In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00083-CV

GEORGE THOMAS, Appellant

V.

SELECT PORTFOLIO SERVICING, INC., U.S. BANK NATIONAL ASSOCIATION AS TRUSTEE FOR EQCC HOME EQUITY LOAN TRUST 1993-3, AND MERITPLAN INSURANCE COMPANY, Appellees

---

On Appeal from the 258th District Court
Polk County, Texas
Trial Cause No. CIV23,739

MEMORANDUM OPINION

George Thomas, appearing pro se, appeals the trial court's summary judgment in favor of Select Portfolio Servicing, Inc. ("SPS") and U.S. Bank National Association as Trustee for EQCC Home Equity Loan Trust 1993-3 ("U.S. Bank").[1] Thomas further

[1] U.S. Bank National Association as Trustee for EQCC Home Equity Loan Trust 1993-3 answered and alleged that it was improperly named as U.S. Bank National Association Trust.

appeals the trial court's dismissal of his case as to Balboa Insurance Group ("Meritplan").[2] We affirm the trial court's judgment.[3]

BACKGROUND

On June 9, 1999, Thomas executed a promissory note valued at $36,000 in order to acquire real property located in Polk County, Texas. U.S. Bank was the lender and SPS was the loan servicer for Thomas's loan. Meritplan issued a mortgage protection policy of insurance to SPS to cover SPS's interest, as the mortgagee, in the residential property. SPS purchased the plan because of Thomas's failure to secure the requisite homeowners insurance under the terms of his loan agreement. Thomas defaulted in the payment of his note, and SPS, on behalf of U.S. Bank, executed a non-judicial foreclosure of the deed of trust.

On January 27, 2005, Thomas filed a motion in federal court seeking to prevent the foreclosure of the property, but the federal court denied Thomas's request and the sale was conducted February 1, 2005. U.S. Bank sent Thomas a timely demand to vacate the

[2] Meritplan Insurance Company filed answer to this suit and alleged Balboa Insurance Group is not the correct corporate entity, and therefore contends Thomas improperly sued Meritplan as Balboa Insurance Group. Meritplan alleged Balboa did not sell, issue, or service the policy of insurance made the basis of this suit. Further, Balboa did not investigate, adjust, or handle the insurance claims made the basis of this suit.

[3] Since filing his initial brief with this court, Thomas has filed subsequent documents for our consideration. Thomas raises additional issues in these documents that were not presented in his original brief. Because these issues are not properly before us, we do not address Thomas's new issues, and we limit our analysis to the issues raised in Thomas's opening brief. *See* Tex. R. App. P. 38.1, 38.3; *Dallas Cnty. v. Gonzales*, 183 S.W.3d 94, 104 (Tex. App.—Dallas 2006, pet. denied) (holding rules of appellate procedure do not allow an appellant to raise new issues in a reply brief).

property. When Thomas failed to vacate, U.S. Bank filed a forcible entry and detainer suit, which resulted in judgment in favor of U.S. Bank. Thomas filed an appeal of the judgment, which we dismissed for want of prosecution. *See Thomas v. U.S. Bank Nat'l Ass'n*, No. 09-05-370 CV, 2006 WL 1195901 (Tex. App.—Beaumont May 4, 2006, no pet.) (mem. op.).

Eventually, a writ of possession was issued authorizing U.S. Bank to assume possession of the property. Thereafter, a constable for Polk County, Texas, executed on the writ of possession on April 14, 2007.

On June 11, 2007, Thomas filed suit against SPS, U.S. Bank, and Meritplan claiming that various items of personal property and cash were stolen during the eviction process and that SPS, U.S. Bank, and Meritplan were liable to him for money damages based on a negligence cause of action. Thomas also sought relief from Meritplan based on breach of contract.

In October 2007, SPS and U.S. Bank filed a motion for summary judgment, which the trial court granted solely on deemed admissions. On appeal, we held that the trial court erred in granting summary judgment on deemed admissions without providing Thomas an opportunity to withdraw the deemed admissions and supplement his responses. *See Thomas v. Select Portfolio Servicing, Inc.*, 293 S.W.3d 316, 318, 321 (Tex. App.—Beaumont 2009, no pet.).

