Long v. Motheral Printing Co., 05-10-01128-CV (TXCA5)

SHANE LONG, Appellant

v.

MOTHERAL PRINTING COMPANY, Appellee

No. 05-10-01128-CV

Court of Appeals of Texas, Fifth District, Dallas

July 17, 2012

On Appeal from the 160th Judicial District Court Dallas County, Texas Trial Court Cause No. DC-10-00007-H

Before Justices Moseley, FitzGerald, and Richter

MEMORANDUM OPINION

JIM MOSELEY, Justice.

This is an appeal from a summary judgment in favor of Motheral Printing Company against Shane Long on his personal guaranty of an open account for his business, Envy Publications, Inc. Long argues on appeal that the trial court erred by denying his motion for continuance and by rendering summary judgment against him. Long contends (1) the court failed to rule on his objections

to summary judgment evidence; (2) the motion failed to specify the grounds for summary judgment; (3) Motheral did not move for summary judgment on its claim for attorney's fees; (4) the court erred by implicitly finding a binding contract that was breached by Long; and (5) the contract lacked consideration.

The background of the case and the evidence adduced below are well known to the parties; thus, we do not recite them here in detail. Because all dispositive issues are settled in law, we issue this memorandum opinion. Tex.R.App.P. 47.2(a), 47.4. We affirm the trial court's judgment.

Long signed a credit application with Motheral on behalf of Envy Publications, Inc. The application indicated that Long was the CEO/Publisher of Envy and a sixty percent owner. Long signed the application indicating his title was President and CEO. Immediately below that signature is a printed paragraph titled “Personal Guaranty (Required by all persons owning 50% or more of the entity).” Long signed as guarantor below this paragraph. [1]

After the credit application was signed, Motheral provided goods and services to Envy on an open account. When the invoices were not paid in full, Motheral sued Long and Envy on a sworn account and for breach of contract seeking to recover damages for the unpaid invoices and to recover reasonable attorney's fees.

Continuance

Long's first issue argues the trial court erred by not granting his motion for continuance of the summary judgment hearing. Motheral filed the motion for summary judgment on April 1, 2010 and a hearing was set for May 11, 2010. On April 27, 2010, Long served written discovery on Motheral. Two days after that, Long filed a motion for continuance of the summary judgment hearing. The motion for continuance was not verified or supported by an affidavit. The trial court heard the motion for continuance on May 4, 2010. It ordered Motheral to respond to the discovery by May 6, 2010, extended the deadline for Long's response to noon on May 10, 2010, and denied the continuance in all other respects. Motheral produced documents and responded to discovery on May 6, and Long filed his response and objections to the motion for summary judgment on May 10, 2010.

The stated purpose of the motion for continuance was to obtain responses to the pending discovery. The trial court's order accomplished that purpose. Long contends on appeal that his counsel did not have adequate time to properly review the discovery responses and to respond fully to the motion for summary judgment. However, his brief fails to identify any additional evidence or arguments he was prevented from raising because he did not have additional time to review the discovery responses. Thus, Long's first issue fails to show the trial court abused its discretion in ruling on the motion for continuance. *See* Tex.R.Civ.P. 166a(g); *Cooper v. Circle Ten Council Boy Scouts of Am.*, 254

S.W.3d 689, 696 (Tex. App.-Dallas 2008, no pet.).

Moreover, Long's brief cites no authorities in support of his first issue. *See* Tex.R.App.P. 38.1(i) (brief must contain clear and concise argument for contentions made with appropriate citation to authorities and to the record); *Huey v. Huey*, 200 S.W.3d 851, 854 (Tex. App.-Dallas 2006, no pet.) ("Failure to cite applicable authority or provide substantive analysis waives an issue on appeal."). We overrule Long's first issue.

Summary Judgment

Long's second issue challenges the summary judgment rendered against him. He raises five subparts under this issue.

We apply the well-established standards for reviewing a traditional summary judgment under rule 166a(c). *See* Tex.R.Civ.P. 166a(c); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). We review a trial court's summary judgment de novo. *See Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). Once the movant establishes its right to summary judgment as a matter of law, the burden shifts to the non-movant to present evidence raising a genuine issue of material fact, thereby precluding summary judgment. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979); *Talford v. Columbia Med. Ctr. at Lancaster Subsidiary, L.P.*, 198 S.W.3d 462, 464 (Tex. App.-Dallas 2006, no pet.).

