Affirmed and Memorandum Opinion filed July 21, 2020.

In The

Fourteenth Court of Appeals

NO. 14-18-00821-CV

THOMAS MOCCIA, Appellant

V.

THE PLAZA GROUP, Appellee

On Appeal from the 164th District Court
Harris County, Texas
Trial Court Cause No. 2018-09368

MEMORANDUM OPINION

Former commissioned agent, appellant Thomas Moccia ("Moccia"), *pro se*, challenges the trial court's summary judgment ruling in favor of appellee The Plaza Group ("TPG") on its breach of contract claim. We affirm.

I. BACKGROUND

A. The Contract

TPG is a Texas corporation involved in the plastics business. On September 1, 2016, TPG and Moccia entered into a Commissioned Agent Agreement (the

"Agreement"). A "Commissioned Agent" is defined by the Agreement as "an independent contractor willing to provide services to TPG . . .".

Under the terms of the Agreement, Moccia's duties included contacting suppliers of carbon black, nylon and silica, and also marketing and selling these commodities to TPG's customers. The Agreement provided that, Moccia, as an independent contractor, was not to be paid a salary but was to be compensated solely by commissions based on sales. The Agreement also provided Moccia would receive draws against future commissions.

During the first six months of the Agreement, TPG paid approximately $92,000.00 in draws to Moccia. Moccia, however, never generated a single sale of product; therefore, he never earned any commissions. Pursuant to the Agreement, any portion of Moccia's draws which were unearned were due to be repaid to TPG within 6 months of the date the Agreement was terminated. TPG terminated the Agreement on June 22, 2017.

On December 26, 2017, TPG made written demand on Moccia for payment of the unearned draws advanced to Moccia pursuant to the Agreement. Notwithstanding TPG's demand for repayment, Moccia failed to pay back the unearned advances.

B. The Litigation

On February 12, 2018, TPG filed suit against Moccia in the court below, alleging a claim for breach of contract and, alternatively, an equitable claim for money had and received. TPG also sought recovery of its attorneys' fees. Moccia did not file a general denial; instead, on March 5, 2018 he filed a *pro se* two-page, unverified response to TPG's petition.

On February 28, 2018, Moccia filed a *pro se* suit against TPG in the 113th Harris County district court, Cause No. 2018-13258, with the following caption:

Rosmoc Chemicals and Plastic LLC (out of business) Thomas Moccia CEO v. Plaza Group.[1] Moccia purported to raise a breach of contract claim. Moccia alleged he was the former owner and Chief Executive Officer of Rosmoc Chemicals and Plastics LLC ("Rosmoc"). Rosmoc, at some point, went out of business. TPG answered Rosmoc's suit and filed a Rule 91a motion to dismiss. The trial court denied the motion to dismiss, but consolidated that suit with TPG's earlier filed suit in the court below.

After the cases were consolidated, TPG filed two motions for summary judgment. First, TPG filed a traditional summary judgment motion on its claims against Moccia for breach of contract and attorney's fees, or, alternatively, for money had and received. Second, TPG filed a no evidence and traditional motion for summary judgment on claims raised by Rosmoc, asserting there was never a contract between TPG and Rosmoc.[2] Moccia and Rosmoc did not respond to these motions or file objections to the evidence supporting them.

On August 24, 2018, the trial court entered an order granting TPG's no-evidence and traditional motion for summary judgment on all claims raised against it by Rosmoc, ordering that Rosmoc take nothing on its claims against TPG. Also, on August 24, 2018, in a separate order, the trial court granted TPG's traditional summary judgment on its claims against Moccia. The trial court awarded TPG recover from Moccia $91,500.00 in actual damages, $12,299.89 in attorney's fees, prejudgment interest on the actual damages in the amount of $3,431.00, and costs,

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[1] Corporations may appear in court and be represented only by a licensed attorney. *Rabb Intern., Inc. v. SHL Thai Food Serv., LLC*, 346 S.W.3d 208, (Tex. App.—Houston [14th Dist.] 2011, no pet.) (citing *Dell Dev. Corp. v. Best Indus. Uniform Supply*, 743 S.W.2d 302, 303 (Tex. App.-Houston [14th Dist.] 1987, writ denied)).

