In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-11-00017-CV

CLARKSVILLE OIL AND GAS COMPANY, LTD., ET AL., Appellants

V.

MARCUS A. CARROLL, Appellee

On Appeal from the 6th Judicial District Court
Red River County, Texas
Trial Court No. CV02480

Before Morriss, C.J., Carter and Moseley, JJ.
Memorandum Opinion by Chief Justice Morriss

MEMORANDUM OPINION

Clarksville Oil and Gas Company, Ltd., and a group of apparently affiliated organizations[1] (together called the Clarksville Companies) appeal a summary judgment against them and in favor of Marcus A. Carroll, asserting that they did make out a fact issue of whether Carroll was responsible for preparation or filing of an overbroad abstract of judgment. Because the Clarksville Companies' response to Carroll's motion for summary judgment was filed too late, and there was no trial court order allowing such late filing, we find the summary judgment was properly granted.

Patricia Coplan Fry, Dekrfour, Inc., Nelson Operating, Inc., Bobby Noble, and Wood County Oil and Gas, Ltd. (hereinafter referred to as Fry Defendants) had been defendants in a 2004 breach-of-contract case arising out of competing claims to certain interests in an old oil field. In that case, on the Fry Defendants' counterclaim against Wendell Reeder, they obtained a judgment against Reeder. As part of that judgment, the Fry Defendants' attorney, Marcus A. Carroll, was awarded $125,000.00 in attorney's fees.[2]

In 2008, Fry filed an abstract of judgment listing the Fry Defendants and Carroll as judgment creditors. The abstract of judgment ostensibly created judgment liens on nonexempt

[1]The organizations joining Clarksville Oil and Gas Company, Ltd., in the trial court action and this appeal are Smith and Coffman, Ltd., COG Management, L.L.C., Clarksville Transportation L.L.C., S&C Management, L.L.C., W.R. Diversified Holdings, L.P., W.R. Diversified Holdings Management L.L.C., and Midway Armadillo Corporation.

[2]The Twelfth Court of Appeals affirmed, as modified, the trial court's judgment in the 2004 case. Petition for review is pending with the Texas Supreme Court.

real property of those it named as judgment debtors therein. In the abstract of judgment, Fry included the Clarksville Companies as judgment debtors. The problem is that the Clarksville Companies were not judgment debtors in the judgment. Reeder was.

On July 9, 2009, the Clarksville Companies filed suit against the Fry Defendants and Carroll. They sought judgment declaring that the abstract of judgment was invalid and asked for damages for wrongful filing.[3] The Clarksville Companies also alleged that Carroll, by failing to execute a release of lien, was liable for slander of title under the theory that he ratified Fry's actions in filing the invalid abstract. On August 20, 2009, Fry filed a corrected abstract of judgment listing the proper judgment debtor, Reeder.

The suit against Carroll was severed. Carroll filed a no-evidence and traditional motion for summary judgment denying participation in slander of title by alleging that he did not participate in the preparation of the abstract of judgment and was not aware of it until receiving a copy from J. Bennett White, attorney for the Clarksville Companies. He also alleged that Fry was not acting as his agent when she filed the abstract of judgment. Carroll further stated that he aided in the drafting of the amended abstract of judgment correcting the mistake, demonstrating that he did not ratify Fry's actions. The Clarksville Companies appeal the trial court's take-nothing summary judgment in favor of Carroll. Specifically, they argue that the trial court erred in

[3]The claim alleged that W.R. Diversified Holding, LP, "entered into a contract with Darean, Inc. to sell the stock of Clarksville Oil & Gas for $6,500,000.00 and ten (10) gas stations owned by Smith & Coffman, LTD for $9,820,000.00," and that the contract was terminated on Darean's discovery of the abstract of judgment. It was also claimed that the abstract of judgment led to a reduction in "Clarksville Oil & Gas' line of credit with" F&M Bank, and that a loan from Texas Heritage National Bank was withdrawn.

striking the affidavit of their attorney J. Bennett White from the summary judgment record and that there is a genuine issue of material fact as to whether Carroll ratified the filing of the incorrect abstract of judgment. We find that summary judgment was properly granted, and the affidavit properly struck, due to the Clarksville Companies' late-filed response to Carroll's motion for summary judgment.

We employ a de novo review of the trial court's grant of a summary judgment, which is based on written pleadings and written evidence. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005); *Lamar Corp. v. City of Longview*, 270 S.W.3d 609, 613 (Tex. App.—Texarkana 2008, no pet.); *see* TEX. R. CIV. P. 166a(c). Summary judgment is proper if Carroll established that there was no genuine issue of material fact and that he was entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *French v. Gill*, 252 S.W.3d 748, 751 (Tex. App.—Texarkana 2008, pet. denied); *Powers v. Adams*, 2 S.W.3d 496, 497 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (citing *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985)).

