In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-17-00037-CV

RANDALL L. WILLIAMS AND DEBORAH A. WILLIAMS, Appellants

V.

SUNTRUST BANK, Appellee

On Appeal from the 1st District Court
Jasper County, Texas
Trial Cause No. 35823

MEMORANDUM OPINION

In one appellate issue, Randall L. Williams and Deborah A. Williams[1] ("the Williamses") challenge the trial court's granting of summary judgment in favor of Suntrust Bank ("Suntrust") for the balance the Williamses owed on a loan obtained to purchase a vehicle, as well as attorney's fees. We affirm the trial court's summary judgment.

[1]When referring to the appellants individually, we will use their first names to avoid confusion.

BACKGROUND

Suntrust filed a lawsuit against the Williamses, in which Suntrust alleged that it advanced funds to the Williamses pursuant to a contract, which included a security agreement. Suntrust contended that the Williamses had defaulted by failing to make payments pursuant to the contract, and that the Williamses owed Suntrust $25,954.28 after all just and lawful offsets, credits, and payments were applied. According to Suntrust, it demanded that the Williamses pay the amount owed, but they did not do so. Suntrust sought a judgment for the amount due, pre-judgment interest, post-judgment interest, costs, and attorney's fees. In their answer, the Williamses asserted a general denial and asserted the affirmative defenses of laches, limitations, payment, offset, fraud, and waiver. The Williamses also contended that Suntrust had engaged in "unfair claims settlement practices[.]"

Suntrust filed a motion for summary judgment, in which it asserted both traditional and no-evidence grounds. In its motion, Suntrust contended that it entered into a contract with the Williamses, pursuant to which it advanced funds to them. Suntrust asserted that the Williamses presented no evidence supporting their affirmative defenses of laches, limitations, payment, offset, fraud, and waiver. Suntrust further contended that there was no genuine issue of material fact as to its entitlement to attorney's fees of $1500.

Suntrust attached as an exhibit to its motion an affidavit from a representative of Suntrust, Godfrey Bacon, which authenticated business records attached to the affidavit. In the affidavit, Bacon averred that the Williamses had defaulted under the terms of the contract by failing to make the required payments toward the principal and interest due; all lawful offsets, payments, and credits had been allowed; the net charge-off amount was $25,954.28; Suntrust was the owner and holder of the account; and Suntrust had demanded payment from the Williamses, but the Williamses had not tendered payment.

The documents attached to the affidavit as exhibits include a motor vehicle retail sales contract, which indicates that the Williamses financed $31,088.45 to purchase a vehicle on December 8, 2014; an extension of payment agreement, which extended the loan's maturity date to January 23, 2020, and made the next payment on the loan due on November 23, 2015; a printout from a recovery management system, dated June 30, 2016, which showed that the amount due was $25,954.28 and that the last payment made by the Williamses was on December 11, 2015; two letters of April 15, 2016, from Suntrust, one addressed to Randall and the other addressed to Deborah, regarding the past due status of the account, which instructed the addressee to immediately contact Suntrust to discuss payment arrangements; two letters of March 1, 2016, from Suntrust, one addressed to Deborah and the other

addressed to Randall, regarding the fact that payments were overdue and that if payment was not received by March 13, 2016, Suntrust intended to accelerate the loan; and the affidavit of Suntrust's attorney, Jody D. Jenkins, in which Jenkins averred that $250 per hour is a reasonable rate for consumer and business litigation matters in Jasper County and described the services Jenkins had rendered and expected to render for Suntrust, which amounted to six hours. According to Jenkins's affidavit, considering the usual and customary attorney's fees in Jasper County, the amount in controversy, the legal questions involved, Jenkins's fee arrangement with Suntrust, the benefits conferred, and the required time, a reasonable attorney's fee is $1500, with conditional attorney's fees of $5000 for an appeal to the Court of Appeals and $3500 for an appeal to the Texas Supreme Court.

The Williamses filed a three-page response to the motion for summary judgment, in which they argued that genuine issues of material fact preclude summary judgment on either no-evidence or traditional grounds and Suntrust had not established that it is entitled to judgment as a matter of law. In their response, the Williamses argued that (1) Randall's affidavit "demonstrates that there are contested fact issues regarding the number of payments made on the account and the total amount due on the account[;]" (2) Randall's affidavit provides summary judgment evidence supporting the Williamses affirmative defenses "based on

[Suntrust's] conduct in misrepresenting its intentions with regard to deferring payment due dates and refinancing the underlying loan and failing to mitigate its damages by refusing to take possession of the loan collateral and disposing of it in a commercially reasonable manner . . . to reduce the balance due on the account[;]" and (3) their counsel's affidavit "demonstrates that there are contested fact issues regarding the amount of attorney[']s fees[.]"

