



**In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth**

No. 02-21-00285-CV

STEELTEC CONSTRUCTORS, L.L.C., Appellant

v.

FISH AND SKI MARINE, GP-LLC AND CHRISTOPHER A. HICKS, Appellees

On Appeal from the 16th District Court
Denton County, Texas
Trial Court No. 18-4643-16

Before Kerr, Bassel, and Walker, JJ.
Memorandum Opinion by Justice Bassel

MEMORANDUM OPINION

I. Introduction

This appeal involves competing claims arising from a construction contract. The claims were decided based on a motion for summary judgment that was deficient in form. Appellant Steeltec Constructors, L.L.C. specially excepted to the form of the motion for summary judgment filed by Appellees Fish and Ski Marine, GP-LLC (FSM) and Christopher Hicks, but the trial court denied Steeltec's special exceptions and granted Appellees' motion. In its first of six issues, Steeltec argues that the trial court erred by failing to require Appellees to amend their motion for summary judgment and by denying Steeltec's special exceptions because the motion did not state the grounds, as well as the elements of those grounds, on which it sought summary judgment. Because we hold in Steeltec's favor on its first issue, we need not reach its other issues. *See* Tex. R. App. P. 47.1. We therefore reverse the summary judgment in favor of Appellees and remand the case for further proceedings.

II. Background

In March 2017, FSM and its managing member Hicks entered into a contract for Steeltec to construct a commercial building at 303 Stemmons Freeway in Sanger, Texas. The amount due Steeltec under the contract was \$1,450,638.35. The contract required substantial completion by August 1, 2017.

Steeltec encountered "various issues with obtaining payments from [Appellees]." Steeltec believed that it had "fully and in all things" performed under

the contract, having never received any formal deficiency notice or informal indication of dissatisfaction with its work on the project. Due to Appellees' failure to pay the payment applications that Steeltec had submitted to them, Steeltec gave its work-stoppage notice on March 23, 2018.

Claiming that it had not been paid the sum of \$409,636.15, Steeltec filed a mechanic's and constitutional lien affidavit and claim with the county clerk on April 18, 2018. Steeltec then filed suit the following month, asserting claims against Appellees for breach of contract, foreclosure of the mechanic's and constitutional lien, quantum meruit, and violation of the Texas Trust Fund Act. Steeltec also sought to recover attorney's fees and prejudgment interest.

Appellees answered with a general denial and counterclaimed for damages from Steeltec and its president Derek McSpadden. In their second amended original answer, counterclaims, and third-party petition,¹ Appellees stated that in February and March 2018, discrepancies were discovered between the amount of work that Steeltec had actually completed and the amount of work that Steeltec claimed that it had completed per its draw requests. FSM and CDCC began investigating. CDCC

¹In the third-party petition, Appellees asserted causes of action against Independent Bank, but that entity was not served and is not a party to this appeal. According to Appellees' original answer and counterclaims, FSM obtained a commercial loan for the construction from Independent Bank, who contracted CD Construction Consulting (CDCC) to serve as the inspector and manager of draw requests and payments.

determined that Steeltec had submitted draw requests and had been paid for \$140,917.80 of work that could not be accounted for.²

FSM alleged counterclaims against Steeltec for breach of contract, conversion, unjust enrichment, and fraud and against McSpadden for conversion, unjust enrichment, and fraud. FSM also requested judgment under Civil Practice and Remedies Code Chapter 12 and an order removing and releasing Steeltec's and McSpadden's lien, a declaratory judgment that Steeltec's mechanic's and constitutional lien is null and void or alternatively awarding FSM judgment quieting title to its real property by rendering the lien null and void, and attorney's fees.

Steeltec and McSpadden answered with a general denial.

After an adequate time for discovery had passed, FSM, designating itself as "Plaintiff,"³ moved for summary judgment.⁴ After setting forth several pages under

²According to Appellees' second amended original petition, the final audit revealed that CDCC had not, in fact, inspected and confirmed the work that Steeltec had actually performed. Appellees alleged various causes of action against CDCC, and CDCC moved for summary judgment, which was granted on Appellees' breach-of-contract claim because FSM had no contract with CDCC.

³In certain places in the motion, Hicks is also mentioned. It appears that the motion was meant to be construed as FSM's and Hicks's joint motion for summary judgment.

⁴Although designated as a motion for summary judgment, it is more correctly considered a motion for partial summary judgment as it did not list all the parties' claims. However, we will refer to the motion as it was labeled in the record.

the heading “UNDISPUTED FACTS”⁵ and a half page of authorities, the motion ends with the following conclusory statements regarding the relief to which FSM believed that it was entitled:

4.04 Fish & Ski, GP-LLC and Christopher Hicks are entitled to summary judgment for the cancellation of the lien and removal of the affidavit claiming lien filed by Steeltec from the Deed Records of Denton County, and for their attorney[s] fees concerning the same.

