Affirmed and Memorandum Opinion filed August 24, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00497-CV

@.C.T.S. @DVANCED COMPUTER TECHNICIAN SERVICES, LLC, Appellant

V.

LEXINGTON AUTO REPAIR, INC., Appellee

On Appeal from the 55th District Court
Harris County, Texas
Trial Court Cause No. 2015-08678

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

Appellant @.C.T.S. @dvanced Computer Technician Services, LLC ("ACTS") and appellee Lexington Auto Repair, Inc. were parties to a commercial lease. ACTS sued Lexington for breach of the lease and other claims; Lexington then asserted a counterclaim for breach of the lease based on ACTS's alleged failure to timely pay rent. Lexington filed a motion for summary judgment for affirmative relief on its counterclaim for breach of the lease, which the trial court granted.

Separately, the court dismissed ACTS's claims for want of prosecution, with prejudice, because ACTS did not appear for the scheduled trial. The final judgment awards Lexington damages and attorneys' fees. The court subsequently denied ACTS's motion to reinstate its claims.

On appeal, ACTS challenges the trial court's rulings granting Lexington's summary judgment motion and dismissing ACTS's affirmative claims. Concluding that the trial court did not err in granting Lexington's motion for summary judgment and that ACTS has inadequately briefed its argument challenging the trial court's dismissal of ACTS's affirmative claims, we affirm.

Background

Lexington owned a retail shopping center, in which ACTS rented space to operate a computer repair services store. ACTS and Lexington entered into a three-year lease agreement, beginning in September 2013 and ending in August 2016. ACTS sued Lexington for breach of the lease, alleging that Lexington unlawfully evicted ACTS for failure to pay rent and late fees, and wrongfully seized ACTS's property.[1] Lexington filed a counterclaim against ACTS for breach of the lease, seeking ACTS's unpaid rent and other relief. Lexington also joined a third-party defendant, Wendkuuni G. Ouedraogo a/k/a W. Gilles Patrick Ouedraogo, based on the allegation that Ouedraogo personally guaranteed ACTS's rent payment obligations under the lease.[2]

Lexington moved for traditional summary judgment against ACTS and Ouedraogo. In its summary judgment motion, Lexington argued that ACTS

[1] ACTS also purported to assert claims for violations of the Texas Deceptive Trade Practices Act and tortious interference with business.

[2] Lexington's third-party petition against Ouedraogo does not appear in the record, but other pleadings, including Ouedraogo's answer, confirm his joinder as a third-party defendant.

breached the lease by failing to timely deliver monthly rent payments, and that Ouedraogo personally guaranteed ACTS's obligation.

The trial court granted Lexington's motion for summary judgment, adjudging ACTS and Ouedraogo jointly and severally liable to Lexington for $39,702.98, plus prejudgment interest. This was an interlocutory order. According to the record, ACTS subsequently failed to appear for docket call. The court later signed a final judgment, which (1) dismissed with prejudice ACTS's affirmative claims against Lexington for want of prosecution, (2) dismissed without prejudice Lexington's claims against other third parties not relevant here, and (3) noted that the prior interlocutory summary judgment in Lexington's favor shall become final. The final judgment orders that Lexington recover from ACTS and Ouedraogo $39,702.98 in contract damages, prejudgment interest, costs, trial and conditional appellate attorneys' fees, and postjudgment interest.

Within thirty days of the final judgment, ACTS filed an unverified motion to reinstate its affirmative claims, arguing that it "improperly calendared the pretrial setting." Lexington filed responses, which urged the trial court to deny reinstatement of ACTS's claims because, among other reasons, the motion to reinstate was not verified as required by Texas Rule of Civil Procedure 165a(3). The trial court denied the motion to reinstate by written order.

Thirty-two days after the final judgment, ACTS filed a motion for new trial, on which the trial court never ruled.

ACTS now appeals, asserting in three issues that the trial court erred in granting Lexington's motion for summary judgment and in dismissing ACTS's claims for want of prosecution.[3]

[3] Ouedraogo did not file a notice of appeal.

