Affirmed and Opinion filed January 27, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-00928-CV

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MARIO GARZA, JR., M.D., Appellant

V.

ROBERT S. WILSON, L.L.C., Appellee

On Appeal from the County Civil Court at Law One
Harris County, Texas
Trial Court Cause No. 689,596

O P I N I O N

Mario Garza, Jr., M.D., (Garza) appeals from a summary judgment for appellee (Wilson) for sums due by Garza on his guaranty of payment of rent on a commercial lease. In three points of error, appellant contends the trial court erred in: (1) failing to sustain appellant's objections to Wilson's summary judgment proof; (2) granting Wilson's summary judgment on insufficient proof; and (3) granting summary judgment when Wilson failed to prove his case as a matter of law. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND.

Wilson and Hermanas Garza Enterprises, Inc., d/b/a/ House of Carpets (Hermanas), entered into a three-years commercial lease guaranteed by Garza. Hermanas did not pay rent for the last six months of the lease term, and Wilson sued Hermanas and Garza for past due rent, expenses, and attorney fees. Garza filed a general denial for himself, and Hermanas did not answer. Wilson got an interlocutory default judgment for past due rent and expenses against Hermanas. Wilson filed a motion for summary judgment asking for judgment against Garza on his guaranty for the sum due on the judgment together with attorney fees. Garza filed a response contending Wilson's proof was insufficent, and the affidavit of Whipple Newell, Jr., was conclusory as to the authenticity of Garza's signature on the guaranty. Garza further contended that Newell's affidavit failed to state any basis upon which Newell had personal knowledge about the execution of the guaranty agreement. Garza also filed written objections to Wilson's summary judgment proof contending Newell's affidavit was not based on personal knowledge of the execution of the guaranty agreement. There is no ruling in the record by the trial court sustaining or overruling the objection. Garza attached no summary judgment proof to his response controverting the guaranty agreement.

II. DISCUSSION.

A. Standard of Review. A trial court may render summary judgment only if the pleadings, depositions, admissions, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. TEX.R.CIV.P. 166a(c); *Rodriguez v. Naylor Indus., Inc.*, 763 S.W.2d 411, 413 (Tex.1989). In a summary judgment proceeding, the plaintiff, as movant, must conclusively prove his entitlement to prevail on each element of the cause of action as a matter of law. *Swilley v. Hughes*, 488 S.W.2d 64, 67 (Tex.1972). When a plaintiff shows entitlement to summary judgment, the nonmovant defendant seeking to avoid the judgment must present to the trial court proof adequate to raise a fact issue. *Brooks v. Sherry Lane Nat'l Bank*, 788 S.W.2d 874, 876 (Tex.App.--Dallas 1990, no writ). In determining whether there is a disputed material fact

issue precluding summary judgment, we review the summary judgment evidence in the light most favorable to the nonmovant and resolve any doubts in the nonmovant's favor. *See Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex.1985).

B. Wilson's Summary Judgment Proof. Attached to Wilson's motion for summary judgment was the affidavit of Whipple Newell, Jr., stating the "information contained herein is within my personal knowledge and is true and correct." Newell also stated: "[I] am an employee of the Plaintiff, Robert S. Wilson, L.L.C., and attached to this affidavit are" the Lease Agreement, the guaranty agreement of the lease executed by Mario Garza, Jr., M.D. Newell stated Garza's signature was "genuine, true and correct." He stated the said exhibits were true and correct copies of documents delivered to Wilson by Hermanas and Garza. He also said a true and correct copy of letter he sent to Garza demanding payment on Garza's guaranty for past due rent and expenses was attached. The exhibit listed the six months rent due and owing, plus cleaning and repair expenses totaling $16,216.21. The exhibit consisted of five pages of FAX transmittals to Garza's attorney referencing conferences held about the matter between Garza's attorney, L. Keith Rhymes, and Wilson's attorney, Newell.

C. Garza's Objections to Wilson's Motion for Summary Judgment. Garza's objection complained only that Newell's affidavit was insufficient to show that he had any personal knowledge whatsoever of the execution of the guaranty agreement, the lease, or any other part of the transaction complained of. Garza failed to get a ruling or written order by the trial court as to whether the objection was sustained or overruled.

