Reversed and Rendered in Part, Reversed and Remanded in Part, and Memorandum Opinion filed July 23, 2020.

In The

Fourteenth Court of Appeals

NO. 14-18-00678-CV

THE STATE OF TEXAS; THE CITIES OF DALHART, TEXLINE, DALLAS, DUBLIN, PLAINVIEW, TERRELL, LITTLEFIELD, LUBBOCK, DUMAS, AMARILLO, AND CANYON, TEXAS; THE DALLAS TRANSPORTATION AUTHORITY MFA, TEXAS; AND THE COUNTIES OF ERATH, HALE AND LUBBOCK, TEXAS, Appellants

V.

JERRY WILLIS HUNTER, Appellee

On Appeal from the 53rd District Court
Travis County, Texas
Trial Court Cause No. D-1-GN-16-001240

MEMORANDUM OPINION

In this tax delinquency case, the State of Texas, various Texas cities and counties, and the Dallas Transportation Authority MFA, Texas (collectively, the State) challenge the trial court's denial of their motion for summary judgment and

granting of summary judgment in favor of Jerry Willis Hunter on a guaranty agreement.[1] We reverse the trial court's judgment, render judgment in favor of the State, and remand for a determination of attorney's fees.

Background

Hunter is the president of Hunter Agri Construction, Inc., an agricultural construction business. The Texas Comptroller of Public Accounts audited Hunter Agri Construction and determined that it had underreported sales taxes. The Comptroller assessed liability for unpaid taxes, along with penalties and interest.

Hunter Agri Construction and the Comptroller entered into an "Agreement on Insolvency Relief" to settle the debt. The Insolvency Agreement included a term designating Hunter as the co-guarantor: "Mr. Jerry W. Hunter, President, agrees to be a co-guarantor under this agreement." Hunter signed the Insolvency Agreement with the designation "President" underneath his signature.

Hunter Agri Construction and Hunter were also designated, respectively, as "Taxpayer" and "Co-Guarantor" on a "Payment Agreement" with the Comptroller. Hunter's social security number was included on the form. The following payment terms, among others, were included in the Payment Agreement:

- "The above named taxpayer and/or CO-guarantor agree that the following delinquent Sales taxes, penalties and interest are owed and will be paid according to the following terms . . . ."
- "Upon default of any of the terms of this agreement, the Comptroller may collect the amounts due from either the taxpayer or CO-guarantor by any method allowed . . . ."
- "Jerry W. Hunter, Owner, agrees to be a co-guarantor under this

[1] This case was transferred to our court from the Austin Court of Appeals; therefore, we decide the case in accordance with its precedent if our decision would be otherwise inconsistent. *See* Tex. R. App. P. 41.3.

agreement."

The Payment Agreement required a down payment, monthly installment payments, and a final balloon payment. Hunter signed the Payment Agreement with the designation "Taxpayer Title: Pres." underneath his signature. The Payment Agreement included a signature line for "Co-Guarantor" that was left blank.

After two required payments were not made, the Comptroller sent Hunter a letter cancelling the agreements and demanding the full amount of the debt. Hunter responded by letter that he was "well aware of [the] monthly installment agreement" and had "tried to keep up with these payments the best we could." He requested to reduce the payments. Instead, the Comptroller issued a "Texas Certificate to Attorney General of Sales and Use Tax Delinquency" pertaining to Hunter.

The State sued Hunter for breach of contract, alleging he was individually liable for Hunter Agri Construction's tax liability under the Payment Agreement as "a co-guarantor of payment." Hunter asserted affirmative defenses of lack of legal capacity, statute of frauds, lack of consideration, and prior material breach.

The State filed a hybrid motion for summary judgment and alleged that it was entitled to traditional summary judgment on its breach of contract claim and no evidence summary judgment on Hunter's affirmative defenses. Hunter filed a no evidence and traditional summary judgment on the State's breach of contract claim and Hunter's statute of frauds affirmative defense. The trial court denied the State's motion, granted Hunter's motion, and rendered a take-nothing judgment against the State.