Analysis

A. Appellate Jurisdiction

First, we sua sponte address our jurisdiction over this appeal because it appears from the record that ACTS may not have filed its notice of appeal timely. *See Royal Indep. Sch. Dist. v. Ragsdale*, 273 S.W.3d 759, 763 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

An appellate court generally has jurisdiction over a case if a notice of appeal is filed within thirty days after the judgment is signed. Tex. R. App. P. 26.1. ACTS filed its notice of appeal on June 22, 2016, forty-four days after the trial court's judgment. Thus, a question arises as to whether the notice of appeal is timely.

Exceptions to the thirty-day deadline exist, and a party has ninety days from the date on which the judgment is signed to file a notice of appeal if certain motions are timely filed. *See id.*; *Watson v. Clark*, No. 14-14-00031-CV, 2015 WL 780563, at *1 (Tex. App.—Houston [14th Dist.] Feb. 24, 2015, no pet.) (mem. op.). ACTS filed two such motions that potentially could extend the notice of appeal deadline to ninety days: a motion for new trial and a motion to reinstate under Texas Rule of Civil Procedure 165a. Tex. R. App. P. 26.1(a)(1), (3). If either of these motions effectively extended the notice of appeal deadline, then ACTS's appeal was timely and we have jurisdiction. On the other hand, if neither motion extended the deadline, then we must address whether other procedural mechanisms—such as a motion to extend time to file a notice of appeal under Texas Rule of Appellate Procedure 26.3—allow us to deem the notice of appeal timely filed.

We first examine whether ACTS's motion to reinstate extended the notice of appeal deadline from thirty to ninety days. ACTS filed a motion to reinstate its claims on May 12, 2016, within thirty days of the signing of the judgment. However,

motions to reinstate must be verified, and this one was not. Tex. R. Civ. P. 165a(3). Although Lexington raised the lack of verification in its response to the motion, ACTS did not file an amended or corrected—and verified—motion to reinstate within the thirty-day deadline. Accordingly, we hold that ACTS's unverified motion to reinstate did not extend the deadline for filing the notice of appeal. *Butts v. Capitol City Nursing Home, Inc.*, 705 S.W.2d 696, 697 (Tex. 1986) (per curiam) (unverified motion to reinstate does not extend time for perfecting appeal); *Watson*, 2015 WL 780563, at *2 (same).

ACTS also filed a motion for new trial. However, the deadline to file a motion for new trial is thirty days after the judgment is signed, Tex. R. Civ. P. 329b(a), and that deadline cannot be extended. *See In re Brookshire Grocery Co.*, 250 S.W.3d 66, 73 (Tex. 2008) (citing Tex. R. Civ. P. 5, which provides that a trial court "may not enlarge the period for taking any action under the rules relating to new trials"). ACTS did not file its motion for new trial until June 10, 2016, which was thirty-two days after the trial court's judgment was signed. Thus, ACTS's motion for new trial did not extend the appellate timetable. *See* Tex. R. Civ. P. 329b(a); *Goldberg v. Zinn*, No. 14-11-01091-CV, 2013 WL 2456869, at *3 (Tex. App.—Houston [14th Dist.] June 6, 2013, no pet.) (mem. op.) (untimely motion for new trial will not extend deadline for appeal).

Because neither post-judgment motion extended the deadline to file a notice of appeal, and given this State's strong preference for deciding appeals on the merits as opposed to procedural deficiencies,[4] we consider whether other alternatives exist that would vest us with jurisdiction over this appeal. Under Texas Rule of Appellate

[4] *See, e.g.*, *Marino v. King*, 355 S.W.3d 629, 634 (Tex. 2011) (per curiam) ("Constitutional imperatives favor the determination of cases on their merits rather than on harmless procedural defaults.").