A. Objections to Summary Judgment Evidence

Subpart A of Long's second issue argues the trial court erred by not ruling on his objections that portions of the affidavit of Rick Wilson, Motheral's CFO, were legal conclusions. Long argues the objections should have been granted by the trial court.

We review rulings admitting or excluding evidence for an abuse of discretion. *See* Cantu v. Horany, 195 S.W.3d 867, 871 (Tex. App.-Dallas 2006, no pet.). An objection that an affidavit is conclusory goes to the substance of the affidavit, rather than the form, and may be raised on appeal. *See Thompson v. Curtis,* 127 S.W.3d 446, 450 (Tex. App.-Dallas 2004, no pet.). Therefore, we need not consider whether the trial court ruled on the objections. *Id.*

Long objects to two statements in Wilson's affidavit that Long unconditionally guaranteed Envy's obligations and that Long is jointly and severally liable. These two statements are arguably legal conclusions, and for purposes of appeal we do not consider them. However, Long does not object to the underlying document, the credit application and personal guaranty, that he admittedly signed. As discussed below, this document and the remaining summary judgment evidence are sufficient to support the summary judgment.

Long also objects to the following statements as legal conclusions:

the claims arose out of business dealings between Motheral and Envy and Long; the amounts charged for the goods and services were reasonable and that they were requested by Envy; Envy and Long failed and refused to pay the balance due on the account; and that Motheral hired an attorney due to the refusal to pay for the goods and services. Wilson's affidavit attached the credit application, three invoices, and a demand letter to Envy and Long for payment of the unpaid invoices. Long does not object to these attachments or to Wilson's statement that Envy subsequently failed to pay the balances due on the account for the goods provided by Motheral, resulting in damages.

These statements are not improper legal conclusions, but "constitute a factual account of events which are proper summary judgment proof." *Triland Inv. Group v. Tiseo Paving Co.*, 748 S.W.2d 282, 284 (Tex. App.-Dallas 1988, no writ) (affidavit stating defendant entered into contract with plaintiff, work was completed, a specific amount became due and was unpaid, that plaintiff sent demand to defendant and defendant refused to make payment was proper summary judgment evidence); *see also Cooper*, 254 S.W.3d at 699-700. Wilson provided the factual background to support his statements; therefore, his affidavit is proper summary judgment evidence we may consider. *See Strother v. City of Rockwall*, 358 S.W.3d 462, 469 (Tex. App.-Dallas 2012, no pet.) (affidavit was not conclusory when it set out facts supporting conclusions). We overrule Subpart A of Long's second issue.

B. Form of Motion for Summary Judgment

In Subpart B of his second issue, Long argues the motion for summary judgment failed to identify specific evidence in the record to support Motheral's claims. Long cites cases dealing with a party's burden on appeal to direct the appellate court to specific evidence in the record to support its contentions. *See* King v. Wells Fargo Bank, N.A., 205 S.W.3d 731, 734-35 (Tex. App.-Dallas 2006, no pet.); *Most Worshipful Prince Hall Grand Lodge v. Jackson,* 732 S.W.2d 407, 412 (Tex. App.-Dallas 1987, writ ref'd n.r.e.). These cases are relevant to whether Long has met his burden to establish reversible error by the trial court, but they do not support his argument that Motherall somehow failed to meet its burden on summary judgment.

For example, Long argues Motheral merely referred to an exhibit to the motion to support the claim that he unconditionally guaranteed payment of Envy's obligations. Long claims the reader is thus required to "search [] a multiple page document to determine which portions Motheral intended the Trial Court to determine supported its conclusory statement." The referenced exhibit is the two-page credit application and personal guaranty signed by Long in two places on the second page. We fail to see how referring to this document placed an unreasonable burden on counsel or the trial court. This is not a voluminous summary judgment record. Attached to the motion were Wilson's affidavit with the credit application, three unpaid invoices, and a demand letter attached, and an affidavit for attorney's fees. None of these documents is more than four pages

in length. We conclude Motheral's motion sufficiently pointed out the summary judgment grounds and evidence it relied on in seeking judgment as a matter of law. We overrule Subpart B of Long's second issue.

C. Request for Attorney's Fees

Subpart C of Long's second issue contends that the motion for summary judgment did not specifically seek recovery of attorney's fees from Long. At oral argument, Long's counsel represented that Motheral had not requested an award of attorney's fees against him in its motion for summary judgment.

