In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00340-CV

ROBERT J. WILSON, MAHESH KANOJIA, and STEVE MCGUIRE, Appellants

V.

PALERMO REI, L.P. a/k/a PALERMO REI, LTD., Appellee

On Appeal from the County Court at Law No. 2
Montgomery County, Texas
Trial Cause No. 09-05-04558 CV

MEMORANDUM OPINION

Appellants Robert Wilson, Mahesh Kanojia, and Steve McGuire, directors of Texoga Technologies Corporation ("Texoga"), appeal the trial court's judgment holding them jointly and severally responsible for Texoga's indebtedness to Palermo REI, L.P. a/k/a Palermo REI, Ltd. ("Palermo"), which Texoga incurred during a period of time when its corporate charter had been forfeited. We affirm the trial court's judgment.

BACKGROUND

On February 8, 2008, the Texas Secretary of State issued a forfeiture of Texoga's charter. On May 21, 2008, Texoga and Safe Renewables Corporation ("Safe Renewables") entered into a written lease assignment whereby they assigned their lease interest in certain commercial office space to Legado Resources, LLC. Paragraph 9 of the assignment provides:

> Assignor covenants and agrees to pay, hold harmless and indemnify Assignee from and against any and all cost, expense or liability for any compensation, commissions and charge claimed by any broker or agent with respect to the assignment contemplated by this Agreement of the negotiation thereof, including, without limitation, the commission payable to Coldwell Banker Commercial-Ingram Group in an amount equal to four percent (4%), and commission payable to Palermo REI, Ltd. dba Palermo Barr in an amount equal to two percent (2%), of the gross rents payable over the term of the assignment contemplated by this Agreement, to be paid upon execution of this Agreement.

McGuire executed the assignment as an authorized officer of Texoga.

Palermo, a licensed real estate broker, brokered the assignment between Texoga, Safe Renewables, and Legado. In exchange for Palermo's real estate services in securing the lease assignment, Texoga agreed to pay Palermo a two percent commission of the gross rents payable over the term of the assignment. The only document in the record referencing Texoga's agreement to pay Palermo's two percent commission is found in the assignment described above. There is no dispute that Palermo fully performed its duties in securing

the lease assignment for Texoga. There is also no dispute that Texoga did not fully pay Palermo's broker fee and still owed Palermo $60,085.54 at the time of trial.

On October 21, 2008, Texoga applied for reinstatement of its charter and the Secretary of State set aside the forfeiture. On May 8, 2009, Palermo filed suit against Texoga, Safe Renewables, Biofuels Power Corporation,[1] Wilson, Kanojia, and McGuire seeking to recover the balance owed for the broker fee. Palermo alleged that Texoga and Safe Renewables failed to perform under the assignment when they failed to pay Palermo its full commission. Palermo further alleged Wilson, Kanojia and McGuire were personally liable to Palermo for Texoga's debt under section 171.255 of the Texas Tax Code, as officers and directors of Texoga, as Texoga incurred the debt after its corporate charter had been forfeited and before its corporate privileges were revoked. In response, defendants filed a joint answer generally denying Palermo's allegations. Wilson, McGuire and Kanojia filed a sworn denial alleging they were not liable in the capacity in which they were sued.

On March 15, 2010, Palermo filed a motion for summary judgment against Texoga and Safe Renewables. Texoga and Safe Renewables did not contest the motion and the trial court granted summary judgment in favor of Palermo on April 6, 2010.

Simultaneously, but in a separate motion, Palermo moved for summary judgment against appellants Wilson, Kanojia and McGuire seeking to hold Texoga's directors

[1] Palermo non-suited defendant Biofuels Power Corporation.

personally liable for the commission fee pursuant to section 171.255 of the Tax Code. Appellants contested Palermo's motion, asserting that "[t]here is a factual issue under the statutory standard of TEX. TAX CODE §171.255(c)(2) that remains contested." Appellants' response concludes with,

> The summary judgment proof tendered by Plaintiff fails to eliminate the fact issue concerning TEX. TAX CODE §171.255(c)(2) safe harbor for a director of a corporation that has suffered a temporary forfeiture of charter for failure to file an annual report and pay whatever franchise taxes may be owed. The Individual Defendants have each left open to themselves this factual defense by virtue of their replies to Plaintiff's First Request for Admissions.

