TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-14-00546-CV

Veronica L. Davis and James Anthony Davis, Appellants

v.

State Farm Lloyds Texas, Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 345TH JUDICIAL DISTRICT
NO. D-1-GN-12-004077, HONORABLE STEPHEN YELENOSKY, JUDGE PRESIDING

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

Veronica L. Davis and her son James Anthony Davis appeal the trial court's summary judgment in favor of State Farm Lloyds Texas on the Davises' claim for personal injury arising out of State Farm's handling of a 2002 claim under Veronica Davis's homeowners insurance policy for mold damage to her house.[1] We will affirm the trial court's judgment.

BACKGROUND

The Davises originally sued State Farm and one of its policy holders, Gerald Krouse, alleging that State Farm mishandled three claims under her automobile insurance policy arising out of three separate motor vehicle accidents and one claim for mold damage under her homeowners

[1] Veronica Davis, an attorney licensed to practice law in the State of Texas, is representing herself and her son.

insurance policy.[2] State Farm filed a motion to sever the automobile claims from the mold claim. Specifically State Farm requested that the court:

> sever the Auto claims of the Plaintiffs (specifically the tort action to determine the liability and damages under Plaintiffs' UM/UIM coverage and the breach of contract and extra-contractual claims related to the automobile claims), and make those severed claims the subject of a separate lawsuit. By granting this part of the motion the Court would separate the case into one action involving the homeowners claims and one action involving the auto claims. Finally, State Farm asks that within that severed lawsuit (involving the auto claims) the Court abate the breach of contract and extra-contractual claims related to the automobile claims.

After a hearing, the trial court signed an order severing the claims under Davis's automobile insurance policy from her claim under her homeowners insurance policy. The order recites:

> It is further ORDERED that Plaintiffs' "Auto claims" (specifically the tort action to determine the liability and damages under Plaintiffs' UM/UIM coverage and the breach of contract and extra-contractual claims related to the automobile claims) shall be severed and made the subject of a separate lawsuit.
> . . .
>
> It is further ORDERED that the contract and extra-contractual claims within the "Auto claims" suit are hereby abated until the judgment on the UM/UIM coverage has been determined.

The clerk of the court thereafter docketed the auto claims separately and assigned them cause number D-1-GN-13-001724. The homeowners claim remained docketed under cause number D-1-GN-12-004077.

---

[2] Veronica Davis first made the mold damage claim in 2002, approximately ten years before she filed this suit in December 2012.

Thereafter, State Farm propounded discovery in an attempt to discover the factual basis for the Davises' claims in the mold case. State Farm, at the Davises' request, agreed to several extensions of time for the Davises to respond to its request for disclosures. Ultimately, dissatisfied with the adequacy of the Davises' responses, State Farm filed a motion to compel. The motion was set for hearing, but the hearing was passed based on Veronica Davis's assurance that complete discovery responses would be provided. When that did not occur, State Farm filed a motion for entry of a scheduling order that included a deadline for designating experts and providing medical evidence to support the Davises' claim that State Farm's handling of the 2002 mold claim caused James to suffer personal injuries.[3] The Davises responded by filing a motion to transfer venue, the text of which makes it apparent that Veronica Davis mistakenly believed that Cause No. D-1-GN-12-004077 related to her automobile claims, rather than her homeowners insurance claim. Davis also filed a motion for sanctions, asserting that State Farm was improperly attempting to obtain discovery in a case that had been abated, again apparently operating under the mistaken belief that Cause No. D-1-GN-12-004077 dealt with her automobile claims, which had been partially abated by the trial court's previous severance order. In fact, the automobile claims had been severed into Cause No. D-1-GN-13-001724.

The trial court held a combined hearing on State Farm's motion for entry of a scheduling order and the Davises' motions to transfer venue and for sanctions. At the hearing, the

[3] Because James Davis was a minor when his mother made the mold damage claim, the statute of limitations for his claim that State Farm's handling of the mold damage claim caused him personal injury was tolled until he reached majority age shortly before this suit was filed in December 2012. All other claims related to State Farm's handling of the 2002 mold claim were barred by limitations.

trial court explained to Davis that she appeared to be operating under a misunderstanding regarding which claims were the subject of Cause No. D-1-GN-12-004077. The court stated:

> I think there has been a misreading of the [severance] order actually—and I don't mean to pick on you, Ms. Davis—but by you. . . . You see, what they did was they severed all of the auto claims into the other case, and they severed both the underlying extent of injury claim and the breach of contract and extracontractual claims in the auto claim; in other words, that any claim you have for bad faith or violations of the Insurance Code for failure to properly process the auto claim, they are still together in the same lawsuit. And the judge, Judge Triana, signed an order which put all of those claims, the underlying extent of injury in the auto accident and the additional breach of contract and extracontractual claims about that auto accident and State Farm's responsibility to pay in that other lawsuit keeping all of the mold claims and other claims you have against State Farm in this lawsuit. And what Judge Triana abated was not all of these claims about mold, et cetera, in this lawsuit, but I see here she abated only a portion of the other lawsuit. So neither suit is completely abated. Only the other suit is partially abated. And the portion that is abated is the breach of contract and extracontractual claims that are within the auto claims lawsuit. . . . I do see that you've claimed some mold injuries, I believe, to your son, as I recall, in the pleadings. And those—that case is still going on in this original cause of action that I called for the record today, GN-12-4077.

The trial court then turned to the requested scheduling order, which included a November 29, 2013 deadline for designating experts and providing evidence of James Davis's alleged injuries related to the mold claim. The trial court observed that this date was too soon and asked Davis when she could designate experts. Davis chose January 15, 2014. