

Affirmed and Opinion filed May 18, 2000.



In The

Fourteenth Court of Appeals

NO. 14-99-00838-CV

**ROBERTO GARCIA ESPINOZA AND WIFE, SECUNDIA VIDALES ESPINOSA,
Appellants**

V.

AGUSTIN RUIZ AND WIFE, JUANA RUIZ, Appellees

**On Appeal from the 272nd District Court
Brazos County, Texas
Trial Court Cause No. 48,342-272**

OPINION

This appeal illustrates why it is important to respond to a motion for summary judgment even though a response is not required by the Rules of Civil Procedure. Because no genuine issues of material fact were created to preclude the trial court from granting summary judgment in favor of the appellees, we affirm its decision.

The lawsuit underlying this appeal is an action for specific performance on a contract for the sale of a residence. In September 1995, the Ruizes entered into a contract for deed with the Espinozas for the sale of a residence located in Bryan, Texas. The Ruizes made every payment under the contract, all of

which save the final payment were accepted by the Espinozas. Because the Espinozas refused to accept the final payment or execute the deed in favor of they Ruizes, they hired an attorney and filed suit against the Espinozas. The Espinozas decided to represent themselves in the lawsuit—a decision that would prove fatal to their defense of this case.

The Ruizes eventually filed a motion for summary judgment supported by the affidavit of Mr. Ruiz and other documentation showing their entitlement to specific performance under the contract. The Espinozas, however, failed to file a response.

In lieu of a response, they filed a “letter” asking for summary judgment on their own behalf, claiming the Ruizes still owed them money. They bolstered this claim by alleging that the receipt book, from which all receipts were given, did not contain a receipt for July of 1998. In support, they filed copies of the first page of the receipt book and a blank receipt apparently labeled in Mr. Espinoza’s handwriting “Last Payment Shown in Booklet.” None of these copies were made proper summary judgment proof, however. The Espinozas also claimed that the warranty deed submitted for the judge to sign contained a falsehood, namely the deed recital that the property was transferred in exchange for “TEN AND NO/100 DOLLARS and other valuable and good consideration.”¹ Only the Ruizes’ motion was set for a hearing.

The trial court granted the Ruizes’ motion. At the hearing, the Espinozas appeared in person and attempted to put on oral testimony in contravention of Texas Civil Procedure Rule 166a(c). Following the hearing, the trial court ordered the Ruizes to recover fee simple title to the real property from the Espinozas.

The Espinozas present fifteen appellate issues. The main issue, however, is that the trial court erred in granting appellees’ motion for summary judgment.²

¹ Apparently, appellants do not understand that “ten dollars and other valuable consideration” is a legal term comprising any amount of money meeting the legal requirements for valid consideration without expressing the actual consideration paid. The use of the term is to prevent the purchase price of a piece of real estate from becoming public record once the deed is on file in the county where the property is located. For an illustration of the use of the term where more consideration is paid than the recital, see *Holloway v. Int’l Bankers Life Ins. Co.*, 354 S.W.2d 198, 207 (Tex. Civ. App.—Fort Worth 1962).

² Though fifteen issues are presented, the Espinozas only brief their complaints regarding Agustin
(continued...)

The standard we follow when reviewing a summary judgment is well established. Summary judgment is proper only when the movant establishes there are no genuine issues of material fact and proves he is entitled to judgment as a matter of law. *See* TEX. R. CIV. P. 166a(c). Once the movant has established its entitlement to summary judgment, the burden shifts to the non-movant. The non-movant then must respond to the motion for summary judgment 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 (Tex.1979); *Farroux v. Denny's Restaurants, Inc.*, 962 S.W.2d 108, 110 (Tex. App.–Houston [1st Dist.] 1997, no writ). In deciding whether there exists a disputed fact issue precluding summary judgment, we treat all proof favorable to the non-movant as true and indulge all reasonable inferences in the non-movant's favor. *See American Tobacco Co., Inc. v. Grinnell*, 951 S.W.2d 420, 425 (Tex.1997).

Specific performance is an equitable remedy that rests in the sound discretion of the trial court. *See American Apparel Prods, Inc. v. Brabs, Inc.*, 880 S.W.2d 267, 269 (Tex. App.–Houston [14th Dist.] 1994, no writ). To prevail on a suit for specific performance the plaintiff must show that a valid contract existed and that the plaintiff performed, or tendered performance of, all contractual obligations. *See id.*

Here, the Ruizes proved that a contract existed and that they had complied with the provisions of that contract by tendering the purchase price of the property. They also established that the Espinozas were refusing to accept the final payment on the property. Based on the proof attached to their motion, we find that the Ruizes established their entitlement to summary judgment as a matter of law.

The burden then shifted to the Espinozas to create a genuine issue of material fact which would prevent the trial court from granting summary judgment to the Ruizes. By failing to file a response, however, they failed in this burden. The Espinozas argue for the first time on appeal that summary judgment was improper because many statements in Agustin Ruiz's affidavit were false. They also argue that the

² (...continued)

Ruiz's affidavit and the Ruizes' attorney's alleged violations of the Rules of Professional Conduct. Accordingly, all other unsupported complaints are waived. *See Hicks v. Humble Oil & Refining Co.*, 970 S.W.2d 90, 97 (Tex. App.–Houston[14th Dist.] 1998, pet. denied).

appellee's attorney violated the Texas Rules of Professional Conduct during the prosecution of this case. These violations, they argue, create genuine issues of material fact precluding summary judgment.³ We find no proof in the record to support either of these assertions, however, largely due to the fact that the Espinozas failed to file a response to the Ruizes' motion for summary judgment.

Because summary judgment was properly granted in favor of the appellees, we affirm the judgment of the trial court.

/s/ Paul C. Murphy
Chief Justice

Judgment rendered and Opinion filed May 18, 2000.

Panel consists of Chief Justice Murphy and Justices Hudson and Wittig.

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

³ The Espinozas also argue that the trial court's grant of summary judgment violated their right to a jury trial under the U.S. and Texas Constitutions. The U.S. Constitution, however, does not guarantee the right to a jury trial in a civil case. *See White v. White*, 108 Tex. 570, 579, 196 S.W. 508, 511 (1917); *Baca v. City of Dallas*, 796 S.W.2d 497, 498 (Tex. App.—Dallas 1990, no writ). Nor does the federal summary judgment rule infringe on any right to a jury trial. *See Fidelity & Deposit Co. of Maryland v. U. S.*, 187 U.S. 315, 319-320 (1902). Likewise, the Texas Constitution does not guarantee a jury trial in a civil case when no factual issues exist, making the grant of summary judgment constitutional. *See Texas Worker's Compensation Comm'n v. Garcia*, 893 S.W.2d 504, 526 (Tex. 1995); *see also Schroeder v. Texas & Pacific Ry. Co.*, 243 S.W.2d 261, 263 (Tex. Civ. App.—Dallas 1951, no writ) (finding that summary judgment does not infringe the right to a jury trial in the Texas Constitution). Thus, we cannot find that the trial court's action violated appellants' right to a jury trial, even though appellants asked for a trial by jury.