Reversed and Remanded and Memorandum Opinion filed January 12, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00435-CV

BEATRICE FOOTS, Appellant

V.

JIMMIE ANDREPOINT, Appellee

On Appeal from the County Court at Law No. 3
Harris County, Texas
Trial Court Cause No. 1060830

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

In this appeal from Jimmie Andrepoint's judgment against her for breach of contract, appellant Beatrice Foots argues there is no evidence of a contract between them. She is correct. Although the trial court granted Andrepoint's motion for no-evidence summary judgment on the question of contract liability, it was Andrepoint who bore the burden to establish the elements of his breach-of-contract claim. He did not do so, instead asserting that there was no evidence to the contrary. Because Foots had no burden to respond to the summary-judgment motion with evidence negating the

elements of Andrepoint's claim, we reverse the judgment and remand the cause for further proceedings.

I. BACKGROUND

Jimmie Andrepoint sued Beatrice Foots in justice court for breach of contract, alleging that she failed to repay a series of loans. A jury found in favor of Andrepoint, and Foots appealed via trial de novo to the county court at law.

In the county court at law, Andrepoint filed a motion for no-evidence summary judgment on his breach-of-contract claim and on Foots's affirmative defenses. Foots did not file a response. The trial court granted the motion, holding Foots liable for breach of contract and ordering Andrepoint to set a hearing on damages and attorney's fees.

Although Andrepoint filed a motion for summary judgment on damages, the trial court nevertheless held an evidentiary hearing on the matter. At the hearing on May 11, 2016, the trial court instructed Andrepoint's attorney not to show exhibits to Foots and stated that Foots "can't respond at this point." After Andrepoint testified and his attorney passed the witness, the trial court said, "[Foots] really can't ask questions because she didn't respond." At the conclusion of the hearing, the trial court rendered judgment ordering Foots to pay Andrepoint actual damages of $9,038.03, attorney's fees of $961.97, post-judgment interest, and costs. The trial court then told Foots, "[Y]ou really tied my hands by not filing a response at all, because you took all of my discretion away. I would have had discretion to set it aside if you had filed an answer, but you didn't file anything. So you really tied my hands legally." Foots then asked, "Do I get to explain anything to you?" The trial court responded, "No. The time to explain was back when you should have filed a response to the motion for summary judgment."

On appeal, Foots challenges the trial court's summary judgment on liability, which is merged into the final judgment. In her first two issues on appeal, Foots argues that there is no evidence of the alleged contract's existence or its terms. She contends in her third issue that, in violation of her right to due process, she was not notified of a hearing held on January 12, 2016.[1]

Andrepoint presents no cross-issues, but he asserts that this is a frivolous appeal and asks that we award him $3,500 for his attorney's fees pursuant to Texas Rule of Appellate Procedure 45.

II. THE NO-EVIDENCE SUMMARY JUDGMENT

A party may obtain a no-evidence summary judgment on matters on which he does not bear the burden of proof at trial. *See* TEX. R. CIV. P. 166a(i). "The motion must state the elements as to which there is no evidence." *Id.* If these requirements are met, then the court must grant the motion unless the respondent produces probative summary-judgment evidence raising a genuine issue of material fact. *See id.*

On the other hand, a movant is not entitled to prevail on a no-evidence motion for summary judgment on a claim or defense on which he has the burden of proof. *See Foreman v. Whitty*, 392 S.W.3d 265, 279–80 (Tex. App.—San Antonio 2012, no pet.). For example, an affirmative defense must be proved by the party asserting it. *See Zorilla v. Ayco Constr. II, LLC*, 469 S.W.3d 143, 156 (Tex. 2015). Thus, a plaintiff may obtain no-evidence summary judgment defeating a defendant's affirmative defenses, but "a party may never properly move for no-evidence summary judgment to prevail on its own claim or affirmative defense for which it bears the burden of proof." *Haven Chapel United Methodist Church v. Leebron*, 496 S.W.3d 893, 904 (Tex. App.—

[1] Foots lists a fourth issue in which she states that the trial court abused its discretion by failing to analyze or apply the law correctly, but because she does not identify the specific error of law to which she refers, we understand this to be a further argument in support of Foots's first two issues.

Houston [14th Dist.] 2016, no pet.) (quoting *Nowak v. DAS Inv. Corp.*, 110 S.W.3d 677, 679 (Tex. App.—Houston [14th Dist.] 2003, no pet.)).

