

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00314-CV

Claire L. Allen, Appellant

v.

Lawrence Allen, Appellee

**FROM THE DISTRICT COURT OF WILLIAMSON COUNTY, 425TH JUDICIAL DISTRICT
NO. 2014-0804-f425, HONORABLE BETSY F. LAMBETH, JUDGE PRESIDING**

MEMORANDUM OPINION

Claire Allen appeals from the trial court's summary judgment in favor of Lawrence Allen in Claire's suit to enforce a Washington State divorce decree.¹ The parties filed competing motions for summary judgment, and the trial court granted Lawrence's motion and denied Claire's motion. For the reasons that follow, we reverse in part and affirm in part the trial court's judgment.

BACKGROUND²

Claire and Lawrence were divorced in 1984 in the state of Washington. At the time of the divorce, Lawrence was receiving military retirement benefits in the amount of \$1,240 per month. The divorce decree included the following disputed provisions:

¹ For clarity, we refer to the parties by their first names.

² The background is taken from the parties' appellate briefing and pleadings in the trial court.

5. By way of child support and spousal maintenance Lawrence H. Allen shall pay through the registry [sic] of the Superior Court for Whatcom County for the benefit of Claire L. Allen on the first day of each calendar month an amount equal to his U.S. Army retirement pay (presently \$1,240 per month, subject to periodic cost of living increases). Of such amount one-third of the total payment shall be deemed spousal maintenance and such payment shall continue so long as both parties survive; two-thirds of such monthly payment shall be deemed child support for the parties (sic) three minor children. . . .

6. Respondent shall procure and continuously maintain life insurance on himself payable to [Claire] and the parties [sic] three minor children as irrevocable beneficiaries in an amount sufficient to fund an annuity equal in value to Respondent's U.S. Army Retirement Pension.

Lawrence began making monthly spousal maintenance payments through the Defense Finance and Accounting Service in the amount of \$413.13. According to Claire, as a result of cost of living increases over the years, the amount of the payments increased to \$979.05 by July 2013. In 2011, Lawrence was determined to be 100% disabled and entitled to receive disability-related compensation under Title 38 (VA disability payments). *See generally* 38 U.S.C. §§ 1101–1163. In order to receive VA disability payments, a retiree must waive a portion of his retirement pay equal to the amount of VA benefits he is to receive. *See id.* §§ 5304 (Prohibition against duplication of benefits), 5305 (Waiver of retired pay). In June 2013, Lawrence was also found to be entitled to Combat-Related Special Compensation (CRSC) under Title 10. *See* 10 U.S.C. § 1413a. CRSC is paid under a separate program created to provide monthly benefits to retirees with combat-related disabilities to replace the amount of retirement pay the retiree waived to receive VA benefits. *See id.* § 1413a(b)(1) (Determination of monthly amount), (2) (Maximum amount). Payments of CRSC “are not retired pay.” *Id.* § 1413a(g).

After being determined eligible for CRSC in June 2013, Lawrence waived his retirement benefits for VA benefits and elected to receive CRSC, reducing the amount of his “retirement pay,” and in turn reducing the amount of spousal maintenance he paid to Claire beginning in September 2013. In his motion for summary judgment, Lawrence alleged that after his waiver of retirement pay in lieu of VA and CRSC benefits, his monthly retirement pay was reduced to approximately \$56 and that Claire continued to receive one-third of that amount as monthly spousal maintenance. In her motion for summary judgment, Claire alleged that the amount of the monthly spousal maintenance payments was reduced to \$51.33 by Lawrence’s waiver of retirement pay and that payments stopped in December 2013; on appeal she states that the amount was reduced to \$18.08 per month.

