Affirmed and Opinion filed March 16, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-01241-CV

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BEVERLY HENDERSON, Appellant

V.

NURSING SERVICES/CONTRACT MANAGEMENT SERVICES, INC., Appellee

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On Appeal from the County Civil Court at Law Number Four
Harris County, Texas
Trial Court Cause No. 657,960

O P I N I O N

Appellant, Beverly Henderson, appeals the no-evidence summary judgment and motion for summary judgment in favor of appellee, Nursing Services/Contract Management Services, Inc., CMSI. Henderson appeals on five points of error. We affirm the judgment of the trial court.

BACKGROUND FACTS AND PROCEDURAL HISTORY

Beverly Henderson entered into an employment contract with CMSI, a contractor that places nurses in various healthcare facilities. Henderson's contract provided that appellee could only terminate her employment "for cause," and that any complaints regarding her work performance must be submitted

to mediation. CMSI placed her in a hospital in New Orleans for a minimum of thirteen, forty-hour weeks.

Nine months later, Henderson was terminated. She sued CMSI for breach of her employment contract on two grounds: first, she contended that CMSI terminated her without cause; second, she contended that CMSI failed to submit its complaints to mediation. CMSI alleged that it fully performed all of its contractual obligations, arguing that Henderson unilaterally breached her contract when she failed to cooperate in an investigation regarding patient safety. Throughout this investigation, Henderson elected not to participate in mediation procedures. Ultimately, CMSI filed an amended answer, generally denying each allegation and counterclaiming for damages against Henderson for breach of contract.

Subsequently, during discovery, CMSI served Henderson's attorney with requests for admissions, interrogatories and requests for production. At the time, Henderson asserted that she was indigent and could not afford bus fare to travel to her attorney's office to answer the discovery requests. She was, however, able to travel downtown to the county clerk's office to copy the requests. She answered them herself without the help of her attorney and sent them to opposing counsel. She mistook the admissions' due date as thirty days from the day she obtained copies of them, rather than thirty days from the date they were served on her attorney. As a result, CMSI's counsel received Henderson's answers five days after the day they were due, and they were deemed admitted.

After the case was set for trial, CMSI filed a no-evidence motion for summary judgment as to Henderson's claim that she was summarily dismissed, and a traditional motion for summary judgment based on her deemed admissions as to the mediation claim. On the day of the hearing for both motions, Henderson filed a motion to withdraw the deemed admissions, arguing that her failure to timely respond was not intentional. The trial judge withdrew her deemed admissions; however, after taking the matter under advisement, the judge also granted both of CMSI's motions for summary judgment. Henderson asked the trial court to reconsider its granting of the no-evidence motion for summary judgment, and the court overruled her motion. After severing her claims for breach of contract, Henderson appeals on five points of error.

STANDARD OF REVIEW

In one pleading, CMSI moved for two types of summary judgment based on Henderson's breach of contract claim: it filed a no-evidence motion for summary judgment based upon the claim for Henderson's dismissal, and a traditional motion for summary judgment based upon her mediation claim. CMSI entitled this pleading, "Defendant's No Evidence Motion for Summary Judgment and Motion for Summary Judgment on Plaintiff's Cause of Action." In its order, the trial court granted both of CMSI's motions, and it ordered that Henderson take nothing on her breach of contract claim. However, the trial court did not specify in its order which motion it was granting; we are unable to determine from the language in the motion whether the trial court granted CMSI's traditional motion for summary judgment or its no-evidence motion for summary judgment.[1]

When an order granting summary judgment does not specify the reason the trial court granted the motion, summary judgment will be affirmed if any of the theories advanced in the motion are meritorious. *See Kyle v. West Gulf Maritime, Ass'n*, 792 S.W.2d 805, 807 (Tex. App.—Houston [14th Dist.] 1990, no writ); *see also Basse Truck Line, Inc. v. First State Bank*, 949 S.W.2d 17,19 (Tex. App.—San Antonio 1997, pet. denied); W. Wendall Hall, *Standards of Review in Texas*, 29 ST. MARY'S L.J. 351, 418 (1998). Here, although CMSI filed two motions - a no evidence motion and a rule 166a(c) motion - they both attack the same cause of action: Henderson's claim for breach of her employment contract. Consequently, even though they are *motions*, we will view them as if they were two *grounds* for summary judgment. If either motion supports the judgment, we must affirm it. *See Kyle*, 792 S.W.2d at 807. As we explain below, we find that the trial court was correct in granting CMSI's no-evidence motion for summary judgment. Consequently, we need not address Henderson's first point of error, and we will address only CMSI's no-evidence motion for summary judgment.