Discussion

In two issues, the State challenges the trial court's summary judgment

rulings. We review a summary judgment de novo. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). We review the evidence presented in the motion and response in the light most favorable to the party against whom the summary judgment was rendered, crediting evidence favorable to that party if reasonable jurors could do so, and disregarding contrary evidence unless reasonable jurors could not. *Id*.

When a party seeks summary judgment on no-evidence and traditional grounds, we generally review the no-evidence grounds first. *See PAS, Inc. v. Engel*, 350 S.W.3d 602, 607 (Tex. App.—Houston [14th Dist.] 2011, no pet.). To prevail on a no-evidence summary judgment, the movant must allege that no evidence exists to support one or more essential elements of a claim for which the non-movant bears the burden of proof at trial. *Id*. (citing Tex. R. Civ. P. 166a(i)). The motion must specifically state the elements for which there is no evidence. *Id*. The non-movant must then present evidence raising a genuine issue of material fact on the challenged elements. *Id*. A fact issue exists when there is more than a scintilla of probative evidence. *Buck v. Palmer*, 381 S.W.3d 525, 527 (Tex. 2012) (per curiam). More than a scintilla of evidence is present when evidence rises to a level that would allow reasonable and fair-minded people to differ in their conclusions as to the existence of a vital fact. *Dworschak v. Transocean Offshore Deepwater Drilling, Inc.*, 352 S.W.3d 191, 196 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (citing *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004)).

The party moving for traditional summary judgment bears the burden of showing no genuine issue of material fact exists and it is entitled to judgment as a matter of law. *Fielding*, 289 S.W.3d at 848 (citing Tex. R. Civ. P. 166a(c)). The evidence raises a genuine issue of fact if reasonable and fair-minded jurors could

differ in their conclusions in light of all of the summary judgment evidence. *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007). Summary judgment for a defendant is proper only when the defendant conclusively negates at least one element of each of the plaintiff's theories of recovery or pleads and conclusively establishes each element of an affirmative defense. *Hilburn v. Storage Tr. Props., LP*, 586 S.W.3d 501, 506 (Tex. App.—Houston [14th Dist.] 2019, no pet.).

When, as in this case, the order granting summary judgment does not specify the grounds upon which the trial court relied, we must affirm if any of the independent summary judgment grounds is meritorious. *State v. $90,235*, 390 S.W.3d 289, 292 (Tex. 2013). When parties file competing motions for summary judgment, and the trial court grants one motion and denies the other, we may consider the propriety of the denial as well as the grant. *City of Galena Park v. Ponder*, 503 S.W.3d 625, 630 (Tex. App.—Houston [14th Dist.] 2016, no pet.). If the issue raised is based on undisputed and unambiguous facts, we may determine the question presented as a matter of law. *Id*. We may then either affirm the judgment or reverse and render the judgment the trial court should have rendered. *Id*.

I. Breach of Contract Conclusively Shown

To conclusively prove breach of contract under these facts, the State was required to establish the following elements: (1) a valid contract existed between the State and Hunter; (2) the State had performed or tendered performance; (3) Hunter breached the contract; and (4) the State was damaged as a result of the breach. *See C.W. 100 Louis Henna, Ltd. v. El Chico Restaurants of Tex., L.P.*, 295 S.W.3d 748, 752 (Tex. App.—Austin 2009, no pet.).

Hunter as Guarantor. As to the first element, the State contends that

Hunter is a party to the Insolvency Agreement and the Payment Agreement because he agreed to guarantee Hunter Agri Construction's debt by signing agreements "that expressly designated him as a guarantor." Hunter contends that "[n]o personal pronouns or other phrases are used in the Payment Agreement indicating that . . . Hunter agreed or intended to personally pay or personally guaranty [Hunter Agri Construction's] obligations set out in the agreement."