Procedure 26.3, an appellate court may extend the deadline to file a notice of appeal if, within fifteen days after the deadline to file a notice of appeal, a party (1) files a notice of appeal in the trial court, and (2) files a motion to extend time in the appellate court. Tex. R. App. P. 26.3. Here, ACTS filed its notice of appeal in the trial court within the fifteen day period referenced in Rule 26.3. Although it did not also file a motion for extension of time to file a notice of appeal in this court, we nonetheless will imply a motion to extend time to implement this State's policy preference for effectuating good faith efforts to invoke appellate jurisdiction. *See Verburgt v. Dorner*, 959 S.W.2d 615, 615 (Tex. 1997) (holding that motion for extension of time is implied when a party, acting in good faith, files an instrument to perfect appeal within the fifteen-day period permitted by the predecessor to Texas Rule of Appellate Procedure 26.3). Therefore, we have jurisdiction over this appeal.[5]

We turn now to the merits of ACTS's appeal.

B. Summary Judgment

In two related issues, ACTS argues that the trial court erred in granting Lexington's motion for summary judgment. ACTS contends there "is/was some evidence that supplies a reasonable basis on which reasonable minds may have reached different conclusions about the existence of vital facts." However, ACTS fails to identify any factual dispute or controverting evidence, nor does it support its argument with any citation to case law, other than pages of standard-of-review cases.

[5] In its appellee's brief, Lexington raises a "jurisdictional" argument different from the one just discussed. Lexington argues that ACTS's failure to suspend enforcement of the trial court's judgment is a jurisdictional defect, requiring this court to dismiss the appeal. We disagree because a judgment debtor's failure to suspend enforcement of a judgment pending appeal does not implicate an appellate court's jurisdiction over a challenge to the judgment. *Cf. In re Crow-Billingsley Air Park, Ltd.*, 98 S.W.3d 178, 179 (Tex. 2003) (per curiam) ("Our procedural rules allow a judgment debtor to supersede a judgment, thereby suspending enforcement, by posting security set by the trial court, not by merely filing an appeal.").

ACTS also argues that it has affirmative defenses that negate Lexington's "account of events," but fails to identify any such defenses, much less explain why the trial court should have denied Lexington's motion for summary judgment on the basis of an affirmative defense.[6] In fact, ACTS's appellate brief contains no record cites whatsoever.

In the absence of any citation to the record or legal authority, we are justified in concluding that ACTS failed to adequately brief any argument in support of its first two issues. *See* Tex. R. App. P. 38.1(i); *Buggelli v. Feltis*, No. 14-07-00027-CV, 2008 WL 4308333, at *2 (Tex. App.—Houston [14th Dist.] Aug. 28, 2008, no pet.) (mem. op.) (although courts liberally construe briefing, failure to identify evidence, explain contentions, or support argument with legal authority in brief constitutes waiver of issue on appeal); *Mondesir v. Luby's Rests., Ltd. P'ship*, No. 01-09-00402-CV, 2010 WL 5060573, at *2-3 (Tex. App.—Houston [1st Dist.] Dec. 9, 2010, no pet.) (mem. op.) (appellant's failure to specify any particular genuine issue of material fact, failure to identify any factual dispute, failure to present any argument about why disputed facts preclude summary judgment, and failure to cite case law constituted inadequate briefing and thus waiver).

However, to the extent that ACTS's brief presents anything for our review, we will consider those arguments we can reasonably discern in the interest of justice. *See Arellano v. Don McGill Toyota of Katy, Inc.*, No. 14-09-00961-CV, 2011 WL 345869, at *1 n.1 (Tex. App.—Houston [14th Dist.] Feb. 3, 2011, no pet.) (mem. op.). After thoroughly reviewing the record, we conclude that the trial court did not err in granting Lexington's motion for summary judgment.

[6] To the extent ACTS pleaded any affirmative defenses in the trial court, we are blind to them because any answer ACTS may have filed to Lexington's counterclaim does not appear in the appellate record.

As the movant, Lexington was required to prove conclusively that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c). If the movant initially establishes a right to summary judgment on the issues expressly presented in the motion, then the burden shifts to the nonmovant to present to the trial court any issues or evidence that would preclude summary judgment. *See Campbell v. Mabry*, 457 S.W.3d 173, 174 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (citing *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678-79 (Tex. 1979)). We review the judgment by considering all the evidence in the light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if a reasonable factfinder could, and disregarding contrary evidence unless a reasonable factfinder could not. *See id.* at 175 (citing *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006)).

