

Affirmed and Opinion filed November 30, 2000.



In The
Fourteenth Court of Appeals

NO. 14-00-00104-CV

HISPANIC HOUSING AND EDUCATION CORPORATION, Appellant

V.

APPLETREE APARTMENTS, LLC, Appellee

**On Appeal from the 281st District Court
Harris County, Texas
Trial Court Cause No. 98-56345**

OPINION

Hispanic Housing and Education Corporation (“HHEC”) appeals a summary judgment granted to Appletree Apartments, L.L.C. (“Appletree”) on the grounds that genuine issues of material fact exist on HHEC’s defenses of force majeure, waiver, and estoppel. We affirm.

Background

HHEC entered into an earnest money contract to purchase an apartment complex from Appletree. After the transaction failed to close by the third extended closing date, HHEC filed a declaratory judgment action against Appletree for a determination of HHEC’s obligation to close on that closing date. Appletree

filed a counterclaim requesting a declaratory judgment that the earnest money contract terminated because HHEC did not close as scheduled. Subsequently, Appletree filed a motion for summary judgment, which the trial court granted.

Standard of Review

A summary judgment may be granted if the motion and summary judgment evidence show that, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law on those issues expressly set out in the motion or response. *See* TEX. R. CIV. P. 166a(c); *Havlen v. McDougall*, 22 S.W.3d 343, 345 (Tex. 2000). In reviewing a summary judgment, we take as true all evidence favorable to the nonmovant and make all reasonable inferences in the nonmovant's favor. *See KPMG Peat Marwick v. Harrison County Housing Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). If the movant's motion and summary judgment proof facially establish his right to judgment as a matter of law, then the burden shifts to the non-movant to raise fact issues precluding summary judgment. *See Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996). If a non-movant relies on an affirmative defense to defeat summary judgment, he must present summary judgment proof sufficient to raise a fact issue as to each element of that defense. *See American Petrofina, Inc. v. Allen*, 887 S.W.2d 829, 830 (Tex. 1994); *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984).

Force Majeure, Waiver, and Estoppel

In this case, Appletree moved for summary judgment on the ground that the contract had been terminated by HHEC's failure to obtain the necessary financing by the August 28, 1998 closing date. HHEC does not challenge the sufficiency of Appletree's evidence to establish these facts, but asserts that it was not obligated to close on that date due to force majeure, waiver, and estoppel.

HHEC's first issue contends that it was excused from closing on the contract on August 28, 1998, because various delays, beyond its control, triggered the common law defense of force majeure. In particular, HHEC contends that Appletree's failure to disclose a judgment lien in the amount of \$650,000.00, and its requirement that HHEC increase the contract purchase price to cover that lien,

delayed the loan application process because the Department of Housing and Urban Development would not continue with the inspection, review, and approval process while the lien issue remained unresolved.

HHEC's second issue contends that Appletree waived its right to enforce the agreed closing date because its granting of three extensions encouraged HHEC to continue with the costly loan application process and gave HHEC the impression that further extensions would continue to be granted as long as HHEC diligently pursued the loan. HHEC's second issue also claims that Appletree is estopped from enforcing the closing date in the contract because Appletree knew of the judgment lien prior to execution of the contract, concealed its existence from HHEC, knew HHEC incurred expenses for the loan application process, and required an additional non-refundable deposit of earnest money for each extension of the closing date.

In support of its defenses of force majeure, waiver, and estoppel, HHEC purports to rely on evidence contained in affidavits and deposition extracts. However, the only record references cited in HHEC's brief are to its verified petition for declaratory judgment.¹ Because HHEC's brief does not direct us to any competent summary judgment evidence supporting its contentions, it affords no basis for relief.² Accordingly, HHEC's two issues

¹ A verified petition is not competent summary judgment evidence. *See* TEX. R. CIV. P. 166a(c); *Laidlaw Waste Sys. v. Wilmer*, 904 S.W.2d 656, 660-61 (Tex. 1995). Moreover, because HHEC's supporting affidavits or depositions, if any, are not in the record, they may not be considered on appeal. *See Russell v. City of Bryan*, 919 S.W.2d 698, 706 (Tex. App.—Houston [14th Dist.] 1996, writ denied)

² It is an appellant's burden to cite to portions of the record where evidence necessary to sustain its contentions can be found. *See* TEX. R. APP. P. 38.1(h).

are overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed November 30, 2000.

Panel consists of Justices Anderson, Fowler, and Edelman.

Do not publish — TEX. R. APP. P. 47.3(b).