NUMBER 13-13-00119-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

**MEZA SIERRA ENTERPRISES, INC.
AND VALDEMAR MEZA, Appellants,**

v.

KINGDOM FRESH PRODUCE, INC. Appellee.

**On appeal from the 92nd District Court
of Hidalgo County, Texas.**

MEMORANDUM OPINION

**Before Chief Justice Valdez and Justices Rodriguez and Benavides
Memorandum Opinion by Chief Justice Valdez**

Appellants, Meza Sierra Enterprises, Inc. and Valdemar Meza (collectively "Sierra"), appeal a summary judgement in favor of the appellee, Kingdom Fresh Produce Inc. ("Kingdom"). In particular, Sierra contends that (1) Kingdom did not prove a suit on a sworn account and (2) the court erred in not abating the case.[1] We reverse and remand.

[1] We have renumbered and reorganized Sierra's issues.

I. BACKGROUND

According to Kingdom, it sold several quantities of tomatoes to Sierra for $215,385.00, and Sierra resold the tomatoes. Kingdom claims that Sierra did not make any payments for the tomatoes. At a meeting between David Edmeier, the sales director for Kingdom, and Meza, the president of Sierra, Meza allegedly told Edmeier that Meza had used the money from the sale of the tomatoes to pay a ransom for his own kidnapping in Mexico.

Kingdom filed an administrative complaint with the Central Region Perishable Agricultural Commodities Act Branch of the U.S. Department of Agriculture ("PACA") concerning Sierra's failure to pay for the tomatoes. Subsequently, in July of 2009, Kingdom filed its original petition in this case, attaching invoices alleging that $215,385 was still owed and an affidavit from Edmeier supporting the claim. Sierra responded with a general denial.

In October 2009, Kingdom filed a motion for summary judgement attaching, among other things, an affidavit from Edmeier. Sierra filed a motion to abate on February 3, 2010 asking to suspend the suit due to Kingdom's complaint with PACA. The trial court denied the plea in abatement, and it granted summary judgement in favor of Kingdom on April 19, 2010. This appeal followed.

II. APPLICABLE LAW

Rule 185 of the Texas Rules of Civil Procedure allows a party to file a suit on a sworn account for "a claim for goods, wares and merchandise, including any claim for a liquidated money demand based upon a written contract or founded on business dealings between the parties." TEX. R. CIV. P. 185. Rule 185 provides that "when an action is

founded on an open account on which a systematic record has been kept and is supported by an affidavit, the account shall be taken as prima facie evidence of the claim, unless the party resisting the claim files a written denial under oath." *Panditi v. Apostle*, 180 S.W.3d 924, 926 (Tex. App.—Dallas 2006, no pet.). Rule 185 is not a rule of substantive law; instead, "it is a rule of procedure regarding the evidence necessary to establish a prima facie right of recovery." *Id.*; *see* TEX. R. CIV. P. 185. "If properly filed, the Plaintiff's petition and affidavit supporting that petition become prima facie evidence of the debt." *Andrews v. E. Tex. Med. Ctr.-Athens*, 885 S.W.2d 264, 267 (Tex. App.—Tyler 1994, no writ). To constitute prima facie evidence of the debt, the petition "must contain a systematic itemized statement of the services rendered, reveal offsets made to the account, and be supported by an affidavit stating the claim is within the affiant's knowledge and that it is 'just and true.'" *Nguyen v. Short, How, Frels & Heitz, P.C.*, 108 S.W.3d 558, 562 (Tex. App.—Dallas 2003, pet. denied).

A party denying the sworn account must strictly comply with the requirements of rule 185 by timely filing "a verified denial or he will not be permitted to dispute the receipt of the services or the correctness of the charges." *See Panditi*, 180 S.W.3d at 927. "[W]hen a defendant fails to file a verified denial to a sworn account, the sworn account is received as prima facie evidence of the debt and the plaintiff/summary judgment movant is entitled to summary judgment on the pleadings." *Powers v. Adams*, 2 S.W.3d 496, 498 (Tex. App.—Houston [14th Dist.] 1999, no pet.). A general denial, even if sworn, does not rebut a plaintiff's prima facie case in a suit on a sworn account. *Andrews*, 885 S.W.2d at 267; *Huddleston v. Case Power & Equip. Co.*, 748 S.W.2d 102, 103–04 (Tex. App.—Dallas

1988, no writ); *see also Martinez v. Rio Grande Steel, Ltd.*, No. 13-06-097-CV, 2008 WL 668232, at *2 (Tex. App.—Corpus Christi Mar. 13, 2008, no pet.) (mem. op.).

III. DISCUSSION

By its first issue, Sierra argues that rule 185 does not apply to Meza because he cannot be held individually liable for this account.

