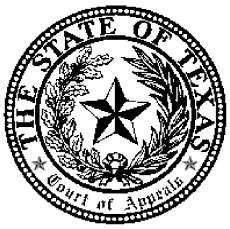
Affirmed and Opinion filed September 27, 2001.



In The

Fourteenth Court of Appeals

NO. 14-00-00770-CV

R. K. DHINGRA, TRUSTEE, Appellant

V.

ARTHUR L. MENDELOW, M.D., Individually and A. L. MENDELOW, M.D., P.A., Appellees

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On Appeal from the 113th District Court
Harris County, Texas
Trial Court Cause No. 99-15212

O P I N I O N

Appellant, Dr. R. K. Dhingra, seeks review of a summary judgment imposed against him in favor of appellees, Dr. Arthur L. Mendelow and his professional association. In three points of error, Dhingra contends (1) he was not properly served with Mendelow's motion for summary judgment; (2) there are genuine issues of material fact that preclude the granting of summary judgment; and (3) he presented at least a scintilla of evidence to support his claims and, thus, defeat Mendelow's "no evidence" motion for summary judgment. We affirm.

The summary judgment proof indicates that in 1995 Mendelow was a tenant in the Jones Road Medical Plaza, a medical office complex managed by Dhingra. At some point, Mendelow's original lease expired and he began paying rent as a month-to-month tenant pursuant to the terms of the original lease. In February 1995, Mendelow advised Dhingra that he would be moving his medical practice to a new building due to Dhingra's alleged refusal to make necessary renovations and repairs. While these preparations were underway, Dhingra sent a letter to Mendelow outlining the terms of a new five-year lease. The letter, dated April 30, 1995, states that the new terms would be effective the following day, May 1, 1995. Shortly thereafter, Mendelow vacated the premises, but not before the May 1 deadline imposed by Dhingra.

Almost four years later, Dhingra sued Mendelow for unpaid rent. Dhingra theorized that Mendelow had accepted the terms of the new five-year "lease" prior to moving out of the building by failing to vacate before May 1, 1995. Thus, Dhingra alleged that Mendelow was delinquent on almost four years of rental payments. Mendelow, in turn, filed a counterclaim alleging that Dhingra's suit was frivolous, groundless in fact, and brought in bad faith solely for the purpose of harassment.

Thereafter, Mendelow also filed both a traditional and a "no evidence" motion for summary judgment. *See* TEX. R. CIV. P. 166(c) & (i). In his traditional motion for summary judgment, Mendelow asserted that enforcement of the alleged lease was barred by the statute of frauds because the "writing" which allegedly constituted a new five-year lease was not signed by Mendelow and did not represent an agreement of the parties. In the alternative, Mendelow alleged that Dhingra had (1) no evidence to support the existence of a valid enforceable lease and (2) no evidence that he had suffered any damages arising from a breach of the alleged lease. The trial court granted Mendelow's summary judgment motion without specifying the grounds for its action. Mendelow subsequently nonsuited his counterclaims, and the trial court entered a final judgment in favor of Mendelow.

In his first issue for review, Dhingra contends the trial court erred in denying his motion for new trial. In his motion for new trial, Dhingra requested the judgment be set aside because (1) neither he nor his staff could find any evidence that they had ever received a copy of the motion for summary judgment and (2) Mendelow had failed to provide him with any evidence of service.

The Rules of Civil Procedure require that when filing a motion, the movant must also serve a copy upon the opposing party, his agent, or his attorney. TEX. R. CIV. P. 21a. Here, the motion for summary judgment contains a certificate of service attesting that a copy of the motion was sent by certified mail on April 6, 2000, to Thomas G. Bousquet, Dhingra's attorney of record. A notice of submission apprising Dhingra of the hearing date bears a similar certificate of service. Moreover, the rules provide that a "certificate by a party or an attorney of record . . . showing service of a notice shall be prima facie evidence of the fact of service." *Id*. Thus, we may presume, in the absence of contrary evidence, that the motion was properly served. *Ruiz v. Nicolas Trevino Forwarding Agency, Inc.*, 888 S.W.2d 86, 88 (Tex. App.—San Antonio 1994, no writ).

In support of his motion for new trial, Dhingra attached the affidavit of his office manager stating that she had not received a copy of the motion for summary judgment. This affidavit, however, does not logically rebut the presumption of service because Mendelow's certificate of service states the motion was served upon Dhingra's attorney, not his office manager. Dhingra contends, for the first time on appeal, that Mr. Bosquet had withdrawn as his attorney of record before service was attempted. To support his contention, Dhingra has attached two documents to his brief which purport to be (1) Bosquet's motion to withdraw and (2) an order signed by the trial judge granting Bosquet's request. These documents, however, are not in the clerk's record, and it is well established that we cannot consider documents attached to an appellate brief that do not appear in the record. *Till v. Thomas*, 10 S.W.3d 730, 733 (Tex. App.—Houston [1st Dist.] 1999, no pet.). Accordingly,

the presumption of proper service has not been rebutted, and appellant's first issue for review is overruled.