Generally, a party objecting to the competency of summary judgment proof must obtain a ruling on its objection or obtain a written order signed by the trial judge and entered of record, or the objection is waived and the proof remains a part of the summary judgment record. *Bauer v. Jasso*, 946 S.W.2d 552, 556-557 (Tex.App.-Corpus Christi 1997, no writ); *Giese v. NCNB Tex. Forney Banking Ctr.*, 881 S.W.2d 776, 782 (Tex.App.--Dallas 1994, no writ). While Garza filed written objections to Wilson's affidavit, there was no order sustaining

the objections, and the order granting summary judgment does not reflect that the trial court sustained the objections.

The rules of civil procedure provide that, "[D]efects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend." TEX. R. CIV. P. 166a(f). On the other hand, a defect in substance, such as the absence of proper authentication, cannot be waived by failing to object or obtain a written order. *Kotzur v. Kelly*, 791 S.W.2d 254, 256 (Tex.App.--Corpus Christi 1990, no writ).

In *Vaughn v. Grand Prairie Indep. Sch. Dist.*, 784 S.W.2d 474 (Tex.App.--Dallas 1989), *rev'd* , 792 S.W.2d 944 (Tex.1990), the court of appeals reversed summary judgment because the affidavit on which the summary judgment was based did not affirmatively show the affiant had personal knowledge and was competent to testify. The supreme court reversed, finding that, "[I]t is clear from reading the entire affidavit that [the affiant] was testifying from personal knowledge and was competent to testify regarding the matters stated. Even if these elements were not shown on the face of the affidavit, Vaughan's failure to object to these defects in form resulted in waiver." *Grand Prairie Indep. School Dist. v. Vaughan*, 792 S.W.2d 944, 945 (Tex.1990); *Giese*, 881 S.W.2d at 782.

We find that Garza waived his objection, and Wilson's proof remains a part of the record. Appellant's point of error one is overruled.

D. Was Wilson's summary judgment proof sufficient as a matter of law? In points two and three, Garza complains that the trial court erred in granting summary judgment because Wilson's proof was insufficient as a matter of law. He asserts that Newell's affidavit is "fraught with conclusory statements." He asserts that Newell's statement that Garza's signature is genuine, true and correct, is without any factual support.

Rule 166a(e), Texas Rules of Civil Procedure, states that copies of papers referred to in summary judgment affidavits must be sworn or certified. The supreme court has held that copies of documents which are attached to a properly prepared affidavit are sworn copies within the meaning of Rule 166a(e). *Republic Nat. Leasing Corp. v. Schindler,* 717 S.W.2d 606, 607 (Tex. 1986); *Zarges v. Bevan,* 652 S.W.2d 368, 369 (Tex.1983); *Life Insurance Company of Virginia v. Gar-Dal, Inc.*, 570 S.W.2d 378, 380 (Tex.1978). Wilson's affidavit stated that the attached documents were true and correct copies of the originals, and the affidavit was properly sworn. Accordingly, the trial court was correct in considering those documents as summary judgment evidence. *Republic Nat. Leasing Corp.,* 717 S.W.2d at 607.

Wilson's motion for summary judgment included sworn copies of the lease and guaranty, a copy of the demand letter sent to the appellant, and Newell's affidavit. The evidence showed that no genuine issue of material fact existed and entitled Wilson to judgment as a matter of law. *Chambers v. NCNB Texas Nat. Bank,* 841 S.W.2d 132, 134 (Tex.App.-Houston[14th Dist.] 1992, no writ); *Texas Airfinance Corp. v. Lesikar,* 777 S.W.2d 559, 562 (Tex.App.--Houston [14th Dist.] 1989, no writ); *Taylor v. Fred Clark Felt, Co.*, 567 S.W.2d 863, 866 (Tex.Civ.App.--Houston [14th Dist.] 1978, writ ref'd n.r.e.).

If a plaintiff moving for summary judgment establishes each element of its cause of action as a matter of law, *see MMP, Ltd. v. Jones*, 710 S.W.2d 59, 60 (Tex.1986), then the defendant must come forward with summary judgment evidence sufficient to raise a fact issue on each element of its affirmative defense to avoid summary judgment. *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex.1984); *Chambers,* 841 S.W.2d at134. Appellant filed no summary judgment evidence to controvert Wilson's summary judgment proof. We find the trial court did not err in granting Wilson's summary judgment motion. We overrule appellant's points of error two and three.

We affirm the judgment of the trial court.

/s/ Bill Cannon
Justice

Judgment rendered and Opinion filed January 27, 2000.

Panel consists of Justices Sears, Cannon, and Draughn.[*]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[*] Senior Justices Ross Sears, Bill Cannon, and Joe L. Draughn sitting by assignment.