The trial court also granted Meritplan's motion for summary judgment. On appeal, we upheld the summary judgment as to Meritplan, except as to Thomas's negligence claim for alleged damages to Thomas's personal property, which he claims occurred during Meritplan's investigation of the claim and inspection of the home. *See id.* at 321-22.

On remand, SPS and U.S. Bank again moved for summary judgment based on traditional and no-evidence grounds as to all of Thomas's claims. On the day of the summary judgment hearing, Thomas filed "Plaintiff's Amended Petition and Response to Defendant Select Portfolio's Summary Judgment." The trial court heard SPS and U.S. Bank's motion for summary judgment and granted summary judgment in favor of SPS and U.S. Bank.

After negotiation, Meritplan and Thomas entered into a settlement of all remaining claims between the parties in exchange for a payment of $9,000 to Thomas. On March 29, 2010, Meritplan filed a motion to enforce the settlement agreement. Therein Meritplan alleged that it reached an agreement with Thomas and sent a settlement check, which Thomas cashed. Meritplan further alleged that after accepting payment, Thomas refused to sign the release and dismiss the cause of action. On June 1, 2010, the trial court heard the matter.[4] On June 6, 2010, the trial court accepted the settlement agreement between Thomas and Meritplan and entered final judgment, dismissing Meritplan with prejudice.

[4] The reporter's record of this hearing is not part of the appellate record.

CLAIMS REGARDING WRONGFUL EVICTION

Thomas devotes a substantial portion of his appeal pursuing arguments related to the wrongful nature of his eviction. SPS and U.S. Bank argue that we are without authority to review issues related to the eviction, as those issues have been finally determined.

U.S. Bank filed a complaint for forcible detainer against Thomas on March 21, 2005. On August 1, 2005, the trial court found that U.S. Bank was entitled to judgment against Thomas for possession of the real property at issue in this case. The trial court also ordered that if Thomas did not vacate the premise, a writ of possession would issue.

Thomas filed a notice of appeal of the trial court's judgment on August 17, 2005, and as previously noted, we dismissed that appeal for want of prosecution. *See Thomas*, 2006 WL 1195901, at *1. As the validity of the foreclosure and issuance of the writ of possession have been finally determined, we do not consider Thomas's arguments regarding wrongful eviction in this appeal.

SUMMARY JUDGMENT FOR SPS AND U.S. BANK

SPS and U.S. Bank filed a traditional and no-evidence motion for summary judgment in the trial court. Thomas complains the trial court erred in granting this motion. In support of this argument, Thomas generally complains that when the trial court granted summary judgment, it denied him a fair jury trial. Thomas further argues that even if no representatives of SPS or U.S. Bank were present during the eviction

process, U.S. Bank and SPS approved the eviction and are therefore responsible for the loss of his belongings and valuables. Thomas argues that SPS and U.S. Bank had a general duty in performing its services not to negligently damage or destroy his property. In support of this proposition, Thomas cites *Colonial Sav. Ass'n v. Taylor*, 544 S.W.2d 116, 119-20 (Tex. 1976); *C & H Nationwide, Inc. v. Thompson*, 810 S.W.2d 259, 266-67 (Tex. App.—Houston [1st Dist.] 1991), *rev'd in part on other grounds*, 903 S.W.2d 315 (Tex. 1994).

Standard of Review

We review a trial court's summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). The purpose of the no-evidence summary judgment motion is to "pierce the pleadings" and evaluate the evidence to see if a trial is necessary. *Benitz v. Gould Group*, 27 S.W.3d 109, 112 (Tex. App.—San Antonio 2000, no pet.). A no-evidence motion for summary judgment is essentially a pretrial motion for directed verdict, which we review for legal sufficiency. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 750-51 (Tex. 2003). Once a no-evidence motion is filed, the burden shifts to the nonmoving party to present evidence raising an issue of material fact as to the elements identified in the motion. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006). The nonmoving party must produce summary judgment evidence raising a genuine issue of material fact. Tex. R. Civ. P. 166a(i); *see Mack Trucks*, 206 S.W.3d at 582. A trial court must grant a no-evidence motion for summary judgment unless the

nonmovant timely responds to the motion and produces more than a scintilla of probative evidence to raise a genuine issue of material fact. Tex. R. Civ. P. 166a(c), (i); *Wal-Mart Stores, Inc. v. Rodriguez*, 92 S.W.3d 502, 506 (Tex. 2002). If the evidence rises to a level that would allow reasonable and fair-minded people to differ in their conclusions, then more than a scintilla of probative evidence exists. *King Ranch*, 118 S.W.3d at 751. In evaluating whether more than a scintilla of evidence exists, we must view the evidence in the light most favorable to the nonmovant. *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004).