Lexington moved for summary judgment on its breach of contract counterclaim because ACTS failed to pay rent for several months. As supporting evidence, Lexington attached: (1) the lease; (2) a judgment ruling that Lexington had not locked out ACTS unlawfully in a prior suit;[7] (3) Lexington's demand to ACTS for possession of the premises; (4) a previous judgment awarding possession to Lexington;[8] and (5) a damages affidavit. Lexington also argued that Ouedraogo personally guaranteed ACTS's lease obligations.

ACTS filed a response, "avow[ing] that it had fully performed all conditions, covenants, and promises on 'its' part as stipulated under the lease

[7] According to the exhibit, Ouedraogo previously filed an unlawful lockout proceeding, in which the justice of the peace concluded that an unlawful lockout had not likely occurred and did not issue a writ of re-entry. Lexington contends that no party appealed that judgment.

[8] According to the exhibits, Lexington demanded possession of the leased premises and payment of outstanding rent, but ACTS did not comply. Lexington then filed a forcible detainer action, and the justice of the peace awarded possession of the premises to Lexington. Lexington contends that no party appealed that judgment.

contract/agreement," and arguing that "despite this, Defendant/Movant wrongfully terminated the lease agreement/contract and unlawfully evicted [ACTS]." ACTS did not, however, attempt to substantively rebut any of Lexington's arguments. In fact, it conceded that it failed to pay rent, though it disputed the amount owed. ACTS attached to its response an affidavit by Ouedraogo. Ouedraogo joined in the response, but he did not assert any argument refuting his potential liability under a personal guarantee.

To prevail on a breach-of-contract claim, a party must establish the following elements: (1) a valid contract existed between the plaintiff and the defendant, (2) the plaintiff tendered performance or was excused from doing so, (3) the defendant breached the terms of the contract, and (4) the plaintiff sustained damages as a result of the defendant's breach. *Viajes Gerpa, S.A. v. Fazeli*, -- S.W.3d --, 2016 WL 7478352, at *12 (Tex. App.—Houston [14th Dist.] 2016, pet. filed); *West v. Triple B Servs., LLP*, 264 S.W.3d 440, 446 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

No one disputes that the lease agreement is a valid contract. Lexington contended that it performed under the contract by allowing ACTS to occupy the premises, a contention ACTS did not deny. ACTS conceded that it had failed to pay at least some rent, which constitutes a breach of contract. *See Stovall & Assocs., P.C. v. Hibbs Fin. Ctr., Ltd.*, 409 S.W.3d 790, 802 (Tex. App.—Dallas 2013, no pet.). As the basis for its damages, Lexington sought the unpaid back rent from August 2014 through August 2015, a "CAMIT shortage," the commission paid to a broker to re-lease the premises, a build-out allowance for the new tenant, and pre-suit legal fees, and credited ACTS its security deposit. ACTS neither disputed nor offered controverting evidence of any of the amounts due. In Ouedraogo's attached affidavit, he stated that (1) Lexington accepted reduced rent payments during the

lease term, (2) Lexington did not provide notice before assuming control of the premises, and (3) Lexington's lockout caused damage to ACTS's business. Assuming any of these arguments constitute a defense, they are not supported by pleadings or evidence in the record.

We hold that Lexington conclusively established its right to summary judgment on its breach of contract claim against ACTS. ACTS failed to raise a genuine issue of material fact as to any element of Lexington's breach of contract claim, and the trial court did not err in granting Lexington's motion. *See Ballard v. Arch Ins. Co.*, 478 S.W.3d 950, 953 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (if movant's motion and evidence establish its right to summary judgment as a matter of law, burden shifts to the nonmovant to raise a genuine issue of material fact sufficient to defeat summary judgment).[9]

We overrule ACTS's first two issues challenging the summary judgment in Lexington's favor on its breach of contract claim against ACTS.

