Affirmed and Opinion filed March 7, 2002.

In The

Fourteenth Court of Appeals

NO. 14-00-00920-CV

WILLIAM J. CHAPMAN, Appellant

V.

ATLANTIC INSURANCE COMPANY, Appellee

On Appeal from the 165th District Court
Harris County, Texas
Trial Court Cause No. 99-18069

O P I N I O N

Appellant, William J. Chapman ("Chapman"), appeals an adverse order granting summary judgment in favor of appellee, Atlantic Insurance Company ("Atlantic"). We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

In October 1996, Chapman bought a used car from Quality Cars of Conroe. In December 1996, that car was seized by law enforcement authorities because it had been stolen. Chapman brought suit in Montgomery County against "James Hicks, d/b/a Quality

Cars of Conroe." In that case, the trial court granted summary judgment in favor of Chapman and against James Hicks. The order signed by the trial court specifically states: "the Court orders that Plaintiff WILLIAM J. CHAPMAN recover from Defendant JAMES HICKS the sum of $15, 050.00; . . . $1, 279.00 interest on that sum; . . . $609.00 for prosecuting this case; . . . ."

Chapman sought to enforce this judgment through a bond issued by Atlantic as surety on behalf of Travel Together, Incorporated, d/b/a Quality Cars of Conroe as principal. Atlantic denied payment asserting the judgment was not against a principal for which Atlantic had furnished a bond. The trial court's plenary power had already expired when Atlantic denied Chapman's request.[1] This prompted Chapman to move for a judgment *nunc pro tunc*. The trial court granted Chapman's motion and signed a new judgment stating: "[T]he Court orders that Plaintiff WILLIAM J. CHAPMAN recover from Defendant TRAVEL TOGETHER, INC., d/b/a QUALITY CARS OF CONROE, the sum of $15,050.00 . . . ."

Even though Chapman was armed with the new judgment *nunc pro tunc*, Atlantic continued to refuse Chapman's claims to recover on the bond, causing Chapman to institute this lawsuit against Atlantic in Harris County. Atlantic filed a motion for summary judgment on the basis "the plaintiff did not obtain a [valid] judgment against the principal on the bond." Atlantic argued the judgment *nunc pro tunc* is void because the trial court's correction constituted a judicial correction, not a clerical one, and the court did not have plenary jurisdiction to make such a change. The trial court granted Atlantic's motion for summary judgment on the following ground: "Chapman did not purchase the vehicle in question from Atlantic Insurance Company's bond principal, Travel Together, Inc."

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[1] The judgment against James Hicks was rendered on February 25, 1998. Chapman sought payment from Atlantic on March 3, 1998. Atlantic initially requested some documents from Chapman, but eventually denied the claim on June 18, 1998. The trial court's plenary power expired on March 27, 1998. The judgment *nunc pro tunc* was signed on August 11, 1998.

II. ISSUES ON APPEAL

Chapman's arguments on appeal can be summarized as follows: whether the trial court erred in granting Atlantic's motion for summary judgment because (1) the judgment *nunc pro tunc* was valid; (2) Atlantic should not be allowed to benefit from its principal's active concealment of its identity; (3) Atlantic's pleadings raise a genuine issue of material fact; (4) the motion for summary judgment was a collateral attack on the judgment *nunc pro tunc*; (5) the language of the bond requires Atlantic to pay Chapman on the bond.

III. SUMMARY JUDGMENT

Atlantic moved for summary judgment because the original order was not against the principal on the bond and the judgment *nunc pro tunc* is invalid; thus, Chapman does not have a valid judgment against the principal on the bond. On appeal, Chapman argues that the judgment *nunc pro tunc* is valid.

1. Standard of Review

Because the propriety of a summary judgment is a question of law, we review the trial court's decision de novo. *Natividad v. Alexsis, Inc*., 875 S.W.2d 695, 699 (Tex. 1994); *Texas Dep't of Ins. v. Am. Home Assurance Co*., 998 S.W.2d 344, 347 (Tex. App.—Austin 1999, no pet.). The standards for reviewing a motion for summary judgment are well established: (1) the movant for summary judgment has the burden of showing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law; (2) in deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the nonmovant will be taken as true; and (3) every reasonable inference must be indulged in favor of the nonmovant and any doubts resolved in its favor. *Nixon v. Mr. Prop. Mgmt.* Co., 690 S.W.2d 546, 548–49 (Tex. 1985).