Generally, a person who signs a contract as a representative for a disclosed principal does not become a party to the contract. *A to Z Rental Ctr. v. Burris*, 714 S.W.2d 433, 435 (Tex. App.—Austin 1986, writ ref'd n.r.e.). In that connection, a signature followed by a corporate office will not result in personal liability unless the individual is clearly designated within the instrument as personal surety for the principal. *Material P'ships, Inc. v. Ventura*, 102 S.W.3d 252, 259 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). In construing such an instrument, we examine and consider the entire writing to harmonize and give effect to all the provisions of the contract so that none of the provisions will be rendered meaningless. *See O'Banion v. Inland W. Clear Lake Gulf Shores GP*, No. 01-15-00704-CV, 2017 WL 5494695, at *7 (Tex. App.—Houston [1st Dist.] Nov. 16, 2017, no pet.) (mem. op.) (construing guaranty).

A guaranty agreement is a contract in which one party agrees to be responsible for the performance of another party even if he does not have direct control. *Material P'ships*, 102 S.W.3d at 258 (citing *Gooch v. Am. Sling Co.*, 902 S.W.2d 181, 185 (Tex. App.—Fort Worth 1995, no writ)); *see also O'Banion*, 2017 WL 5494695, at *7 ("A guaranty creates a *secondary* obligation whereby the guarantor promises to answer for the debt of *another*."). A specific set of words is not required to show an intent to be liable on an obligation. *See Park Creek Assocs., Ltd. v. Walker*, 754 S.W.2d 426, 428 (Tex. App.—Dallas 1988, writ

denied). To be enforceable, a guaranty agreement must include (1) the parties involved, (2) a manifestation of intent to guaranty the obligation, and (3) a description of the obligation being guaranteed. *Material P'ships*, 102 S.W.3d at 261.

All these elements are present in the Payment Agreement—(1) the parties: Hunter Agri Construction as "Taxpayer," Hunter as "Co-Guarantor," and the Comptroller; (2) an intent to guaranty the obligation: "Jerry W. Hunter, Owner, agrees to be a co-guarantor under this agreement"; and (3) a description of the obligation being guaranteed: "The above named taxpayer and/or CO-guarantor agree that the following delinquent Sales taxes, penalties and interest are owed and will be paid according to the following terms," and "Upon default of any of the terms of this agreement, the Comptroller may collect the amounts due from either the taxpayer or CO-guarantor by any method allowed . . . ."[2] Hunter is defined as the "co-guarantor." The word "guarantor" has a specific, legal meaning—"an undertaking by one person to answer for the payment of a debt or performance of a contract or duty by another." *Park Creek Assocs.*, 754 S.W.2d at 428 (citing *Coleman Furniture Corp. v. Lieurance*, 405 S.W.2d 646, 647 (Tex. Civ. App.—Amarillo 1966, writ ref'd n.r.e.)). Personal pronouns are not required if the document includes language defining the guarantor and setting forth the guarantor's obligations. *See Smith v. Patrick W.Y. Tam Tr.*, 235 S.W.3d 819, 825 (Tex. App.—Dallas 2007), *rev'd in part on other grounds*, 296 S.W.3d 545 (Tex. 2009).

Hunter cites this court's opinion, *Mission Grove, L.P. v. Hall*, 503 S.W.3d 546, 555 (Tex. App.—Houston [14th Dist.] 2016, no pet.), to support his argument

---

[2] Hunter argues that he is not a party in his individual capacity to the Insolvency Agreement, which we need not decide because we conclude he is a party individually to the Payment Agreement.

that the guaranty in this case does not include "specific, in-person guarantor language" required to be enforceable. Although we noted in that case that "[t]he contract at issue has no . . . first-person language," our holding was based on the fact that the "signature line and agreement [did] not evidence an intent [for the signatory's] signature [to be] made in an individual capacity." *Id.*

The contract at issue here explicitly states that Hunter is the co-guarantor, contains his identification number, and states that upon default, the Comptroller could collect the amounts due from either the taxpayer, Hunter Agri Construction, or the co-guarantor, Hunter. This language shows an intent for Hunter's signature to be in his individual capacity. Moreover, to conclude Hunter signed the Payment Agreement only in his personal capacity would render the guaranty language meaningless. *See Smith.*, 235 S.W.3d at 825; *see also Material P'ships*, 102 S.W.3d at 263 (Frost, J., concurring) ("It simply makes no sense for [a party] to be *both* the account debtor *and* the 'corporate guarantor' because a guarantor is one who stands for the debt of *another*.").

