Affirmed and Opinion filed May 3, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-98-01283-CV

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CALIPH JOHNSON AND AYESHA MUTOPE-JOHNSON, Appellants

V.

IDEAL ROOFING, INC.,
D/B/A IDEAL ROOFING AND HOME SERVICES, Appellee

On Appeal from the 190th Judicial District Court
Harris County, Texas
Trial Court Cause No. 97-53936

O P I N I O N

Caliph Johnson and Ayesha Mutope-Johnson, appellants, filed suit against appellee, Ideal Roofing, Inc for inferior workmanship, which resulted in an allegedly leaky roof. The trial court granted appellee's summary judgment motions. Appellants did not file a timely response to any of these motions. In three issues, appellants argue the summary judgment should be reversed. We affirm.

BACKGROUND

Appellants filed suit against appellee alleging breach of contract, breach of warranty, and Deceptive Trade Practices Act violations. Thereafter, appellee filed a traditional motion for summary judgment on appellants' breach of contract and breach of warranty claims and a no-evidence summary judgment motion on appellants's DTPA cause of action. Appellants admit they did not file a summary judgment response to either of these motions.

Before the trial court granted these motions for summary judgment, appellants added a fraud claim to their petition. Subsequently, appellee filed a no-evidence summary judgment motion attacking the fraud claim. Appellant did file a response to this motion. Subsequently, the trial court granted this final motion.

ANALYSIS

Traditional Summary Judgment Motion

In their first point of error, appellants contend that summary judgment was improperly granted because there were genuine issues of material fact to defeat the traditional motion for summary judgment. Appellants contend both their answers to interrogatories and letters, which were attached to their answers to interrogatories, complaining about the roof, would have raised a genuine issue of material fact. Civil Procedure Rule 197.3 (previously Rule 168(2)) states "[a]nswers to interrogatories may be used only against the responding party." TEX. R. CIV. P. 197.3. Thus, appellants are unable to use their answers to interrogatories as summary judgment proof raising a genuine issue of material fact. *See Fisher v. Yates*, 988 S.W.2d 730, 731 (Tex. 1998) (per curiam); *Garcia v. National Eligibility Express*, 4 S.W.3d 887, 890 (Tex. App.—Houston [1st Dist.] 1999, no pet.).

Accordingly, we overrule their first point of error.

DTPA Summary Judgment Motion

In their second point of error, appellants contend they presented more than a scintilla

of evidence to defeat the no-evidence summary judgment motion addressing their DTPA claims. Appellants admit they did not timely file a response to the first no-evidence summary judgment motion, which addressed their DTPA claims.

Civil Procedure Rule 166a(i) requires a trial court to grant the no-evidence summary judgment if the non-movant does not file a summary-judgment response. TEX. R. CIV. P. 166a(i); *see Saenz v. Southern Union Gas Co.*, 999 S.W.2d 490, 493 (Tex. App.—El Paso 1999, pet. denied); *see also Dolcefino v. Randolph*, 19 S.W.3d 906, 917 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). Rule 166a(i) shifts the burden of raising a genuine issue of material fact to the nonmovant. *See Lampasas v. Spring Center, Inc.*, 988 S.W.2d 428, 436 (Tex. App.—Houston [14th Dist.] 1999, no pet.). Thus, because appellants did not file a response to the no-evidence motion for summary judgment, the trial court was required to grant summary judgment. *See Saenz*, 999 S.W.2d at 494. Accordingly, we overrule appellants's second point of error.

Fraud Summary Judgment Motion

In their third point of error, appellants argue the trial court erred in granting a no-evidence summary judgment because there was more than a scintilla of evidence in support of Plaintiffs' claims of fraud in the inducement, and because adequate time for discovery had not elapsed in light of the Court's trial schedule.

Adequate Time for Discovery

Appellants contend that because the trial court's scheduling order gave the parties one year to conduct discovery, she was "entitled to repose in the notion that discovery was proceeding at a proper pace consistent with the [trial court's] expectations." We find appellant has not preserved this point for our review.

When a party contends that it has not had an adequate time for discovery before a summary judgment hearing, it must file either an affidavit explaining the need for further discovery or a verified motion for continuance. *See* TEX. R. CIV. P. 166a(g), 251, and 252;

Tenneco Inc. v. Enterprise Products Co., 925 S.W.2d 640 (Tex. 1996); *Triad Home Renovators, Inc. v. Dickey*, 15 S.W.3d 142, 145 (Tex. App.—Houston [14th Dist.] 2000, no pet.). Appellants did not file such an affidavit or motion. Accordingly, because appellants have not preserved the complaint that they did not have an adequate time for discovery, *see Dickey*, 15 S.W.3d at 145, we overrule this portion of appellant's third point of error.

Fraud in the Inducement

Appellant alleged appellants had committed fraud in the inducement. Appellee contended in its no-evidence motion that appellants had no evidence of a material misrepresentation, which was known to be false when made or was asserted without knowledge of its truth.

On review of a no-evidence summary judgment, the appellate court reviews the evidence in the light most favorable to the nonmovants and disregards all evidence and inferences to the contrary. *See Blan v. Ali*, 7 S.W.3d 741, 747 (Tex. App.—Houston [14th Dist.] 1999, no pet.). We sustain a no evidence summary judgment if: (1) there is a complete absence of proof of a vital fact; (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla; or (4) the evidence conclusively establishes the opposite of a vital fact. *See id*. Less than a scintilla of evidence exists when the evidence is so weak as to do no more than create a mere surmise of suspicion of a fact. *See Isbell v. Ryan*, 983 S.W.2d 335, 338 (Tex. App.—Houston [14th Dist.] 1998, no pet). More than a scintilla of evidence exists when the evidence rises to a level that would enable reasonable and fair-minded people to differ in their conclusions. *See id.*

Appellants argue that "more than a scintilla of evidence is presented on the documents alone that [the appellee] had no intention, or knowingly had no ability, to honor the warranty, and to bring their performance in line with [appellants] reasonable expectations." The only proof discussed in their brief is appellee's proposal to do roofing work. Although the proposal is included in the brief, it was not included in the summary judgment proof.

Consequently, because appellants have not provided us with summary judgment proof to meet their no-evidence summary judgment burden of proof, *see Lampasas*, 988 S.W.2d at 436, we find the trial court did not err in granting the summary judgment motion.

Having overruled each of appellants's points of error, we affirm the judgment of the trial court.

/s/ Ross A. Sears
Justice

Judgment rendered and Opinion filed May 3, 2001.

Panel consists of Justices Sears, Lee and Amidei.*

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

* Senior Justices Ross A. Sears, Norman R. Lee and Former Justice Maurice Amidei sitting by assignment.