Reversed and Remanded and Opinion filed October 5, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-01081-CV

TAMMY BRADY, Appellant

V.

CASH AMERICA PAWN, L.L.P., Appellee

On Appeal from the County Civil Court at Law No. 3
Harris County, Texas
Trial Court Cause No. 702, 197

O P I N I O N

Appellant, Tammy Brady, appeals the grant of a no-evidence summary judgment in favor of Cash America Pawn, L.L.P. Because we believe she produced more than a scintilla of probative evidence supporting her claim, we reverse.

Ms. Brady allegely owned a Delta miter saw that was stolen during a burglary of her garage. Several months later, she claims to have recognized the saw on sale in a pawn shop. Cash America, however, sold the saw to a third party. Ms. Brady sued for conversion.

The only issue before us is the propriety of the trial court's grant of a no-evidence summary judgment. According to the Texas Rules of Civil Procedure,

> After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. The motion must state the elements as to which there is no evidence. The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact.

TEX. R. CIV. P. 166a (i). Cash America filed a no-evidence summary judgment alleging that Ms. Brady had no evidence she was the owner of the saw, an essential element of her claim. The issue must be determined by the sufficiency of the proof offered by Ms. Brady in reply to Cash America's motion.

When responding to a no-evidence summary judgment, it is the non-movant's burden to bring forth evidence that raises a fact issue on the challenged elements. *See Heiser v. Eckerd Corp.*, 983 S.W.2d 313, 316 (Tex. App.—Fort Worth 1998, no pet.); *Jackson v. Fiesta Mart, Inc.*, 979 S.W.2d 68, 70 (Tex. App.—Austin 1998, no pet.). We apply the same legal sufficiency standard in reviewing a no-evidence summary judgment as we apply 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 Pharmaceuticals, 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 its proof," but need only point out the evidence produced which establishes the existence of a fact question. *See Bomar v. Walls Regional Hosp.*, 983 S.W.2d 834, 840 (Tex. App.—Waco 1998, no pet.). A no-evidence summary judgment is properly granted *only* 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 Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, 714 (Tex.1997). 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).

As evidence, Ms. Brady submitted her own affidavit. Summary judgment evidence may be provided by interested parties if it is "clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted." TEX.R. CIV. P. 166a(c); *see also Casso v. Brand*, 776 S.W.2d 551, 558 (Tex.1989). According to Ms. Brady's affidavit, she recognized the saw as hers because the serial number matched the one on her warranty card. The probative effect of this proof is weakened by the fact Ms. Brady claims she has since misplaced her warranty card. However, she also identified the saw by certain scratches made when she attached her saw to a rolling cart. Further, she states in her affidavit that the saw's miter degree gauge was covered with a sheet of clear plastic that had distinctively "bubbled up" on one small area. We find this to be more than a scintilla of evidence of her ownership of the saw.

Accordingly, the judgment of the trial court is reversed and the cause is remanded for further proceedings consistent with this opinion.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed October 5, 2000.
Panel consists of Chief Justice Murphy and Justices Hudson and Wittig.
Do Not Publish — TEX. R. APP. P. 47.3(b).