Affirmed in Part, Reversed and Remanded in Part, and Memorandum Opinion filed August 24, 2023

In The

Fourteenth Court of Appeals

NO. 14-22-00101-CV

CMS CONSULTANTS, LLC, Appellant

V.

EPM DISASTER RECOVERY TEAM, LLC, Appellee

On Appeal from the 281st District Court
Harris County, Texas
Trial Court Cause No. 2020-69065

MEMORANDUM OPINION

Appellee EPM Disaster Recovery Team, LLC moved for summary judgment on its claims for breach of contract and violations of the Prompt Payment Act. The trial court granted appellee's motion and awarded appellee a judgment of actual damages, interest, and attorney's fees. Appellant CMS Consultants, LLC appeals the trial court's judgment. We affirm in part and reverse and remand in part.

MOTION FOR NEW TRIAL

Appellant argues the trial court erred in not considering its late-filed response to appellee's motion for summary judgment. Appellant contends that because of the difficulties it had in responding to the motion because of Hurricane Ida and appellant's inability to communicate with counsel, there was sufficient "good cause" to consider the response.

A. General Legal Principles

We review a trial court's refusal to grant a new trial for an abuse of discretion. *Dolgencorp of Tex., Inc. v. Lerma*, 288 S.W.3d 922, 926 (Tex. 2009). Generally, when a defaulting party moving for a new trial meets all three elements of the *Craddock* test, then a trial court abuses its discretion if it fails to grant a new trial. *Id*. However, when a party has notice of the summary judgment setting and an opportunity "to obtain additional time to file a response, either by moving for leave to file a late response or by requesting a continuance of the summary judgment hearing," then *Craddock* does not apply to the motion for new trial. *Id.* at 927 (citing *Carpenter v. Cimarron Hydrocarbons, Corp.*, 98 S.W.3d 682, 686 (Tex. 2002)). Instead, a party that fails to avail itself of the relief provided by the Rules of Civil Procedure waives its right to equitable relief. *See id*.; *see also Carpenter*, 98 S.W.3d at 683–84; *Reiff v. Roy*, 115 S.W.3d 700, 704 (Tex. App.—Dallas 2003, pet. denied) ("[W]hen the rules provide the defaulting party a remedy, *Craddock* does not apply."); *see also Sims v. Sims*, No. 05-16-00984-CV, 2018 WL 1477598, *3 (Tex. App.—Dallas Mar. 27, 2018, no pet.) (mem. op.) (concluding *Craddock* did not apply where nonmovant had opportunity and failed to avail himself of relief provided in the Rules of Civil Procedure and was not entitled to raise any arguments in motion for new trial).

B. Background

Appellee filed suit against appellant for breach of contract and a claim under the Prompt Payment Act (PPA). *See* Tex. Gov't Code § 2251, et seq. Appellant's counsel apparently did not respond to appellee's discovery requests, appellee's motion to compel, or appellee's motion to enforce the order compelling discovery responses. The trial court granted all of appellee's motions and, ultimately, rendered an order striking appellant's defenses and counterclaims.

Thereafter, appellee filed a motion for summary judgment on its claim for breach of contract and its claim under the PPA. Four days after appellee filed its motion for summary judgment, on August 29, 2021, Hurricane Ida made landfall near Port Fourchon, Louisiana. Severe damage was recorded across much of the coastal Louisiana area. On September 27, 2021, appellant filed its response to appellee's motion for summary judgment—two days late. Appellant did not file a motion for continuance or a motion for leave to file a late response. Appellee objected to the late filed response as untimely.

At the hearing on the motion for summary judgment, appellant's counsel indicated that he had trouble obtaining affidavits to support the summary judgment response "because [appellant is] in New Orleans, and because of Hurricane Ida, they didn't have adequate communications." At the hearing appellant's counsel made an oral request for leave to file the response considering the issues his client faced with Hurricane Ida. However, the trial court indicated the lack of evidence to support a motion, such as an affidavit or verification that would inform the trial court of the good cause to obtain relief. Appellant's counsel stated that he "could easily obtain [an affidavit] now that we do have communications with Louisiana." The trial court did not consider appellant's late-filed response and granted appellee's summary judgment.