In March 2014, Claire filed a motion to enforce the Washington divorce decree in the trial court. At a hearing in April 2015, the trial court heard argument of counsel and instructed the parties to file competing motions for summary judgment. Acting first, Lawrence filed a traditional motion for summary judgment and attached as exhibits the Washington divorce decree, Claire’s amended petition, his amended answer, a letter approving his claim for CRSC, a CRSC pay statement, a CRSC benefits fact sheet, and relevant statutes and case law. Claire then filed a traditional motion for summary judgment.³ Although Claire’s motion referred to “evidence included in the appendix to [her] motion,” the appellate record contains no such appendix or evidence. After

³ Although Claire’s motion recites that it was filed as both a traditional and no-evidence motion for summary judgment, the substance of the motion, in which Claire argued that there were no genuine issues of material fact and that she was entitled to judgment as a matter of law, reflects that it was a traditional motion for summary judgment. *See* Tex. R. Civ. P. 166a(c); *cf. id.* R. 166a(i).

a hearing on the motions for summary judgment, the trial court granted Lawrence's motion and denied Claire's motion. This appeal followed.

DISCUSSION

In three issues, Claire challenges the trial court's ruling on the competing motions for summary judgment. We review a trial court's decision to grant summary judgment de novo. *Katy Venture, Ltd. v. Cremona Bistro Corp.*, 469 S.W.3d 160, 163 (Tex. 2015) (per curiam). To prevail on a traditional summary judgment motion, the movant must demonstrate that there are no genuine issues of material fact and that he is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Katy Venture*, 469 S.W.3d at 163. When both parties move for summary judgment, each party bears the burden of establishing that it is entitled to judgment as a matter of law. *Moayedi v. Interstate 35/Chisam Rd., L.P.*, 438 S.W.3d 1, 3–4 (Tex. 2014); *Abbott v. Dallas Area Rapid Transit*, 410 S.W.3d 876, 879 (Tex. App.—Austin 2013, no pet.). When both parties move for summary judgment on the same issues and the trial court grants one motion and denies the other, we consider the summary judgment evidence presented by both sides, determine all questions presented, and if we determine that the trial court erred, render the judgment the trial court should have rendered. *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 124 (Tex. 2010); *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000). We may consider evidence presented by both parties in determining whether to grant either motion. *Expro Ams., LLC v. Sanguine Gas Expl., LLC*, 351 S.W.3d 915, 919 (Tex. App.—Houston [14th Dist.] 2011, pet. denied).

Claire's Motion for Summary Judgment

In her petition, Claire sought judgment in the amount of \$15,459.48 for past unpaid spousal maintenance and an order that Lawrence resume monthly payments in the amount of \$979.05 and “obtain and produce the irrevocable life insurance policy he was ordered to maintain.”⁴ In her motion for summary judgment, Claire argued that she was entitled to these amounts as a matter of law.⁵ The divorce decree awarded Claire monthly payments in an amount equal to Lawrence’s monthly military retirement pay at the time of \$1,240, which resulted in monthly payments for spousal maintenance of \$413.13. On appeal, Claire contends that she is entitled to a minimum of \$413.13 per month, the “base amount” of spousal maintenance, along with periodic cost of living increases, so that she is now entitled to \$979.05 based on “the last known amount” of Lawrence’s military retirement pay, regardless of whether his income is characterized as “retirement pay,” VA benefits, or CRSC benefits. Claire further contends that Lawrence was required to obtain a life insurance policy in an amount such that upon his death she and the children would receive no less than \$1,240 per month, the amount of Lawrence’s retirement pay at the time of the divorce.

As appellant, Claire bears the burden to bring forward the record of the summary judgment evidence to provide this Court with a basis to review her claim of harmful error. *See Enterprise Leasing Co. v. Barrios*, 156 S.W.3d 547, 549–50 (Tex. 2004) (per curiam) (citing *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 689 (Tex. 1990)); *see also* Tex. R. App. P. 34.5(a)

⁴ The amount of monthly spousal maintenance requested in the petition was \$970.05. However, other references in the record reflect that the amount is \$979.05, and the number stated in the petition appears to be a typographical error.

⁵ By the time Claire filed her motion for summary judgment, the amount of unpaid spousal maintenance she sought was \$20,457.39.

