Opinion filed June 11, 2020

In The

Eleventh Court of Appeals

No. 11-18-00157-CV

WELL 2 WEB, INC. AND CLIFF LIGHTFOOT, INDIVIDUALLY, Appellants

V.

KIRBY-SMITH MACHINERY, INC., Appellee

On Appeal from the County Court at Law
Ector County, Texas
Trial Court Cause No. CC-16-0317-CV

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

Well 2 Web, Inc. (W2W) rented two bulldozers from Kirby-Smith Machinery, Inc. (KSMI). After W2W returned both bulldozers, KSMI demanded that W2W pay $30,128.43 for outstanding rental fees, charges for service and parts, and finance charges. When W2W did not pay, KSMI sued both W2W and its president, Cliff Lightfoot. W2W and Lightfoot responded with a counterclaim for usury.

KSMI moved for summary judgment on its claims based on an open account, breach of contract, and breach of guaranty; on its request for attorneys' fees; and on

W2W and Lightfoot's counterclaim for usury. The trial court granted KSMI's motion for summary judgment and awarded KSMI $30,128.43 and attorneys' fees of $10,685.70.

In a single issue, W2W and Lightfoot contend that the trial court erred when it granted summary judgment because there are genuine issues of material fact about the nature and amount of the account, the existence of either a valid contract or a binding guaranty agreement, KSMI's entitlement to attorneys' fees, and the usurious nature of the finance charge assessed by KSMI. We affirm the trial court's grant of summary judgment on W2W and Lightfoot's usury counterclaim. However, because the summary judgment evidence demonstrated that there was a genuine issue of material fact as to KSMI's claimed damages and as to the existence of a written contract, we reverse the trial court's summary judgment on KSMI's claims based on an open account, breach of contract, and breach of a guaranty and on KSMI's request for attorneys' fees.

Background

KSMI rents, sells, and services heavy equipment for commercial construction projects. In 2013, W2W rented two bulldozers from KSMI. After W2W returned the last bulldozer to KSMI, a dispute arose over whether W2W owed KSMI money for the rentals. KSMI ultimately sued W2W and Lightfoot. KSMI asserted claims against W2W based on an open account and for breach of a written contract and against Lightfoot for breach of a guaranty. In the alternative, KSMI asserted a claim for quantum meruit against both W2W and Lightfoot. W2W and Lightfoot brought a counterclaim for usury, and Lightfoot also raised an affirmative defense of usury.

KSMI filed a motion for summary judgment on its claims based on an open account, breach of contract, and breach of a guaranty; on its request for attorneys' fees; and on W2W and Lightfoot's usury counterclaim. As summary judgment

evidence, KSMI relied on the affidavit of Timothy John Kline, its corporate credit manager, and documents attached to Kline's affidavit.

This evidence showed that W2W completed a Credit Application and Agreement on July 31, 2013, to allow KSMI to obtain consumer credit information about W2W. Lightfoot signed the Agreement as W2W's president. The Agreement stated that KSMI's "Credit Terms" were (1) that all invoices would be "due on or before the tenth day of the month following month of invoice" and (2) that any balance "carried beyond the due date" would be "delinquent" and "at the end of the calendar month due [would] be assessed a service charge at the rate of 1-1/2% per month (18% annual rate)."

The Agreement contained a personal guaranty pursuant to which the guarantor agreed (1) to pay "all debts and sums, present and future, due KSMI under" the Agreement, including "rental charges, interest, late charges, costs and attorneys' fees"; (2) to guarantee W2W's performance of the Agreement; and (3) to indemnify and pay KSMI "for any loss incurred by KSMI as the result of" W2W's failure to perform and "for any and all costs, expenses and reasonable attorneys' fees incurred by KSMI in enforcing or attempting to enforce" the Agreement or the personal guaranty. Lightfoot signed the personal guaranty.

According to Kline, KSMI established an account so that W2W could rent "equipment" and purchase related parts and services from KSMI. Attached to Kline's affidavit were two August 7, 2013 rental agreements for two bulldozers.[1] The monthly rental rate for each bulldozer was $8,500. The rental agreements for the bulldozers provided that "[a]ll amounts charged will be due on date of receipt of

[1]The first rental agreement listed two bulldozers, one with a serial number of 1591 and one with a serial number of 1485. The rental period set out in this agreement was from August 7, 2013, to August 7, 2014. The second rental agreement was for only the bulldozer with a serial number of 1591 and set out a rental period of August 7, 2013, through September 3, 2013. W2W returned one bulldozer to KSMI in September 2013 and retained possession of the other bulldozer until sometime in 2015.

invoice or later date as specified on invoice and a FINANCE CHARGE (18% APR) will be imposed on this account if said account is not paid on date the amount comes due."

Each rental agreement had a signature block for KSMI and a signature block for the customer. Neither agreement is signed in the KSMI signature block, and someone other than Lightfoot signed each rental agreement in the block for the customer's signature. However, it is undisputed that W2W took possession of the bulldozers.