4.05 Further, it is conclusively proven[] and undisputed[] that Steeltec was overpaid for work on the project when it abandoned that very same project. Steeltec breached its contract in the amount of \$140,917.80[] and has been unjustly enriched in the same amount, and Fish & Ski and Christopher Hicks are entitled to judgment for the same.

4.06 Lastly, Fish and Ski[] and Christopher Hicks are entitled to attorney[s] fees in the prosecution of these claims[] in the amount of \$35,000.00 up to[] and through the prosecution of this motion for summary judgment.

CONCLUSION

Plaintiff is entitled to summary judgment on Steeltec’s claim for a [m]echanic’s and [m]aterialman’s [l]ien[] and to a judgment for the removal of the lien[;] for judgment against Steeltec for [b]reach of [c]ontract and [u]njust [e]nrichment in the amount of \$140,917.80[;] and for their reasonable and necessary attorney[s] fees.

Steeltec filed a response and specially excepted to Appellees’ motion for summary judgment

⁵The section also contains argument such as the following: “What followed was an incredible and epic series of delays, mistakes, miscommunication, misrepresentations, unsatisfactory work, work needing to be redone, fraudulent draw requests, demands, disappearances and flat out lies by Steeltec and its principal, Mr. McSpadden.”

because Counter-Plaintiff[s] lump[] all of [their] claims together and assert[] conclusory arguments in support thereof. To the extent that Counter-Plaintiff[s]' Motion for Summary Judgment attempts to address breach of contract, unjust enrichment, or attorney[']s fees, the motion for summary judgment does not clearly assert any argument in favor of granting summary judgment for Counter-Plaintiff[s]. As a result, it is unclear on what grounds [Counter-]Plaintiff[s]' motion for summary judgment is seeking summary judgment.

Steeltec's response also asserted objections to Appellees' summary-judgment evidence and argued that summary judgment on Appellees' claims should be denied because genuine issues of material fact exist.

FSM filed a reply⁶ and responded to Steeltec's special exceptions, stating that it "could not be any more clear in the relief that it [was] pleading for" and referencing the conclusion from the summary-judgment motion.

The trial court denied Steeltec's special exceptions and objections, other than the objections to Appellees' summary-judgment evidence on attorney's fees. The trial court granted partial summary judgment for Appellees, concluding that Steeltec did not substantially comply with Texas Property Code Section 53.054(a)(1) when it filed its lien claim and ordering the county clerk to strike the lien from the real property records because it was invalid and void. The trial court further stated that Steeltec was owed \$0.00 by Appellees; that Steeltec had breached its contract with FSM and had caused damages in the amount of \$140,917.80; and that Steeltec had been unjustly enriched in that amount. Thus, the trial court ordered that Steeltec was liable to FSM

⁶This document did not mention Hicks.

for that amount, plus prejudgment and postjudgment interest. The trial court concluded the order by stating that Appellees' claim for attorney's fees would be determined later.

Thereafter, Steeltec filed objections to Appellees' request for attorney's fees. Steeltec argued that attorney's fees cannot be recovered against a limited liability company under Civil Practice and Remedies Code Chapter 38 and that Appellees had wholly failed to file a motion requesting such fees and to provide any evidence regarding the amount of fees requested.

Later that same day, Appellees' attorney filed an affidavit on the requested attorney's fees with billing statements attached.

Steeltec then filed additional briefing in support of its objections to Appellees' request for attorney's fees. Steeltec reiterated that attorney's fees cannot be recovered against a limited liability company under Civil Practice and Remedies Code Chapter 38 and that it is an LLC. Steeltec stated that during a hearing on Appellees' attorney's fees, Appellees had agreed to drop any claim for attorney's fees under Chapters 12 and 38. Steeltec argued that Appellees were thus seeking attorney's fees related to the declaratory-judgment action on the mechanic's lien and that attorney's fees cannot be awarded under the Declaratory Judgments Act if otherwise barred, "as they are here." Steeltec further argued that "[i]f the [trial court] were to entertain [Appellees'] request for attorney[s] fees, [then such amount was] not [(1) reasonable, (2) necessary,

(3) equitable[,] or (4) just as it relate[d] to a fee finding strictly pertaining to the declaratory[-]judgment action.”

The trial court held a hearing on Appellees’ attorney’s fees request and awarded \$30,875.

The trial court rendered a final judgment that included the renditions from the partial summary-judgment order and the order on attorney’s fees. The final judgment also stated that Steeltec should take nothing by reason of its suit against Appellees.

Steeltec filed a combined motion to reconsider and motion for new trial, and Appellees filed a response. Steeltec’s motion was overruled by operation of law, and Steeltec then perfected this appeal.

III. Form of Summary-Judgment Motion Failed to Give Notice of Grounds

In its first issue, Steeltec argues that the trial court erred by denying Steeltec’s special exceptions and by not requiring Appellees to amend their motion for summary judgment. After reviewing Appellees’ motion for summary judgment, we agree with Steeltec that the motion’s deficiencies failed to give Steeltec notice of all matters expected to be asserted in urging the motion.

