Affirmed and Memorandum Opinion filed September 14, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00051-CV

SAMMY VEAL, Appellant

V.

CBREI/USA HOLLISTER DST D/B/A WYNHAVEN AT HOLLISTER LP AND RIVERSTONE RESIDENTAL SC, LLC D/B/A RIVERSTONE RESIDENTAL GROUP, LLC, Appellees

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On Appeal from the 11th District Court
Harris County, Texas
Trial Court Cause No. 2012-21471

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

Appellant Sammy Veal sued his former apartment complex, appellees CBREI/USA Hollister DST d/b/a Wynhaven at Hollister LP and Riverstone Residential SC, LLC d/b/a Riverstone Residential Group, LLC (collectively "Wynhaven"), for breach of contract, Texas Deceptive Trade Practices Act

("DTPA"), unlawful lockout, wrongful eviction, wrongful interruption of utilities, and retaliation.[1] The trial court granted summary judgment in Wynhaven's favor, dismissing all of Veal's claims. In eight issues,[2] Veal argues that the trial court erred by excluding evidence and granting Wynhaven's motions for summary judgment. We affirm.

I. Factual and procedural background

Veal was a residential tenant at the Wynhaven at Hollister apartments from July 24, 2010, through August 25, 2011, as set forth by the terms of a lease agreement. The lease agreement further provided that either party give at least 60 days' written notice of termination or intent to move out.

> Lease Term. The initial term of the Lease begins on 24th day of July (month), 2010 (year), and ends at midnight the 25th day of August (month), 201[1] (year). This Lease will automatically renew month-to-month unless either party gives at least 60 days' written notice of termination or intent to move out as required by Par. 37.

During the time Veal was a tenant, he complained about the condition of the apartment, specifically the carpet and the blinds. Additionally, during his tenancy, Veal was issued several notices of lease violations for offenses such as excessive noise and having a prohibited animal (snake). He also was issued notices to vacate for non-payment/late-payment of rent, utilities, or other sums.

Veal's apartment was burglarized on June 24, 2011. After the burglary, Veal inquired with Wynhaven personnel about repairs to his door, and was told that after police finished their report the door would be repaired. Veal was notified in writing

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[1]Veal also brought negligence and fraud causes of action. The trial court granted summary judgment as to both of those causes of action; however, Veal does not appeal the trial court's judgment as to these claims.

[2] In the Table of Contents and Argument portions of Veal's brief, he identifies eight issues on appeal. In his brief under Issues, however, he identifies nine issues due to a duplication of issues 5 and 6 on unlawful lockout.

by Wynhaven on July 1, 2011, that it would not renew his lease, which expired on August 25, 2011. This gave Veal a 55-day advance notice of non-renewal.

On August 25, 2011, Veal had not yet vacated his unit. Wynhaven gave him until the close of business on August 26, 2011, to vacate the premises. At the close of business day on August 26, 2011, Veal still had not moved out. Veal was informed he either had to vacate the apartment or pay additional rent. Veal did not pay additional rent and removed the rest of his items into the hallway of the building. After the items were removed, the locks to the apartment were changed.

On April 21, 2012, Veal filed suit against Wynhaven, alleging causes of action for breach of contract, DTPA, negligence, fraud, unlawful lockout, wrongful eviction, and retaliation. Veal amended his petition, adding a claim for wrongful interruption of utilities. Wynhaven served Veal with a request for disclosure in May 2012.

Over the next few years, the parties propounded discovery as well as filed dispositive motions, including Wynhaven's no-evidence motion for partial summary judgment[3] and a traditional motion for final summary judgment.[4] In September 2014, the case was called to trial and Veal filed his third motion for continuance. Wynhaven opposed the continuance and objected under Rule 193.6 to any evidence of damages from Veal because Veal had failed to timely disclose his damages. *See* Tex. R. Civ. P. 193.6. The court granted the motion for continuance to give Veal the opportunity to amend his disclosures to set forth his claimed damages.

[3] Wynhaven's no-evidence partial summary judgment motion sought dismissal of Veal's claims for breach of contract, negligence, fraud, and DTPA.

[4] Wynhaven's traditional motion for final summary judgment sought dismissal of all of Veal's claims, including: breach of contract, negligence, fraud, DTPA, unlawful lockout, wrongful eviction, and retaliation.