[2] The 113th District Court correctly observed in its consolidation order that Rosmoc "is not a party to the contract under which Thomas Moccia seeks recovery against The Plaza Group, LLC in this case," and consequently that "[t]he Plaintiff s petition does not allege grounds upon which Rosmoc is entitled to recover from Plaza Group."

and awarded $1,400.00 for any response necessitated by post judgment motions filed by Moccia. The trial court rendered the order "a final judgment, disposing of all parties [sic] claims . . . " .

This appeal timely followed.

II. ANALYSIS

A. Issues on Appeal

Moccia's brief fails to "state concisely all issues or points presented for review." Tex. R. App. P. 38.1(f). In addition to deficiencies of form, Moccia's brief fails to contain any clear and concise arguments to support his contentions and does not include appropriate citations to authority and the record, as required by the Texas Rules of Appellate Procedure. *See* Tex. R. App. P. 38.1(i); *Freedonia State Bank v. General American Life Ins. Co*., 881 S.W.2d 279, 284-85 (Tex. 1994) (discussing "long-standing rule" that inadequate briefing results in waiver). We nonetheless construe Moccia's brief liberally to reach his appellate issues on the merits, where possible. *Reule v. M & T Mortg.*, 483 S.W.3d 600, 608 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (citing *Perry v. Cohen*, 272 S.W.3d 585, 587 (Tex. 2008)). Despite our liberal reading of his brief, we note that *pro se* litigants such as Moccia are held to the same standards as licensed attorneys and must comply with all applicable rules of procedure. *Reule*, 483 S.W.3d at 608 (citing *Mansfield State Bank v. Cohn*, 573 S.W.2d 181, 185 (Tex. 1978); *Brown v. Tex. Emp't Comm'n*, 801 S.W.2d 5, 8 (Tex. App.—Houston [14th Dist.] 1990, writ denied)).

Liberally construing Moccia's briefs filed March 15, 2019, and April 30, 2019, we glean challenges to the following: (1) he was denied due process of law because the trial court granted TPG's motions for summary judgment without an oral hearing; (2) TPG's agreement was with Rosmoc and not him individually, and TPG failed to pierce the corporate veil; (3) the judgment against him should be

overturned because Rosmoc made sales of several containers of product to TPG's customers; and (4) he should not have to pay TPG's attorneys' fees because the court ruled in Rosmoc's favor and dismissed the case.

B. Summary Judgment Standards of Review

"When a party moves for both traditional and no-evidence summary judgments, we first consider the no-evidence motion." *First United Pentecostal Church of Beaumont, d/b/a The Anchor of Beaumont v. Parker*, 514 S.W.3d 214, 219 (Tex. 2017) (citing *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004)). "To defeat a no-evidence motion, the non-movant must produce evidence raising a genuine issue of material fact as to the challenged elements." *Parker*, 514 S.W.3d at 220 (citing *Ridgway*, 135 S.W.3d at 600). "If the non-movant fails to meet its burden under the no-evidence motion, there is no need to address the challenge to the traditional motion, as it necessarily fails." *Id*. (citing *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013)). "Thus, we first review each claim under the no-evidence standard." *Id*. Any claims that survive the no-evidence review will then be reviewed under the traditional standard. *Id.* at 219–20.

A party moving for traditional summary judgment meets its burden by proving that there is no genuine issue of material fact and it is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c). "A genuine issue of material fact exists if the evidence rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Parker*, 514 S.W.3d at 220 (internal quotations omitted). The evidence does not create an issue of material fact if it is "so weak as to do no more than create a mere surmise or suspicion" that the fact exists. *Kia Motors Corp. v. Ruiz*, 432 S.W.3d 865, 875 (Tex. 2014) (quoting *Ridgway*, 135 S.W.3d at 601).