The requirement that a motion for summary judgment state specific grounds provides "the opposing party with adequate information for opposing the motion and define[s] the issues for purposes of summary judgment." *Roof Sys., Inc. v. Johns Manville Corp.,* 130 S.W.3d 430, 436 (Tex. App.-Houston [14th Dist.] 2004, no pet.). "In determining whether grounds are expressly presented, we may not rely on briefs or summary judgment evidence." *Sci. Spectrum, Inc. v. Martinez,* 941 S.W.2d 910, 912 (Tex. 1997).

A statement of the grounds for summary judgment is sufficiently specific if it provides the non-movant with fair notice of the basis upon which judgment is sought. *City of Roanoke v. Town of Westlake,* 111 S.W.3d 617, 633 (Tex. App.-Fort Worth 2003, pet. denied). "A movant is not required to specifically describe how evidence in support of the motion justifies a summary judgment; merely identifying a theory of liability or defense will suffice." *Id.*; *see McMahon Contracting, L.P. v. City of Carrollton*, 277 S.W.3d 458, 467 (Tex. App.-Dallas 2009, pet. denied).

Motheral's motion for summary judgment asserts that the signed credit application was a valid contract between Motheral and Long by which Long unconditionally guaranteed payment of all obligations owed by Envy to Motheral, that Motheral performed by delivering goods and services to Envy, and that Long breached by failing to make all payments when due for the goods and services provided to Envy. The motion alleges that Motheral suffered damages resulting from the breach and refers to its attorney's affidavit as establishing the reasonable and necessary attorney's fees incurred as a result of the breach. Finally, the prayer for relief requests judgment against both defendants for the principal amount owed, prejudgment interest, and "Plaintiff's reasonable and necessary attorney's fees and expenses in the amount of $3, 566.00, plus court costs in the amount of $302.74, and in the event of appeal, $4, 000.00 for the Court of Appeals and $8, 000.00 for the Texas Supreme Court; pursuant to Tex. Civ. Prac. & Rem. Code Ann. § 38.001."

We conclude the motion provided fair notice that Motheral sought to recover damages from Long for his breach of the guaranty agreement and sought to recover its reasonable and necessary attorney's fees by statute. Tex.

Civ. Prac. & Rem. Code Ann. § 38.001. We overrule Subpart C of Long's second issue.

D. Credit Application and Guaranty

Because they substantially overlap, we will address Subparts D and E together. Long first contends the credit application alone does not constitute an enforceable contract between Envy and Motheral. Long also contends the personal guaranty at the end of the credit application is not an enforceable contract because its terms are too uncertain, and there is no proof of an offer, acceptance, meeting of the minds, or consideration for the guaranty.

The elements of a breach of a guaranty claim are: (1) the existence and ownership of the guaranty; (2) performance of the underlying contract by the holder; [2] (3) the occurrence of the conditions upon which liability is based; and (4) the failure or refusal to perform the promise by the guarantor. *See Wiman v. Tomaszewicz,* 877 S.W.2d 1, 8 (Tex. App.-Dallas 1994, no writ); *see also Simpson v. MBank Dallas, N.A.*, 724 S.W.2d 102, 107 (Tex. App.-Dallas 1987, writ ref'd n.r.e.) (stating that when a guaranty is in writing and signed by the guarantor, the guaranty's existence presumes consideration).

The summary judgment proof establishes that in exchange for Motheral providing goods and services to Envy on an open account, Long offered to guaranty the payment of all indebtedness within five days of notice that the account was past due. Motheral accepted Long's offer by providing goods and services to Envy on an open account as shown by the invoices. *See Cobb v. Tex. Distributors, Inc.*, 524 S.W.2d 342, 345 (Tex. Civ. App.-Dallas 1975, no writ) (sale of goods on credit to principal debtor in reliance on guaranty is sufficient acceptance). Thus, Motheral proved an offer and acceptance.

Furthermore, the terms of the personal guaranty are sufficiently certain to be enforceable. Personal guaranties in credit applications with similar language have been enforced by other courts. [3] There is nothing uncertain or indefinite about the terms of the personal guaranty. As in *Austin Hardwoods*, the credit application “clearly evidences application for credit by a corporation guaranteed by the individual signing the application.” 917 S.W.2d at 323. The language waiving notice of the rearrangement or extension of the terms does not make the guaranty uncertain. This language is designed to prevent the discharge of the guarantor by alteration of the original terms of the debt. *See Lenamond*, 667 S.W.2d at 287 (guarantor agreed that alteration would not result in discharge by agreeing that terms of debt could be altered without notice).