Hunter also contends that he signed the Payment Agreement only as "President" of Hunter Agri Construction because he did not sign the "Co-Guarantor" signature line. This argument is unpersuasive. The fact that Hunter wrote "Pres." under his signature line does not establish that he signed only in his corporate capacity because the language of the Payment Agreement is clear and unambiguous—it identifies Hunter as the Co-Guarantor and reflects that he would be personally liable for the debt "upon default." Accordingly, Hunter's signature creates not only corporate liability but also individual liability for the debt of the corporation. *See 84 Lumber Co. v. Powers*, 393 S.W.3d 299, 305 (Tex. App.—Houston [1st Dist.] 2012, pet. denied). The fact that Hunter did not sign his name twice is of no moment under these circumstances. A second signature would be

superfluous. Construing the Payment Agreement as a whole, we conclude the State conclusively established that Hunter is a guarantor—and thus a party—to the Payment Agreement. We turn to evidence of breach of contract.

Breach and Damages. The State contends that it conclusively established the delinquency and amount of sales taxes owed by presenting the Comptroller's certificate of delinquency in support of the State's summary judgment motion stating the amount of delinquent sales taxes. A taxpayer attempting to deny liability for taxes bears a heavy burden once the comptroller produces a certificate stating the amount of delinquent sales taxes. *Kawaja v. State*, No. 03-05-00491-CV, 2006 WL 1559343, at *2 (Tex. App.—Austin June 8, 2006, no pet.) (mem. op.) (citing *Sundown Farms, Inc. v. State*, 89 S.W.3d 291, 293 (Tex. App.—Austin 2002, no pet.)). The comptroller's delinquency certificate is prima facie evidence of both the delinquency and the amount of tax owed. *Id*. (citing Tex. Tax Code §§ 111.013(a), 151.603). The comptroller's delinquency certificate creates a presumption of correctness in the taxing authority's claim, which the taxpayer must overcome to defeat summary judgment. *Id*. (citing *Hylton v. State*, 665 S.W.2d 571, 572 (Tex. App.—Austin 1984, no writ)). If unrebutted, the certificate establishes the amount owed by the taxpayer as a matter of law. *Id*. (citing *Baker v. Bullock*, 529 S.W.2d 279, 281 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.)).

To overcome the presumption of correctness accorded the comptroller's delinquency certificates, "the taxpayer must conclusively establish that he owes no tax." *Id*. (citing *State v. Glass*, 723 S.W.2d 325, 327 (Tex. App.—Austin 1987, writ ref'd n.r.e.)). The taxpayer must present "evidence tending to support the contrary as would be conclusive, or evidence which would be so clear and positive it would be unreasonable not to give effect to it as conclusive." *Id*. (citing *Hylton*, 665 S.W.2d at 572). A taxpayer's vague, self-serving, or conclusory allegations

will not suffice to overcome the presumption of correctness in the comptroller's certificates of delinquency. *Id*. (citing *Baker*, 529 S.W.2d at 281).

Hunter argues that the Comptroller's certificate of delinquency is not prima facie evidence of damages in this breach of contract suit to recover on a guaranty because Hunter, as the guarantor, is not the taxpayer. A guarantor's liability is measured by that of his principal. *Park Creek Assocs.*, 754 S.W.2d at 429 ("Unless a guarantor expressly assumes a greater or lesser liability, . . . his liability is measured by that of his principal."). The presumption of correctness in the certificate applies to suits such as this one "involving the . . . collection of a tax." *See* Tex. Tax Code § 111.013(a).

