Opinion filed June 18, 2020

In The

Eleventh Court of Appeals

No. 11-18-00154-CV

ALAN COPELAND, Appellant
V.
A-TOWN/HI-TECH, L.P. D/B/A SERVICEMASTER, Appellee

On Appeal from the 104th District Court
Taylor County, Texas
Trial Court Cause No. 27,236-B

M E M O R A N D U M O P I N I O N

This appeal arises from a suit on a sworn account filed by Appellee, A-Town/Hi-Tech, L.P. d/b/a ServiceMaster, against Appellant, Alan Copeland. The trial court granted A-Town's motion for summary judgment and awarded A-Town $10,031.39 for actual damages and $3,300 for attorney's fees. In two issues, Copeland contends that the trial court improperly granted summary judgment because he is not individually liable on the account and because, after he filed a

verified denial, A-Town was not entitled to summary judgment based on its pleadings. We affirm.

Background

After a building at the Tin Cup Country Club was damaged by a sewer leak, Copeland hired A-Town to perform restoration services. Copeland paid A-Town a deposit of $500 and signed a Work and Direct Pay Authorization. The Authorization listed Copeland as the property owner and did not reflect that Copeland signed the Authorization in a representative capacity.

The Authorization provided:

> I (we) understand that the total lump sum cost of cleaning and/or repairs shall be payable upon completion of work and hereby authorize[] and instruct[] that direct payment be made to ServiceMaster. I (we) understand that I (we) are liable for payment of any deductible and for any charges not covered by the insurance company.

After it completed the work, A-Town sent an invoice in the total amount of $10,531.39 to Copeland at the Tin Cup Country Club. Copeland made no payments to A-Town other than the original $500 deposit.

A-Town sued Copeland on a sworn account and, alternatively, for quantum meruit. In an affidavit attached to A-Town's petition, Gary Glenn, the president of A-Town's general partner, swore that the "foregoing and annexed" account against Copeland in the amount of $10,031.39 was within Glenn's knowledge, was just and true, and was due and unpaid and that all just and lawful offsets, payments, and credits had been allowed. A-Town also attached to its petition the Authorization signed by Copeland, A-Town's invoice for its work, and a description of the work performed by A-Town and its charges for that work. Copeland responded to A-Town's petition through a letter to the trial court in which he complained that A-Town had not contacted his insurance agent as he had directed.

A-Town filed a motion for summary judgment on its claim for a sworn account based on the "systematic record of all charges, credits, and offsets" that was attached to its original petition. A-Town specifically argued that it was entitled to summary judgment on the pleadings because Copeland had failed to deny that he executed the Authorization, that A-Town provided goods and services, that A-Town's charges for the goods and services were reasonable, or that A-Town had applied all offsets and credits. The only summary judgment evidence attached to A-Town's motion was its counsel's affidavit as to the attorney's fees incurred by A-Town.

Copeland did not file a response to the motion for summary judgment. Instead, he filed a "Verified Original Answer and Affirmative Defenses." In his "General Denial and Verified Denial," Copeland stated:

> Pursuant to Texas Rule of Civil Procedure 92, Copeland generally denies each and every allegation in [A-Town's] Original Petition and demands strict proof thereof by the applicable burden of proof. Pursuant to Texas Rule of Civil Procedure 93(10), Copeland veriefs [sic] under oath that the amounts alleged to be owed are not owed or due [A-Town].

After a hearing, the trial court granted summary judgment in favor of A-Town and awarded A-Town $10,031.39 for actual damages and $3,300 for attorney's fees.

Analysis

In two issues Copeland complains that the trial court erred when it granted summary judgment because he is not individually liable for the unpaid account and because, after he filed a verified denial, A-Town was not entitled to summary judgment based on its pleadings.

We review a trial court's grant of summary judgment de novo. *Hillis v. McCall*, No. 18-1065, 2020 WL 1233348, at *2 (Tex. Mar. 13, 2020). A traditional summary judgment is proper only if the movant establishes that there is no genuine

issue of material fact and that it is entitled to judgment as a matter of law. *Id.*; *see also* TEX. R. CIV. P. 166a(c).

In his first issue, Copeland argues that the trial court erred when it granted summary judgment against him individually because A-Town's client was Tin Cup Golf Course. A contention that a party is not liable in the capacity in which he was sued must be raised in a verified pleading in the trial court. TEX. R. CIV. P. 93(2). Copeland first questioned his capacity to be sued individually in his briefing before this court. Therefore, Copeland has waived any complaint that he is not individually liable on the contract with A-Town. *See Sneed v. Webre*, 465 S.W.3d 169, 188 (Tex. 2015); *Pledger v. Schoellkopf*, 762 S.W.2d 145, 146 (Tex. 1988) (per curiam). We overrule Copeland's first issue.

In his second issue, Copeland contends that, because he filed a verified denial, A-Town could not rely on the sworn account attached to its petition as prima facie evidence of its claim and that, without summary judgment evidence, A-Town was not entitled to summary judgment.