KSMI sent "monthly invoices for amounts due on the Account." W2W and Lightfoot admit that, instead of making regular monthly payments on the invoices, W2W periodically made larger payments to KSMI. When W2W did not make a timely monthly payment, KSMI assessed a monthly finance charge of 1-1/2% on the balance. The monthly invoices sent by KSMI to W2W reflected only the current monthly charges and did not set out either the finance charges that KSMI had assessed or the total balance owed on the account. When W2W made a payment, KSMI applied the payment to the oldest of the outstanding invoices and related finance charges.

KSMI's records reflect that W2W returned the second bulldozer on March 19, 2015. According to Kline, W2W failed to pay rental fees for the bulldozer from December 24, 2014, through March 17, 2015; a pro rata portion of the rental fee for the bulldozer from March 18, 2015, through April 14, 2015; a February 25, 2015 invoice for service work performed on the bulldozer; a March 19, 2015 invoice for fuel; and finance charges that had been assessed by KSMI. Kline stated that, as of April 30, 2016, the outstanding balance on W2W's account was $30,128.43.

W2W and Lightfoot responded that KSMI was not entitled to summary judgment on its claims based on an open account and breach of contract because

there were genuine issues of material fact about (1) the existence of an account or a contract, (2) the amount of KSMI's alleged damages, or (3) the usurious nature of the interest rate. W2W and Lightfoot also argued that KSMI was not entitled to summary judgment on its breach of guaranty claim against Lightfoot because KSMI had failed to establish either the existence of an enforceable guaranty or any liability on the part of W2W. Finally, W2W and Lightfoot asserted that, because KSMI had failed to conclusively establish its claim for breach of contract, it had also failed to conclusively establish its right to attorneys' fees.

As summary judgment evidence, W2W and Lightfoot relied on Lightfoot's affidavit and documents attached to that affidavit. Lightfoot stated that W2W returned the bulldozer to KSMI on February 19, 2015. Between September 2013 and February 2015, W2W paid KSMI approximately $153,000 for rental charges and $13,000 for parts and service for the bulldozer. KSMI never notified Lightfoot or W2W of any default on a monthly payment obligation, and "[a]ll payment invoices from [KSMI were] submitted to and paid by W2W during the September 2013 through February 2015 time frame." According to Lightfoot, even though W2W returned the bulldozer on February 19, 2015, and made all the required monthly payments to KSMI, KSMI had made "unauthorized demands" for payment for (1) the rental period of February 18, 2015, through March 17, 2015; (2) for service to the bulldozer after it was returned to KSMI; (3) for the rental period of March 18, 2015, through April 14, 2015; and (4) for fuel charges. Lightfoot stated that "W2W and Lightfoot did not agree to pay any amount shown on [KSMI's] 'Statement of Account' that contains a date after January 31, 2015."

W2W and Lightfoot also attached the "Terms and Conditions" of the Agreement. A "General Term" of the Agreement was that "this contract shall not be considered in effect" until it was accepted by KSMI and "executed by the proper

officer." The signature block for KSMI on the Agreement's "Terms and Conditions" is blank.

The trial court granted KSMI's motion for summary judgment and awarded KSMI actual damages of $30,128.43; prejudgment and postjudgment interest at an annual rate of 18%; attorneys' fees of $10,865.70; and conditional attorneys' fees on appeal.

Analysis

In a single issue, W2W and Lightfoot assert that the trial court improperly granted summary judgment in favor of KSMI because there are genuine issues of material fact as to the nature and amount of the account, the existence of a valid contract, the existence of a binding guaranty agreement, KSMI's entitlement to attorneys' fees, and the usurious nature of the finance charge. 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 our review of a trial court's grant of summary judgment, "we take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor." *Hillis*, 2020 WL 1233348, at *2 (quoting *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005)). The evidence raises a genuine issue of material fact if "reasonable and fair-minded jurors could differ in their conclusions in light of all of the evidence presented." *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007) (per curiam).

To be entitled to summary judgment on any of its claims, KSMI was required to conclusively prove the amount of its damages. *See Pathfinder Oil & Gas, Inc. v. Great W. Drilling, Ltd.*, 574 S.W.3d 882, 890 (Tex. 2019) (elements of a claim for

breach of contract include that the plaintiff sustained damages due to the breach); *Smith v. Cmty. Nat'l Bank*, 344 S.W.3d 561, 564 (Tex. App.—Eastland 2011, pet. denied) (elements of a claim for breach of a guaranty include that a plaintiff must establish the occurrence of the conditions upon which liability is based); *Sanders v. Total Heat & Air, Inc.*, 248 S.W.3d 907, 914 (Tex. App.—Dallas 2008, no pet.) ("A suit on a sworn account is not an independent cause of action; it is a procedural rule for proof of certain types of contractual (account) claims.").

