defenses of res judicata, accord and satisfaction, election of remedies, waiver, and estoppel defeat all of DEK-M’s claims. *See* TEX. R. CIV. P. 94.⁴

An affirmative defense is, by definition, “[a] defendant’s assertion of facts and arguments that, if true, will defeat the plaintiff’s or prosecution’s claim, *even if all the allegations in the complaint are true.*” *Zorrilla v. Aypco Constr. II, LLC*, 469 S.W.3d 143, 155–56 (Tex. 2015) (quoting BLACK’S LAW DICTIONARY 509 (10th ed. 2009)) (emphasis added, alteration in original); *see also* *Heggy v. Am. Trading Emp. Ret. Account Plan*, 123 S.W.3d 770, 778 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (sub. op. on reh’g) (“An affirmative defense generally accepts the existence at one time or another of a prima facie case but asserts propositions which, if established, would defeat the plaintiff’s claim.”). A successful affirmative defense will defeat an otherwise valid claim. *See, e.g., F.D.I.C. v. White*, 76 F. Supp. 2d 736, 739 (N.D. Tex. 1999) (“[D]uress is an

⁴ After the Buyers pointed out these omissions in their response brief, DEK-M filed a reply brief in which it addressed the issue of res judicata; however, we are not required to consider issues raised for the first time in a reply brief. *See DeWolf*, 452 S.W.3d at 388 n.13; *see also Dallas County v. Gonzales*, 183 S.W.3d 94, 104 (Tex. App.—Dallas 2006, pet. denied) (“The Texas Rules of Appellate Procedure do not allow an appellant to include in a reply brief a new issue in response to some matter pointed out in the appellee’s briefs but not raised by the appellant’s original brief.”). In neither of its briefs did DEK-M address the summary-judgment grounds of election of remedies, waiver, estoppel, or accord and satisfaction.

affirmative defense that must be proved by the party seeking to avoid an otherwise valid contract.”); *Pilot Travel Ctrs., LLC v. McCray*, 416 S.W.3d 168, 177 (Tex. App.—Dallas 2013, no pet.) (stating that an affirmative defense will avoid an otherwise valid arbitration provision).

Thus, even if DEK-M were correct that its title otherwise would be superior to a later-recorded deed or that DEK-M otherwise would have been entitled to notice of the pending tax sale, these arguments do not overcome the District’s and the Buyers’ affirmative defenses.

DEK-M also argues that the judgment is overly broad in that the summary-judgment motions did not address DEK-M’s later-added requests to quiet title or for an equitable lien. Although it is true that DEK-M added these requests after the summary-judgment motions were filed, the District and the Buyers argued in their motions that *res judicata* defeated all of DEK-M’s claims. In addition, their arguments about election of remedies, accord and satisfaction, waiver, and estoppel were not limited to specific causes of action or remedies. Thus, the affirmative defenses raised in the summary-judgment motions were broad enough to encompass all of DEK-M’s claims and requests for relief, including those added after the motions were filed.

Because DEK-M failed to adequately challenge every ground on which the trial court may have granted summary judgment, any one of the unchallenged grounds is sufficient to support the judgment. See *Cuidado Casero Home Health of El Paso, Inc. v. Ayuda Home Health Care Servs., LLC*, 404 S.W.3d 737, 743–44 (Tex. App.—El Paso 2013, no pet.) (“When a summary judgment ground goes unaddressed, its validity is presumed.”). We accordingly affirm the trial court’s judgment on the grounds of *res judicata*, election of remedies, waiver, estoppel,

and accord and satisfaction without further addressing DEK-M's appellate arguments.

III. Conclusion

Because DEK-M has failed to negate all of the grounds on which the trial court may have based its summary-judgment rulings, we affirm the trial court's judgment.

/s/ Tracy Christopher
Justice

Panel consists of Justices Boyce, Christopher, and Brown