Carroll filed a traditional and no-evidence motion for summary judgment. During our analysis of the traditional motion, and in deciding whether there is a disputed material fact issue which precludes summary judgment, proof favorable to the Clarksville Companies will be taken as true and every reasonable inference will be indulged in their favor. *Limestone Prods. Distrib., Inc. v. McNamara*, 71 S.W.3d 308, 311 (Tex. 2002); *Nixon*, 690 S.W.2d at 548–49. A

no-evidence summary judgment is essentially a pretrial directed verdict. We, therefore, apply the same legal sufficiency standard in reviewing a no-evidence summary judgment as we apply in reviewing a directed verdict to determine whether the nonmovant produced any evidence of probative force to raise a fact issue on the material questions presented. *Wal-Mart Stores, Inc. v. Rodriguez*, 92 S.W.3d 502, 506 (Tex. 2002); *Woodruff v. Wright*, 51 S.W.3d 727, 734 (Tex. App.—Texarkana 2001, pet. denied). The Clarksville Companies would defeat a no-evidence summary judgment motion if they presented more than a scintilla of probative evidence on each element of their claims. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003).

The trial court's summary judgment specified no particular ground as supporting the summary judgment. When, as is the case here, the trial court does not set out the grounds on which it ruled, we affirm the summary judgment if any ground urged in the motion for summary judgment is meritorious. *W. Invs., Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005).

"Except on leave of court, the adverse party, not later than seven days prior to the day of hearing [on a motion for summary judgment] may file and serve opposing affidavits or other written response." TEX. R. CIV. P. 166a(c); *see Alford v. Thornburg*, 113 S.W.3d 575, 586 (Tex. App.—Texarkana 2003, no pet.) (opposing party must file *and serve* any opposing affidavits and response at least seven days before hearing). "A trial court may accept late-filed summary judgment evidence, but it must affirmatively indicate that it accepted or considered that evidence." *SP Terrace, L.P. v. Meritage Homes of Tex., L.L.C.*, 334 S.W.3d 275, 281–82 (Tex.

App.—Houston [1st Dist.] 2010, no pet.) (citing *Stephens v. Dolcefino*, 126 S.W.3d 120, 133–34 (Tex. App.—Houston [1st Dist.] 2003), *pet. denied*, 181 S.W.3d 741 (Tex. Crim. App. 2005). "If no order in the record indicates that the court gave leave to file untimely evidence, then we presume that the trial court did not consider the evidence." *Id.* at 282; *see Benchmark Bank v. Crowder*, 919 S.W.2d 657, 663 (Tex. 1996) ("There is no order in this record granting the Crowders leave to file McCool's affidavit late. McCool's affidavit was not properly before the trial court on the motions for summary judgment.").

In this case, Carroll filed the motion for summary judgment November 1, 2010. The Clarksville Companies filed their response to the motion for summary judgment, attaching White's affidavit and other documentation, December 13, 2010, the same day that the hearing on the motion for summary judgment was scheduled and heard.[4] The record does not contain any request for leave from the trial court to file the late-filed response, and there is no order granting, and no other indication that the trial court gave, such permission.

An untimely summary judgment response is not before the trial court and cannot be considered unless leave of court is sought and granted. *Derouen v. Wal-Mart Stores, Inc.*, No. 06-06-00087-CV, 2007 WL 188698, at *1 (Tex. App.—Texarkana Jan. 26, 2007, no pet.) (mem. op.).

> When a defendant files a motion for a no evidence summary judgment which properly alleges that there is a lack of evidence supporting one or more specific

[4]White's affidavit was dated December 7, six days before the hearing; Carroll's counsel stated he did not receive the response until December 10, three days before the hearing.

> essential elements of the plaintiff's cause of action, the trial court must grant the summary judgment unless the plaintiff timely responds, presenting to the trial court evidence (more than a scintilla) which raises a genuine issue of fact bearing on the challenged elements. TEX. R. CIV. P. 166a(i); *City of Keller v. Wilson*, 168 S.W.3d 802 (Tex. 2005).

Id. Because the Clarksville Companies failed to comply with the timely filing requirements of Rule 166a(c) of the Texas Rules of Civil Procedure, and their tardy response was not permitted by the trial court, the Clarksville Companies presented no evidence in response to Carroll's no-evidence motion for summary judgment. *See O'Donald ex rel. Estate of O'Donald v. Texarkana Mem'l Hosp.*, No. 06-04-00121-CV, 2005 WL 3191999, at *1–2 (Tex. App.—Texarkana Sept. 28, 2005, pet. denied) (mem. op.) ("Because the [Plaintiffs] did not timely respond to [Defendant's] no-evidence summary judgment motion or timely point the trial court to any summary judgment evidence raising an issue of fact on the challenged elements, the trial court properly rendered summary judgment in favor of [Defendant]."); *Baker v. Gregg County*, 33 S.W.3d 72, 77–79 (Tex. App.—Texarkana 2000, pet. dism'd) (because evidence was filed late without leave of court, plaintiff presented no evidence on her claim). Accordingly, the trial court properly granted summary judgment to Carroll.

We affirm the trial court's judgment.

Josh R. Morriss, III
Chief Justice

Date Submitted: August 10, 2011

Date Decided: September 1, 2011