TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

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NO. 03-00-00054-CV

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Ron Adkison, Appellant

v.

Scott, Douglass & McConnico, L.L.P., Appellee

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FROM THE DISTRICT COURT OF TRAVIS COUNTY, 250TH JUDICIAL DISTRICT
NO. 99-04544, HONORABLE JOHN K. DIETZ, JUDGE PRESIDING

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Ron Adkison appeals from a summary judgment recovered by the law firm of Scott, Douglass & McConnico, L.L.P. ("the law firm"). We will reverse the judgment and remand the cause to the trial court.

THE CONTROVERSY

Adkison, a licensed attorney, contracted with the law firm to represent him in administrative and judicial proceedings resulting from his alleged misconduct under the Texas Disciplinary Rules of Professional Conduct. The law firm defended him successfully. When he failed to pay sums allegedly due and owing under their contract, the law firm sued him to recover such sums in the present cause.

The law firm alleged against Adkison a common-law cause of action for breach of contract, framed as such and as a suit for debt on sworn account under Rule 185 of the Texas

Rules of Civil Procedure. After Adkison appeared and answered in the cause, the law firm moved for summary judgment on the single ground that the summary-judgment record established the firm's right to judgment as a matter of law, both on the sworn account claim and the action for breach of contract.

The trial-court judgment awards the law firm a principal sum of $149,838.97 together with $49,279.55 attorneys fees, interest, and costs of court. The judgment does not indicate whether it rests upon the sworn-account claim or the breach-of-contract action. We will consider each basis in turn.

SWORN ACCOUNT

Two rules of pleading govern a suit for debt on sworn account.

Rule 185 provides that when an action

> is founded upon an open account or other claim . . . for personal service rendered . . . on which a systematic record has been kept, and is supported by the affidavit of the [plaintiff], his agent or attorney . . . to the effect that such claim is, within the knowledge of affiant, just and true, that it is due, and that all just and lawful offsets, payments and credits have been allowed, the same shall be taken as prima facie evidence thereof, *unless* the [defendant] *shall file a written denial, under oath.* A party resisting such a sworn claim shall comply with the rules of pleading as are required in any other kind of suit, provided, however, that *if he does not timely file a written denial, under oath, he shall not be permitted to deny the claim*, or any item therein, as the case may be. No particularization or description of the nature of the component parts of the account or claim is necessary unless the trial court sustains special exceptions to the pleadings.

Tex. R. Civ. P. 185 (emphasis added). Rule 93 provides as follows:

> A pleading setting up any of the following matters, unless the truth of such matters appear of record, shall be *verified by affidavit*.
>
> * * *
>
> 10. A denial of an account which is the foundation of the plaintiff's action, and [which is] supported by affidavit.

Tex. R. Civ. P. 93 (emphasis added).

The law firm's first amended original petition and supporting affidavit complied with Rule 185, giving rise to a prima facie case on the sworn-account claim. The law firm was therefore entitled to summary judgment on the pleadings themselves unless Adkison disputed the sworn account by filing a written denial of the claim under oath (Rule 185) and an affidavit (Rule 93(10)) verifying his denial of the account. *See Rizk v. Financial Guardian Ins. Agency, Inc.,* 584 S.W.2d 860, 862 (Tex. 1979); *Andrews v. East Tex. Med. Ctr.—Athens*, 885 S.W.2d 264, 267 (Tex. App.—Tyler 1994, no writ).

We should state initially that we disagree with the law firm's contention on appeal that Rules 93(10) and 185 mandate the filing of two distinct instruments: a written denial, under oath, and a separate affidavit verifying the defendant's denial of the account. Both rules are satisfied if the defendant files a sworn answer denying the account that is the foundation of the plaintiff's action. *See Livingston Ford Mercury, Inc. v. Hal Haley,* 997 S.W.2d 425, 429-30 (Tex. App.—Beaumont 1999, no pet.); *Huddleston v. Case Power & Equip. Co.,* 748 S.W.2d 102, 103 (Tex. App.—Dallas 1988, no writ); David Hittner, *Summary Judgments in Texas*, 22 Houston L. Rev. 1109, 1113 (1985); Steve McConnico and Daniel W. Bishop, III, *Practicing Law with the*

