In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-20-00007-CV

ROY HENRY MESSER AND MESSER AGRI INDUSTRIES, INC.,
APPELLANTS

V.

HEREFORD LOGISTICS AND COMMODITY CO., LLC
D/B/A PRIME LOGISTICS, FORERUNNER AG, LLC,
JAMES BARRETT, INDIVIDUALLY, J&B COMMODITIES, LLC,
AND MARK W. COLLIER, INDIVIDUALLY,
APPELLEES

On Appeal from the 222nd District Court
Deaf Smith County, Texas
Trial Court No. CI-2019B-025; Honorable Roland Saul Presiding

June 19, 2020

MEMORANDUM OPINION

Before PIRTLE, PARKER, and DOSS, JJ.

Appellants, Roy Henry Messer and Messer Agri Industries, Inc., appeal from the trial court's entry of summary judgment in favor of Appellees, Hereford Logistics and Commodity Co., LLC d/b/a Prime Logistics, Forerunner AG, LLC, James Barrett, Individually, J&B Commodities, LLC, and Mark W. Collier, Individually. In a single issue, Appellants argue the trial court erred in granting Appellees' no-evidence motion for

summary judgment because Appellants proved each element of their breach of contract claim. We will affirm the judgment of the trial court.

BACKGROUND

In February 2017, Messer Agri, Forerunner AG, and J&B Commodities formed Prime Logistics and signed an *Amended Company Agreement.* These entities were in the business of hauling freight and Prime Logistics was formed as a brokerage company for the entities to secure a contract with White Energy, a local producer of ethanol. Prime Logistics collected freight charges from customers on behalf of the three entities and then compensated the entities, less a brokerage fee.

In December 2017, Messer Agri hauled loads of freight for White Energy and other customers. Prime Logistics sent an invoice to White Energy and other customers for the loads and collected payment from White Energy. However, according to Appellants, Prime Logistics did not compensate Messer Agri for those collected loads.

Messer Agri sued for breach of contract. In doing so, it identified the *Amended Company Agreement* as the contract Prime Logistics supposedly breached. It argued Prime Logistics collected payments for which it was contractually obligated to compensate Messer Agri, resulting in damages of at least $130,085.28.

In December 2019, the trial court held a hearing on Appellees' no-evidence motion for summary judgment.[1] It concluded Appellees' *No-Evidence Motion for Summary Judgment* should be granted and entered a take-nothing judgment against Appellants.

[1] At that hearing, Appellants dismissed all of their claims except their breach of contract claim against Prime Logistics. That was the only claim subject to the no-evidence motion for summary judgment and is the only claim at issue on appeal.

STANDARD OF REVIEW

When reviewing a trial court's ruling on a no-evidence motion for summary judgment, we employ a *de novo* review. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). In our review, we apply the same legal sufficiency standard of review we would apply following a conventional trial on the merits. *See Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 581-82 (Tex. 2006); *City of Keller v. Wilson*, 168 S.W.3d 802, 823, 827 (Tex. 2005). Rather than viewing evidence in the light most favorable to the verdict, we review the evidence in the light most favorable to the party against whom the no-evidence summary judgment was rendered and we disregard all contrary evidence and inferences. *City of Keller*, 168 S.W.3d at 823.

To prevail on a defensive no-evidence motion for summary judgment the movant must prove that there is no evidence of at least one essential element of each of the plaintiff's causes of action. *Id.* If the party against whom the summary judgment was rendered brings forth more than a scintilla of probative evidence to raise a genuine issue of material fact, a no-evidence summary judgment motion cannot properly be granted. *Reynosa v. Huff*, 21 S.W.3d 510, 512 (Tex. App.—San Antonio 2000, no pet.) (citations omitted).

Applying the traditional legal sufficiency standard of review, a no-evidence point will be sustained when (1) there is a complete absence of evidence of a vital fact, (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a mere scintilla, or (4) the evidence conclusively establishes the opposite of a vital fact. *Cypress Creek EMS v. Dolcefino*, 548 S.W.3d 673, 684 (Tex. App.—Houston [1st Dist.] 2018, pet.

denied) (citing *City of Keller*, 168 S.W.3d at 810; *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003)). When a movant files a proper no-evidence summary judgment motion, the burden shifts to the nonmovant to defeat the motion by presenting at least a scintilla of probative evidence raising a genuine issue of material fact as to each element challenged in the no-evidence motion. *Mack Trucks, Inc.*, 206 S.W.3d at 582.

