Affirmed and Memorandum Opinion filed March 29, 2018.

In The

Fourteenth Court of Appeals

NO. 14-17-00423-CV

ERIC LYONS, Appellant

V.

LEXINGTON WOODS TRAILS COMMUNITY ASSOCIATION, INC., Appellee

On Appeal from the County Civil Court at Law No. 1
Harris County, Texas
Trial Court Cause No. 1081407

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

A homeowners' association sued appellant, a homeowner, for allegedly violating the subdivision's deed restrictions. The association moved for summary judgment. Appellant did not file a response, and the trial court granted summary judgment in the association's favor. The homeowner appeals. We conclude that the association established its entitlement to summary judgment and appellant did not create a genuine issue of material fact. Accordingly, we affirm.

Background

Lexington Woods Trails Community Association, Inc. (the "Association") is the homeowner's association for the Lexington Woods Trails Subdivision. The Association filed suit against appellant Eric Lyons, who is alleged to be the owner of one of the homes located within the subdivision. The Association claimed that Lyons's home was in violation of the subdivision's Declaration of Covenants, Conditions and Restrictions (the "Deed Restrictions") because Lyons constructed a structure on his property without obtaining prior approval. The Association sought injunctive relief—specifically, the removal of the unapproved structure—and attorney's fees.

Lyons filed an answer containing a general denial and several affirmative defenses. In his answer, Lyons provided his address as 25203 Tuckahoe Lane, Spring, Texas 77373. This is the street address of the property about which the Association complains in its original petition.

The Association filed a traditional motion for summary judgment. The Association asserted that its board of directors passed certain rules and regulations related to lot maintenance (the "Regulations"), including a regulation requiring "[a]ll standing structures on a lot, other than the home, including . . . sheds . . ." to be "screened from view from the street." The Association argued that Lyons was in violation of the Regulations because he had constructed a shed that was visible from the street.[1] The Association attached a copy of the Regulations approved by the

[1] The Association's motion for summary judgment alleged a breach different from the one asserted in its original petition. To the extent this variance constitutes a defect in the Association's pleadings, Lyons did not except to the motion or otherwise point out the defect in the pleadings. The issues were therefore tried by consent. *See Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 495 (Tex. 1991) ("If the non-movant does not object to a variance between the motion for summary judgment and the movant's pleadings, it would advance no compelling interest of the

Association's board of directors regarding "Lot Maintenance," which is applicable to all "owners, tenants, families, guests and invitees." The Association also attached an affidavit from an employee with the Association's management company, Wendy Ishee. Ishee testified that Lyons is the owner of the property at 25203 Tuckahoe Lane, and that the identified property is within the Lexington Woods Trails Subdivision. The Association submitted photographic evidence of the property, which depicted the top of a shed visible over Lyons's fence. Ishee testified that the violation existed prior to the filing of this lawsuit and continues to exist, and that the Association sent notice of the violation to Lyons but Lyons failed to cure the violation. The Association argued that it was entitled to statutory damages under Texas Property Code section 202.004(c), a permanent injunction requiring Lyons to screen the shed from street view, and attorney's fees. The motion indicates it was served on Lyons by certified mail–return receipt requested. Lyons did not file a response.

The trial court granted the Association's motion for summary judgment, awarding statutory damages, a permanent injunction requiring Lyons to screen the shed from street view, trial and conditional appellate attorney's fees, and post-judgment interest.

Lyons now appeals.

Analysis

We review a trial court's grant of summary judgment de novo. *Phillips v. Abraham*, 517 S.W.3d 355, 359 (Tex. App.—Houston [14th Dist.] 2017, no pet.). To prevail on a traditional motion for summary judgment, the moving party must

parties or of our legal system to reverse a summary judgment simply because of a pleading defect.").

demonstrate that no material fact issue exists and that it is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000) (per curiam). Specifically, the moving party must establish each element of its claim as a matter of law or negate an element of the non-movant's claim or defense as a matter of law. *See Willrich*, 28 S.W.3d at 23. If the movant facially establishes its right to judgment as a matter of law, the burden shifts to the nonmovant to raise a genuine, material fact issue. *Phillips*, 517 S.W.3d at 359; *Willrich*, 28 S.W.3d at 23. If the movant fails to meet its initial summary judgment burden, then the nonmovant has no duty to respond and may challenge the grant of summary judgment on appeal on legal sufficiency grounds regardless whether the nonmovant filed a response. *See Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999).

