Reversed and Remanded and Opinion filed April 12, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-00-00377-CV

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LARRY G. SCHNEIDER, M.D., P.A., Appellant

V.

A-K TEXAS VENTURE CAPITAL, L.C., Appellee

On Appeal from the 215th District Court
Harris County, Texas
Trial Court Cause No. 99-47613

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

The parties are already familiar with the background of the case and the evidence adduced on the motion for summary judgment, therefore, we limit our recitation of the facts. We issue this memorandum opinion pursuant to Texas Rule of Appellate Procedure 47.1 because the law to be applied in the case is well settled.

Appellant leased space from appellee for a medical office. Appellant moved out because of sanitation problems in the space. Appellee sued for breach of lease and on sworn account. Appellant filed an unverified denial, raising failure of consideration as an affirmative

defense. Appellee moved for summary judgment on the sworn account. Appellant submitted the affidavit of Dr. Schneider, which made the following assertions:

- The lease space had been flooded on many occasions from the restaurant next door;
- The flood water damaged the carpet, equipment, stained the walls, and left a foul odor;
- Appellant made numerous complaints to appellee about the conditions and informed appellee they were not conducive to rendering medical care;
- Appellee represented it would remedy the conditions but failed to do so;
- Appellant moved out and stopped paying on the lease because the conditions rendered the premises unfit for providing medical care.

Appellee did not respond to the substance of these allegations in the trial court or here.[1] The court granted the summary judgment. We reverse and remand.

Appellant argues that raising the affirmative defense of failure of consideration and Schneider's affidavit precludes summary judgment. Appellee responds that because appellant failed to file a verified denial under rules of procedure 93(10) or 185 to its properly pled sworn account, appellant is precluded from defending against it. Thus, appellee claims, it is entitled to summary judgment on the sworn account.

Initially, we observe that, in light of rule 185 and cases following it, a suit on sworn account is an improper vehicle for a breach of lease claim. TEX. R. CIV. P. 185 (types of action which may be brought as sworn account are: (1) upon an open account or other claim for goods, wares and merchandise, including any claim for a liquidated money demand based upon written contract or founded on business dealing between the parties, or (2) for personal service rendered, or (3) labor done or labor or materials furnished); *see Meineke Discount*

[1] Appellee objected to appellant's affidavit but fails to point to where in the record it obtained a ruling on its objections. Thus, appellee's objections are waived. *McConnell v. Southside I.S.D.*, 858 S.W.2d 337, 343 n. 7 (Tex.1993) (holding that party must obtain a ruling on an objection as to defects of an affidavit's form or the objection is waived).

Muffler Shops v. Coldwell Banker Property Mgmt. Co., 635 S.W.2d 135, 138 (Tex. App—Houston [1st Dist.] 1982, writ ref'd n.r.e.) (holding sworn account not applicable to breach of lease); *Parmer v. Anderson*, 456 S.W.2d 271, 272-73 (Tex. Civ. App.—Dallas 1970, no writ) (same); *see also Van Zandt v. Fort Worth Press*, 359 S.W.2d 893, 895 (Tex.1962) (holding sworn account applies only to transactions in which there is a sale on one side and a purchase on the other, whereby title to personal property passes from one to the other, and the relation of debtor and creditor is thereby created by general course of dealing).

We further note that even though appellant's answer might have failed to properly deny a sworn account, appellant was still not precluded from defeating appellant's claims by asserting an affirmative defense in confession and avoidance. *Rizk v. Financial Guardian Insurance Agency, Inc.*, 584 S.W.2d 860, 862 (Tex. 1979) (holding affirmative defenses may be raised even in the absence of a verified denial under Rule 185). Appellant properly raised its failure of consideration defense under TEX. R. CIV. P. 94 and, as shown above, appellant's affidavit clearly raised a fact issue that it was not liable under this defense.

Appellee also claims in the alternative that it was entitled to summary judgment that appellant is liable as a matter of law based on breach of the lease agreement. However, this ground was not raised in appellee's motion below. A motion for summary judgment must "state the specific grounds therefor." TEX. R. CIV. P. 166a(c). Thus, we may not affirm summary judgment on a ground not presented in the motion. *Travis v. City of Mesquite*, 830 S.W.2d 94, 99-100 (Tex. 1992). In any event, as held above, appellant raised a fact issue on its affirmative defense.

We therefore hold the trial court erred in granting appellee's motion for summary

judgment. The judgment of the trial court is reversed and remanded.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed April 12, 2001.

Panel consists of Acting Justice Fowler, and Justices Yates and Wittig.

Do Not Publish — TEX. R. APP. P. 47.3(b).