In his second and third issues, Dhingra claims that (1) genuine issues of material fact exist which preclude the granting of a traditional summary judgment and (2) he presented at least a scintilla of evidence to show the existence of a lease agreement.

The standard for reviewing the granting of a traditional motion for summary judgment is well established. Summary judgment is proper if the defendant, as the movant, disproves at least one element of each of the plaintiff's claims or establishes all elements of an affirmative defense to each claim. *See Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997). The movant has the burden of showing there is no genuine issue of material fact and it is entitled to judgment as a matter of law. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985). In deciding whether there is a disputed material fact issue precluding summary judgment, proof favorable to the non-movant is taken as true and the court must indulge every reasonable inference and resolve any doubts in favor of the non-movant. *See id.* at 548-49.

The standard for reviewing the granting of a "no evidence" motion for summary judgment is the same one applied in reviewing a directed verdict. *See Moore v. KMart Corp.*, 981 S.W.2d 266, 269 (Tex. App.—San Antonio 1998, pet. denied). We look at the evidence in the light most favorable to the respondent against whom the summary judgment was rendered, disregarding all contrary evidence and inferences. *See id*; *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex.1997), *cert. denied*, 523 U.S. 1119, 118 S.Ct. 1799, 140 L.Ed.2d 939 (1998). The non-movant is not required to marshal his proof, but need only point out the evidence produced which establishes that a question of fact exists. *Bomar v. Walls Reg'l Hosp.*, 983 S.W.2d 834, 840 (Tex. App.—Waco 1998, no pet.). A no-evidence summary judgment is properly granted if the respondent fails to bring forth more than a scintilla of probative evidence to raise a genuine issue of material fact as to an essential element of the respondent's case. *See Moore*, 981 S.W.2d at 269; TEX. R. CIV. P.

166a(i). 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." *Merrell Dow,* 953 S.W.2d at 714 (internal citations omitted). Less than a scintilla of evidence exists when the evidence is "so weak as to do no more than create a mere surmise or suspicion" of a fact. *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex.1983).

Dhingra contends there is a fact issue regarding whether Mendelow "ratified" the terms of the "new lease" by remaining on the property and that the record contains at least a scintilla of evidence establishing such ratification.

A lease is a contract between parties conveying land, minerals, property, or tenements for some temporal term in consideration of rent or other periodic compensation. The essence of a contract involves the meeting of the minds between the parties to the agreement. *Solis v. Evins*, 951 S.W.2d 44, 49 (Tex. App.—Corpus Christi 1997, no writ). To constitute a contract, the minds of the parties must meet with respect to the subject matter of the agreement, and as to all of its essential terms; and all of them must assent to the same thing in the same sense at the same time. *Findley v. Hundley*, 252 S.W.2d 958, 962 (Tex. Civ. App.—Dallas 1952, no writ). There can be no agreement when one party has an intention to make it, but the other has not. *Charlie Thomas Courtesy Ford, Inc. v. Sid Murray Agency*, 517 S.W.2d 869, 875 (Tex. App.—Corpus Christi 1974, writ ref'd n.r.e.). Here, Dhingra contends Mendelow's agreement to the terms of the proposed lease agreement is shown by his "ratification" of its terms when he failed to vacate the premises on 24 hour's notice.

Ratification is the (1) adoption or confirmation by a person; (2) with knowledge of all material facts; (3) of a prior act which did not then legally bind that person and which that person had the right to repudiate. *Vessels v. Anschutz Corp*., 823 S.W.2d 762, 764 (Tex.App.—Texarkana 1992, writ denied). Ratification occurs when a party recognizes the validity of a contract by acting under it or affirmatively acknowledging it. *Simms v. Lakewood Village Property Owners Ass'n, Inc.*, 895 S.W.2d 779, 784 (Tex. App.—Corpus

Christi 1995, no writ). An express ratification is not necessary; any act based upon a recognition of the contract as existing or any conduct inconsistent with an intention of avoiding it has the effect of waiving the right of recission. *Rosenbaum v. Texas Bldg. & Mortgage Co.*, 140 Tex. 325, 167 S.W.2d 506, 508 (1943). The uncontroverted facts presented here show Mendelow failed to comply with Dhingra's demand on April 30, 1999, to move his medical practice out of the building before May 1, 1999.

We find, as a matter of law, that Mendelow's failure to vacate the premises in less than twenty-four hours, standing alone, does not constitute any evidence that he agreed to a new lease agreement. Thus, Dhingra has failed to produce even a scintilla of evidence showing the existence of the alleged lease he seeks to enforce. Thus, the trial court did not err in granting Mendelow's "no-evidence" motion for summary judgment. Because the trial court had a valid basis for granting summary judgment, we need not consider the merits of Mendelow's traditional motion for summary judgment.

The judgment of the trial court is affirmed.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed September 27, 2001.
Panel consists of Justices Anderson, Hudson, and Frost.
Do Not Publish — TEX. R. APP. P. 47.3(b).