A defendant's motion for summary judgment should be granted if the defendant either disproves at least one essential element of each of the plaintiff's causes of action or establishes all the elements of an affirmative defense. *Am. Tobacco Co. v. Grinnell*, 951

S.W.2d 420, 425 (Tex. 1997). When a defendant moves for summary judgment on an affirmative defense, he must prove each essential element of his defense as a matter of law, leaving no issues of material fact. *Ryland Group, Inc. v. Hood*, 924 S.W.2d 120, 121 (Tex. 1996). The function of the summary judgment is not to deprive a litigant of his right to trial by jury, but to eliminate patently unmeritorious claims and untenable defenses. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 n.5 (Tex. 1979).

2. Analysis

A trial judge has authority to correct mistakes and misrecitals in a judgment after the judgment becomes final only if the error to be corrected is clerical, rather than judicial in nature. *Butler v. Continental Airlines, Inc.*, 31 S.W.2d 642, 647 (Tex. App.—Houston [1st Dist.] 2000, pet. denied); *W. Texas State Bank v. Gen. Res. Mgmt. Corp.*, 723 S.W.2d 304, 306 (Tex. App.—Austin 1987, writ. ref'd n.r.e.) (citations omitted). A clerical error is a mistake that occurs in the reduction of the judgment to writing. *W. Texas State Bank*, 723 S.W.2d at 306 (citations omitted). In other words, the written record of the judgment does not reflect the trial court's pronouncement. *Id*. A judicial error, on the other hand, is an error that occurs as a result of a mistake in law or fact determinative to the outcome of the cause, "requiring the exercise of judgmental offices to correct." *Id*.

Chapman's original suit was brought against "James Hicks, d/b/a Quality Cars of Conroe." The original judgment signed by the trial court was against James Hicks. The judgment *nunc pro tunc* was against "Travel Together, Inc., d/b/a Quality Cars of Conroe." Chapman argues that the identity of Travel Together, Incorporated ("Travel Together") was unknown at the time of the original judgment. Chapman's statement defeats his first point of error. If the trial court did not know of Travel Together's existence at the time of the original judgment, the judgment *nunc pro tunc* cannot be said to have resulted from a clerical correction. Instead, the judgment *nunc pro tunc* must be characterized as having resulted from a judicial correction; the correction of an error that occurred because of a mistake in fact. *See id*.

Chapman cites *Holberg & Company v. Citizens National Assurance Company*, 856 S.W.2d 515 (Tex. App.—Houston [1st Dist.] 1993, no writ), for the proposition that a judgment rendered against a party in its assumed name is binding on the true party. In *Holberg*, an unincorporated sole proprietorship was sued for breach of contract. 856 S.W.2d at 516. The issue presented on appeal was whether in a suit against such an entity a judgment entered against the entity was binding on the owner. *Id*. In deciding that it was, the First Court of Appeals noted that historically, unincorporated sole proprietorships had no existence apart from their owners. *Id*. at 518 (citing *Cox v. Thee Evergreen Church*, 836 S.W.2d 167, 169 (Tex. 1992)). The *Holberg* court also cited *Cox* for the rule that those incurring debt on behalf of an association are personally liable. *Id*.

However, *Holberg* is distinguishable. Here, Hicks is personally liable, but Chapman cannot reach the bond through Hicks, inasmuch as Hicks is not the principal on the bond. Therefore, the rule articulated in *Holberg* and the reasoning behind it are not applicable here. In addition, the original judgment here was only against "James Hicks," and not against "Quality Cars of Conroe." The assumed name of Travel Together is Quality Cars of Conroe, not James Hicks. Therefore, unlike in *Holberg*, the original judgment here was not against the entity's assumed name.

Chapman also asserts that Hicks deliberately misled him into believing that James Hicks was doing business under the assumed name of Quality Cars of Conroe; therefore, the correction was clerical. However, we cannot reconcile Chapman's claim that he was misled with his assertion that the error in the judgment was a clerical one. If Chapman was misled by Hicks, the trial court's original judgment against James Hicks was the result of a mistake of fact. Therefore, the judgment *nunc pro tunc* was a correction of a mistake of fact, or a judicial error. We overrule Chapman's first point of error.

IV. ACTIVE CONCEALMENT BY PRINCIPAL

Chapman argues that this Court should reverse the judgment of the trial court because Atlantic should not be permitted to benefit from its principal's active concealment of its identity. Specifically, Chapman asserts that Hicks concealed Travel Together's identity in the original suit between Chapman and Hicks. However, Chapman cites no authority which supports his argument that this is a basis for reversal. On appeal, appellant's brief must contain a "clear and concise argument for the contentions made with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(h). Failure to do so results in waiver of that issue on appeal. Accordingly, Chapman has waived this issue and we overrule his second point of error.

