

Affirmed and Memorandum Opinion filed April 10, 2018.



In The

Fourteenth Court of Appeals

NO. 14-16-00619-CV

DORA LINDA RODRIGUEZ AND FRANCISCO RODRIGUEZ, Appellants

V.

OVATION SERVICES, LLC, Appellee

**On Appeal from the 333rd District Court
Harris County, Texas
Trial Court Cause No. 2014-41901**

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

In this judicial-foreclosure case two real property owners appeal the trial court's summary-judgment rulings favoring the current holder of the promissory note and lien. The property owners assert that the trial court erred in sustaining the lienholder's objections to the property owners' summary-judgment evidence, in granting summary judgment, and in denying the property owners' motion for new trial. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

In January 2006, appellants/plaintiffs/counter-defendants Dora Linda Rodriguez and Francisco Rodriguez each signed a promissory note and a deed of trust. Years later the Rodriguezes filed this lawsuit asserting various claims against appellee/defendant/counter-plaintiff Ovation Services, LLC. Ovation answered and counterclaimed, asserting that it was the current holder of the promissory note and lien. Ovation sought to recover against the Rodriguezes for alleged breach of the promissory note and also requested judicial foreclosure of Ovation's lien.

In its summary-judgment motion, Ovation sought a traditional summary judgment as to the Rodriguezes' claims against Ovation and as to Ovation's claims against the Rodriguezes. The Rodriguezes timely filed a summary-judgment response with attached evidence. Ovation asserted objections to the Rodriguezes' proffered proof, and the trial court sustained these objections in a written order, granted Ovation's summary-judgment motion, denied the Rodriguezes recovery on their claims, and granted Ovation summary judgment on its breach-of-contract claim and request for judicial foreclosure. The Rodriguezes then filed a motion for new trial, and the trial court denied it.

II. ISSUES AND ANALYSIS

A. **Did the trial court err in sustaining the objections to the summary-judgment evidence and in granting summary judgment?**

In responding to Ovation's summary-judgment motion, the Rodriguezes submitted the following documents in an attempt to raise a fact issue: (1) their Fourth Amended Petition, (2) Dora Rodriguez's affidavit, and (3) Francisco Rodriguez's affidavit. Ovation objected to this proffered evidence, and the trial court signed an order sustaining Ovation's objections to (1) the Fourth Amended

Petition, (2) paragraphs 2 through 6 of Dora Rodriguez's affidavit, and (3) paragraphs 2 through 6 of Francisco Rodriguez's affidavit.

In their first issue on appeal, the Rodriguezes assert that the trial court erred in sustaining Ovation's objections to their summary-judgment evidence and in granting Ovation's summary-judgment motion. Because these two arguments are closely related, we address them together.

Objections to Summary-Judgment Affidavits

The trial court sustained Ovation's objections to almost all of the Rodriguezes' summary-judgment evidence. On appeal, the Rodriguezes concede that the objection to the Fourth Amended Petition was valid, but they assert that the trial court erred in sustaining the objections to their affidavits.

The two affidavits were substantially similar. Each had eight paragraphs. In paragraphs 1, 7, and 8 of each affidavit, the affiant stated: (1) the affiant's name, residence address, competence to make the affidavit, and personal knowledge of the facts stated in the affidavit; (2) the affiant never received a release of lien for the promissory note and deed of trust; and (3) the affiant paid attorney's fees as a result of having to defend the affiant's interest in this case.

The Rodriguezes state in a conclusory manner that their affidavits are competent summary-judgment evidence that set forth sufficient facts, and they assert that Ovation's objections to the affidavits lacked merit. But, in their appellate brief the Rodriguezes do not discuss each objection. Nor do they address the affidavit statements to which the objections pertained. The Rodriguezes do not discuss the standard of review of the trial court's rulings on objections to summary-judgment evidence or the legal standard applicable to the substance of the objections.

An appellant’s brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record. Tex. R. App. P. 38.1(h); *San Saba Energy, L.P. v. Crawford*, 171 S.W.3d 323, 338 (Tex. App.—Houston [14th Dist.] 2005, no pet.). We interpret this requirement reasonably and liberally. *Republic Underwriters Ins. Co. v. Mex-Tex, Inc.*, 150 S.W.3d 423, 427 (Tex. 2004). Yet, we enforce the briefing rules, and they require the appellant to put forth some specific argument and analysis showing that the record and law supports the appellant’s contentions. *See Deutsch v. Hoover, Bax & Slovacek, L.L.P.*, 97 S.W.3d 179, 198–99 (Tex. App.—Houston [14th Dist.] 2002, no pet.). We conclude that the Rodriguezes have failed to submit adequate briefing to support their contention that the trial court erred in sustaining Ovation’s objections to their summary-judgment affidavits. *See Kaldis v. Aurora Loan Servs.*, 424 S.W.3d 729, 736–37 (Tex. App.—Houston [14th Dist.] 2014, no pet.). Therefore, the Rodriguezes have waived this complaint.¹ *See id.*