Attached to the Williamses' response were Randall's affidavit and the affidavit of the Williamses' counsel. In his affidavit, Randall averred as follows, in pertinent part:

> The payment records filed by Plaintiff Suntrust Bank are incorrect and do not give us credit for all of the payments we made. Specifically, there were deductions from our checking account . . . that are not reflected in the History Summary attached as part of Exhibit A to [Suntrust's motion for summary judgment][.]
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> . . . The transmission coolant box in the truck failed in late October, 2015, which ruined the transmission, and we could no longer drive the truck to get to work. I contacted Suntrust's refinancing department and requested that they defer a payment and refinance the note so that we would have funds to repair the vehicle, and they agreed to do that, but they never sent the paperwork they promised to send.
>
> I called Suntrust again . . . and was told that now they were not going to extend and refinance the note. We reasonably relied upon Suntrust's representation[.]"
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> . . .
>
> [Suntrust] could have taken possession of the truck, sold it at auction[,] and credited our account for the salvage value of the vehicle. [Suntrust] refused and continues to refuse to take the truck, which has prevented us from paying the Suntrust note.

Randall did not attach any documentary evidence to his affidavit. The Williamses' counsel filed an affidavit, in which counsel averred as follows, in pertinent part:

> . . . I have practiced law in Jasper County, Texas[,] and surrounding areas for 37 years. I am familiar with the usual, customary[,] and reasonable fees charged for legal services provided to clients in civil litigation in Jasper County, Texas.
>
> . . .
>
> An hourly billing rate of $250.00 is not a usual, customary[,] or reasonable fee for legal services representing a plaintiff in a collection action of this type in Jasper County, Texas. Six (6) hours is an unreasonably inflated time period to bill for attorney's fees for the services actually rendered to [Suntrust] in this case, and therefore $1,500.00 is not a usual, customary[,] or reasonable fee[.]"

The trial court signed a final summary judgment, in which it found that Suntrust "is entitled to prevail and is entitled to [the] relief sought in Plaintiff's Traditional and No-Evidence Motion for Summary Judgment[.]" In its summary judgment, the trial court ordered that Suntrust recover $25,954.28 from the Williamses, plus attorney's fees of $1500 and conditional appellate attorney's fees, as well as costs of court and post-judgment interest. The Williamses appealed.

THE WILLIAMSES' SOLE ISSUE

In their sole appellate issue, the Williamses argue that the trial court erred in granting summary judgment in favor of Suntrust because the affidavits they filed with their response "raised genuine issues of material fact." When a party moves for both a traditional and a no-evidence summary judgment, we must first review the

summary judgment under the no-evidence standards set forth in Rule 166a(i). *Martinez v. Leeds*, 218 S.W.3d 845, 849 (Tex. App.—El Paso 2007, no pet.) (citing *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004)). If the non-movant failed to produce more than a scintilla of evidence raising a genuine fact issue on the challenged elements of its claims, we need not address whether traditional summary judgment was proper. *Id*.

We review the trial court's granting of a no-evidence motion for summary judgment under the standards set forth in Rule 166a(i) of the Texas Rules of Civil Procedure. *See* Tex. R. Civ. P. 166a(i). To defeat a no-evidence summary judgment motion, the non-movant must produce summary judgment evidence raising a genuine issue of material fact regarding each element challenged by the movant. *Ridgway*, 135 S.W.3d at 600. The non-movant raises a genuine issue of material fact by producing more than a scintilla of evidence establishing the challenged element's existence. *Id*.; *Forbes Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 172 (Tex. 2003). More than a scintilla of evidence exists when the evidence is such that reasonable and fair-minded people can differ in their conclusions. *Ridgway*, 135 S.W.3d at 600. If "'the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence.'" *Id.* (quoting *Kindred v.*

Con/Chem, Inc., 650 S.W.2d 61, 63 (Tex. 1983)). In determining whether the non-movant has produced more than a scintilla of evidence, we view the evidence in the light most favorable to the non-movant and disregard all contrary evidence and inferences. *Id*.; *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 750-51 (Tex. 2003).

With respect to a traditional motion for summary judgment, the movant must establish that there is no genuine issue of material fact 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 non-movant 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 material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken 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 non[-]movant, indulging every reasonable inference and resolving any doubts against the motion." *City of Keller v. Wilson*, 168 S.W.3d 802, 824 (Tex. 2005).