Because the order granting summary judgment in this matter did not specify the grounds on which the trial court relied, we must affirm the judgment if any of the theories raised in Appellees' motion for summary judgment are meritorious. *State Farm Fire & Cas. Co. v. S.S.*, 858 S.W.2d 374, 380 (Tex. 1993), *Reynosa*, 21 S.W.3d at 513 (citation omitted).

DISCUSSION

As an initial matter, we must address Appellants' appellate brief. The Texas Rules of Appellate Procedure govern the required contents and organization of an appellant's brief. *See* TEX. R. APP. P. 38.1. One of those requirements is that an appellant's brief must contain a clear and concise argument including appropriate citations to the record. *Id.* Failure to comply with Rule 38.1(i), i.e., "[f]ailure to brief, or to adequately brief, an issue by an appellant, effects a waiver of that issue on appeal." *Zayed v. Best Publ'ns, LLP*, No. 07-09-0333-CV, 2010 Tex. App. LEXIS 7872, at *3-4 (Tex. App.—Amarillo Sep. 28, 2010, no pet.) (mem. op.) (citing *Sunnyside Feedyard, L.C. v. Metropolitan Life Insurance Company*, 106 S.W.3d 169, 173 (Tex. App.—Amarillo 2003, no pet.) (citing *General Serv. Comm'n. v. Little-Tex Insulation Co*., 39 S.W.3d 591, 598 n.1 (Tex. 2001); *Denmon v. Atlas Leasing, L.L.C*., 285 S.W.3d 591, 597 (Tex. App.—Dallas 2009, no pet.)

("Bare assertions of error, without argument, authority, or citation to the record waive error.")).

Here, the sum total of Appellants' argument in the appellate brief, other than providing the applicable law regarding the appropriate standard of review and elements for a breach of contract cause of action, is as follows:

> The summary judgement [sic] evidence proves:
>
> 1. There is a valid, enforceable contract. (CR 29-63)
> 2. The plaintiff is the proper party to sue for breach of the contract (CR 29-63)
> 3. The plaintiff performed or tendered performance of, or was excused from performing its contractual obligations. (CR 29-63)
> 4. The defendant breached the contract (CR 29-63)
> 5. Defendant's breach caused the plaintiff injury (CR 29-63)

Appellants' appellate issue is argued in a very conclusory fashion without citation to specific portions of the record and without citation to relevant legal authority or substantive analysis. Appellants point this court only to some thirty-four pages of record, the response to Appellees' motion for summary judgment, and do not provide analysis as to how those pages raise a scintilla of probative evidence raising a genuine issue of material fact as to each element challenged in Appellees' no-evidence motion. At the summary judgment hearing, Appellants relied on the affidavit of Roy Henry Messer to support their contention that they had proved each of the elements necessary to succeed on a breach of contract claim. On appeal, Appellants do not mention that Appellees objected to large portions of the affidavit or that the trial court sustained those objections,

leaving nothing of substance in evidence. Appellants did not offer any other summary judgment evidence to satisfy their burden.

As an appellate court, it is not our duty to perform an independent review of the summary judgment record for evidence supporting Appellants' position. *Zayed*, 2010 Tex. App. LEXIS 7872, at *6-7 (citing *Priddy v. Rawson*, 282 S.W.3d 588, 595 (Tex. App.—Houston [14th Dist.] 2009, pet. denied)). Likewise, it is not our duty to locate applicable law to determine whether there was error. *Zayed*, 2010 Tex. App. LEXIS 7872, at *6 (citing *Martinez v. El Paso County*, 218 S.W.3d 841, 844 (Tex. App.—El Paso 2007, pet. dism'd)). Appellants must cite to authority and the record as well as conduct a substantive analysis of the legal issues. *Zayed*, 2010 Tex. App. LEXIS 7872, at *6 (citing *Dunn v. Bank-Tec South*, 134 S.W.3d 315, 327 (Tex. App.—Amarillo 2003, no pet.)). If we were to undertake this task, we would be "abandoning our role as neutral adjudicators and become an advocate for that party." *Zayed*, 2010 Tex. App. LEXIS 7872, at *7 (citing *Plummer v. Reeves*, 93 S.W.3d 930, 931 (Tex. App.—Amarillo 2003, pet. denied)).