A year later, on September 20, 2015, Veal served Wynhaven with supplemental disclosures regarding damages. During pretrial conference conducted on October 20 and 21, Wynhaven objected to any evidence of damages from Veal because his supplemental disclosures were untimely.[5]

On October 23, 2015, the case was called to trial. After setting aside multiple prior orders, the trial court reconsidered the entire record and granted Wynhaven's motion to exclude evidence of damages as well as an affidavit Veal filed in response to a summary judgment. The trial court granted Wynhaven's motions for summary judgment, ordered Veal take nothing on all claims, and awarded Wynhaven its court costs. The trial court memorialized its actions in "uncharacteristic detail" in a five-page single-spaced final judgment. The trial court denied Veal's motion for a new trial; this appeal timely followed.

II. Analysis

A. Issues on appeal

On appeal, Veal raises eight issues. Veal contends that the trial court erred by (1) excluding Veal's summary judgment response affidavit on the basis it was a "sham" affidavit. Veal also claims the trial court erred in granting summary judgment on his claims for: (2) breach of contract; (3) DTPA; (4) wrongful eviction; (5) unlawful lockout; (6) unlawful interruption of electricity; and (7) retaliation. Veal further asserts the trial court erred by (8) excluding evidence of Veal's damages.

Analyzing Veal's issues out of order, we will first determine whether the trial court abused its discretion in excluding evidence of Veal's damages—*i.e.*, issue

[5] We do not have a report's record of the pretrial conference; however, Veal does not dispute appellee's statement of facts in this regard.

eight. If Veal cannot establish any damages, his claims are precluded and we need not address the remaining issues in the case.[6]

B. Exclusion of Evidence

In his eighth issue, Veal asserts that the trial court abused its discretion in excluding his damages evidence. Wynhaven contends Veal had ample opportunity to timely supplement his disclosure regarding his damages and still failed to do so.

1. Standard of review

We review a trial court's evidentiary rulings for an abuse of discretion. *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 906 (Tex. 2000). To determine whether a trial court abused its discretion, we must decide whether the trial court acted without reference to any guiding rules or principles; in other words, we must decide whether the act was arbitrary or unreasonable. *Cire v. Cummings*, 134 S.W.3d 835, 838-39 (Tex. 2004). We must uphold the trial court's evidentiary ruling if there is any legitimate basis in the record for the ruling. *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998).

2. Discovery Rule 193.6

Under rule 193.6, discovery that is not timely disclosed is inadmissible as evidence. Tex. R. Civ. P. 193.6(a); *Fort Brown Villas III Condo. Ass'n, Inc. v. Gillenwater*, 285 S.W.3d 879, 881 (Tex. 2009).[7] A party who fails to make, amend, or supplement a discovery response in a timely manner may not introduce in evidence the material or information that was not timely disclosed unless the court

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[6] As discussed, *infra*, damages are an essential element to each of Veal's claims.

[7] The Supreme Court noted that the 1999 amendment to pretrial discovery rules to include evidentiary exclusions, coupled with the no-evidence summary judgment introduced to Texas Rules of Civil Procedure in 1997, established a date certain for the completion of discovery, which depends on the discovery plan level and not on the trial date. *See Fort Brown Villas II Condominium Ass'n, Inc.*, 285 S.W.3d at 881–82.

finds that (1) there was good cause for the failure to timely disclose or (2) the failure will not unfairly surprise or prejudice the other parties. Tex. R. Civ. P. 193.6(a); *see also Tex. Mun. League Intergovernmental Risk Pool v. Burns*, 209 S.W.3d 806, 817 (Tex. App.—Fort Worth 2006, no pet.). "The salutary purpose of [this rule] is to require complete responses to discovery so as to promote responsible assessment of settlement and prevent trial by ambush." *Alvarado v. Farah Mfg. Co.,* 830 S.W.2d 911, 914 (Tex. 1992) (applying former rule 215(5), the predecessor to rule 193.6). The burden of establishing good cause or lack of unfair surprise or prejudice is on the party seeking to introduce the evidence. Tex. R. Civ. P. 193.6(b)). The trial court has discretion to determine whether the offering party has met its burden. *Burns*, 209 S.W.3d at 817 (citing *Alvarado*, 830 S.W.2d at 914); *see also Fort Brown Villas III Condominium Ass'n, Inc.*, 285 S.W.3d at 882 (affirming exclusion of an untimely expert affidavit when expert not disclosed pursuant to the deadline provided for in the agreed scheduling order and subsequent extension agreements); *In re Staff Care, Inc.*, 422 S.W.3d 876, 882–83 (Tex. App.—Dallas 2014, no pet.) (affirming exclusion of undisclosed evidence of damages, noting trial court could have concluded that amended and supplemental disclosures were not made "reasonably promptly").