In a no-evidence motion for summary judgment, the non-movant carries the burden to present enough evidence to entitle him to a trial. *See* TEX. R. CIV. P. 166a(i); *Lampasas v. Spring Center, Inc.*, 988 S.W.2d 428, 433 (Tex. App.—Houston [14th Dist.] 1999, no writ). The movant must state the

[1] The language in the trial court's order reads as follows: "After considering the pleadings, the motion, the response, and other evidence on file, the Court: GRANTS defendant, CONTRACT MANAGEMENT SERVICES, INC.'s No Evidence Motion for Summary Judgment and Motion for Summary Judgment as to Plaintiff, BEVERLY HENDERSON'S claim for breach of contract in this suit."

elements as to which no evidence exists in the motion, and the burden shifts to the respondent to produce summary judgment evidence raising a genuine issue of material fact. *See Lampasas*, 988 S.W.2d at 433; *Graves v. Komet*, 982 S.W.2d 551, 553 (Tex. App.—San Antonio 1998, no writ). We must review the evidence in the light most favorable to the respondent against whom the no-evidence summary judgment was rendered, disregarding all contrary evidence and inferences. *See Lampasas*, 988 S.W.2d at 432; *Graves*, 982 S.W.2d at 553.

DISCUSSION AND HOLDINGS

Specificity of CMSI's No-evidence Motion for Summary Judgment

In Henderson's second point of error, she contends that the trial court erred in granting CMSI's no-evidence motion for summary judgment because the motion lacked specificity. We disagree.

CMSI's motion included a subparagraph entitled, "The First Alleged Breach." This paragraph contends that Henderson produced no evidence showing that CMSI breached the contract by summarily dismissing her from her nursing duties. While CMSI does not specifically state that its contention was brought under subparagraph (i) of rule 166a, it is a sufficient no-evidence motion for summary judgment. *See Roth v. FFP Operating Partners, L.P.*, 994 S.W.2d 190, 194 (Tex. App.—Amarillo 1999, no pet.)(holding that rule 166a does not require a motion to state that it is brought under subparagraph (i)). CMSI mentions the words "no-evidence" four separate times within this paragraph, and Henderson acknowledged in her response that the motion was a no-evidence motion. A no-evidence motion is specific enough if the grounds in it give fair notice to the non-movant. *See Pettitte v. SCI Corp*, 893 S.W.2d 746, 747 (Tex. App.—Houston [1st Dist.] 1995, no pet.).

Moreover, CMSI's motion adequately stated the specific grounds on which it was brought. Under a no-evidence motion for summary judgment, the movant must specify the essential element of a claim or defense to which no evidence exists. *See* TEX. R. CIV. P. 166a(i); *Lampasas*, 988 S.W.2d at 436. Here, CMSI's motion for summary judgment specifically challenged Henderson's first ground for breach of contract. In its motion, CMSI stated,

> There is no evidence of one or more essential elements of Plaintiff's claim for breach of contract. Plaintiff has not produced any evidence which would prove CMSI breached the contract by summarily suspending Henderson from her nursing duties. No evidence has been developed by Plaintiff that CMSI is the party who suspended Plaintiff from her employment by Hospital.

The essential elements in a suit for breach of contract are: (1) the existence of a valid contract; (2) that the plaintiff performed or tendered performance; (3) that the defendant breached the contract; and (4) that the plaintiff was damaged as a result of the breach. *See Bradley v. Houston State Bank*, 588 S.W.2d 618, 624 (Tex.App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.). Therefore, this language specifically challenged the breach element of Henderson's claims. We find that CMSI's motion was sufficiently specific under rule 166a(i) and overrule Henderson's second point of error.

Shifting the Burden in CMSI's No-evidence Motion for Summary Judgment

In her third and fourth points of error, Henderson contends that the trial court erred in shifting the burden to her as the non-movant. Because her contentions expressly contradict rule 166a(i), we overrule these points.