KSMI presented summary judgment evidence that W2W retained possession of the bulldozer through March 19, 2015, and that W2W failed to pay all incurred rental fees, charges for service and parts, and finance charges. W2W and Lightfoot responded with summary judgment evidence in the form of an affidavit executed by Lightfoot stating that W2W returned the bulldozer on February 19, 2015, and that it had paid all invoices sent by KSMI during the rental period. W2W and Lightfoot also denied that KSMI ever notified W2W that it was in default of any monthly payment.

On appeal, W2W and Lightfoot have said in their brief that their summary judgment proof as to the date of return of the bulldozer is incorrect and have admitted to a date of return that coincides with that claimed by KSMI in its summary judgment proof. However, we may consider only the evidence that was before the trial court at the time that the summary judgment was granted. *Blankinship v. Brown*, 399 S.W.3d 303, 309 (Tex. App.—Dallas 2013, pet. denied); *see also Ray v. Dennis*, No. 06-19-00072-CV, 2020 WL 1679314, at *3 (Tex. App.—Texarkana Apr. 7, 2020, no pet. h.) (refusing to consider documents attached to appellants' brief in analysis because "on appellate review, this Court may only consider the evidence that was properly filed with the trial court before the [motion for summary judgment's]

submission for decision"); *Neely v. Comm'n for Lawyer Discipline*, 302 S.W.3d 331, 347 n.16 (Tex. App.—Houston [14th Dist.] 2009, pet. denied).

Moreover, although it is undisputed that KSMI provided the bulldozers to W2W and that W2W paid a rental fee for the bulldozers, KSMI did not move for summary judgment on its quantum meruit claim and asserted a breach of contract claim based solely on the Agreement. There was summary judgment evidence that both the Agreement, and the rental agreements purportedly executed pursuant to the Agreement, contained a "General Term" that "the contract shall not be considered in effect" until it was accepted by KSMI and executed "by its proper officer." The signature blocks for KSMI on the Agreement and the rental agreements are blank. Therefore, KSMI failed to conclusively establish the existence and terms of a written contract, a necessary element of its claims based on an open account, breach of the written contract, and breach of guaranty. *See Pathfinder Oil & Gas, Inc.*, 574 S.W.3d at 890; *Smith*, 344 S.W.3d at 564; *Sanders*, 248 S.W.3d at 914.

Based on the summary judgment evidence before the trial court, there was a genuine issue of material fact about (1) when W2W returned the bulldozer, (2) whether W2W was responsible for all the charges claimed by KSMI, and (3) whether a written contract existed. Therefore, the trial court erred when it granted summary judgment in favor of KSMI on its claims based on an open account and breach of contract against W2W. Further, because KSMI failed to conclusively establish that it was entitled to recover from W2W, it also failed to conclusively establish that it was entitled to prevail on either its claim against Lightfoot for breach of the personal guaranty or its request for attorneys' fees. *See Ventling v. Johnson*, 466 S.W.3d 143, 154 (Tex. 2015) ("To recover attorneys' fees under section 38.001, a party must prevail on the underlying claim and recover damages."); *Smith*, 344

S.W.3d at 564 (to prevail on a claim for a breach of a guaranty, the plaintiff must prove the occurrence of the conditions upon which liability are based).

We sustain W2W and Lightfoot's issue to the extent that they challenge the trial court's grant of summary judgment on KSMI's claims based on an open account, breach of contract, and breach of the guaranty and on KSMI's request for attorneys' fees.

KSMI also sought summary judgment on W2W and Lightfoot's usury counterclaim on the ground that Texas law allows parties to contract for an annual interest rate of up to 18% and, in the Agreement and the personal guaranty, W2W and Lightfoot agreed to pay a finance charge of 18% on any delinquent balance. In his affidavit, Kline stated that KSMI had assessed an annual interest rate of 18% on past due amounts. W2W and Lightfoot responded that the Agreement and the rental agreements each provided for an annual finance charge of 18% but assessed that charge on different dates. W2W and Lightfoot argued that, combined, these two charges amounted to a usurious rate of 36%.

On appeal, W2W and Lightfoot argue that the trial court erred when it granted summary judgment on the usury counterclaim because there was a genuine issue of material fact as to whether the method that KSMI used to calculate the finance charge caused the charge to exceed the annual 18% per annum cap imposed by Section 303.001 of the Finance Code. *See* TEX. FIN. CODE ANN. §§ 303.001, .009(a) (West 2016). However, W2W and Lightfoot produced no summary judgment evidence that controverted Kline's statement that KSMI had assessed an annual finance charge of 18%. Therefore, W2W and Lightfoot failed to raise a genuine issue of material fact that the "amount, calculation, and propriety of the finance charge" was usurious.

We overrule W2W and Lightfoot's issue to the extent that they complain that the trial court erred when it granted summary judgment on the usury counterclaim.

This Court's Ruling

We affirm the trial court's grant of summary judgment on W2W and Lightfoot's counterclaim for usury. We reverse the trial court's grant of summary judgment on KSMI's claims based on an open account, breach of contract, and breach of a guaranty and on KSMI's request for attorneys' fees, and we remand those claims for further proceedings.

JOHN M. BAILEY
CHIEF JUSTICE

June 11, 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.