NO. 12-16-00199-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

GEORGE MCKNIGHT, APPELLANT	***§***	***APPEAL FROM THE 87TH***
V.	***§***	***JUDICIAL DISTRICT COURT***
JOHN MOSS, APPELLEE	***§***	***ANDERSON COUNTY, TEXAS***

MEMORANDUM OPINION

George McKnight appeals the trial court's grant of summary judgment in favor of John Moss. In a single issue, he contends that Moss did not present legally sufficient evidence in support of his motion for summary judgment. We reverse and remand.

BACKGROUND

McKnight owned a piece of property in Anderson County, Texas. When his property taxes became delinquent, Anderson County foreclosed. Moss purchased the property at the tax sale. Following the sale, McKnight exercised his right to redeem the property under the Texas Tax Code. Anderson County sent Moss a notice informing him of McKnight's redemption.

Moss intervened in the foreclosure suit, filing a notice of appearance and post-judgment motion to set aside. Moss claimed McKnight did not comply with the redemption statute. Specifically, Moss alleged he was not reimbursed for his associated "costs," as defined by the tax code. He sought a declaratory judgment that he was entitled to ownership of the property.

Moss later moved for summary judgment on his claim. McKnight filed a response, but it was untimely and not considered by the trial court. After a hearing, the trial court granted Moss's motion for summary judgment. This appeal followed.

SUMMARY JUDGMENT

In his only issue, McKnight argues the trial court erred in granting summary judgment for Moss because the evidence is legally insufficient.[1]

Standard of Review

The movant for traditional summary judgment has the burden of showing that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); ***Nixon v. Mr. Prop. Mgmt. Co.***, 690 S.W.2d 546, 548 (Tex. 1985). When the movant seeks summary judgment on a claim in which he has the burden of proof, he must prove all elements of his cause of action as a matter of law. *See* ***Rhone–Poulenc, Inc. v. Steel***, 997 S.W.2d 217, 223 (Tex. 1999). Once the movant establishes a right to summary judgment, the nonmovant must respond to the motion and present to the trial court any issues that would preclude summary judgment. *See* ***City of Houston v. Clear Creek Basin Auth.***, 589 S.W.2d 671, 678–79 (Tex. 1979). Except to attack the legal sufficiency of the movant's grounds for summary judgment, the nonmovant must expressly present to the trial court in a written answer or response any reason for avoiding the movant's entitlement to summary judgment. ***McConnell v. Southside Indep. Sch. Dist.***, 858 S.W.2d 337, 343 (Tex. 1993).

We review a trial court's summary judgment ruling de novo. ***Provident Life & Accident Ins. Co. v. Knott,*** 128 S.W.3d 211, 215 (Tex. 2003). In doing so, we take as true all evidence favorable to the nonmovant, resolve all conflicts in the evidence in the non-movants' favor, and "indulge every reasonable inference and resolve any doubts in the nonmovant's favor." ***Steel***, 997 S.W.2d at 223; *see also* ***Sudan v. Sudan***, 199 S.W.3d 291, 292 (Tex. 2006); ***KPMG Peat Marwick v. Harrison Cnty. Hous. Fin. Corp.***, 988 S.W.2d 746, 748 (Tex. 1999). A fact issue arises when "reasonable and fair-minded jurors could differ in their conclusions in light of all of

[1] McKnight argues in his brief that the evidence is legally insufficient because Moss did not attach any evidence to his motion for summary judgment. The affidavit attached to Moss's motion was subsequently included in the supplemental clerk's record. In Moss's brief, he contends that his affidavit constitutes competent summary judgment evidence. In his reply brief, McKnight argues that the affidavit constitutes legally insufficient evidence. While new issues may not be raised for the first time in a reply brief, an appellant is entitled to respond to the appellee's brief. TEX. R. APP. P. 38.3; ***Bankhead v. Maddox***, 135 S.W.3d 162, 164 (Tex. App.—Tyler 2004, no pet.). Because McKnight's argument in his reply brief both responds to Moss's specific argument and reasserts his contention that Moss's motion for summary judgment is not supported by legally sufficient evidence, we may address whether the affidavit is legally sufficient. *See* ***Watts v. Pilgrim's Pride Corp.***, No. 12-04-00082-CV, 2005 WL 2404111, at *4 (Tex. App.—Tyler Sept. 30, 2005, no pet.) (mem. op.) (affidavits that do not meet requirements of Rule 166a cannot sustain summary judgment and are not competent summary judgment evidence).

the evidence presented." ***Goodyear Tire & Rubber Co. v. Mayes***, 236 S.W.3d 754, 755 (Tex. 2007).

