In The

Court of Appeals

Ninth District of Texas at Beaumont

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NO. 09-16-00037-CV

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EDWARD LONGORIA, Appellant

V.

K AND K TREE AND TRACTOR, Appellee

On Appeal from the 435th District Court
Montgomery County, Texas
Trial Cause No. 14-07-07676-CV

MEMORANDUM OPINION

Edward Longoria[1] appeals from a summary judgment in favor of appellee K and K Tree and Tractor ("K and K") in a lawsuit to recover fees for the cleanup of debris and waste from real property via the sale of the property. In four appellate issues, Longoria argues that the trial judge failed to consider all of Longoria's evidence, the trial judge erred by granting summary judgment in favor of K and K,

[1]Longoria is incarcerated and is acting *pro se* in this appeal.

the trial court and parties failed to provide him "notice of hearing dates and other critical dates[,]" and the trial court failed to allow his counterclaim "to proceed according to the Texas Rules of Civil Procedure." We reverse the trial court's summary judgment order and remand the cause for further proceedings consistent with this opinion.

BACKGROUND

K and K filed suit against appellant Edward Longoria individually,[2] contending that Longoria and another individual, Lorenzo Espinosa, owned a company called L&E Properties, Inc. ("L&E"). According to K and K, L&E and a second individual, Thomas L. Lilley, purchased a tract of land as co-owners. According to K and K's petition, in late 2011 or early 2012, debris, trash, and waste were dumped on the land in violation of Texas law, and the State of Texas assessed a $30,000 administrative penalty against Lilley, as well as a fine of $25,000 per day until the property was cleaned up. K and K alleged that Lilley, "acting for all owners of the property[,]" contracted with K and K to clean up the property for $80,750. K and K pleaded that it undertook the cleanup and the State of Texas subsequently nonsuited its proceedings against Lilley. K and K requested an order from the trial

[2]K and K also sued L&E Properties, Inc., Thomas L. Lilley, Lorenzo Espinosa, and "unknown stockholders of L&E Properties[.]" Those individuals and entities are not parties to this appeal.

court ordering the tract to be sold for satisfaction of the debt of $80,750, as well as attorney's fees and interest.

Longoria filed an answer, in which he pleaded a general denial, filed special exceptions to various portions of K and K's petition, and asserted a counterclaim for fraud. Longoria pleaded that "Plaintiff has not properly provided notice nor has Plaintiff properly complied with the Texas Property Code for placement of a mechanic's lien on the property."

K and K filed a traditional motion for summary judgment, in which it asserted that its summary judgment proof establishes that it is entitled to judgment as a matter of law because there are no genuine issues of material fact. K and K did not cite any statutes, case law, rules of procedure, or other authorities in its motion for summary judgment. K and K pleaded in its motion for summary judgment that the evidence "establishes that Plaintiff performed the contract, and that Defendants received the benefit of Plaintiff's labor." Attached to K and K's motion for summary judgment were three affidavits. In his affidavit, Lilley stated that he is an individual owner of the property, and the other owner of the property is L&E Properties, a dissolved Nevada corporation that had been operated by Longoria and Espinosa, both of whom are currently incarcerated. Lilley averred as follows:

> Some[]time during the years 2012 and 2013, large amounts of trash, rubbish, cement[,] and tires were dumped on the real property in issue.

> The party who dumped the majority of the trash claim[s] to have paid [one of Longoria's relatives] for permission to dump there. Criminal complaints were filed with the Montgomery County Sheriff[']s Department. . . . The State of Texas made demands that the property[] be cleaned up. On or about October 13, 2013, Texas entered a $30,000.00 penalty against me as an owner of the property and . . . threatened a $25,000.00 a day fine until the property was cleaned up. As the only available owner[,] I contracted with K and K Tree and Tractor to clean[]up the property for a specific fee of $80,750.00. I further negotiated with K and K Tree and Tractor, that if he was not paid he would look solely to the sale of the land to recover his/its fee. . . . Based upon the cleanup I negotiated with the State of Texas to dismiss hearings for daily fines and the withdrawal of the $30,000 assessment. I am in Chapter 13 [b]ankruptcy . . . and received authority to sell the real property in issue.

In his affidavit, Chase Cook stated that he is the owner of K and K, and that K and K entered into a written contract with Lilley to clean up and remove trash and other material from the property. Cook averred that, as part of the agreement, K and K agreed to look solely to the real property to satisfy the payment for the work. In addition, Cook averred, "I performed all the requirements of the contract and presented my bill to Thomas L. Lilley and have not been paid." Cook also stated that, after adding all offsets and credits, "K and K Tree and Tractor is owed the sum of $85,000.00." Cook further averred that he had been required to obtain the services of an attorney and agreed to pay an attorney's fee of $5000. Lastly, Cook averred that the property "should be sold and after cost of sale, I should receive $90,000.00

out of the sale proceeds, with remaining balance, if any, to the owners." K and K attached numerous exhibits as summary judgment evidence.

Longoria filed a response to the motion for summary judgment, in which he asserted that genuine issues of material fact exist, and he alleged that K and K lacked authority to conduct any work on the property and stated that he contested "each and every amount claimed by Plaintiff." Longoria asserted that Lilley did not have authority to act on behalf of all the owners of the property. Longoria also asserted that K and K could not assert any mechanic's lien on the property because it "did not comply with the law to place a lien on the property and thus is left with having to sue for the debt." Furthermore, Longoria asserted "that the Agreement upon which Plaintiff relies was prepared as part of the fraud[,]" and he stated that Cook's affidavit was self-serving and unreliable. Longoria attached an affidavit to his response, in which he averred that he is an owner of the real property; he did not consent or give anyone authority to perform work on the property; he is unaware of K and K performing any services; and he stated, "I believe that Chase Cook, [K and K's counsel], and Thomas L. Lilley fabricated the agreement[] and its terms resulting in fraud."