If the pleadings did not establish a prima facie case against Meza individually, it was unnecessary for him to answer Kingdom's suit with a verified denial sufficient to satisfy rule 185. *See Special Marine Prods., Inc. v. Weeks Welding and Construction, Inc.*, 625 S.W.2d 822, 826 (Tex. App.—Houston [14th Dist.] 1981, no writ); *see also Keever v. Hall & Northway Advertising, Inc.*, 727 S.W.2d 704, 705–06 (Tex. App.—Dallas 1987, no writ) ("Because the invoices upon which Hall & Northway rely indicate that only Feature Vision was the party to the transaction, there is a significant fact question created by this apparent conflict in the summary judgment evidence as to whether Glenn Keever is individually liable to Hall & Northway."). Here, the invoices attached to Kingdom's pleading showed that Kingdom sold merchandise to Meza Sierra Enterprises, Inc. There is no evidence in the record that Meza individually purchased any merchandise from Kingdom. Thus, we agree with Sierra that Meza was not required to file a verified answer under rule 185 regarding Kingdom's claims against him individually. *See Special Marine Prods., Inc. v*, 625 S.W.2d at 826 ("Since no prima facie case was established against Lloyd Gouge individually, it was unnecessary that appellant Gouge [individually] answer appellee's suit with a sworn denial sufficient to satisfy Tex. R. Civ. P. 185. A general denial would have been sufficient."). Accordingly, we conclude that the trial court erroneously granted summary judgment against Meza on the basis that he did not file a verified denial on a suit

on a sworn account. *See id.* ("In the instant case, appellant's Rule 93(c) denial that he was liable in his individual capacity was sufficient to controvert plaintiff's assertion of his individual liability. . . . [And, t]he summary judgment was erroneously granted against Lloyd V. Gouge individually."); *see also Tandan v. Affordable Power, L.P.*, 377 S.W.3d 889, 894–95 (Tex. App.—Houston [14th Dist.] 2012, no pet.) ("When the plaintiff's evidence fails to identify the defendant as the debtor on the account, "the sworn account is not considered as prima facie proof of the debt."). We sustain Sierra's first issue to the extent it argues that summary judgment was improper against Meza individually.

Next, Sierra argues that Kingdom did not meet the requirements of rule 185 because Kingdom failed (1) to show that its petition was filed under oath, (2) to state that a systematic record was kept, (3) to state that "the claim is within the affiant's knowledge," (4) to state that the claim is "just and true," and (5) to show that the amount was liquidated. Thus, according to Sierra, Kingdom did not prove as a matter of law all of the elements of a suit on a sworn account.

Here, Edmeier's affidavit does not strictly comply with rule 185 because it did not state that the claim was within his knowledge and just and true. Thus, Kingdom's failure to strictly comply with rule 185's requirements rendered the affidavit insufficient to establish the account as prima facie evidence of the claim. *Hou–Tex Printers, Inc. v. Marbach*, 862 S.W.2d 188, 190 (Tex. App.—Houston [14th Dist.] 1993, no writ) (concluding that the affidavit was insufficient because it failed to state that "the claim was within their knowledge or that it was just and true; nor did it state that all just and lawful offsets, payments, and credits had been allowed"). Because the claim is not supported by prima facie evidence of the debt, Sierra was not required to file a verified denial. *See id.* ("In the absence of a

proper Rule 185 affidavit establishing the account, Hou–Tex was under no obligation to file the denial required by Rule 185."). Thus, it was error for the trial court to grant summary judgment on the basis that Sierra failed to file a verified answer.[2] We sustain Sierra's first issue to the extent that it argues that the summary judgment was improper as to Meza Sierra Enterprises Inc.[3]

IV. CONCLUSION

We reverse the trial court's judgment and remand for proceedings consistent with this opinion.

/s/ Rogelio Valdez
ROGELIO VALDEZ
Chief Justice

Delivered and filed this
13th day of October, 2016.

[2] If the pleadings in a suit on a sworn account do not sufficiently comply with rule 185, to prevail, the plaintiff must prove his case at common law. *Jones v. Ben Maines Air Conditioning, Inc*., 621 S.W.2d 437, 439 (Tex. Civ. App.—Texarkana 1981, no writ). To prevail, Kingdom must prove, among other things, that the amount of the account is just meaning that the prices were charged in accordance with an agreement or in the absence of an agreement, they are the usual, customary, and reasonable prices for that merchandise. *See Worley v. Butler*, 809 S.W.2d 242, 245 (Tex. App.—Corpus Christi 1990, no writ). Here, there is no evidence regarding whether the prices charged were in accordance with an agreement or if the charges were usual, customary, and reasonable prices for the merchandise. *See id.*

[3] We need not address Sierra's other issues as they are not dispositive of this appeal.