We therefore find Appellants' sole appellate issue is inadequately briefed, consisting of "nothing more than conclusion bereft of analysis or explanation"; *Zayed*, 2010 Tex. App. LEXIS 7872, at *7 (citing *Dunn*, 134 S.W.3d at 327); and "preserving nothing for review." *Zayed*, 2010 Tex. App. LEXIS 7872, at *7 (citing *Limestone Group, Inc. v. Sai Thong, L.L.C.*, 107 S.W.3d 793, 798 (Tex. App.—Amarillo 2003, no pet.))[2].

[2] In Appellant's reply brief, he argues for the first time that the trial court erred in striking certain portions of the Messer affidavit. We will not consider an issue raised for the first time in a reply brief. *See Humphries v. Advanced Print Media*, 339 S.W.3d 206, 207-08 (Tex. App.—Dallas 2011, no pet.) (issue raised for the first time in a reply brief will not be considered).

Nevertheless, assuming Appellants had not waived their issue for our review and applying the requisite standard of review to the record before us, we find Appellees satisfied their burden to show there was no evidence of at least one essential element of Appellants' breach of contract cause of action. The burden then shifted to Appellants to present admissible evidence raising a fact issue sufficient to preclude summary judgment. *City of Houston v. Clear Creek Basin Auth*., 589 S.W.2d 671, 678 (Tex. 1979).

The four essential elements of a breach-of-contract cause of action are as follows: (1) existence of a valid contract between the parties; (2) the plaintiff's performance or tender of performance; (3) the defendant's breach; and (4) the plaintiff's damage as a result of that breach. *Esty v. Beal Bank S.S.B.*, 298 S.W.3d 280, 299 (Tex. App.—Dallas 2009, no pet.); *Valero Mktg. & Supply Co. v. Kalama Int'l, L.L.C.*, 51 S.W.3d 345, 351 (Tex. App.—Houston [1st Dist.] 2001, no pet.); *Aquila Sw. Pipeline*, *Inc. v. Harmony Exploration, Inc.*, 48 S.W.3d 225, 235 (Tex. App.—San Antonio 2001, pet. denied).

In their no-evidence motion for summary judgment, Appellees argued that "Plaintiffs have not identified a written contract that exists between MAI and Prime Logistics, and Plaintiffs have not identified the terms that Prime Logistics allegedly materially breached. Moreover, Plaintiffs have not adduced admissible summary judgment evidence supporting its claim for damages for Prime Logistics' alleged breach of contract." In response, Appellants pointed only to Messer's affidavit, arguing it proved each element of the breach of contract action or, alternatively, raised genuine issues of material fact sufficient to preclude summary judgment.

As noted by Appellees, they lodged numerous objections to Messer's affidavit, all of which the trial court sustained. While the trial court did not strike the affidavit in its

entirety, what is left are general assertions that do not support the elements of Appellants' breach of contract claim. The only remaining portions of Messer's affidavit are as follows:

> 1. My name is Roy Henry Messer. I am over the age of 18 and I am otherwise competent to make this affidavit. I have personal knowledge of the facts stated in this affidavit and those facts are true and correct.
>
> 2. I am the owner of Messer Agri Industries, Inc.
>
> 3. James Barret is the president of Forerunner Ag, L.L.C.
>
> 4. Mark Collier is the president of J&B Commodities, L.L.C.
>
> 5. In February 2017, Messer Agri, Forerunner AG, and J&B (the "three entities") formed Prime Logistics. The three entities are in the business of hauling freight and Prime Logistics was formed as a brokerage company for the three entities in order to secure a contract with White Energy, a local producer of ethanol and a large contract for each of the three entities. A true and correct copy of the agreement is attached to this affidavit.

Appellants did not challenge in the trial court and do not challenge on appeal the trial court's rulings sustaining Appellees' objections. Thus, only the above-noted portions of the affidavit constitute summary judgment evidence to be considered. *Celtic Props., L.C. v. Cleveland Reg'l Med. Ctr., L.P.*, No. 09-13-00464-CV, 2015 Tex. App. LEXIS 8051, at *15 (Tex. App.—Beaumont July 31, 2015, no pet.) (mem. op.) (citations omitted). Because none of the remaining provisions of Messer's affidavit speak to, much less prove, any element of Appellants' breach of contract cause of action, we cannot say the trial court erred in granting Appellees' no-evidence motion for summary judgment. Accordingly, we overrule Appellants' sole issue.

CONCLUSION

Having overruled Appellants' only issue on appeal, we affirm the judgment of the trial court.

Patrick A. Pirtle
Justice