A week after the trial court granted summary judgment, appellant filed a Motion for New Trial/Reconsideration and attached the affidavits of appellant's employees. The affidavits detailed the impact of Hurricane Ida on their ability to respond to the motion for summary judgment. Appellee non-suited its remaining claims and moved for entry of a final judgment. The trial court rendered a final judgment denying all relief not expressly granted therein.

C. Analysis

Appellant argues the trial court erred in not considering its late-filed response because there was good cause for its delay. We do not disagree that a hurricane and the ensuing disaster can certainly be good cause. However, in this case, prior to summary judgment there was no written motion or evidence presented to the trial court to allow it to make a good cause determination.

At the hearing on the motion for summary judgment, appellant's counsel made an oral request for the court to consider the late-filed response. In *Carpenter*, the Texas Supreme Court articulated the standard for granting leave to file a late summary-judgment response:

> We hold that a motion for leave to file a late summary-judgment response should be granted when a litigant establishes good cause for failing to timely respond by showing that (1) the failure to respond was not intentional or the result of conscious indifference, but the result of accident of mistake, and (2) allowing the late response will occasion no undue delay or otherwise injure the party seeking summary judgment.

Carpenter, 98 S.W.3d at 688.

Appellant's counsel argued to the trial court that he had good cause to late-file his summary judgment response because he had communication issues with his client due to Hurricane Ida. Counsel contended that his client had to travel to

obtain updated information, and that such travel was impossible due to the state of emergency. However, the trial court was permitted to disregard, at its discretion, these unsworn statements. *See id.* ("Even assuming that the trial court could consider counsel's unsworn argument . . . we cannot say that the trial court abused its discretion in denying leave based upon counsel's bare assertion."); *Duchene v. Hernandez*, 535 S.W.3d 251, 256–57 (Tex. App.—El Paso 2017, no pet.) ("[T]he trial court was entitled to overlook [counsel's] unsworn statements in determining whether to grant or deny leave."); *see also Banda v. Garcia*, 955 S.W.2d 270, 272 (Tex. 1997) (attorney's statements must be under oath to be considered evidence).

Counsel contended that he "presumed the court would be willing to, in the interest of justice, allow the late filing." However, the trial court does not abuse its discretion in denying leave without evidence of good cause. *See LeBlanc v. LeBlanc*, 365 S.W.3d 70, 82 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (no abuse of discretion when a party "failed entirely to present a reason for the late-filing of the evidence. He did not claim accident or mistake. Instead, he merely offered the evidence 'in the interest of fairness and justice.'"). When asked why he did not file a motion for continuance, counsel responded, "because we're anxious to get this resolved" and that he "wasn't confident that the court would grant a continuance at such a late time." Further, there was no evidence or argument from appellant regarding the second element of the *Carpenter* test—undue prejudice or delay. *See Swett v. At Sig, Inc.*, No. 02-08-00315-CV, 2009 WL 1425161, at *2 (Tex. App.—Fort Worth May 21, 2009, no pet.) (mem. op.) (no abuse of discretion because affidavits failed to discuss undue prejudice or delay).

From the record, prior to summary judgment, we cannot conclude the trial court abused its discretion in denying leave or refusing to consider the late filed summary judgment response and evidence. *See Carpenter*, 98 S.W.3d at 688

("While counsel argued at the hearing . . . that [it] had not timely responded because of a calendaring error, he offered no explanation of the error from which the trial court might determine that an accident or mistake had occurred."); *Duchene*, 535 S.W.3d at 256–57 (no abuse of discretion in denying leave when "[Party] argues that he established good cause . . . based primarily on the unsworn statements his counsel made at the summary judgment hearing regarding his alleged 'mistakes,' yet [Party] provided no affidavits or other evidence to support [his] statements"); *State Office of Risk Mgmt. v. Alonso*, 290 S.W.3d 254, 258 (Tex. App.—El Paso 2009, no pet.) (good cause element not established where witness was on vacation when response was due but party knew summary judgment was pending and record was silent regarding any communications or efforts to communicate with witness to obtain affidavit needed for response); *LeBlanc*, 365 S.W.3d at 82 (no abuse of discretion when a party "failed entirely to present a reason for the late-filing of the evidence. He did not claim accident or mistake. Instead, he merely offered the evidence 'in the interest of fairness and justice.'"); *see also Levine v. Shackelford, Melton & McKinley*, 248 S.W.3d 166, 169 (Tex. 2008) (upholding default judgment because pattern of ignoring deadlines and warnings from opposing party amounted to conscious indifference).