The cases cited by Hunter involve the imposition of corporate tax liability on corporate officers under Tax Code section 111.016, which requires the State to prove the amount of taxes *collected* by the person, not just the amount of the *delinquency*. *Id*. § 111.016(a) ("Any person who receives or collects a tax or any money represented to be a tax from another person holds the amount so collected in trust for the benefit of the state and is liable to the state for the full amount collected . . . ."); *see Parker v. State*, 36 S.W.3d 616, 618 (Tex. App.—Austin 2000) ("[A]ssuming [a corporate officer] is individually liable under section 111.016, the State still has the burden of proving the actual amount of taxes . . . collected. The comptroller's certificate . . . does not establish how much . . . tax money [the officer] (or even [corporation]) actually collected."), *judgment withdrawn, appeal dismissed*, 40 S.W.3d 555 (Tex. App.—Austin 2001, no pet.); *N.S. Sportswear, Inc. v. State*, 819 S.W.2d 230, 233 (Tex. App.—Austin 1991, no writ) ("If [a corporate officer] can be held individually liable under this section of the tax code, which we do not decide, the State must prove the actual amount he received or collected, and his liability is limited to the 'amount collected.'"). The

amount of taxes collected by Hunter or Hunter Agri Construction is not at issue here. This case involves taxpayer liability imposed on a guarantor measured by the principal's delinquency.

The Comptroller's certificate of delinquency shows a total liability of $84,642.20 at the time the State filed its motion for summary judgment. Hunter had the burden to present conclusive evidence to overcome the presumption of correctness in the certificate of delinquency. Hunter's evidence consisted of an affidavit in which Hunter attested that Hunter Agri Construction made payments to the Comptroller totaling $29,000 under the Payment Agreement, along with check stubs and Comptroller statements reflecting payments totaling $27,000. This evidence of payments does not establish that Hunter did not owe the amount reflected in the certificate of delinquency—it merely shows that certain payments were made.[3] The certificate of delinquency shows the amount of the taxes due "*after* all just and lawful offsets, payments, and credits have been allowed." Tex. Tax Code § 111.013(a) (emphasis added).

Hunter also points to his verified denial disputing the amount owed. A verified denial is not evidence rebutting the presumption of correctness in a Comptroller's certificate of delinquency. *See Ayeni v. State*, 440 S.W.3d 707, 710 (Tex. App.—Austin 2013, no pet.) ("[N]othing in section 111.013 says that subsection (b)'s verified denial has any impact on the operation and effect of

---

[3] In the Payment Agreement, the parties agreed that (1) Hunter Agri Construction had a "Sales and Use Tax" balance of $107,053.13, including tax, penalties, and interest; (2) "[t]he full amount of the audit liability including penalty and interest [would] be upheld"; (3) the Comptroller's Audit Division agreed to a settlement of $85,000; and (4) if any of the payments under the Payment Agreement were not made timely, "the full assessment, less any payments, and any adjustments agreed to above [would] immediately become due and payable along with any applicable statutory penalties and interest that may have accrued." The balance of the audit liability would be dismissed only after timely payment and full compliance with the Payment Agreement.

subsection (a)'s Comptroller's certificate.").

Hunter did not offer proof that would overcome the presumption of correctness in the certificate of delinquency. *See Kawaja*, 2006 WL 1559343, at *2. We conclude the State conclusively established the delinquency and the amount of tax owed.

II. No Evidence Supporting Affirmative Defenses

The State moved for no evidence summary judgment on Hunter's affirmative defenses of legal capacity to be sued, statute of frauds, lack of consideration, and prior material breach. Hunter moved for traditional summary judgment on his affirmative defenses of capacity and statute of frauds.

Capacity. Hunter argued below that he lacks the capacity to be sued in his individual capacity because he is not a guarantor of the subject agreements. The State moved for no evidence summary judgment on the basis that Hunter could not show he lacked the capacity to be sued individually. *See Thies v. Montilino*, No. 14-95-00953-CV, 1996 WL 606990, at *2 (Tex. App.—Houston [14th Dist.] Oct. 24, 1996, writ denied) (mem. op., not designated for publication) (noting lack of capacity to be sued individually is an affirmative defense) (citing Tex. R. Civ. P. 93.1). Hunter responded and moved for summary judgment, contending the Payment Agreement "is not a valid and enforceable guaranty" against him and thus, according to him, he is not individually liable. For the reasons discussed, we disagree. As a guarantor of the Payment Agreement, Hunter failed to show that he could not be sued individually for its breach.