Here, the Association moved for summary judgment on its claim that Lyons violated the Regulations. A party seeking to enforce a deed restriction must prove that the defendant intended to do an act which would breach the deed restriction or that the defendant violated the deed restriction. *Nash v. Peters*, 303 S.W.3d 359, 362 (Tex. App.—El Paso 2009, no pet.); *see also Southwyck, Section IV Homeowners' Ass'n, Inc. v. Southwyck Cmty. Ass'n, Inc.*, No. 14-16-00139-CV, 2017 WL 4697884, at *6 (Tex. App.—Houston [14th Dist.] Oct. 19, 2017, no pet.) (mem. op.) (when party seeks injunction to enforce a covenant in a deed, the movant must prove that the defendant intends to do an act that would breach the restrictive covenant). The Association argued that Lyons violated one of the Regulations relating to lot maintenance because his shed was visible from the street. The Association attached evidence that Lyons owned the subject property and constructed a shed that violates the applicable Regulation because it is visible from the street. Thus, the Association facially established its right to summary judgment.

The burden then shifted to Lyons to raise a genuine issue of material fact. *Willrich*, 28 S.W.3d at 23. Lyons did not file a response, however. After the court granted summary judgment, Lyons did not file any motion to set aside the judgment, such as a motion for new trial.

Construing his appellate brief liberally,[2] Lyons argues that summary judgment was improper for several reasons. First, he contends the Regulations do not apply to him because he is not the property owner. Second, acknowledging he did not file a summary judgment response, he asserts he was unable to respond because he was out of town on the due date and the Association filed its motion and set it for hearing knowing that Lyons would be unable to respond. Third, Lyons alleges various facts that, in substance, amount to an argument that he is not violating the Regulations and met all covenants and conditions for approval of his shed. Finally, Lyons contends that the Association enforces the Deed Restrictions and Regulations inequitably.

Turning first to the property ownership issue, Ishee's affidavit established that Lyons owned the property at 25203 Tuckahoe Lane. Because Lyons did not contest that affidavit in the trial court or present opposing proof showing a lack of ownership, his argument and allegations on appeal provide no basis for reversing the summary judgment. *See McAnally v. Friends of WCC, Inc.*, 113 S.W.3d 875, 879-80 (Tex. App.—Dallas 2003, no pet.) (concluding that affidavit was sufficient proof of ownership of cemetery plots, when defendant did not contest the affidavit); *accord also Goad v. Hancock Bank*, No. 14-13-00861-CV, 2015 WL 1640530, at *5 (Tex. App.—Houston [14th Dist.] Apr. 9, 2015, pet. denied) (mem. op.) (trial court

[2] *See Green v. Midland Mortg. Co.*, 342 S.W.3d 686, 692 n.7 (Tex. App.—Houston [14th Dist.] 2011, no pet.) ("[Appellants] are appearing pro se on appeal, and we construe their appellate brief liberally."). Lyons is self-represented in this court, as he was in the trial court.

did not err in granting summary judgment when non-movant provided no controverting evidence regarding movant's ownership of promissory note).

As to Lyons's remaining arguments for reversal, the record does not show that he raised them in the trial court. For example, he cites several facts supporting the assertion that he is not in violation of the Regulations, but those are matters that could have been, but were not, asserted in a summary judgment response. Lyons is presenting his side of the story for the first time to our court. He cannot seek to reverse summary judgment on a ground not raised below. *See Swinehart v. Stubbeman, McRae, Sealy, Laughlin & Browder, Inc.*, 48 S.W.3d 865, 885 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (op. on reh'g). Fact issues that are not raised by summary judgment evidence set forth in a summary judgment motion or response filed before judgment is entered may not be considered as grounds for reversal on appeal. *See* Tex. R. Civ. P. 166a(c); *Benchmark Bank v. Crowder*, 919 S.W.2d 657, 663 (Tex. 1996).[3]

To the extent that Lyons seeks to reverse the summary judgment because the Association sought to impede Lyons's ability to file a timely response by setting a hearing when he was out of town, that issue could have been raised in a motion for new trial or other post-judgment motion. Lyons filed no motion presenting his version of the facts to the trial court, nor did he ask the court to vacate the judgment and allow him to file a summary judgment response. Accordingly, we are constrained to conclude that he failed to preserve error as to these arguments. *See* Tex. R. App. P. 33.1(a) (requiring timely and specific objection upon which the trial court ruled or refused to rule); *Davis v. Wells Fargo Bank, N.A.*, No. 03-13-00166-CV, 2015 WL 5232018, at *1 n.4 (Tex. App.—Austin Aug. 31, 2015, no pet.) (mem.

[3] Further, Lyons has not cited any legal authority to support his arguments. *See* Tex. R. App. P. 38.1(i) (brief must include appropriate citations to authorities).

op.) ("We do not address these arguments because a party may not raise on appeal new reasons why a summary judgment should have been denied.").

On this record, we thus hold that the trial court did not err in granting the Association's motion for summary judgment.

Conclusion

We overrule Lyons's issue on appeal, and we affirm the trial court's judgment.

/s/ Kevin Jewell
Justice

Panel consists of Justices Christopher, Donovan, and Jewell.