Timeliness of Thomas's Response

U.S. Bank and SPS argue that Thomas's response to their summary judgment was untimely. The nonmovant may respond to the motion for summary judgment no later than seven days prior to the day of the hearing. Tex. R. Civ. P. 166a(c). When there is no indication in the record that a party's late filing of a written response was with leave of court, we presume that the trial court did not consider the response. *Goswami v. Metro. Sav. & Loan Ass'n*, 751 S.W.2d 487, 491 n.1 (Tex. 1988).

In this case, Thomas filed "Plaintiff's Amended Petition and Response to Defendant Select Portfolio's Summary Judgment" on February 16, 2010, the day of the summary judgment hearing. The certificate of service on his response indicates that he mailed a copy to opposing counsel February 12, 2010. There is nothing in the record to suggest that Thomas did not receive proper notice of the hearing, and Thomas does not

argue otherwise. While Thomas's summary judgment response was untimely, the trial court's order granting summary judgment recites that the trial court reviewed the response to the motion. As such, we will presume the trial court granted leave for Thomas to file his late response. *See id.*

Thomas's Live Pleading

Rule 166a(c) provides that the trial court should render summary judgment based on the pleadings on file at the time of the hearing. Tex. R. Civ. P. 166a(c). Since a summary judgment proceeding is a trial within the meaning of Rule 63, a party may file amended pleadings without leave of court up to seven days before the hearing. Tex. R. Civ. P. 63; *Goswami,* 751 S.W.2d at 490. When a party files an amended pleading within seven days of trial, we presume the trial court granted leave for the late filing when the summary judgment states that the court considered all of the pleadings, the record does not indicate that the court did not consider the amended pleading, and the opposing party does not show surprise. *Goswami,* 751 S.W.2d at 490. If the opposing party fails to show sufficient surprise by a late filed pleading, then the trial court's action in considering the late filed amended pleading may cure the party's failure to obtain leave of court. *Id*.

Thomas filed an amended petition within seven days of the hearing on SPS and U.S. Bank's motion for summary judgment. However, there is no indication in the record that the trial court did not consider Thomas's amended pleading. In fact, as Thomas's

response and amended petition are one in the same, the trial court's order granting summary judgment indicates that the trial court did consider the amended pleading when the court considered Thomas's response to the motion for summary judgment. Further, aside from noting the lateness of Thomas's response and pleading on the record, SPS and U.S. Bank did not indicate that the lateness caused them undue surprise, nor did they request the court to exclude the amended pleading. We presume Thomas filed his amended petition with leave of court. *See Goswami*, 751 S.W.2d at 490; *see also Continental Airlines, Inc., v. Kiefer*, 920 S.W.2d 274, 276 (Tex. 1996).

A generous interpretation of Thomas's live pleading suggests that it was Thomas's intent to allege SPS and U.S. Bank were liable for damages Thomas received when his personal property was taken during his eviction. Thomas contends that a representative of SPS, "admitted entering the Plaintiff's residence and gave a phone number to the Plaintiff, through which the Plaintiff could find out where some of [his] belongings could be." Thomas further alleges that, "It may be true that certain persons of [SPS] was not present during the ugly act, but certainly knew who did it, especially when the Defendant's agent . . . knew about it. Those who commuted [sic] the crimes couldn't have done it without the permission of some staff of [SPS] . . . ."

Grounds for No-Evidence MSJ

SPS and U.S. Bank allege in their motion that "there is no evidence that [SPS and U.S. Bank] ever assumed possession of any personal property belonging to [Thomas] or

that [SPS and U.S. Bank] were ever present during the process of securing the premises, much less that they were involved in any negligent act relating to the eviction or the property."