1. Hearing not required

To the extent Moccia complains he was denied due process of law because

the trial court granted TPG's motions for summary judgment without an oral hearing, his appellate briefing fails to meet the standards set forth in the Texas Rules of Appellate Procedure; he has not offered any analysis or any citations to legal authorities to support this challenge. *See* Tex. R. App. P. 38.1(i). Even construing Moccia's appellate brief liberally, we cannot conclude that he adequately briefed any argument in support of the assertion that the trial court denied him due process of law because it granted TPG's motions for summary judgment without an oral hearing. *See San Saba Energy, L.P. v. Crawford*, 171 S.W.3d 323, 337 (Tex. App.—Houston [14th Dist.] 2005, no pet.); *Fox v. Alberto*, 455 S.W.3d 659, 663, n.1 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). Therefore, we find briefing waiver. *See San Saba Energy, L.P.*, 171 S.W.3d at 337; *Fox*, 455 S.W.3d at 663, n.1.

Even assuming Moccia had not waived this issue, due process does not require an oral hearing on a motion for summary judgment. *Martin v. Martin, Martin & Richards, Inc.*, 989 S.W.2d 357, 359 (Tex. 1998) (per curiam). Moccia does not assert, and based on the record before us we cannot conclude that Moccia was deprived of a reasonable opportunity to respond to TPG's motions for summary judgment. *See Enriquez v. Livingston*, 400 S.W.3d 610, 617 (Tex. App.—Austin 2013, pet. denied) ("Generally, due process does not require an oral hearing on a motion but only an opportunity to respond at a meaningful time and in a meaningful manner.").

We overrule his complaint as to summary judgment being granted without an oral hearing.

2. Breach of Contract

TPG's breach of contract claim requires proof of four elements: (1) the existence of a valid contract, (2) performance or tendered performance by TPG, (3) breach of the contract by Moccia, and (4) damages sustained by TPG because of the

breach. *See Mays v. Pierce*, 203 S.W.3d 564, 575 (Tex. App.—Houston [14th Dist.] 2006, pet. denied).

Moccia appears to assert TPG failed to establish several elements of its breach of contract claim and therefore argues that the trial court erred in granting TPG's motion for summary judgment on its breach of contract claim.

a. Valid Agreement

Moccia asserts that it was the company, Rosmoc, not him, that was a party to the Agreement, and that TPG failed to pierce the corporate veil.

The Agreement, which Moccia signed as an individual, does not even mention or name Rosmoc or contain a space for Rosmoc to assent to the Agreement. In its preamble, the Agreement clearly identifies the only two parties as TPG and Moccia: "This Agreement is made of as of September 1st, 2016, by and between Thomas Moccia ("Commissioned Agent") and The Plaza Group, Inc., (TPG)." The Agreement was signed by Randy E. Velarde in his capacity as President of TPG, and Moccia as the commissioned agent. The Agreement also prohibits Moccia from assigning it to anyone else and prohibits any changes to the Agreement, including a change in parties, without the written, signed agreement of both parties. TPG's performance under the Agreement consisted of payments to Moccia, not Rosmoc. The record is devoid of any agreement except that between TPG and Moccia. The trial court did not err in finding Moccia, individually, was a party to the Agreement and, therefore, personally responsible for its breach.

Moccia's issue asserting that TPG's agreement was with Rosmoc and not him individually, is overruled.

b. Moccia's Breach

Moccia appears to argue, in the alternative, that even if he individually contracted with TPG, he made sales to TPG customers, implicitly contending that

he was not in breach and earned the draws on commissions such that TPG did not suffer damages. The evidence in this case, however, refutes Moccia's unsupported contentions. TPG demonstrated in its summary judgment motion that Moccia failed to secure any customer purchases on which net profits were earned. There were no completed customer transactions evidencing product sold by or purchased through Moccia, and therefore, no net profits. Because Moccia failed to earn any net profits for TPG, he was not entitled to any commissions under the Agreement. TPG made written demand for repayment of the draw payments it had paid to Moccia, but he never repaid any portion of the draw payments as he was required to do under the Agreement. Moccia's failure and refusal to repay the unearned draw payments that TPG advanced to him amounts to a breach of the Agreement for which undisputed evidence shows TPG suffered damages.