C. Dismissal and Post-Judgment Motions

In its third issue, ACTS challenges the trial court's order dismissing its claims for want of prosecution and the denial of ACTS's motion for new trial. The full extent of ACTS's argument is as follows:

> The trial court erred by granting Appellee's Motion to Dismiss[10] and denying Appellant's Motion for new Trial. Appellant failed to show up

[9] We do not address whether Lexington conclusively established its right to summary judgment against Ouedraogo based on the alleged personal guarantee because Ouedraogo has not appealed the judgment and no party to the appeal challenges that aspect of the judgment. Accordingly, we leave undisturbed the portion of the judgment awarding damages against Ouedraogo.

[10] There is no motion to dismiss filed by Lexington in the clerk's record. A trial court may dismiss a party's suit for want of prosecution on its own motion. *See Belohlavy v. Belohlavy*, No. 05-98-02096-CV, 2001 WL 804507, at *2 (Tex. App.—Dallas July 18, 2001, no pet.) (not

> for trial as slated, but this was not as a result of willful disregard but because of circumstances beyond its control as Appellant's Principal Officer, Wendkunmi [*sic*] G. Ouedraogo, was in jail at the time slated for trial.

Such a bare assertion, unaccompanied by argument or authority, waives error on appeal. *See CoTemp, Inc. v. Houston W. Corp.*, 222 S.W.3d 487, 495 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (citing Tex. R. App. P. 38.1, which requires a clear and concise argument for the contentions made with appropriate citations to authorities and the record). ACTS's briefing waiver authorizes us to deny relief. *See* Tex. R. App. P. 38.1(i); *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 410 (Tex. 1997) (noting that ordinarily failure to brief an argument waives error on appeal); *see also Nguyen v. Kosnoski*, 93 S.W.3d 186, 188 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

We note that typically a dismissal under these circumstances must be without prejudice. *See Harris County v. Gambichler*, 479 S.W.3d 514, 516 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (dismissal for want of prosecution is not a determination on the merits, and therefore dismissal with prejudice in such circumstances is improper); *see also Martinez v. Benavides*, No. 01-14-00269-CV, 2015 WL 1501793, at *3 (Tex. App.—Houston [1st Dist.] Mar. 31, 2015, no pet.) (mem. op.) ("If a trial court improperly dismisses a case for want of prosecution with prejudice, the appellate court should modify the judgment to strike the words 'with prejudice.'"); *Downs v. Tex. Bd. of Pardons & Paroles*, No. 03-97-00331-CV, 1998 WL 426021, at *3 (Tex. App.—Austin July 30, 1998, no pet.) (not designated for publication) (modifying judgment to delete "with prejudice" from dismissal order) (citing Tex. R. App. P. 43.2(b)). Although the trial court dismissed ACTS's claims

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designated for publication) (citing Tex. R. Civ. P. 21, 165a; *Villareal v. San Antonio Truck & Equip.*, 994 S.W.2d 628, 630 (Tex. 1999)).

with prejudice, we have held that ACTS waived any challenge to the portion of the judgment dismissing its claims. Additionally, ACTS has not argued alternatively that, assuming the trial court did not abuse its discretion in dismissing ACTS's claim, it nonetheless erred in dismissing the claims with prejudice. While we would typically modify the judgment under these circumstances to state that the claims are dismissed without prejudice, we consider it imprudent, if not prohibited, to sua sponte modify the judgment when ACTS has not requested that relief and has otherwise waived any error with respect to the portion of the judgment dismissing its claims. *See State v. Brown*, 262 S.W.3d 365, 370 (Tex. 2008) ("We do not believe it proper to sua sponte grant relief Brown has not sought."); *see also Zaidi v. Shah*, 502 S.W.3d 434, 446 (Tex. App.—Houston [14th Dist.] 2016, pet. denied).

We overrule ACTS's third issue.

Conclusion

For the above reasons, we affirm the trial court's judgment.

/s/ Kevin Jewell
Justice

Panel consists of Justices Boyce, Donovan, and Jewell.