In this case, we do not have before us a reporter's record of the proceedings that took place on October 20 and 21, 2015. Unless an appellant arranges for the filing of a complete reporter's record (or partial reporter's record and accompanying statement of issues), we must presume that the proceedings support the trial court's judgment. *See Bennett v. Cochran*, 96 S.W.3d 227, 229 (Tex. 2002); *Christiansen v. Prezelski*, 782 S.W.2d 842, 843 (Tex. 1990). In its final judgment, the trial court explained the basis for excluding Veal's evidence of damages:

> The Court grants that motion and excludes all evidence of damages because the response was not timely, there was no good cause and Defendants were unfairly surprised and prejudiced.

Because Veal did not show good cause for failing to timely supplement his disclosure of damages during discovery, we hold that the trial court did not abuse its discretion in excluding Veal's evidence regarding damages. Veal's eighth issue is sustained.

3. Veal's affidavit

Because we have found the trial court did not abuse its discretion in excluding Veal's evidence of damages under Rule 193.6, we need not decide whether the trial court abused its discretion in excluding Veal's affidavit.

C. Remaining issues

1. Standard of review

We review summary judgments de novo. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). Under the well-established standards governing traditional motions for summary judgment, the movant must show there is no genuine issue of material fact and he is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985). When reviewing a summary judgment, we examine the record in the light most favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015). We review a summary judgment for evidence that would enable reasonable and fair-minded jurors to differ in their conclusions. *Wal–Mart Stores, Inc. v. Spates*, 186 S.W.3d 566, 568 (Tex. 2006) (per curiam).

2. Claims for breach of contract, DTPA, wrongful eviction, unlawful lockout, unlawful interruption of electricity, and retaliation

In its final judgment, the trial court listed specific grounds for granting summary judgment on Veal's remaining claims, which included Veal's inability to introduce any evidence regarding damages.

> . . . in the event the Court has erred in granting Defendants' Traditional and No-Evidence Motions for Summary Judgment, the Court finds that Final Judgment for Defendants is appropriate because of the inability of Plaintiff to introduce any evidence regarding damages.

Because Veal cannot produce any evidence of damages on his claims for breach of contract, DTPA and wrongful eviction, this element has been negated and, as such, the trial court did not err in granting Wynhaven's traditional and no-evidence motions for summary judgment on Veal's causes of action for breach of contract, DTPA, and wrongful eviction.[8] *See Davis v. Galagaza*, No. 14-16-00362-CV, 2017 WL 1450582, at *2 (Tex. App.—Houston [14th Dist.] Apr. 18, 2017, no pet.) (mem. op.) (affirming summary judgment based upon appellant's failure to challenge no evidence of damages); *Didur-Jones v. Family Dollar, Inc.*, No. 2-09-069-CV, 2009 WL 3937477, at *3-4 (Tex. App.—Fort Worth Nov. 19, 2009, pet. denied) (mem. op) (affirming exclusion of evidence on damages under Rule 193.6).

As to his claims under Chapter 92 of the Property Code (unlawful lockout § 92.0081, unlawful interruption of electricity § 92.008, and retaliation § 92.331), Veal pled only for economic damages, statutory penalties and attorneys' fees rather than re-entry or other non-economic damages. As such, it was incumbent on Veal to disclose his damages timely as they relate to the alleged property code violations.

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[8] *See generally Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 478 (Tex. 1995) (listing elements for DTPA); *Garcia v. Galvan*, Nos. 14-11-00338-CV, 1411-00350-CV, 2012 WL 1606312, at *3 (Tex. App.—Houston [14th Dist.] May 8, 2012, pet. dism'd w.o.j.) (listing elements for wrongful eviction); *West v. Triple B Servs., LLP*, 264 S.W.3d 440, 446 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (listing elements for breach of contract).

Because Veal failed to do so, the trial court did not err in granting summary judgment on these claims, as well. Consequently, Veal's second, third, fourth, fifth, sixth, and seventh issues are overruled.

III. Conclusion

Having overruled Veal's issues, we affirm the trial court's judgment.

/s/ John Donovan
Justice

Panel consists of Justices Christopher, Jamison, and Donovan.