Opposing affidavits must be made on personal knowledge and must set forth facts that would be admissible in evidence. Tex. R. Civ. P. 166a(f). To be competent evidence to oppose a summary judgment, an affidavit must do more than make

conclusory, self-serving statements that lack factual detail. *Haynes v. City of Beaumont*, 35 S.W.3d 166, 178 (Tex. App.—Texarkana 2000, no pet.). "Conclusory affidavits are not sufficient to raise fact issues because they are not credible or susceptible to being readily controverted." *Pipkin v. Kroger Tex., L.P.*, 383 S.W.3d 655, 670 (Tex. App.—Houston [14th Dist.] 2012, pet. denied). The thoughts and opinions of an interested witness, when related in a self-serving affidavit, are not easily disproved by his opponent. *Wise v. Dallas Sw. Media Corp.*, 596 S.W.2d 533, 536 (Tex. Civ. App.—Beaumont 1979, writ ref'd n.r.e.). If a party opposing a motion for summary judgment relies on an affirmative defense, he must come forward with sufficient summary judgment evidence to raise an issue of fact on each element of the affirmative defense. *See City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678-79 (Tex. 1979); *Life Ins. Co. of Va. v. Gar-Dal, Inc.*, 570 S.W.2d 378, 381 (Tex. 1978).

As discussed above, the Williamses asserted the affirmative defenses of laches, limitations, payment, offset, fraud, and waiver. Randall's affidavit did not provide any documentary or other evidence substantiating the claims Randall made regarding payments the Williamses made not being properly credited or about Suntrust agreeing to defer payment. In addition, Randall's affidavit does not address or provide evidence regarding laches, fraud, waiver, or limitations, nor does the

Williamses' response address these elements with the exception of simply contending that Randall's affidavit created a fact issue or constituted some evidence of the claimed defenses. We conclude that Randall's affidavit was conclusory, self-serving, and not susceptible to being readily controverted because it lacked underlying factual detail. *See* Tex. R. Civ. P. 166a(f); *Pipkin*, 383 S.W.3d at 670; *Haynes*, 35 S.W.3d at 178; *Wise*, 596 S.W.2d at 536. Accordingly, Randall's affidavit was not competent summary judgment evidence as to the affirmative defenses claimed by the Williamses, and the Williamses failed to produce more than a scintilla of evidence in support of their affirmative defenses. *See Ridgway*, 135 S.W.3d at 601. Therefore, the trial court did not err by granting a no-evidence summary judgment in favor of Suntrust as to the Williamses' affirmative defenses.

In addition, we conclude that the summary judgment evidence provided by Suntrust established the existence of a contract, pursuant to which Suntrust advanced funds to the Williamses; that the Williamses had failed to pay as required by the contract; and that all offsets, credits, and payments were applied. Therefore, we conclude that Suntrust established that no genuine issues of material fact exist and that it is entitled to judgment as a matter of law. *See* Tex. R. Civ. P. 166a(c); *Johnson*, 891 S.W.2d at 644.

Finally, we turn to the issue of the trial court's award of $1500 in attorney's fees to Suntrust. The Texas Supreme Court has set forth a list of eight factors that the factfinder should consider when determining the reasonableness of attorney's fees. *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997). The Supreme Court held that the factors the factfinder should consider include:

1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;

2) the likelihood . . . that the acceptance of the particular employment will preclude other employment by the lawyer;

3) the fee customarily charged in the locality for similar legal services;

4) the amount involved and the results obtained;

5) the time limitations imposed by the client or by the circumstances;

6) the nature and length of the professional relationship with the client;

7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

Id. (quoting Tex. Disciplinary R. Prof'l Conduct R. 1.04, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. A (West 2013) (Tex. State Bar R. art. X, § 9)).

The Williamses' counsels' affidavit does not address the *Arthur Andersen* factors, but instead simply concludes that $250 per hour is unreasonable and is not usual or customary, six hours is an "unreasonably inflated" period of time to spend on a case such as this one, and $1500 is not a usual, customary, or reasonable fee. In addition, counsel's affidavit does not discuss the award of conditional appellate attorney's fees. We conclude that this affidavit suffers from the same flaws as Randall's affidavit in that it is conclusory, self-serving, and lacking in sufficient factual detail. *See* Tex. R. Civ. P. 166a(f); *Pipkin*, 383 S.W.3d at 670; *Haynes*, 35 S.W.3d at 178; *Wise*, 596 S.W.2d at 536. However, the affidavit of Suntrust's counsel averred that $250 per hour is a reasonable rate for consumer and business litigation matters in Jasper County; described the attorney services rendered; and explained the reasons that the fees were necessary and reasonable. We conclude that the trial court did not err by granting summary judgment in favor of Suntrust and awarding Suntrust attorney's fees in the amount of $1500 as well as conditional appellate attorney's fees. *See* Tex. R. App. P. 166a(c), (f); *see also Arthur Andersen*, 945 S.W.2d at 818. We overrule the Williamses' sole issue and affirm the trial court's judgment.

AFFIRMED.

STEVE McKEITHEN
Chief Justice

Submitted on August 7, 2017
Opinion Delivered October 5, 2017

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