Appellant contends that the trial court should have granted its Motion for New Trial/Reconsideration[1] because, after summary judgment was granted, it provided evidence of good cause through the affidavits of its employees. However, when a nonmovant fails to timely respond, had notice of the hearing, and had an opportunity to employ the means available in the Rules of Civil Procedure, the *Craddock* elements do not apply in deciding whether the trial court should have

[1] This motion was filed a week after the trial court granted the motion for summary judgment.

granted a motion for new trial. *Carpenter*, 98 S.W.3d at 683–84; *Reiff*, 115 S.W.3d at 704; *Sims*, 2018 WL 1477598 at *3.

Appellant argues that *Wheeler v. Green* allows us to apply the "good cause" standard to appellant's motion for new trial. 157 S.W.3d 439, 441–43 (Tex. 2005). However, in *Wheeler*, the court noted that nothing in the record suggested that before summary judgment was granted the nonmovant realized she needed to file a response to the summary judgment raising certain arguments.[2] *Id*. at 442; *see also Nguyen*, 414 S.W.3d at 241 (noting that "*Carpenter* refused to 'extend equitable principles allowing these arguments to be raised in a motion for new trial' when 'a party realizes its mistake before judgment and has other avenues of relief available'"). As a result, the nonmovant in *Wheeler* was entitled to raise the arguments in her motion for new trial. *Id*. Here, the record is clear that appellant was aware of the need to timely file a response or request either a continuance or leave of court prior to judgment. As a result, appellant is not entitled to raise these arguments in a motion for new trial, and no equitable considerations are appropriate. *See Carpenter*, 98 S.W.3d at 686; *Reiff*, 115 S.W.3d at 704; *Sims*, 2018 WL 1477598 at *3; *see also Rabe v. Guaranty Nat. Ins. Co.*, 787 S.W.2d 575 (Tex. App.—Houston [1st Dist.] 1990, ("[T]he *Craddock* standard does not apply in an appeal from a summary judgment . . . . the trial court does not grant a summary judgment because the nonmovant fails to answer, but because the movant's proof is sufficient as a matter of law.").

Because appellant had notice and an opportunity to avail itself of the Rules of Civil Procedure, we cannot say that the trial court abused its discretion in

[2] *Wheeler* is also limited in its holding. *See id*. at 444. The court concluded that "when a rule itself turns on an actor's state of mind (as these do here), application may require a different result when the actor is not a lawyer." *Id*.

denying appellant's motion for new trial.[3] *See Carpenter*, 98 S.W.3d at 688 (upholding trial court's denial of motion for new trial even after considering evidence supporting "good cause" presented at the hearing on the motion for new trial); *see also Parsons v. Parsons*, No. 01-18-00902-CV, 2019 WL 5382637 (Tex. App.—Houston [1st Dist.] Oct. 22, 2019, no pet.) (mem. op.) (deferring to trial court's credibility determination and concluding trial court did not abuse its discretion for disbelieving explanation of "good cause"); *see also Kern v. Spencer*, No. 02-06-00199-CV, 2008 WL 2854657 (Tex. App.—Fort Worth July 24, 2008, no pet.) (mem. op.) (pattern of conduct in disregarding deadlines showed conscious indifference).

We overrule appellant's first issue.[4]

MOTION FOR TRADITIONAL SUMMARY JUDGMENT

Appellant contends that even without its response, the trial court erred in granting summary judgment on appellee's claims. Appellant argues that the affidavit supporting appellee's motion for summary judgment is from "an interested witness" and "is not clear, positive, direct, credible, free from contradiction, and susceptible from being readily controverted." Appellant

[3] Appellee also urges that the affidavits of appellant's employees attached to the Motion for New Trial/Reconsideration are deficient because they fail to attest to the truth of the assertions contained therein. "Swearing to the statement by the party making and signing it is essential to the validity of an affidavit." *Brown Found. Repair & Consulting, Inc. v. Friendly Chevrolet Co.*, 715 S.W.2d 115, 118 (Tex. App.—Dallas 1986, writ ref'd n.r.e.) (concluding affidavit did not constitute a verified denial because the defendant did not deny the account under oath—denial was merely "subscribed and sworn to"). Nowhere within the affidavits have the affiants sworn or affirmed under oath that the facts stated are true. *See id*.; *see also In re K.M.L.*, 443 S.W.3d 101, 110–11 (Tex. 2014) (concluding affidavit was sufficient because the jurat indicated the affiant made the statements "under oath").