1984 Rules: Texas Rules of Civil Procedure Amendments Effective April 1, 1984, 36 Baylor L. Rev. 73, 99 (1984).

From the decisions now to be discussed, we believe it settled that a general denial, although sworn to, is insufficient under the two rules to contravene the plaintiff's prima facie case and thus permit a consideration of the defendant's summary-judgment proof disputing the account. Some precision of pleading is required. Unless the defendant's sworn denial is directed expressly and particularly at the account made the basis of the plaintiff's suit, it amounts only to an insufficient general denial. *See Hidalgo v. Surety Sav. & Loan Ass'n,* 462 S.W.2d 540, 543 n. 1 (Tex. 1971); *Huddleston,* 748 S.W.2d at 103-04. A sworn denial is sufficient in that respect, however, when the answer "denies the allegations in Paragraphs II and III and IV of the Plaintiff's Original Petition," Paragraph II contains the plaintiff's sworn-account claim, and the affiant swears that all allegations and statements of fact in his answer "are true and correct." *See Canter & McGehee v. Easley*, 787 S.W.2d 72, 73-74 (Tex. App.—Houston [1st Dist.] 1990, writ denied). On the other hand, if the defendant's sworn answer states that he "specifically deni(es) under oath each and every, all and singular, the allegations [in] Plaintiff's . . . Petition, saying that said allegations are not true in whole or in part," it is merely a sworn general denial because it is directed at the plaintiff's allegations generally as opposed to his sworn-account claim particularly. *East Tex. Med. Ctr.—Athens*, 885 S.W.2d at 268. Finally, any factual averments in the defendant's answer, directed at the plaintiff's sworn-account claim, must be verified by an oath that the facts alleged by the defendant are *true*; otherwise, the answer does not satisfy the requirements of Rules 93(10) and

185. *See Brown Found. Repair & Consulting, Inc. v. Friendly Chevrolet Co.,* 715 S.W.2d 115, 117-18 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

In his first assignment of error, Adkison contends his original answer satisfied the requirements of Rules 93(10) and 185, permitting him to deny by summary-judgment proof the law firm's sworn-account claim. In consequence, if the summary judgment rests on the pleadings alone the judgment rests upon reversible error.

In his answer, Adkison alleged as follows:

> Defendant *denies* each and every item in Plaintiff's *sworn account*, which is the basis of Plaintiff's action, and demands strict proof of all items in the account. Defendant further *denies* that Plaintiff has *allowed and credited all payments* made by Defendant.

(emphasis added).

Adkison verified his original answer by an affidavit that states as follows:

> State of Texas
>
> County of Rusk
>
> Before me, the undersigned notary public, on this day personally appeared Ron Adkison, who, after being duly sworn, stated under oath that he is the Defendant in this action; that he has read the above Defendant's . . . Original Answer . . . and that every statement contained [therein] is within his personal knowledge and is *true and correct.*
>
> /s/ Ron Adkison
>
> Subscribed and sworn to before me on July 12, 1999.

/s/ Mollie Jo Dunlap
Notary Public, State of Texas

(emphasis added).

In the text of his original answer, Adkison thus denied expressly and specifically "each and every item in Plaintiff's sworn account," and in his accompanying affidavit he stated under oath "that every statement contained in [his answer] is within his personal knowledge and is true and correct." His sworn denial thus satisfies easily the requirements of Rules 93(1) and 185 under the precepts stated above. His original answer is even more specific, in its denial of the law firm's sworn-account claim, than was the case in *Canter & McGee v. Easley* where the object of the defendant's sworn denial was directed merely at the paragraph number under which the sworn-account claim was alleged in the plaintiff's petition. *See Canter & McGee*, 787 S.W.2d at 73-74.

We therefore sustain Adkison's first assignment of error.

BREACH OF CONTRACT

In his third assignment of error, Adkison contends the summary-judgment record reveals genuine issues of material fact that preclude judgment as a matter of law on the law firm's common-law breach-of-contract claim. The summary-judgment proof is found solely in four affidavits attached to the law firm's motion for summary judgment and Adkison's affidavit filed in opposition to the motion.

The following may reasonably be inferred from the pleadings and the law firm's affidavits: the law firm contracted with Adkison to represent him in specified litigation; he

agreed to pay for such services at the firm's usual, reasonable, and customary rates and to reimburse the firm for travel and other expenses advanced in the course of the litigation; the law firm performed its obligations under the contract, resulting in a total charge for the firm's services equal to $410,409.49; the sum of $260,570.52 has been paid by Adkison or credited to his account, leaving a balance due and owing equal to $149,838.97, which he has failed to pay.