Appellants presented the trial court with no other grounds for denying Palermo's motion for summary judgment. In support of its response in opposition to Palermo's motion, appellants presented a single affidavit signed by Steve McGuire. After a hearing, the trial judge granted summary judgment against appellants. The trial court entered final judgment in favor of Palermo finding Texoga, Safe Renewables, Wilson, Kanojia, and McGuire jointly and severally liable for Palermo's actual damages, interest and attorneys' fees.

Appellants contend the trial court erred in granting Palermo's motion for summary judgment because two fact issues remain concerning the application of section 171.255 of the Tax Code. Specifically, appellants contend there is a fact issue as to their intent to create a debt, and a fact issue as to whether the assignment actually created a debt during the period of Texoga's charter forfeiture.

ARGUMENTS AND AUTHORITIES

A summary judgment movant must prove there is no genuine issue of material fact to prevail on its motion. *State Farm Fire & Cas. Co. v. Vaughan*, 968 S.W.2d 931, 932 (Tex. 1998); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). We view evidence favorable to the non-movant as true in deciding whether there is a disputed material fact issue that precludes summary judgment. *Nixon*, 690 S.W.2d at 548-49. We will indulge every reasonable inference in favor of the non-movant and resolve any doubt in the non-movant's favor. *Id*.

APPLICABILITY OF SECTION 171.255

Palermo sought to hold appellants jointly and severally liable under section 171.255 of the Tax Code, which provides in relevant part:

> If the corporate privileges of a corporation are forfeited for the failure to file a report or pay a tax or penalty, each director or officer of the corporation is liable for each debt of the corporation that is created or incurred in this state after the date on which the report, tax, or penalty is due and before the corporate privileges are revived.

Tex. Tax Code Ann. § 171.255(a) (West 2008). This section further provides that "[t]he liability of a director or officer is in the same manner and to the same extent as if the director or officer were a partner and the corporation were a partnership." *Id*. § 171.255(b).

The trial court granted Palermo's summary judgment against Texoga and Safe Renewables, jointly and severally, for actual damages for Palermo's unpaid broker fee, together with costs and attorneys' fees, which judgment became final. It is undisputed

Texoga's corporate privileges were in forfeiture at the time Texoga executed the assignment agreement. It is also undisputed that Wilson, Kanojia and McGuire served on the board of directors for Texoga when the assignment was executed and that McGuire entered into the assignment as an officer and director of Texoga, with Texoga's authority.

Appellants argue that the trial court erred in granting summary judgment because the assignment agreement did not create a debt or cause Texoga to incur debt, but rather the assignment only confirmed a pre-existing obligation Texoga and Safe Renewables owed to Palermo for payment of broker's fees. In support of their position, appellants rely on *Schwab v. Schlumberger Well Surveying Corporation*, 198 S.W.2d 79 (Tex. 1946). In *Schwab*, the Texas Supreme Court held that the liability imposed under section 171.255 of the Tax Code only includes debts contracted after the forfeiture and has no application to the renewal of obligations arising prior to forfeiture. *Id*. at 81.

Palermo argues that appellants failed to preserve this issue, as they did not present this argument to the trial court. We agree that appellants failed to present this argument or any supporting evidence of this defense to the trial court. Appellants only argument to the trial court was that there was a fact issue remaining regarding the directors' liability under section 171.255(c)(2) of the Tax Code. Appellants did not dispute whether the debt was "created or incurred" during the forfeiture period to the trial court. We do not consider independent grounds not asserted in the trial court by parties to a motion for summary judgment. "[I]ssues a non-movant contends avoid the movant's entitlement to summary

judgment must be expressly presented by written answer to the motion or by other written response to the motion and are not expressly presented by mere reference to summary judgment evidence." *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 341 (Tex. 1993); *see also City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979). The Texas Rules of Civil Procedure clearly declare that all "[i]ssues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal." Tex. R. Civ. P. 166a(c). As the non-movants, appellants should have presented any defense that would avoid Palermo's right to a summary judgment to the trial court. Appellants did not present this defense to the trial court, therefore, we do not consider appellants' argument that they created or incurred any such indebtedness before forfeiture.