[4] Because we conclude that the trial court did not abuse its discretion in denying leave, we do not reach appellant's second issue, that the late-filed evidence raised a fact issue precluding summary judgment. *See* Tex. R. App. P. 47.1.

questions whether the affiant has any "personal knowledge" regarding the work done by appellee. Appellant complains that "there is no substantiation as to the amounts paid on labor or materials . . . because [the affiant] gives no detail as to how he arrived upon" the amounts of damages requested. Appellant also contends that there is "no evidence" to support the award for appellee's prompt payment act claim because appellee was required to provide evidence that appellant had been paid.

A. General Legal Principles

We review the trial court's grant of a motion for summary judgment de novo. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). In reviewing a traditional motion for summary judgment, we must take as true all evidence favorable to the nonmovant and draw every reasonable inference and resolve all doubts in favor of the nonmovant. *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23–24 (Tex. 2000) (per curiam). The party moving for a traditional summary judgment has the burden to show that no genuine issue of material fact exists and that the movant is entitled to summary judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Willrich*, 28 S.W.3d at 23. We must consider all the evidence in the light most favorable to the nonmovant, indulging all reasonable inferences in favor of the nonmovant, and determine whether the movant proved there were no genuine issues of material fact and that it was entitled to judgment as a matter of law. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979).

When a nonmovant fails to respond to a traditional motion for summary judgment, the nonmovant is limited on appeal to arguing the legal sufficiency of the grounds presented in the motion. *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 343 (Tex. 1993). Once the movant establishes its right to

summary judgment, the burden shifts to the nonmovant to present a material fact issue that precludes summary judgment. *Clear Creek Basin Auth.*, 589 S.W.2d at 678. When the trial court does not specify the grounds for summary judgment, we must affirm if any of the independent grounds are meritorious. *Chrismon v. Brown*, 246 S.W.3d 102, 106 (Tex. App.—Houston [14th Dist.] 2007, no pet.).

To prevail on a claim of breach of contract, a plaintiff must prove: "(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." *Atrium Med. Ctr., LP v. Houston Red C LLC*, 546 S.W.3d 305, 311 (Tex. App.—Houston [14th Dist.] 2017), *aff'd*, 595 S.W.3d 188 (Tex. 2020).

Under the PPA a "subcontractor who receives a payment from a vendor shall pay a person who supplies goods or a service for which the payment is made the appropriate share of the payment not later than the 10th day after the date the subcontractor receives the payment." Tex. Gov't Code § 2251.023(a). On the eleventh day after the subcontractor receives the payment, the appropriate share is overdue. *Id*. § 2251.023(b). "A payment begins to accrue interest on the date the payment becomes overdue." *Id*. § 2251.025(a).

B. Background

The Texas General Land Office (GLO) awarded Yates Construction, LLC (Yates) a construction contract to "perform rehabilitation, reconstruction and new construction of single-family and multi-family residential structures" in response to Texas flooding events. The GLO assigned Yates projects by issuing work orders.

After being assigned a work order for construction of residences in Beaumont, Texas, Yates contracted with appellant to complete the construction of certain residential properties. Appellant in turn contracted with appellee for the construction of four single family homes included in the contract between Yates and appellant. The agreement between appellant and appellee was memorialized by "Agreement Change Orders" for the four single family homes.

A dispute arose as to whether appellee completed each home and whether appellant owes appellee any amounts under the contracts. Appellee contends it completed the work on each home and each was approved for occupancy in April 2020. Appellant disputes that the homes were completed and contends that appellee finished only one of the four homes and had only completed about forty percent of the work on the other three homes. Appellee contends it submitted applications for payment to appellant and is owed $239,761.81 from appellant for the completed work. Appellee further contends that appellant received payment from Yates. Appellant contends that it has not been fully paid by Yates.