One may reasonably infer from Adkison's opposing affidavit the following matters: the law firm failed to follow his instructions in particular matters in the course of their representation; the firm exceeded the scope of the representation contracted for; and, the sums claimed by the law firm do not constitute reasonable and necessary attorney's fees. For example, Adkison's affidavit declares as follows:

> The number of hours charged and the work done . . . throughout this case are excessive. The total attorney's fees for this case should not have exceeded $100,000.00. . . . In fact, a litigation budget was prepared by [the law firm] and sent to me which listed a "worst case" scenario of costs. The single billing of [the law firm] for the trial itself, which did not last as long as their own projection, exceeds the entire litigation budget . . . and, therefore, . . . their billings in this case are not reasonable nor necessary. I will point out that only a fraction of the work in discovery estimated in the litigation budget . . . was actually done. [The litigation budget] is attached hereto . . . for the court to compare against their bill to show prima facie the unreasonableness of these charges and remind the Court that [the law firm] admits that I have paid them $260,570.52 for representation in this matter.

The attached "litigation budget" referred to in the foregoing is contained in what purports to be a letter from the law firm to Adkison, estimating a total charge of $220,555.00 exclusive of expenses. The letter states that sum is "an outside estimate of what the cost may be," but cautions that "it may be more." The concluding sentence of the letter states that the writer wants

"to have a personal meeting with [Adkison] to finalize our agreement on this budget and to discuss our strategy."

None of the affidavits attached to the law firm's motion for summary judgment refer to the difference between the estimated cost of representation ($220,555.00) and the amount actually charged by the firm ($410,409.49). Nor do the affidavits set forth any underlying facts peculiar to the actual litigation in which the firm represented Adkison, as these facts might refer to the reasonableness and necessity of the fees charged. The affidavits merely state, in pertinent part, the following abstract conclusion recited by an experienced partner in the law firm:

> In my opinion, the total fees charged and costs incurred by [the law firm] were reasonable and necessary given (a) the time and labor required; (b) the novelty and difficulty of the questions involved; (c) the skill required to perform the legal service properly; (d) the fee customarily charged in the locality for similar legal services; (e) the stakes involved; (f) the time limitations imposed by the client or by the circumstances; (g) the nature and length of the professional relationship with the client; (h) the experience, reputation, and ability of the lawyers and paralegals performing the services; and (i) the results obtained.

See Arthur Andersen & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 818 (Tex. 1997); *Ragsdale v. Progressive Voters League,* 801 S.W.2d 880, 881 (Tex. 1990); Tex. Disciplinary. R. of Prof'l Conduct

1.04(b)(1-8)(State Bar Rules x, §9).

While the facts underlying some of the foregoing elements of a reasonable fee are obvious in context, the same may not be said of other elements. For example, there is no

indication of what time restrictions were imposed by the client or the circumstances; nor are the nature and length of the firm's professional relationship with Adkison indicated.

Most importantly, the affidavits attached to the law firm's motion for summary judgment do not set forth any underlying facts upon which the affiant based his conclusory opinions that "the total fees charged and costs incurred . . . were reasonable and necessary given . . . the time and labor required, . . . the novelty and difficulty of the questions involved; [and] the skill required to perform the legal service properly."

> [I]t is the basis of the witness's opinion and not the witness's qualifications or his mere opinions alone, that can settle an issue as a matter of law; a claim will not stand or fall on the mere *ipse dixit* of a credentialed witness. Thus, as we held in *Anderson v. Snider*, "conclusory statements made by an expert witness are insufficient to support summary judgment."

Burrow v. Arce, 997 S.W.2d 229, 235 (Tex. 1999).

Adkison's affidavit also purports to be the opinion of an expert having specified qualifications and legal experience. His conclusions that the fees charged by the law firm were excessive and outside the contract are supported, somewhat at least, by a copy of the firm's estimate of a total fee that is roughly about half the amount actually charged.

The best that may be said in support of the summary-judgment is that the record and reasonable inferences therefrom reveal a conflict in expert opinions regarding the reasonableness and necessity of the fees charged by the law firm. In this state of the record, one may not say as a *matter of law* that the affidavits attached to the law firm's motion for summary

judgment (1) destroy all probative force in Adkison's affidavit and (2) establish the necessity and reasonableness of the fees claimed by the law firm.

We sustain Adkison's second assignment of error.

For the reasons given, we reverse the summary judgment and remand the cause to the trial court. It is not necessary that we consider Adkison's remaining assignments of error.

John E. Powers, Justice

Before Chief Justice Aboussie, Justices Kidd and Powers *

Reversed and Remanded

Filed: November 16, 2000

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* Before John E. Powers, Senior Justice (retired), Third Court of Appeals, sitting by assignment. *See* Tex. Gov't Code Ann. § 74.003(b) (West 1998).