On appeal, Moccia attempts to support his assertion that he made sales of several containers of product to TPG's customers through an email attached to his April 30, 2019 brief to this court. No portion of this attachment, however, is contained in the clerk's record filed in this court. With exceptions not applicable in this case, the rule is that documents attached to an appellate brief which are not part of the record may not be considered by the appellate court. *See WorldPeace v. Comm'n for Lawyer Discipline*, 183 S.W.3d 451, 465 n.23 (Tex. App.—Houston [14th Dist.] 2005, pet. denied) ("we cannot consider documents attached as appendices to briefs and must consider a case based solely upon the record filed"); *cf. Dallas Mkt. Ctr. v. The Swing, Inc.*, 775 S.W.2d 838, 842 (Tex. App.—Dallas 1989, no writ) ("At the very most, the exhibits that were tendered to this Court, absent a showing that they were properly offered into evidence and that the trial court admitted them into evidence during trial, are loose exhibits, forming no part of the record proper."). The appellate record consists of the clerk's record and, if necessary to the appeal, the reporter's record. Tex. R. App. P. 34.1. The email was

not part of the record on appeal. *Nguyen v. Intertex, Inc.*, 93 S.W.3d 288, 293 (Tex. App.—Houston [14th Dist.] 2002, no pet.). Accordingly, we will not consider any documents attached to Moccia's brief which are not part of the appellate record.

Moccia's issue (asserting that the judgment against him should be overturned because Rosmoc made sales of several containers of product to TPG's customers such that he was not in breach and TPG did not suffer damages) is overruled.

C. Attorneys' Fees

Moccia asserts he should not have to pay TPG's attorneys' fees because the court ruled in Rosmoc's favor and dismissed the case. At best, Moccia's argument is misplaced. The trial court in Cause No. 2018-13258, the 113th district court, denied TPG's motion to dismiss under Rule 91a and consolidated the claims into the earlier filed case, Cause No. 2018-09368, pending in the 164th district court, noting the claims Moccia asserted would be compulsory counterclaims in the preceding case, because the claims arise out of the same transaction. The Order also stated:

> It appears to the Court that Rosmoc Chemicals and Plastics, LLC is not a party to the contract under which Thomas Moccia seeks recovery against The Plaza Group, LLC in this case. It does appear that Thomas Moccia is a party to the subject contract. The Plaintiff s Original Petition appears to have been brought by Thomas Moccia, and it is unclear whether a claim is asserted in (sic) behalf of Rosmoc Chemicals and Plastics, LLC. The Plaintiff's petition does not allege grounds upon which Rosmoc is entitled to recover from Plaza Group, and yet it does describe the Plaintiff in various ways, all of which begin with the name of Thomas Moccia. Plaintiffs petition does allege grounds upon which Moccia could be entitled to recover, upon proper proof, from Plaza.

The court's order also required Moccia to replead the claims brought on behalf of "Rosmoc Chemicals and Plastics LLC (out of business) Thomas Moccia CEO" to state the basis upon which it alleges Rosmoc is entitled to recover from TPG within 30 days (*i.e.*, June 6, 2018). Moccia did not comply with the order to replead.

As set forth above, the trial court granted TPG's summary judgment motion

on all claims raised against it by defendant and counter-plaintiff Rosmoc. Contrary to Moccia's claim, the trial court did not rule in Rosmoc's favor. Additionally, the evidence of record demonstrates that the trial court granted TPG's traditional summary judgment on its breach of contract claim against Moccia and awarded TPG its actual damages, reasonable attorney's fees, costs in the event of post judgment motions, and court costs, from Moccia.

We overrule Moccia's issue asserting that the trial court erred in ordering him, individually, to pay TPG's attorneys' fees because the trial court allegedly ruled in Rosmoc's favor and dismissed the case.

III. CONCLUSION

We affirm the judgment of the trial court.

/s/ Margaret "Meg" Poissant
Justice

Panel consists of Justices Wise, Jewell, and Poissant.