In its motion appellee sought summary judgment on its claims for breach of contract and violation of the PPA. Appellee attached the affidavit of Eric Hill, its owner and managing member. Appellee also included the change orders, the construction contract between Yates and the GLO, the work order from the GLO, the contract between Yates and appellant, certificates of occupancy, final inspection reports, a spreadsheet of invoices from appellant to Yates, payments made on account of those invoices by Yates to appellant, and the affidavit of appellee's attorney regarding attorney's fees.

The trial court granted appellee's motion and ordered appellant to pay actual damages, interest under the PPA, and attorney's fees.

C. Analysis

Appellant contends that the trial court erred in granting summary judgment because the affidavit relied upon is from "an interested witness and his affidavit testimony is not clear, positive, direct, credible, free from contradiction and susceptible from being readily controverted." However, defects in the form of an affidavit "will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend." Tex. R. Civ. P. 166a(f). No such objection was made to the trial court and is not preserved on appeal. *See Patterson v. Mobiloil Federal Credit Union*, 890 S.W.2d 551, 554 (Tex. App.—Beaumont 1994, no writ). Appellant also contends that Hill lacks personal knowledge about when the homes were completed. However, this argument was also not raised before the trial court and is not preserved. *See Washington DC Party Shuttle, LLC v. IGuide Tours*, 406 S.W.3d 723, 734–35 (Tex. App.—Houston [14th Dist.] 2013, pet. denied).

Appellant also argues that because Hill avers that the homes were completed "on or before approximately March 2020," his statement is conclusory. However, the affidavit is supported by the final inspection documents for each of the homes as well as the certificates of occupancy. The final inspections are signed on or before April 16, 2020. Also attached to the motion are the certificates of occupancy for three of the four homes that issued on or before April 13, 2020.[5] The fact that Hill does not detail every unpaid invoice submitted by appellee to appellant does not render his testimony conclusory.

Because appellant failed to file a timely response to the traditional motion, it is limited to arguing the legal sufficiency of the grounds presented in the motion.

[5] One home was located in a part of the county that did not issue certificates of occupancy.

See McConnell, 858 S.W.2d at 343. Turning to the evidence supporting summary judgment, Hill attested that (1) the homes were completed on or about March 2020; (2) appellee had paid all of the "trades, subcontractors, and vendors" engaged by appellee to provide labor and materials for construction of the homes; (3) there were no liens or claims against any of the homes from any such trades, subcontractors, or vendors; and (4) the homes had passed inspection, were "accepted" by appellant and Yates, and are now occupied. Hill attested to the amounts owed to appellee for each home as well as those amounts appellee had been paid. Hill attested that appellee was owed $239,761.81 for the work completed on the four homes. This number was further broken down by home. Appellee also included an accounting from Yates on each property which showed invoices sent from appellant and checks to appellant from Yates for each invoice submitted. The evidence presented by appellee is legally sufficient to support the trial court's judgment awarding actual damages to appellee for breach of contract.

The trial court also awarded appellee interest under the PPA. Appellee contends that the Yates's records show the last payment made to appellant was on June 30, 2020. As a result, under the statute, on July 11, 2020, interest began to accrue. *See* Tex. Gov't Code §§ 2251.023(b), 2251.025(a). However, the statute calculates interest based on the receipt of the payment, not the date payment was made. *See id*. § 2251.023(a). The spreadsheet does not indicate the method of transmission of the payments made by Yates to appellant. The spreadsheet also does not indicate when appellant received these payments.[6] Because the evidence provided does not conclusively establish when the payment was received by

[6] The Yates spreadsheets provide the amounts paid on each invoice submitted on each property, as well as the check numbers for each check. The last column of the spreadsheet is labeled "CM Clr DT" and lists dates. There is no explanation of what the abbreviation "CM Clr DT" means and whether it is the date that the check was sent to appellant or deposited by appellant.

appellant for purposes of calculating interest under the PPA, the trial court erred in granting summary judgment on this claim.

We overrule appellant's third issue in part and sustain in part.

CONCLUSION

The trial court did not abuse its discretion in denying appellant's motion for new trial. However, the trial court improperly granted summary judgment on appellee's claim under the PPA, and we reverse and remand this claim to the trial court. Concluding the trial court properly granted summary judgment on appellee's claim for breach of contract, we affirm the remainder of the trial court's judgment.

/s/ Ken Wise
Justice

Panel consists of Justices Wise, Zimmerer, and Wilson.