Andrepoint stated in his motion that Foots had no evidence of affirmative defenses, but under that heading, he included the elements of his own breach-of-contract claim. He asserted there is no evidence that Foots "did not enter into a valid contract"; no evidence that Andrepoint "did not perform by providing the loans" to Foots; no evidence that Foots "did not breach the contract"; and no evidence that Foots's "breach did not cause [him] injury." But, to prevail on a breach-of-contract claim, it is the plaintiff who must prove that there is a valid contract between the parties; that the plaintiff performed or tendered performance of his contractual obligations; that the defendant breached the contract; and that the plaintiff was damaged as a result of the defendant's breach. *See Comiskey v. FH Partners, LLC*, 373 S.W.3d 620, 632 (Tex. App.—Houston [14th Dist.] 2012, pet. denied). And to prove that there is a valid contract, the plaintiff must establish "that the parties agreed on all of the essential terms of the contract and the essential terms were sufficiently certain so as to define the parties' legal obligations." *Lombana v. AIG Am. Gen. Life Ins. Co.*, No. 01-12-00168-CV, 2014 WL 810858, at *6 (Tex. App.—Houston [1st Dist.] Feb. 27, 2014, pet. denied) (mem. op.). The trial court could not properly grant Andrepoint's motion for no-evidence summary judgment on his own breach-of-contract claim, because doing so would reverse the burden of proof.

Andrepoint attempted to avoid proving that a contract exists by asserting in the motion, "It is undisputed that Plaintiff and Defendant entered into a contract." This statement is not evidence. It also is not accurate: Foots specifically denied the existence of a contract in the justice court, and filed a general denial in the county court at law. Andrepoint therefore was required to prove the elements of his claim. Because he did not do so, the county court at law reversibly erred in granting Andrepoint's no-evidence motion for summary judgment on liability.

We do not consider whether Andrepoint's motion for summary judgment on damages cured this failure of proof, because the record shows that the trial court held an evidentiary hearing on damages, and thus, the issue was litigated by a bench trial rather than by summary judgment. *Cf.* TEX. R. CIV. P. 166(a)(c) ("No oral testimony shall be received at the [summary-judgment] hearing."); *Martin v. Martin, Martin & Richards, Inc.*, 989 S.W.2d 357, 359 (Tex. 1998) (explaining that "oral testimony cannot be adduced in support of or opposition to a motion for summary judgment").

We also do not consider the evidence or arguments Andrepoint offered during the bench trial because the trial court refused to allow Foots to participate. Although the record shows that the trial court believed that Foots's failure to respond to the earlier no-evidence motion for summary judgment on liability required this prohibition, that belief was mistaken. Even a defendant whose liability has been established by a no-answer default or death-penalty sanctions has a due-process right to participate in an evidentiary hearing on damages. *See Paradigm Oil, Inc. v. Retamco Operating, Inc.*, 372 S.W.3d 177, 185–86 (Tex. 2012). Because the trial court did not allow Foots to participate, consideration of Andrepoint's evidence and arguments from the bench trial would violate her due-process rights. *See id.*; *Baghvardani v. Wilson*, No. 05-14-00431-CV, 2015 WL 1611950, *1 (Tex. App.—Dallas Apr. 10, 2015, no pet.) (mem. op.).

We sustain Foots's first and second issues. Because her appeal, as a matter of law, is not frivolous, we deny Andrepoint's request for an award of attorney's fees. *See* TEX. R. APP. P. 45.

III. THE HEARING ALLEGEDLY HELD ON JANUARY 12, 2016

Foots next asserts that she was denied due process because she was not notified of a hearing held on January 12, 2016. On this record, however, we are unable to determine what, if anything, was heard on that date. The trial court signed the order granting the no-evidence summary judgment on January 12, 2016, but the order

contains a line on which to state the date of the hearing, and no date was written in. Andrepoint does not concede that a hearing was held on January 12, 2016, but instead asserts that the no-evidence motion for summary judgment motion was heard by submission on December 18, 2015. The record contains no notices of any matter set for hearing on either date. The record does show, however, that Andrepoint filed the motion on November 23, 2015, and that Foots's attorney filed a motion to withdraw the next day. Although it is mandatory that an attorney's motion to withdraw contain "all pending settings and deadlines,"[2] the motion identifies no setting for Andrepoint's no-evidence motion for summary judgment (although it did state the motion was pending).[3]

Foots states that if she had been notified of a hearing on January 12, 2016, she would have appeared and informed the trial court that there is no evidence of a contract; thus, we understand her to mean that she would have responded to the no-evidence motion for summary judgment on that date. For the reasons previously explained, however, Andrepoint was not entitled to a no-evidence summary judgment on his own breach-of-contract claim regardless of whether Foots filed a response to the motion or appeared at the summary-judgment hearing.

