Affirmed and Opinion filed October 21, 1999

In The

Fourteenth Court of Appeals

———————————

NO. 14-98-00996-CV

———————————

TODD R. SMITH a/k/a TODD R. SMITH, D.C., Appellant

V.

MARSHALL B. BROWN, P.C., Appellee

On Appeal from the County Court at Law No. 4
Harris County, Texas
Trial Court Cause No. 693,842

O P I N I O N

This is an appeal from a summary judgment in favor of appellee, Marshall B. Brown, P.C. Appellee filed suit against appellant, Todd R. Smith, alleging appellant owed him $33,645.11. Appellant replied with a general denial and appellee then filed a motion for summary judgment. Summary judgment was granted in favor of appellee for $33,645.11, plus attorney's fees. On appeal, appellant contends the trial court erred in granting the motion for summary judgment. We affirm.

I. Background

Appellant, a chiropractor, retained appellee as his attorney in April of 1994. Appellant signed three separate contracts, one for each case appellee would be working on. All three contracts were signed the same day, April 15, 1994. The crux of all three contracts was that appellee would perform as appellant's attorney for agreed-upon rates and appellant would pay for appellee's services and costs incurred on receipt of billing. Itemized records of all three case accounts show appellant made several payments on each account, although none of the accounts were paid in full.

Eventually, disputes arose concerning payment on the accounts. Appellee demanded, both verbally and in writing, that appellant pay the balance on the accounts. Appellant refused to pay stating that appellee had withheld money due *him* for medical services provided for appellee's clients. Appellee then filed suit to recover the balance allegedly due. The trial court granted summary judgment in favor of appellee. Appellant perfected this appeal.

II. Standard of Review

Summary judgment is properly granted when the movant establishes there is no genuine issue of material fact, and that he is entitled to judgment as a matter of law. *See Randall's Food Markets, Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995); TEX. R. CIV. P. 166a(c). In deciding whether there is a disputed material fact issue which precludes summary judgment, all evidence favorable to the non-movant is taken as true. *See Science Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997); *Nixon v. Property Management, Co.*, 690 S.W.2d 546, 548 (Tex. 1985). Further, we must indulge every reasonable inference in favor of the non-movant. *See id.*; *Johnson*, 891 S.W.2d at 644.

When a trial court issues an order granting summary judgment without specifying the particular ground on which it is based, the appellant must establish that each ground alleged in the motion is insufficient to support the trial court's judgment. *See Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 473 (Tex. 1995); *Carlisle v. Phillip Morris, Inc.*, 805 S.W.2d 498, 518 (Tex. App.–Austin 1991, writ denied).

III. Analysis

In his sole point of error, appellant argues the trial court erred in granting summary judgment because appellee failed to meet his burden of proof. Appellee's motion for summary judgment asserted three bases for relief: breach of contract, quantum meruit, and suit on account. The trial court's order granting summary judgment did not specify which of the three grounds the order was based on. We find, however that appellee's proof on the claim for suit on account is sufficient to support the trial court judgment. Accordingly, we need not address the merits of appellee's other claims. *See id.*

Rule 185 of the Texas Rules of Civil Procedure provides that a suit on an account is proper when an action is founded upon an open account for personal service rendered. *See* TEX. R. CIV. P. 185. Rule 185 is not a rule of substantive law, but one of procedure which establishes the evidence necessary to prove the prima facie case. *See Vance v. Holloway*, 689 S.W.2d 403, 403-04 (Tex. 1985); *Rizk v. Financial Guardian Insurance Agency, Inc.*, 584 S.W.2d 860, 862 (Tex. 1979); *Northwest Park Homeowners Ass'n, Inc. v. Brundrett*, 970 S.W.2d 700, 702 (Tex. App.--Amarillo 1998, writ denied); *Hou-Tex Printers, Inc. v. Marbach*, 862 S.W.2d 188, 190 (Tex. App.--Houston [14th Dist.] 1993, no writ); *Andrews v. East Texas Med. Ctr. Ass'n*, 885 S.W.2d 264, 268 (Tex. App.--Tyler 1994, no writ). A petition supporting a suit on account must contain an affidavit "to the effect that such claim is, within the knowledge of the affiant, just and true." *See* TEX. R. CIV. P. 185.

In the instant case, appellee's petition met the evidentiary requirements of rule 185. The petition was supported by an affidavit, signed by appellee, which stated that the claim was within his knowledge, was just and true, and that all lawful offsets, payments and credits had been applied. Further, detailed itemizations of charges incorporated in appellee's original petition.