Long contends there was no meeting of the minds because he never signed the application in his individual capacity. He stated in his affidavit, “I never intended to personally, individually, guarantee any debts of any corporation, including Envy Publications, Inc.” However, the law presumes a party signing a contract understands and agrees to the contents of the contract. *See* In re Int'l

Profit Associates, Inc., 274 S.W.3d 672, 679 (Tex. 2009) (per curiam). "[P]arties to a contract have an obligation to protect themselves by reading what they sign and, absent a showing of fraud, cannot excuse themselves from the consequences of failing to meet that obligation." *In re Lyon Fin. Services, Inc.*, 257 S.W.3d 228, 233 (Tex. 2008) (per curiam). The instrument alone will be deemed to express the intention of the parties because it is the objective, not subjective, intent that controls. *City of Pinehurst v. Spooner Addition Water Co.*, 432 S.W.2d 515, 518 (Tex. 1968).

Long signed the two-page document twice, once indicating that his title was "President & CEO" and the other without indicating a title. The second, untitled, signature was after the personal guarantee paragraph, which includes statements that "I personally guarantee all indebtedness hereunder" and "I will within five (5) days from the date of notice that the account is past due, pay the amount due." Long did not indicate this signature was in any representative capacity.

Here, the language of the personal guaranty paragraph creates a personal obligation in addition to the application for credit on behalf of the corporation. Long signed the credit application and guaranty twice, once indicating his title and once without. Even if he had signed the guaranty indicating his corporate office, that would not change his individual liability on the guaranty. [4] The guaranty would be meaningless if the corporation was purporting to guaranty its own open account. *Dann v. Team Bank*, 788 S.W.2d 182, 184-85 (Tex. App.-Dallas 1990, no writ) (guaranty securing a corporate debt will be rendered meaningless if the primary debtor is found to be the sole party liable thereunder). A corporate designation in this case would be only descriptive of his position; it would not change the capacity in which he signed. *Id.* (corporate designations appearing after signatures on guaranty are considered to be only *descriptio personae*, i.e., descriptive of the person intended).

Long next argues the guaranty was not signed by Motheral and it does not list the address where he may mail a revocation of the guaranty. The guaranty does not indicate the parties intended the guaranty to be conditioned on Motheral's signature. The absence of a party's signature does not necessarily destroy an otherwise valid contract. [5] And the guaranty was a unilateral offer by Long that Motheral accepted by extending credit to Envy. [6] The written guaranty also does not show that the parties intended the address for delivery of a revocation was a vitally important element of their bargain. [7]

Long's final attack on the guaranty is based on a lack of consideration. He contends he received no personal benefit from the contract. As mentioned above, the written guaranty signed by Long creates a presumption of consideration. [8] The burden was on Long to plead and prove the absence of consideration. [9] Lack of consideration is an affirmative defense and Long had the burden to produce summary judgment evidence sufficient to raise an issue of fact on all elements of the defense. [10]

Consideration for a guaranty agreement consists of either a detriment to the creditor or a benefit conferred on the primary debtor. *Hargis v. Radio Corp. of Am., Elec. Components*, 539 S.W.2d 230, 232 (Tex. Civ. App.-Austin 1976, no writ). “It is not necessary that consideration for the guarantee pass to the guarantor, ... for it is sufficient consideration if the primary debtor receives some benefit.” *Id.*; *Coleman Furniture*, 405 S.W.2d at 648 (actual delivery of goods in return for a promise of guaranty of payment is itself sufficient consideration).

Here, Motheral conferred a benefit on Envy, the primary debtor, by extending credit to it on an open account. Not only is this sufficient consideration for Long's guaranty, but Long would personally benefit as a majority owner and officer of Envy. We conclude Long failed to produce any summary judgment evidence rebutting the presumption of consideration or raising a material issue of fact on his affirmative defense of no consideration.

We overrule Subparts D and E of Long's second issue.

We affirm the trial court's summary judgment.

JUDGMENT

In accordance with this Court's opinion of this date, the summary judgment of the trial court is AFFIRMED. It is ORDERED that appellee Motheral Printing Company recover its costs of this appeal from appellant Shane Long.

Notes:

[1] The paragraph reads:

In consideration of goods unconditional being sold on open account on the above named firm; I personally guarantee all indebtedness hereunder revocable only in writing by certified mail to address above. I further agree that this guarantee is an absolute, completed and continuing one, and no notice of the indebtedness already or hereafter contracted need be given. The terms may be rearranged, extended and/or renewed without notice to me. That I will within five (5) days from the date of notice that the account is past due, pay the amount due.