V. A GENUINE ISSUE OF MATERIAL FACT

Chapman argues that Atlantic's pleadings preclude summary judgment because they raise a genuine issue of material fact regarding whether Hicks was acting on behalf of Quality Cars of Conroe when he sold the car to Chapman. Chapman asserts that if the trial court had indulged every reasonable inference in favor of Chapman (the non-movant), as it was required to, it would have presumed that Hicks was acting on behalf of Quality Cars of Conroe when Chapman purchased the car. In his brief, Chapman states:

> "[if] the trial court made such assumptions as required, it could not have concluded that Chapman's suit naming 'Quality Cars of Conroe' created no liability for the true owner of that assumed name–Travel Together, Inc. Without reaching such a conclusion, the trial court could not have granted summary judgment in favor of Atlantic."

However, Hicks did not present this argument to the trial court. Texas Rule of Civil Procedure 166a(c) provides that issues not expressly presented to the trial court by written motion, answer, or other response shall not be considered on appeal as grounds for reversal. TEX. R. CIV. P. 166a(c). Grounds not expressly presented to the trial court in a motion for summary judgment are waived on appeal. *City of Houston v. Clear Creek Basin Auth.*, 589

S.W.2d 671, 679 (Tex. 1979). Likewise, issues a non-movant contends avoid summary judgment that are not expressly presented to the trial court by written answer or other written response to the summary judgment motion are waived on appeal. TEX. R. CIV. P. 166a(c); *City of Houston*, 589 S.W.2d at 677. Therefore, this issue was not preserved for review.

VI. COLLATERAL ATTACK ON THE JUDGMENT *NUNC PRO TUNC*

Chapman argues that Atlantic, by moving for summary judgment, is impermissibly collaterally attacking the judgment *nunc pro tunc*. Chapman correctly states that a judgment which established liability against a bond principal is binding on the surety. Contrary to Chapman's assertion, however, Atlantic is not simply disagreeing with the judgment *nunc pro tunc*. Rather, Atlantic's basis for summary judgment was that Chapman did not have a valid judgment which established the bond principal's liability because the judgment *nunc pro tunc* was invalid and the original judgment did not establish liability on the bond principal. This is a permissible challenge. *See Employers Casualty Co. v. Block*, 744 S.W.2d 940, 943 (Tex. App.—Fort Worth 1988, writ ref'd n.r.e.). Therefore, we overrule Chapman's fourth point of error.

VII. THE LANGUAGE OF THE BOND

Chapman argues the language of the bond requires Atlantic to pay the judgment even if the judgment *nunc pro tunc* is invalid and he must rely on the original judgment. Chapman's argument is premised on the basis that Travel Together's charter was revoked at all relevant times and a provision in the surety bond extended Atlantic's obligation under the bond to Hicks when Travel Together had its charter revoked. Therefore, according to Chapman, a judgment rendered against Hicks is enforceable against the bond.

The provision to which Chapman refers states that Atlantic's obligation under the bond will extend "to any change of officers of the Principal if the Principal is a corporation, . . . to any substitution of business name of the Principal wherein ownership is not changed." Chapman argues that when Travel Together's charter was revoked, it ceased to exist and it

assumed the name Quality Cars of Conroe. Chapman also asserts that ownership did not change as Hicks has always been the owner of both Quality Cars of Conroe and Travel Together. Therefore, Chapman argues, Atlantic's obligation under the bond extended to Hicks.

The primary concern of a court in construing a written contract is to ascertain the true intent of the parties as expressed in the instrument. *Nat'l Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995). If a written contract is so worded that it can be given a definite or certain legal meaning, then it is not ambiguous. *Id.*; *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). The language of a contract will be enforced according to its plain meaning, unless such a reading would defeat the intentions of the parties. *Pepe Int'l Dev. Co. v. Pub Brewing Co.*, 915 S.W.2d 925, 930 (Tex. App.—Houston [1st Dist.] 1996, no writ). In determining the intention of the parties, we look only to the four corners of the agreement to see what is actually stated. *Cook Composites, Inc. v. Westlake Styrene Corp*., 15 S.W.3d 124,131 (Tex. App.—Houston [14th Dist.] 2000, pet. dism'd). In this case, the contract terms are clear and susceptible to only one possible interpretation. This provision contemplates a situation where, as it expressly states, a business changes its name or new officers are elected. It does not, however, encompass a situation where a corporation's charter has been revoked and the corporation ceases to exist as a legal entity, but the corporation's sole shareholder continues to do business. Accordingly, we overrule Chapman's final point of error.

VIII. CONCLUSION

We affirm the judgment of the trial court.

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John S. Anderson
Justice

Judgment rendered and Opinion filed March 7, 2002.

Panel consists of Justices Anderson, Hudson, and Frost.

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