In response, Thomas failed to produce any evidence to support his allegations against SPS or U.S. Bank. Thomas filed his lawsuit June 11, 2007. Thomas had ample time to conduct discovery in order to produce evidence to support his claims. A mere pleading or response to a summary judgment motion does not satisfy the burden of coming forward with sufficient evidence to prevent summary judgment. *Am. Petrofina, Inc. v. Allen*, 887 S.W.2d 829, 830 (Tex. 1994). Thomas has failed to produce more than a scintilla of probative evidence to raise a genuine issue of material fact as to any of his claims against SPS and U.S. Bank. We conclude the trial court did not err in granting summary judgment for SPS and U.S. Bank under Rule 166a(i). *See* Tex. R. Civ. P. 166a(i). Because this issue is dispositive of Thomas's claims, we need not address SPS and U.S. Bank's arguments under their traditional summary judgment motion. *See Ford Motor Co.*, 135 S.W.3d at 600.

MERITPLAN'S DISMISSAL

Thomas argues that the trial court erred in dismissing his case against Meritplan. However, Thomas does not name Meritplan as a defendant in his live pleading. In fact, Thomas affirmatively states, "COMES NOW GEORGE THOMAS, PLAINTIFF in the above styled case, to file the amended petition in which the Defendant Balboa Insurance

Group is excluded because of a settlement." He reiterates, "[I]n this amended filing the Plaintiff has excluded the Dependent [sic] Balboa Insurance Group." Thomas alleged that Meritplan/Balboa negotiated and paid $9,000 for roof damages. He further alleges:

> [The] amount owed for hurricane Rita damages has nothing to do with the Plaintiff, since the Defendant Balboa argued before the settlement that the proceeds of the hurricane damages goes to the Defendant Select Portfolio and not to the Plaintiff. Now it is a matter between the Defendants Select Portfolio and the Defendant Balboa. Nevertheless, in this amended filing the Plaintiff has excluded the Dependent [sic] Balboa Insurance Group.

On March 29, 2010, Meritplan filed a motion to enforce its settlement agreement. On June 6, 2010, the trial court signed a judgment dismissing Meritplan from the lawsuit with prejudice based on Meritplan's settlement with Thomas. In part the judgment states:

> The parties appeared before the Court and announced that they had reached an agreement whereby Meritplan . . . had agreed to and had paid George Thomas $9,000 to resolve George Thomas' claim for negligence resulting in damage to his roof, which was the sole remaining issue before the Court after remand from the Beaumont Court of Appeals. Mr. Thomas acknowledged that he had agreed to the settlement and in exchange for the payment of $9,000 agreed to dismiss Meritplan . . . . The Court acknowledged and accepted the party's agreement on the record.

Generally, the "omission of a party from an amended petition indicates an intent to non-suit." *Am. Petrofina*, 887 S.W.2d at 830-31; *Wren v. Tex. Emp't Comm'n*, 915 S.W.2d 506, 508 (Tex. App.—Houston [14th Dist.] 1995, no writ). Unless a defendant has asserted a claim for affirmative relief, when a plaintiff non-suits his claims, there is no case or controversy and the court of appeals has no jurisdiction over the suit. *See Klein v. Hernandez*, 315 S.W.3d 1, 3 (Tex. 2010).

Here, Thomas's omission of Meritplan from his amended petition was not inadvertent. Thomas intentionally and effectively abandoned his claims against Meritplan. Meritplan has made no claims for affirmative relief, and, as such, Thomas's non-suit in the trial court and the court's subsequent dismissal ended the case against Meritplan. We affirm the trial court's dismissal of Thomas's claims against Meritplan.

Having concluded Thomas's issues are without merit, we affirm the trial court's judgment.[5]

AFFIRMED.

_____
CHARLES KREGER
Justice

Submitted on March 10, 2011
Opinion Delivered July 14, 2011

Before McKeithen, C.J., Kreger and Horton, JJ.

[5] On appeal, Thomas asserts claims against entities other than SPS, U.S. Bank, and Meritplan. However, there is no evidence in the appellate record that these entities or individuals were actual defendants in the underlying suit. There is no evidence that they were served, answered, or otherwise appeared in the trial of this case.