[2] Because Long does not challenge the sworn account claim against Envy we need not address whether the credit application was an enforceable contract satisfying this element. *See Holloway v. Starnes*, 840 S.W.2d 14, 18, 23 (Tex. App.-Dallas 1992, writ denied) (where order does not specify grounds, appellant must show each independent ground alleged in motion for summary judgment is insufficient). Thus, we do not discuss the arguments regarding the credit application between Envy and Motheral raised in Subpart D.

[3] *See 84 Lumber Co., L.P. v. Powers,* No. 01-09-00986-CV, 2012 WL 243524, at *4 (Tex. App.-Houston [1st Dist.] Jan. 26, 2012, no pet.) (officer's signature on credit application merely identified his position with company and did not limit the capacity in which he could be held liable where body of application stated “I do unconditionally and irrevocably personally guarantee this credit account”); *Taylor-Made Hose, Inc. v. Wilkerson*, 21 S.W.3d 484, 487-88 (Tex. App.-San Antonio 2000, pet. denied) (en banc) (credit application signed by vice president containing language stating “I, personally agree to pay all invoices and cost of collection....” raised fact issue as to personal liability of vice president sufficient to defeat her no-evidence motion for summary

judgment); *Austin Hardwoods, Inc. v. Vanden Berghe,* 917 S.W.2d 320, 322-23 (Tex. App.-El Paso 1995, writ denied) (vice president signing credit application on behalf of corporation personally guaranteed payment of the account where he signed immediately below statement that "If a corporation, the undersigned personally guarantees the payment of this account in his individual capacity"); *Lenamond v. N. Shore Supply Co.*, 667 S.W.2d 283, 286 (Tex. App.-Houston [14th Dist.] 1984, no writ) (personal guaranty paragraph of credit application almost identical to that in present case).

[4] *See* cases cited in note 3.

[5] *Thomas J. Sibley, P.C. v. Brentwood Inv. Dev. Co., L.P.*, 356 S.W.3d 659, 663-64 (Tex. App.-El Paso 2011, pet. denied) (landlord's failure to sign lease did not indicate lack of mutual assent to agreement or preclude enforceability of lease against tenant); *Augusta Dev. Co. v. Fish Oil Well Serv. Co., Inc.,* 761 S.W.2d 538, 544 (Tex. App.-Corpus Christi 1988, no writ) (party who does not sign contract may accept it and indicate intent to be bound by its acts and conduct in accordance with the terms of the contract).

[6] *See Cobb*, 524 S.W.2d at 345; *Coleman Furniture Corp. v. Lieurance*, 405 S.W.2d 646, 648 (Tex. Civ. App.-Amarillo 1966, writ ref'd n.r.e.) (contract of guaranty may be unilateral or bilateral). A unilateral contract is "created by the promisor promising a benefit if the promisee performs. The contract becomes enforceable when the promisee performs." *Vanegas v. Am. Energy Servs.*, 302 S.W.3d 299, 302 (Tex. 2009) (quoting *Plano Surgery Ctr. v. New You Weight Mgmt. Ctr.*, 265 S.W.3d 496, 503 (Tex. App.-Dallas 2008, no pet.)).

[7] *See* Spooner, 432 S.W.2d at 518 (in the usual case instrument alone determines intent of the parties); *Potcinske v. McDonald Prop. Invs., Ltd.*, 245 S.W.3d 526, 531 (Tex. App.-Houston [1st Dist.] 2007, no pet.) (essential terms of a contract "are those that parties would reasonably regard as vitally important elements of their bargain").

[8] "The law is settled that the existence of a written contract presumes consideration for its execution.... Therefore, where a contract of guaranty is in writing and signed by the guarantor, its existence imports a consideration." *Simpson v. MBank Dallas, N.A.*, 724 S.W.2d 102, 107 (Tex. App.-Dallas 1987, writ ref'd n.r.e.) (citations omitted).

[9] Long's first amended original answer pleads lack of consideration, but the answer is not verified or supported by an affidavit. *See* Tex.R.Civ.P. 93(9) (requiring a verified plea that "a written instrument upon which a pleading is founded is without consideration, or that the consideration of the same has failed in whole or in part").

[10] *See* Tex.R.Civ.P. 94. A party relying on an affirmative defense to defeat a motion for summary judgment must raise a genuine issue of fact as to each element of the defense. *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984); *Birenbaum v. Option Care, Inc.*, 971 S.W.2d 497, 504 (Tex. App.-Dallas 1997, no pet.).