Foots's argument that her due-process rights were violated by the denial of an opportunity to be heard may also encompass the trial court's refusal to allow her to participate in the bench trial on damages, but even if so, we already have granted her all the relief to which she is entitled by reversing the summary judgment on liability and refusing to consider the argument and evidence from the bench trial. This issue therefore presents nothing further for our review.

---

[2] *See* TEX. R. CIV. P. 10.

[3] The only setting identified in the attorney's motion to withdraw is a trial setting for January 11, 2016, which is consistent with the representations in Foots's brief that she went to court that day and was told that the case was not on the docket.

IV. SCOPE OF REMAND

Having found reversible error, we turn now to the scope of remand, that is, whether to remand not only Andrepoint's breach-of-contract claim, but also Foots's affirmative defenses. Texas Rule of Appellate Procedure 44.1(b) provides, "If the error affects part of, but not all, the matter in controversy and that part is separable without unfairness to the parties, the judgment must be reversed and a new trial ordered only as to the part affected by the error."

On this record, we cannot conclude that Andrepoint's claim and Foots's affirmative defenses can be separated without unfairness to the parties. *See Downing v. Burns*, 348 S.W.3d 415, 428–29 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (remanding the defendant's counterclaim for theft of trade secrets with the plaintiff's defamation and tortious-interference claims, because "[i]f Downing did knowingly steal trade secrets, then Sherry's statements . . . to that effect would not be defamatory, and the Burnses would have established justification as an affirmative defense to Downing's tortious-interference claim."). This is particularly true given that both Andrepoint's breach-of-contract claim and Foots's affirmative defenses were addressed in the same defective no-evidence motion for summary judgment,[4] and in many instances, the same evidence would both establish an affirmative defense and negate an element of the breach-of-contract claim. For example, if Andrepoint were to prove that the parties contracted for Foots to repay him for some amount that Andrepoint paid a third party on her behalf, evidence that Foots paid Andrepoint that amount would both establish the

[4] Even where the motion listed the affirmative defenses on which Foots bore the burden of proof, it did not specifically identify any element that lacked evidence, but instead contained only global statements such as, "Defendant has no evidence of estoppel." *But see* TEX. R. CIV. P. 166a(i) ("The motion must state the elements as to which there is no evidence.").

affirmative defense of payment and negate the element of breach.[5] We accordingly do not limit the scope of remand.

V. CONCLUSION

Because the trial court erred in granting Andrepoint's no-evidence motion for summary judgment on Andrepoint's own breach-of-contract claim, and Foots's affirmative defenses cannot be separated from that claim without unfairness to the parties, we reverse the judgment and remand the cause for further proceedings consistent with this opinion.

/s/ Tracy Christopher
Justice

Panel consists of Justices Christopher, Jamison, and Donovan.

[5] Although this is sufficient for us to remand Foots's affirmative defenses along with Andrepoint's claim, we additionally are concerned about Foots's suggestion that she had no actual notice of the date of the summary-judgment hearing. No one contends that Andrepoint failed to serve Foot's attorney with the notice of hearing, so Foots presumably had constructive knowledge of the hearing on the motion. *See McMahan v. Greenwood*, 108 S.W.3d 467, 480–81 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (op. on reh'g) ("Knowledge acquired by an attorney during the existence of an attorney-client relationship, and while acting in the scope of his or her authority, is imputed to the client."). Nevertheless, her suggestion that she lacked actual notice is consistent with record before us, because Foots's attorney stated in his motion to withdraw that a motion for summary judgment was pending, but he did not include in the motion the date of the summary-judgment hearing as required by Texas Rule of Civil Procedure 10. Ultimately, however, whether Foots lacked actual notice of the hearing date on Andrepoint's no-evidence motion for summary judgment—and thus, of her need to file a response to the motion by a certain date—is a question of fact that was not litigated below, and is not for us to decide.