Applicable Law

Texas Tax Code section 34.21 governs the right to redemption. TEX. TAX CODE ANN. § 34.21 (West 2015). Pertinent to the present case, section 34.21 provides as follows:

> (a) The owner of real property sold at a tax sale to a purchaser other than a taxing unit that was used as the residence homestead of the owner or that was land designated for agricultural use when the suit or the application for the warrant was filed, or the owner of a mineral interest sold at a tax sale to a purchaser other than a taxing unit, may redeem the property on or before the second anniversary of the date on which the purchaser's deed is filed for record by paying the purchaser the amount the purchaser bid for the property, the amount of the deed recording fee, and the amount paid by the purchaser as taxes, penalties, interest, and costs on the property, plus a redemption premium of 25 percent of the aggregate total if the property is redeemed during the first year of the redemption period or 50 percent of the aggregate total if the property is redeemed during the second year of the redemption period.
>
> . . .
>
> (e) The owner of real property sold at a tax sale other than property that was used as the residence homestead of the owner or that was land designated for agricultural use when the suit or the application for the warrant was filed, or that is a mineral interest, may redeem the property in the same manner and by paying the same amounts as prescribed by Subsection (a), (b), (c), or (d), as applicable, except that:
>
> > (1) the owner's right of redemption may be exercised not later than the 180th day following the date on which the purchaser's or taxing unit's deed is filed for record; and
> >
> > (2) the redemption premium payable by the owner to a purchaser other than a taxing unit may not exceed 25 percent.

Id. § 34.21(a), (e). Costs include the amount reasonably spent by the purchaser for maintaining, preserving, and safekeeping the property. ***Id.*** § 34.21(g)(2).

Redemption statutes are liberally construed in favor of redemption. ***Rogers v. Yarborough***, 923 S.W.2d 667, 669 (Tex. App.—Tyler 1996, no writ). Therefore, substantial compliance with the statute is required. ***Macha v. Carameros***, 674 S.W.2d 491, 492-93 (Tex. App.—El Paso 1984, no writ). An act of redemption by the original owner of the property is presumptively effective and whatever title was held prior to redemption automatically reverts to the original owner. ***Gonzalez v. Razi***, 338 S.W.3d 167, 170 (Tex. App.—Houston [1st Dist.] 2011, pet. denied). Therefore, the purchaser bears the burden of proof to overcome the presumption that the redemption was effective. ***Id.*** at 171.

Analysis

McKnight argues that Moss's summary judgment evidence is legally insufficient. Specifically, McKnight urges that Moss did not conclusively establish that he failed to repay costs required by section 34.21.

Moss's summary judgment evidence in support of his noncompliance claim consists entirely of his affidavit. To constitute proper summary judgment evidence, an affidavit must be made on personal knowledge, set forth facts that would be admissible in evidence, and show the affiant's competence. TEX. R. CIV. P. 166a(f); ***United Blood Servs. v. Longoria***, 938 S.W.2d 29, 30 (Tex. 1997). To be competent summary judgment evidence, the affidavit must be based on facts and not merely recite legal conclusions. ***Elizondo v. Krist***, 415 S.W.3d 259, 264 (Tex. 2013); ***Brownlee v. Brownlee***, 665 S.W.2d 111, 112 (Tex. 1984). Conclusory statements that are not supported by facts are not proper summary judgment proof because they are not credible or susceptible to being readily controverted and therefore, constitute no evidence at all. *See* ***Elizondo***, 415 S.W.3d at 264; ***McIntyre v. Ramirez***, 109 S.W.3d 741, 749–50 (Tex. 2003); ***Ryland Grp., Inc. v. Hood***, 924 S.W.2d 120, 122 (Tex. 1996).

With regard to the costs allegedly owed by McKnight, Moss's affidavit states, "I personally incurred costs of $8,579.53 which were never reimbursed to me." Moss's affidavit, however, contains no facts to support this statement. For instance, the affidavit does not provide an itemization or other explanation of how the costs were incurred. Nor does Moss explain that the costs were reasonably spent for maintaining, preserving, or safekeeping the property as required by the statute. *See* TEX. TAX CODE ANN. § 34.21(g)(2). As a result, Moss's affidavit does not prove that his costs were of the kind McKnight is mandated to repay. *See* ***Gonzalez***, 338 S.W.3d at 175-76 (purchaser failed to prove cost of removing mobile home and evicting occupant were necessary for maintenance, preservation, or safekeeping of property). Accordingly, indulging all reasonable inferences in favor of McKnight, we conclude that Moss's affidavit fails to conclusively establish as a matter of law that McKnight did not substantially comply with the redemption statute. *See* ***id.***; *see also* TEX. R. CIV. P. 166a(c); ***Steel***, 997 S.W.2d at 223. For this reason, the trial court erred by granting summary judgment in favor of Moss, and we sustain McKnight's sole issue.

DISPOSITION

Having sustained McKnight's sole issue, we ***reverse*** the judgment of the trial court and ***remand*** this case for further proceedings consistent with this opinion.

BRIAN HOYLE
Justice

Opinion delivered June 7, 2017.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

JUNE 7, 2017

NO. 12-16-00199-CV

GEORGE MCKNIGHT,
Appellant
V.
JOHN MOSS,
Appellee

Appeal from the 87th District Court

of Anderson County, Texas (Tr.Ct.No. 87-11651)

THIS CAUSE came to be heard on the appellate record and the briefs filed herein, and the same being considered, because it is the opinion of this court that there was error in the judgment of the court below, it is ORDERED, ADJUDGED and DECREED by this court that the judgment be **reversed** and the cause **remanded** to the trial court **for further proceedings** and that all costs of this appeal are hereby adjudged against the Appellee, **JOHN MOSS**, in accordance with the opinion of this court; and that this decision be certified to the court below for observance.

Brian Hoyle, Justice.

Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.