A suit on a sworn account is not an independent cause of action. *Rizk v. Fin. Guardian Ins. Agency, Inc.*, 584 S.W.2d 860, 862 (Tex. 1979); *S. Mgmt. Servs., Inc. v. SM Energy Co.*, 398 S.W.3d 350, 353 (Tex. App.—Houston [14th Dist.] 2013, no pet.). Rather, it is based on Rule 185 of the Texas Rules of Civil Procedure, which affords a procedural right of recovery in certain contract disputes. TEX. R. CIV. P. 185; *S. Mgmt. Servs.*, 398 S.W.3d at 353. Rule 185 provides that when a claim is based on an open account "on which a systematic record has been kept," the account "shall be taken as prima facie evidence" of the claim if it is supported by affidavit. TEX. R. CIV. P. 185; *see also Schum v. Munck Wilson Mandala, LLP*, 497 S.W.3d 121, 124 (Tex. App.—Texarkana 2016, no pet.). The affidavit must be "to the effect that such claim is, within the knowledge of affiant, just and true, that it is

due, and that all just and lawful offsets, payments and credits have been allowed." TEX. R. CIV. P. 185. A plaintiff who meets all the requirements of Rule 185 is entitled to summary disposition of the case without formally introducing the account as evidence of the debt. *Woodhaven Partners, Ltd. v. Shamoun & Norman, L.L.P.*, 422 S.W.3d 821, 833 (Tex. App.—Dallas 2014, no pet.); *S. Mgmt. Servs.*, 398 S.W.3d at 354.

A defendant may destroy this evidentiary presumption by filing a sworn denial of the plaintiff's claim supported by an affidavit in which the defendant denies the account as required by Rule 93(10). *Woodhaven Partners*, 422 S.W.3d at 833; *see also* TEX. R. CIV. P. 93(10), 185. If a defendant properly denies the account, the plaintiff is forced to introduce proof of its claim. *Woodhaven Partners*, 422 S.W.3d at 833. However, a defendant who fails to properly file a written denial under oath will not be permitted to dispute either the receipt of the services or the correctness of the charges. *Id.* (citing *Andrews v. E. Tex. Med. Ctr.–Athens*, 885 S.W.2d 264, 267 (Tex. App.—Tyler 1994, no writ)); *see also* TEX. R. CIV. P. 185.

"[T]he purpose of a verified specific denial is to point out the manner in which the plaintiff's allegations within the petition are not true. Otherwise[,] neither the court nor the opposing party is apprised of the fact issue that necessitates further litigation." *Andrews*, 885 S.W.2d at 267. "A sworn general denial does not constitute a denial of the account and is insufficient to remove the evidentiary presumption created by a properly worded and verified suit on an account." *Woodhaven Partners*, 422 SW.3d at 833. The defendant must do more than make a "broad generalization that he 'specifically denies' the sworn account allegations." *Id.* Rather, the defendant's affidavit "must address the facts on which the defendant intends to rebut the plaintiff's affidavit." *Id.*; *see also Andrews*, 885 S.W.2d at 268. A statement in the affidavit that the sworn account is "not true in whole or in part"

or that denies that the defendant is "indebted for the amount alleged" in the petition is, at most, a verified general denial that is insufficient to rebut the evidentiary effect of a properly verified claim on a sworn account. *Woodhaven Partners*, 422 S.W.3d at 832, 834; *Andrews*, 885 S.W.2d at 265, 268.

Glenn's affidavit, which was attached to A-Town's petition, contains all of the elements required by Rule 185.[1] *See* TEX. R. CIV. P. 185. A-Town also attached to its petition the Authorization, the invoice for its work, and a description of (1) the date of each charge, (2) each task that was performed, (3) the time or materials needed for the task, and (4) the charges for each task. Therefore, A-Town's verified pleading constituted prima facie evidence of A-Town's claim for a sworn account. *See Woodhaven Partners*, 422 S.W.3d at 833–34.

After A-Town filed its motion for summary judgment, Copeland filed a verified answer in which he swore that "the amounts alleged to be owed are not owed or due" to A-Town. In his affidavit, Copeland did not deny that he had an agreement with A-Town for the work; that A-Town performed the work; that A-Town's charges were reasonable, due, and just; or that all offsets, payments, and credits had been allowed. Further, Copeland set forth no facts in the affidavit to support the statement that he did not owe A-Town the alleged amount. Copeland's verified denial, therefore, constituted only a "sworn general denial" and was insufficient to rebut A-Town's prima facie case. *See id.*; *Andrews*, 885 S.W.2d at 268.

Because Copeland failed to rebut A-Town's prima facie case of a sworn account, the trial court properly granted summary judgment in favor of A-Town. *See*

[1]In passing, Copeland complains that Glenn's affidavit was insufficient because it was not based on "personal knowledge" as required by Texas Rule of Civil Procedure 166a(f). However, this court has held that the affiant's lack of personal knowledge is a defect in form that must be preserved in the trial court. *Athey v. Mortg. Elec. Registration Sys., Inc.*, 314 S.W.3d 161, 165–66 (Tex. App.—Eastland 2010, pet. denied). Copeland did not object to Glenn's affidavit in the trial court and, therefore, has failed to preserve this issue for our review. *See id.*; *see also* TEX. R. APP. P. 33.1.

Andrews, 885 S.W.2d at 268 ("A general denial, even if sworn to, does not raise a fact issue on a suit on a sworn account."). We overrule Copeland's second issue.

This Court's Ruling

We affirm the judgment of the trial court.

JOHN M. BAILEY
CHIEF JUSTICE

June 18, 2020

Panel consists of: Bailey, C.J.,
Stretcher, J., and Wright, S.C.J.[2]

Willson, J., not participating.

[2]Jim R. Wright, Senior Chief Justice (Retired), Court of Appeals, 11th District of Texas at Eastland, sitting by assignment.