(providing that absent request from party, only items listed in Rule 34.5(a) are included in appellate record). “If the pertinent summary judgment evidence considered by the trial court is not included in the appellate record, an appellate court must presume that the omitted evidence supports the trial court’s judgment.” *Barrios*, 156 S.W.3d at 550 (citing *DeSantis*, 793 S.W.2d at 689). As noted above, although Claire’s motion for summary judgment referred to “evidence included in the appendix,” no such appendix or evidence is contained in the appellate record. Therefore, we presume that Claire’s summary judgment evidence failed to establish her claims for past unpaid spousal maintenance and resumption of monthly payments in the amount of \$979.05 and her claim that Lawrence had not obtained or produced the ordered life insurance policy in the proper amount and thus that the summary judgment evidence supported the trial court’s denial of her summary judgment. *See id.* Accordingly, we conclude that the trial court did not err in denying Claire’s motion.⁶

⁶ It is not entirely clear from the appellate record and the parties’ briefing whether Claire failed to bring her summary judgment evidence forward as part of the appellate record or failed to attach any summary judgment evidence to her motion. At the first hearing, the trial court inquired as to whether there were any questions of fact, and there was discussion concerning possible testimony by Claire, business records authentication, and stipulations, but the appellate record contains no testimony, authenticated business records, or stipulations. On appeal, Claire does not cite to any summary judgment evidence and, in her opening brief, states that “[n]o evidence was taken or offered at” the hearing on the motions for summary judgment. However, as discussed below, the record reflects that Lawrence attached summary judgment evidence in support of his motion.

As movant, Claire had the burden of establishing her entitlement to summary judgment. *See Moayedi v. Interstate 35/Chisam Rd., L.P.*, 438 S.W.3d 1, 3–4 (Tex. 2014). If, in fact, Claire did not attach any evidence in support of her motion for summary judgment, then she offered no evidence of the amount of Lawrence’s military retirement pay, of the existence and amounts of prior payments, or of his alleged failure to pay the maintenance amounts sought. Consequently, she did not produce any evidence to support her claims for past unpaid spousal maintenance and resumption of monthly payments in the amount of \$979.05. Likewise, she offered no evidence that Lawrence

Lawrence’s Motion for Summary Judgment

In his motion for summary judgment, Lawrence argued that the plain language of the divorce decree requires him to pay spousal maintenance based on his “retirement pay” and to obtain a life insurance policy based on the value of his “retirement pension” and that “retirement pay” and “retirement pension” do not include VA benefits and CRSC benefits. *See* 10 U.S.C. § 1413a(g); 38 U.S.C. §§ 5304, 5305. Lawrence also contended that the amount of his life insurance policy obligation is to be calculated based on the amount of “retirement pay” that he now receives, exclusive of VA and CRSC benefits. However, Lawrence failed to meet his summary judgment burden.

As noted above, Lawrence filed a traditional motion for summary judgment, asserting that he was entitled to judgment as a matter of law, not merely that there was no evidence of one or more essential elements of Claire’s claims, as would be the case had he filed a no-evidence motion for summary judgment. *See* Tex. R. Civ. P. 166a(c), (i); *Hahn v. Love*, 321 S.W.3d 517, 523–24 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (stating that no-evidence summary judgment

had failed to obtain or produce the ordered life insurance policy in the proper amount in support of her claim requesting that he be ordered to do so. In short, if Claire failed to produce any evidence, she failed to meet her summary judgment burden. *See id.*; *Texas Home Mgmt., Inc. v. Peavy*, 89 S.W.3d 30, 50 (Tex. 2002) (explaining that party did not meet summary judgment burden where it did not assert or prove facts necessary to establish claim); *Whittington v. City of Austin*, 174 S.W.3d 889, 905–06 (Tex. App.—Austin 2005, pet. denied) (concluding that city failed to meet summary judgment burden where it submitted no evidence of element of claim). Thus, regardless of whether Claire failed to produce any evidence or produced evidence but subsequently failed to include that evidence in the appellate record, in the absence of any evidence in support of Claire’s claims, we cannot conclude that the trial court erred in denying Claire’s motion. *See Moayedi*, 438 S.W.3d at 3–4; *Enterprise Leasing Co. v. Barrios*, 156 S.W.3d 547, 550 (Tex. 2004) (per curiam); *Whittington*, 174 S.W.3d at 905–06.