Once a plaintiff's petition meets the requirements of rule 185, a defendant's answer must meet the requirements contained in both rules 185 and 93(10). *See* TEX. R. CIV . P. 185; 93(10). Rule 185 states that a party resisting a suit on account must file a timely written denial, under oath. *See* TEX. R. CIV. P. 185. Rule 93(10) specifically provides that if a plaintiff pleads a suit on account, the defendant's denial of the account must be supported by

a verified affidavit. *See* TEX. R. CIV. P. 93(1). If a defendant fails to comply with rules 185 and 93(10), he concedes that he has no defense to the account against him. *See Hidalgo v. Surety Sav. and Loan Ass'n*, 462 S.W.2d 540, 543 n.1 (Tex. 1971); *Enernational Corp. v. Exploitation Eng'rs, Inc.*, 705 S.W.2d 749, 750 (Tex. App.–Houston [1st Dist.] 1986, writ ref'd. n.r.e.). A sworn general denial is insufficient to rebut the evidentiary effect of a properly pled suit on account. *See Cooper v. Scott Irrigation Constr., Inc.*, 838 S.W.2d 743, 746 (Tex. App.--El Paso 1992, no writ); *Huddleston v. Case Power & Equip. Co.*, 748 S.W.2d 102, 103-04 (Tex. App.--Dallas 1988, no writ).

In the instant case, appellant filed only a general denial in response to appellee's properly pleaded suit on account. Therefore, appellant cannot dispute the receipt of the services, or the correctness of the stated charges contained within appellee's claim. *See Vance*, 689 S.W.2d at 404*; Canter v. Easley*, 787 S.W.2d 72, 73 (Tex. App.–Houston [1st Dist.] 1990, writ denied).

Appellant agrees that he cannot contest the charges contained within appellee's itemization of the account. He argues, however, that he properly asserted the affirmative defense of payment and/or offset in his response to appellee's motion for summary judgment. Appellant's argument is based on his assertion that appellee withheld over $30,000 due appellant for healthcare services provided to appellee's clients. Appellant argues his assertion of payment and/or offset created a dispute on a material issue of fact, and thus, the trial court's order granting summary judgment was improper.

Essentially, appellant argues that because appellee owes him money, there is a fact issue as to whether *he* owes money to appellant. Appellant, however, is barred from making this argument, and thereby asserting the affirmative defense of payment and/or offset, by the doctrine of res judicata.

Res judicata is a legal doctrine meaning that a thing or matter has been settled by judgment. *See* BLACK'S LAW DICTIONARY 1305 (6th ed. 1990). The general doctrine of res judicata consists of two principal categories: (1) res judicata or claim preclusion; and (2)

collateral estoppel or issue preclusion. *See Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 628 (Tex. 1992). Collateral estoppel may preclude relitigation of issues previously litigated even though the subsequent suit is based upon a different cause of action. *See Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 521 (Tex. 1998). To invoke the doctrine of collateral estoppel, a party must establish three elements: (1) the facts sought to be litigated in the second action were fully and fairly litigated in the prior action; (2) those facts were essential to the judgment in the prior action; and (3) the parties in the second action were case as adversaries in the prior action. *See El Paso Natural Gas Co. v. Berryman*, 858 S.W.2d 362, 364 (Tex. 1993); *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 818 (Tex. 1984); *Mann v. Old Republic Nat'l Title Ins. Co.*, 975 S.W.2d 347, 350 (Tex. App.--Houston [14th Dist.] 1998, no writ); *Phillips v. Allums*, 882 S.W.2d 71, 74 (Tex. App.--Houston [14th Dist.] 1994, writ denied).

Here, the summary judgment proof conclusively established that the defensive issue raised by appellant in this suit, *i.e.*, appellant does not owe appellee any money because appellee *owes him money* for payment of services rendered by appellant to appellee's clients, is barred by collateral estoppel. In three separate suits, appellant sought to recover money he alleged appellant owed for healthcare services rendered by appellant to appellee's clients. All three suits were resolved in favor of appellee on all issues. The issue raised in these prior suits is the same issue appellant now seeks to raise as a defense to appellee's sworn account claim. Accordingly, we find collateral estoppel bars appellant from raising the affirmative defenses of payment and/or offset. We overrule appellant's point of error.

Appellee asks this court to award sanctions in his favor under rule 45 of the Texas Rules of Civil Procedure. The rule provides that if the court of appeals determines that an appeal is frivolous, it may, after notice and a reasonable opportunity for response, award a prevailing party "just" damages. *See* TEX. R. APP. P. 45. Though we have affirmed the judgment, we decline to sanction appellant for filing a frivolous appeal.

Having overruled appellant's sole point of error, we affirm the trial court's judgment.

PER CURIAM

Judgment rendered and Opinion filed October 21, 1999.

Panel consists of Amidei, Edelman, and Wittig.

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