After setting the motion for summary judgment for hearing by submission, the trial court signed an order granting K and K's motion for summary judgment.[3] In its order, the trial court found that "Defendants have not pled and served any counterclaim that will preclude summary judgment in this case[]" and "have not pled any affirmative defense that would preclude summary judgment in this cause." The trial court further found that K and K could only look to the real property to satisfy the judgment and concluded that K and K is entitled to recover $85,000, as well as an attorney's fee of $5000. Longoria then filed this appeal.

ANALYSIS

As discussed above, in issue two, Longoria argues that the trial judge erred by granting summary judgment in favor of K and K. Because issue two is dispositive, we will address it first. However, before doing so, we must first address K and K's contention that Longoria filed his notice of appeal late, thereby depriving this Court of jurisdiction over the appeal. The trial court signed the summary judgment order on November 19, 2015. Lilley filed his notice of appeal on January 19, 2016.

By letter to the parties, we questioned our jurisdiction and requested documentation regarding the date that the notice of appeal was delivered to prison

[3]The appellate record reflects that the property was ultimately sold for $55,000.

authorities and the date the notice of appeal was actually mailed. In response, Longoria filed an affidavit, made under penalty of perjury, in which he stated that on or about December 15, 2015, he received notice of the trial court's order granting summary judgment; on December 17, 2015, he placed a document entitled "objection" to the summary judgment with the prison's legal mail drop system; his objection was filed on December 28, 2015; and he followed up his objection by filing a document entitled "notice of appeal" on January 19, 2016.

Because the summary judgment was signed on November 19, 2015, a motion for new trial was due on or before December 21, 2015. *See* Tex. R. Civ. P. 329b(a) ("A motion for new trial, if filed, shall be filed prior to or within thirty days after the judgment or other order complained of is signed."). As discussed above, Longoria averred that he placed his "objection" with the prison mail system for filing on December 17, 2015. We conclude that Longoria's objection was, in substance, a timely-filed motion for new trial. *See* Tex. R. Civ. P. 45 ("All pleadings shall be construed so as to do substantial justice."); Tex. R. Civ. P. 71 ("When a party has mistakenly designated any plea or pleading, the court, if justice so requires, shall treat the plea or pleading as if it had been properly designated."); *Warner v. Glass*, 135 S.W.3d 681, 684-86 (Tex. 2004) (holding that a document is deemed filed at the moment prison authorities receive the document for mailing). Therefore, Longoria's

timely-filed motion for new trial extended the timetable for filing a notice of appeal to ninety days after the judgment was signed, which made Longoria's notice of appeal due on or before February 17, 2016. *See* Tex. R. App. P. 26.1(a)(1). Accordingly, Longoria's notice of appeal, which was filed on January 19, 2016, and received by this Court on February 10, 2016, was timely filed, and this Court has jurisdiction over Longoria's appeal.

We review summary judgment orders *de novo*. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). The party moving for traditional summary judgment must establish that no genuine issue of material fact exists and it is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995). If the moving party produces evidence entitling it to summary judgment, the burden shifts to the nonmovant to present evidence that raises a material fact issue. *Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996). In determining whether there is a disputed issue of material fact precluding summary judgment, we take evidence favorable to the nonmovant as true. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). We review the summary judgment record "in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts against the motion." *City of Keller v. Wilson*, 168 S.W.3d 802, 824 (Tex. 2005).

The contract for cleaning up the property was signed by Cook and Lilley; however, Longoria did not sign the contract, and the contract makes no reference to Longoria or to L&E. The contract was not signed by any representative of L&E, the corporation formerly operated by Longoria and Espinosa. K and K has provided no statute, procedural rule, or case law to the trial court or to this Court which would support holding Longoria personally liable to a contract which he did not sign. In addition, although K and K pleaded that Lilley was acting for all owners of the property when he signed the contract with K and K, K and K has provided neither evidence nor legal authorities to demonstrate that Longoria authorized Lilley to sign the contract on his behalf. *See Laidlaw Waste Sys. (Dallas), Inc. v. City of Wilmer*, 904 S.W.2d 656, 660 (Tex. 1995) (holding that pleadings do not constitute competent summary judgment evidence). Longoria averred in his affidavit that he did not consent or give anyone authority to perform work on the property and he is unaware of K and K performing any services.

We conclude that Longoria's affidavit raised a genuine issue of material fact as to his liability under the contract, and K and K failed to establish that it is entitled to judgment against Longoria as a matter of law. *See* Tex. R. Civ. P. 166a(c); *Johnson*, 891 S.W.2d at 644; *see also Walker*, 924 S.W.2d at 377. The trial court therefore erred by granting summary judgment in favor of K and K. We sustain issue

two. Because issues one, three, and four would not result in greater relief, we need not address them. *See* Tex. R. App. P. 47.1. We reverse the trial court's summary judgment order and remand this cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

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STEVE McKEITHEN
Chief Justice

Submitted on December 21, 2016
Opinion Delivered March 9, 2017

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