motion asserts that there is no evidence to support essential element of nonmovant’s claim on which nonmovant would have burden of proof at trial). Thus, Lawrence’s burden was to establish that he was entitled to judgment as a matter of law by conclusively negating at least one element of each of Claire’s claims. *See Henkel v. Norman*, 441 S.W.3d 249, 251 (Tex. 2014) (per curiam) (stating that traditional summary judgment motion is properly granted where defendant conclusively negates at least one essential element of cause of action); *Moayedi*, 438 S.W.3d at 3–4. However, although the appellate record contains the exhibits that Lawrence attached to his motion, including evidence of the amount of his CRSC pay, Lawrence offered no evidence of the amount of his “retirement pay” exclusive of VA and CRSC benefits, which he claims should be the basis for calculating the spousal maintenance and the amount of the life insurance policy. He therefore failed to conclusively negate Claire’s claim for resumption of payments in the amount of \$979.05, based on what Claire contends is his last known retirement pay. He also failed to produce any evidence that he has made monthly spousal maintenance payments—in any amount. Consequently, he failed to negate Claire’s claims for past unpaid spousal maintenance. Nor did he offer any evidence that he has complied with the requirement to obtain a life insurance policy so as to negate Claire’s claims requesting that he be ordered to obtain and produce the policy.⁷ Because Lawrence offered no evidence to conclusively negate Claire’s claims and establish that he was entitled to judgment as a matter of law, we conclude

⁷ In fact, the record appears to reflect that Lawrence has not purchased—or at least has not maintained—the required insurance policy. In his motion for summary judgment, he stated that he “stands ready to purchase an insurance policy . . . in an amount necessary to purchase a monthly annuity payment” based on his current, reduced retirement pay. And, at the second hearing, counsel for Lawrence stated that “if there’s any ambiguity in the decree at all, it is, What is . . . what are the terms of that annuity” and that he could not “tell you how much the annuity is supposed to be.”

that the trial court erred in granting his motion for summary judgment. *See Henkel*, 441 S.W.3d at 251; *Moayedi*, 438 S.W.3d at 3–4; *University of Tex. Sys. v. Paxton*, No. 03-14-00801-CV, 2017 Tex. App. LEXIS 3043, at *12 (Tex. App.—Austin Apr. 7, 2017, no pet. h.) (mem. op.) (holding that appellee failed to meet summary judgment burden where summary judgment evidence did not conclusively disprove essential element of common law right to privacy in case involving Texas Public Information Act).⁸

CONCLUSION

We affirm the trial court’s denial of Claire’s motion for summary judgment. We reverse the trial court’s summary judgment in favor of Lawrence and remand this case to the trial court for further proceedings consistent with this opinion.

⁸ As discussed above, the parties join issue on whether the amount of the spousal maintenance payments and the amount of the life insurance policy should be calculated based on Lawrence’s retirement pay at the time of the divorce decree plus cost of living increases, as Claire urges, or on the current amount of “retirement pay,” excluding the VA benefits and CRSC benefits, as Lawrence argues. Much of the parties’ briefing is devoted to this disagreement. However, both parties failed to offer any summary judgment evidence of what they contend is the amount of Lawrence’s retirement pay. In the absence of such evidence, it is impossible to calculate the correct amounts for the spousal maintenance payments and life insurance policy regardless of which argument is correct. Therefore, given the procedural posture of this case and the parties’ failure to produce summary judgment evidence, we do not reach this argument.

Melissa Goodwin, Justice

Before Chief Justice Rose, Justices Goodwin and Bourland

Affirmed in Part; Reversed and Remanded in Part

Filed: May 17, 2017