No Fact Issues to Defeat Summary Judgment

The Rodriguezes assert that their proffered summary-judgment proof raised a fact issue as to whether they breached the promissory note by failing to make payments and as to whether Ovation has any damages under its breach-of-contract claim. The Rodriguezes assert that they satisfied the promissory note and that Ovation has no damages under its note claim. But, the portions of the affidavits remaining after Ovation’s objections were sustained do not raise a genuine fact issue as to these points.² *See Winfield v. Pietsch*, No. 07-09-00261-CV, 2011 WL

¹ Even if the Rodriguezes had briefed this argument sufficiently, we still would conclude that the trial court did not err in sustaining the objections to the affidavits.

² In their appellate brief, the Rodriguezes cite documents that are in our appellate record but are not part of the summary-judgment evidence. These documents cannot raise a fact issue precluding summary judgment.

336131, at *4 (Tex. App.—Amarillo Feb. 3, 2011, no pet.) (mem. op.) (holding that summary-judgment evidence remaining after trial court sustained objections did not raise a fact issue). Thus, we overrule the Rodriguezes’ first issue.

B. Did the trial court abuse its discretion in denying the motion for new trial?

In their second issue, the Rodriguezes assert that the trial court abused its discretion in denying their motion for new trial. In this motion, the Rodriguezes asserted that before the trial court granted summary judgment, the Rodriguezes had in their possession proper summary-judgment evidence that would have raised a fact issue precluding summary judgment if the evidence had been submitted. The Rodriguezes indicate that the reason this evidence was not filed with the trial court was due to accident, mistake, or the negligent conduct of their counsel of record at the time. Therefore, the Rodriguezes assert, good cause existed to grant a new trial and a new trial was necessary to prevent manifest injustice. The Rodriguezes attached evidence to their motion for new trial that allegedly would have raised a genuine fact issue that would have precluded the trial court from properly granting Ovation’s summary-judgment motion.³

We review a trial court’s denial of a motion for new trial for an abuse of discretion. *Dir., State Employees Workers’ Comp. Div. v. Evans*, 889 S.W.2d 266, 268 (Tex. 1994). An abuse of discretion occurs when a court acts in an arbitrary or unreasonable manner, or without reference to guiding rules and principles. *Downer v. Aquamarine Operators*, 701 S.W.2d 238, 241–42 (Tex. 1985).

“Generally, a party may not rely on new evidence in a motion for new trial

³ The trial court did not affirmatively indicate in its order denying the motion for new trial or elsewhere in the record that it had accepted the evidence attached to the motion for new trial as summary-judgment evidence or that it considered the evidence.

without showing that the evidence was newly discovered and could not have been discovered through due diligence prior to the ruling on a summary judgment motion.” *McMahan v. Greenwood*, 108 S.W.3d 467, 500 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). The Rodriguezes do not argue, either in their motion for new trial or on appeal, that the additional proof attached to their motion for new trial amounted to newly discovered evidence that could not have been discovered through due diligence before the trial court’s ruling. Indeed, the Rodriguezes assert in their motion that they had this evidence before the trial court ruled and could have filed it in response to the summary-judgment motion. The Rodriguezes did not show that their failure to timely file this evidence in response to the summary-judgment motion was not due to lack of diligence. *See Herrera v. Alejos*, No. 01-16-00841-CV, 2017 WL 4545728, at *6–7 (Tex. App.—Houston [1st Dist.] Oct. 12, 2017, no pet.) (mem. op.). Presuming, without deciding, that the failure of the Rodriguezes’ attorney to file these documents in response to Ovation’s summary-judgment motion constituted a lack of diligence, any such lack of diligence is imputed to the Rodriguezes and does not require the trial court to grant a new trial. *See Petro–Chem. Transp. v. Carroll*, 514 S.W.2d 240, 246 (Tex. 1974); *Cotton v. Briley*, 517 S.W.3d 177, 183–84 (Tex. App.—Texarkana, 2017, no pet.).

We hold that the Rodriguezes have failed to show that the trial court abused its discretion by denying their motion for new trial. *See McMahan*, 108 S.W.3d at 500; *Herrera*, 2017 WL 4545728, at *6–7. Accordingly, we overrule the Rodriguezes’ second issue.

Having overruled both of the Rodriguezes' appellate issues, we affirm the trial court's judgment.

/s/ **Kem Thompson Frost**
 Chief Justice

Panel consists of Chief Justice Frost and Justices Donovan and Wise.