Statute of Frauds. The State moved for no evidence summary judgment on Hunter's statute of frauds affirmative defense, contending that Hunter, as the person to be charged with the terms of the Payment Agreement, could not show

that the statute of frauds bars the State's breach of contract claim. *See* Tex. Bus. & Com. Code § 26.01 (statute of frauds, stating certain promises or agreements are not enforceable unless they are in writing and "signed by the person to be charged with the promise or agreement"); *see also Dynegy, Inc. v. Yates*, 422 S.W.3d 638, 642 (Tex. 2013) ("Here, Dynegy pled the statute of frauds as an affirmative defense and thus had the initial burden to establish that the alleged promise fell within the statute of frauds."). Hunter responded and moved for summary judgment on the basis that he signed the Payment Agreement only as president of Hunter Agri Construction, not individually, and he was not the person to be charged with the promise or agreement. Because Hunter signed the Payment Agreement as a guarantor, as discussed, he did not negate this element of the statute of frauds.

Lack of Consideration. The State moved for no evidence summary judgment on the basis that Hunter could not show the Payment Agreement fails for lack of consideration. *See Petroleum Workers Union of the Republic of Mexico v. Gomez*, 503 S.W.3d 9, 31 (Tex. App.—Houston [14th Dist.] 2016, no pet.) ("[A] contract must be supported by consideration to be enforceable. Consideration consists of a benefit to the promisor or a detriment to the promisee."). Hunter did not present evidence in response to the State's argument. Therefore, he did not meet his burden to present evidence raising a genuine issue of material fact on this affirmative defense. *See id.* ("Lack of consideration for a contract is an affirmative defense to its enforcement; therefore, the burden of proof is on the party alleging the lack of consideration.").

Prior Material Breach. The State also moved for no evidence summary judgment based on lack of evidence supporting three elements of prior material breach: (1) the Comptroller breached the Payment Agreement, (2) the alleged

breach was material, and (3) the Comptroller's alleged breach was prior to Hunter's alleged breach. *See Compass Bank v. MFP Fin. Servs., Inc.*, 152 S.W.3d 844, 852 (Tex. App.—Dallas 2005, pet. denied) (listing elements).; *see also State Farm Lloyds v. Fuentes*, 597 S.W.3d 925, 933 (Tex. App.—Houston [14th Dist.] 2020, no pet.) ("The contention that a party to a contract is excused from further performance because of a prior material breach by the other contracting party is an affirmative defense which must be pleaded and proved.") (citing Tex. R. Civ. P. 94). Hunter pointed to monthly statements from the Comptroller that purportedly sought "more than the amount due" as evidence of a prior material breach by the Comptroller. Under the Payment Agreement, "[a]dditional statutory penalties and/or interest will accrue on the unpaid tax balance and must be paid," "[n]otices generated as the result of a delinquency shall continue to be mailed during the course of the [P]ayment [A]greement regardless of any special conditions indicated," and only "[a]fter [t]imely payment, and upon full compliance with the foregoing terms, any portion of the adjusted assessment . . . that remains unpaid shall be dismissed." Hunter has not shown how the Comptroller's statements were sent in breach of the Payment Agreement.

Conclusion

We conclude that the trial court erred in granting summary judgment in favor of Hunter and against the State on its breach of contract claim—Hunter failed to negate any element of the State's breach claim or conclusively establish each element of an affirmative defense. The trial court further erred in denying the State's motion for summary judgment on its breach of contract claim and Hunter's affirmative defenses—the State presented evidence showing no genuine issues of material fact on its breach claim and that it was entitled to judgment as a matter of law, and Hunter failed to present evidence raising a genuine issue of material fact

on the challenged elements of its affirmative defenses. We reverse the trial court's judgment, render judgment in favor of the State on its breach of contract claim, and award the State the sales tax, penalties, and interest due. We remand for a determination of attorney's fees. *See Kendziorski v. Saunders*, 191 S.W.3d 395, 411 (Tex. App.—Austin 2006, no pet.) ("Because we have reversed the judgment of the trial court and concluded that Saunders breached the surety agreement . . . , we remand the case to the county court to consider what amount of attorney's fees . . . should be awarded.").

/s/ Frances Bourliot
Justice

Panel consists of Justices Jewell, Bourliot, and Zimmerer.