Henderson asserts that, since CMSI based its motion on her deemed admissions that were later withdrawn, it was deficient on its face. She argues that she did not have a burden to prove anything in response, and that such a burden would have an oppressive effect on her and future litigants. Appellee misconstrues the application of rule 166a(i).

As we have said, CMSI met its burden under the rule because it sufficiently specified the elements on which Henderson had no evidence. The withdrawn deemed admissions had no effect on CMSI's no-evidence motion for summary judgment. Thus, the burden shifted to Henderson, as the non-movant, to present enough evidence to be entitled to a trial. *See Lampasas*, 988 S.W.2d at 432. She had the burden to counter CMSI's motion with more than a scintilla of probative evidence to raise a genuine issue of material fact. *See id.*; *Isbell v. Ryan*, 983 S.W.2d 335, 338 (Tex. App.—Houston [14th Dist.] 1998, no pet.). More than a scintilla of evidence exists when the evidence rises to a level that would enable reasonable and fair minded people to differ in their conclusions. *See Lampasas*, 988 S.W.2d at 433. A fact issue is "material" only if it affects the outcome of the suit under governing law, and "genuine" if it

is significantly probative in favor of the nonmoving party. *See id*. The court must grant the motion unless the respondent meets this burden. *See id*.

Henderson did not meet her burden. She did not counter CMSI's motion with more than a scintilla of evidence to establish a material fact. In fact, as we explain, Henderson offered no evidence. Henderson's response to the no-evidence motion contained a statement that, if properly sworn, would have raised a fact issue. There, Henderson claimed that "[t]he defendant's employees communicated with the named plaintiff, via telephone, and suspended her employment contract and . . . such suspension, with its egregious conditions and no compensation, was tantamount to summary dismissal." Henderson attached affidavits from herself and her attorney to her response, however, Henderson's affidavit did not swear to the truth and veracity of the statement contained in her response."[2] Henderson's affidavit recited, "The defendant, named herein, and its employees refused to honor . . . the promises that they made me orally, or in writing, and as a direct result of their not honoring their word I have been made to suffer great economic hardship, inconvenience, and distressful circumstances." These statements are merely legal conclusions; they did not constitute summary judgment proof. *See Anderson v. Snider*, 808 S.W.2d 54, 55 (Tex. 1991); *see also Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984)(holding that affidavits consisting only of legal conclusions are insufficient to raise a fact issue). Although in her response Henderson also referred to her deposition, her deposition was not on file at the time of the hearing and cannot be used as summary judgment evidence. *See Marek v. Tomoco Equip. Co.*, 738 S.W.2d 710 712 (Tex. App.—Houston [14th Dist.] 1987, no writ). Thus, Henderson failed to raise a genuine issue of material fact sufficient to overcome appellee's no-evidence motion for summary judgment. We overrule her third and fourth points of error.

Motion for Reconsideration

[2] The affidavit of Henderson's attorney provided only that "The plaintiff has raised material fact issues with regards {sic} to breach of contract, and they can only be resolved by the trier of fact." Henderson did swear that the response truthfully and accurately described "the preparation and filing of the responses to the named defendant's discovery requests . . . ." But her affidavit did not swear to the truth and accuracy of anything else contained in the response.

In her last point of error, Henderson argues that the trial court erred in overruling her motion for reconsideration. Again, we disagree.

A motion for reconsideration is the equivalent of a motion for new trial. *See IPM Products Corp. v. Motor Parkway Realty Corp.*, 960 S.W.2d 879, 882 (Tex .App.—El Paso 1997, no pet.). It is, therefore, addressed to the trial court's discretion, and the trial court's ruling will not be disturbed on appeal without a showing of an abuse of that discretion. *See Howard Gault & Son, Inc. v. Metcalf*, 529 S.W.2d 317, 321 (Tex. Civ .App.—Amarillo 1975, no writ). We find that the trial court did not abuse its discretion in overruling Henderson's motion for reconsideration.

In that motion, Henderson made no new arguments; she only reiterated her arguments that the trial court erred when it granted CMSI's no-evidence motion for summary judgment. Although she attached her entire deposition to the motion, as we discussed earlier, this proof could not be used as summary judgment evidence. *See City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979). We find no abuse of discretion and overrule Henderson's last point of error.

The judgment of the trial court is affirmed.

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Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed March 16, 2000.
Panel consists of Justices Yates, Fowler and Frost.
Do Not Publish — TEX. R. APP. P. 47.3(b).