SECTION 171.255(c) EXEMPTION FROM LIABILITY

Appellants also argue the trial court erred in granting summary judgment because there is a fact issue regarding appellants' knowledge that the assignment agreement would create a debt for Texoga, and therefore, there is a fact issue as to whether appellants are exempt from liability under section 171.255(c). Appellants argue that they did not intend to create a debt in the assignment agreement because there was already an obligation to pay Palermo. In support of their response to Palermo's motion for summary judgment, appellants submitted McGuire's affidavit. Therein McGuire states,

> I was away from the office on business when the document was signed but I was reached by phone by our corporate secretary[,] Ms. Kristi Bomar. Previously, I had been assured by others that Texoga Technologies Corporation would not be expected to make any payments related to the assignment, except its pro rata share of the rent on the leased premises. I was not aware of any separate liability of Texoga Technologies for brokerage commissions or other costs. I authorized Ms. Bomar to apply a rubber stamp of my signature . . . on [the assignment].
>
> I was not aware at the time that Texoga would be incurring separate responsibility for commissions to Palermo Barr or any other entity under the documents to which my signature stamp was applied, nor was I aware of any circumstance that would make myself, Robert J. Wilson or Mahesh Kanojia personally liable in our capacity as Directors of Texoga Technologies Corporation for any financial obligations under the assignment of the lease.

Section 171.255(c) provides an exception to director and officer liability of a corporation in forfeiture. Tex. Tax Code Ann. § 171.255(c). It provides:

> A director or officer is not liable for a debt of the corporation if the director or officer shows that the debt was created or incurred: (1) over the director's objection; or (2) without the director's knowledge and that the exercise of reasonable diligence to become acquainted with the affairs of the corporation would not have revealed the intention to create the debt.

Id. The director or officer of the corporation seeking to escape personal liability has the burden to prove he or she satisfies one of these conditions. *See id*.; *see also Trammell v. Galaxy Ranch Sch., L.P.*, 246 S.W.3d 815, 822 (Tex. App.—Dallas 2008, no pet.); *PACCAR Fin. Corp. v. Potter*, 239 S.W.3d 879, 884 (Tex. App.—Dallas 2007, no pet.); *Williams v. Adams*, 74 S.W.3d 437, 442-43 (Tex. App.—Corpus Christi 2002, pet. denied). Subsection (c) essentially creates an affirmative defense to personal liability for any officer

or director who can show the necessary elements of the statute. Tex. Tax Code Ann. § 171.255(c); *Serna v. State*, 877 S.W.2d 516, 519 (Tex. App.—Austin 1994, writ denied).

Generally a defendant must plead an affirmative defense or it is waived. Tex. R. Civ. P. 94. Appellants did not affirmatively plead the applicability of subsection (c). Moreover, even if appellants had properly pled this affirmative defense, Palermo had no obligation to negate the defense. However, appellants did have the burden to raise an issue of fact on each element of their affirmative defense. *See Am. Home Shield Corp. v. Lahorgue*, 201 S.W.3d 181, 185 (Tex. App.—Dallas 2006, pet. denied). "In order to show a disputed fact issue that will preclude the rendition of summary judgment for the plaintiff, the defendant must offer summary judgment proof on each element of at least one of the affirmative defenses it has pleaded." *Kirby Explor. Co. v. Mitchell Energy Corp.*, 701 S.W.2d 922, 926 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.). Even if appellants had properly pled this defense, appellants presented no evidence to the trial court that McGuire, Wilson or Kanojia objected to the creation of the debt, nor did they present any evidence that the exercise of reasonable diligence would not have revealed the intention to create the debt. Having overruled all of appellants' issues, we affirm the trial court's judgment.

AFFIRMED.

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CHARLES KREGER
Justice

Submitted on March 10, 2011
Opinion Delivered May 19, 2011

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