We review a summary judgment de novo. *Travelers Ins. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). To prevail on a traditional motion for summary judgment, a plaintiff must conclusively prove all essential elements of the claim. *See* Tex. R. Civ. P. 166a(a), (c); *MMP, Ltd. v. Jones*, 710 S.W.2d 59, 60 (Tex. 1986). A defendant that conclusively negates at least one essential element of a plaintiff’s cause of action is

entitled to summary judgment on that claim. *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 508 (Tex. 2010); see Tex. R. Civ. P. 166a(b), (c). In order to conclusively negate at least one of the requisite elements, the motion must identify or address the cause of action or defense and its elements. See *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 342 (Tex. 1993) (citing *Black v. Victoria Lloyds Ins. Co.*, 797 S.W.2d 20, 27 (Tex. 1990)). See generally Tex. R. Civ. P. 166a(c); *McConnell*, 858 S.W.2d at 341 (“[Rule 166a(c)] is important because it provides the opposing party with notice of all matters expected to be asserted in arguing the motion.” (quoting *Weaver v. Stewart*, 825 S.W.2d 183, 184–85 (Tex. App.—Houston [14th Dist.] 1992, writ denied))).

Here, from the opening sentence of Appellees’ motion for summary judgment, the motion failed to provide the clarity necessary to give Steeltec notice of whose claims it needed to defend. The motion begins by incorrectly identifying FSM as the plaintiff⁷ (instead of as a defendant and counterplaintiff) and fails to mention Hicks, despite his being mentioned with FSM in paragraph 4.04 in the arguments section as set forth above. This error in form could easily be overlooked if the rest of the motion made clear the claims on which Appellees were seeking summary judgment. Appellees rely on their motion’s one-sentence conclusion to show that they clearly stated the grounds on which they sought summary judgment. Although the

⁷The motion’s opening sentence states, “NOW COMES Plaintiff, FISH AND SKI MARINE GP-LLC[] (‘Plaintiff’) in the above entitled and numbered cause, complaining of Counter-Defendants, **STEELTEC CONSTRUCTORS, LLC and DEREK MCSPADDEN** and files this MOTION FOR SUMMARY JUDGMENT”

conclusion provides some guidance as to the grounds—at least as to identifying Steeltec’s lien claim and Appellees’ unjust-enrichment claim—the motion’s conclusion does not state which party’s claim for breach of contract is at issue, despite that both parties asserted a breach-of-contract claim. It is not clear if Appellees were attempting to move for summary judgment simultaneously on Steeltec’s breach-of-contract claim and Appellees’ breach-of-contract claim. The trial court presumably assumed this because it found that Steeltec was “owed \$0.00 by Fish & Ski Marine, GP-LLC and Christopher A. Hicks” and further found that Steeltec had breached its contract with FSM. But the motion for summary judgment is far from clear on this issue because the motion did not set forth the elements of Steeltec’s breach-of-contract claim or identify the element(s) that Appellees sought to negate, nor did it set forth what part(s) of the contract that Steeltec had breached.

Similarly, as noted in Steeltec’s brief, Appellees’ summary-judgment motion failed to “identify the requirements for a valid lien or the legal bases by which a court may invalidate a lien.” With regard to Steeltec’s lien claim, Appellees were required in their role as defendants—who were seeking summary judgment on the plaintiff’s claim—to negate at least one essential element of that cause of action and to identify the elements of the cause of action. *See Frost Nat’l Bank*, 315 S.W.3d at 508; *McConnell*, 858 S.W.2d at 342. Additionally, Appellees’ summary-judgment motion failed to state the elements of their unjust-enrichment claim and how they had conclusively proved all essential elements of their claim. Because Appellees failed to

set forth the elements of any of the causes of action on which they sought summary judgment, they did not satisfy their summary-judgment burden.

Taking these deficiencies together, Appellees' summary-judgment motion failed to give Steeltec "notice of all matters expected to be asserted in arguing the motion." *See McConnell*, 858 S.W.2d at 341 (quoting *Weaver*, 825 S.W.2d at 184–85). We hold that the trial court erred by denying Steeltec's special exceptions, by failing to require Appellees to amend their motion, and by granting Appellees' motion for summary judgment. *See* Tex. R. Civ. P. 166a(c); *Johnson v. Felts*, 140 S.W.3d 702, 706 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) ("Because appellee failed to identify the elements of the various causes of action brought by appellants and did not address any specific elements thereof, we therefore hold that traditional summary judgment is inappropriate and sustain appellants' first issue."). Accordingly, we sustain Steeltec's first issue.

IV. Conclusion

Having sustained Steeltec's first issue, which is dispositive of the appeal, we reverse the trial court's summary judgment in favor of Appellees and remand for further proceedings. *See* Tex. R. App. P. 43.2(d), 43.3(a).

/s/ Dabney Bassel

Dabney Bassel
Justice

Delivered: May 26, 2022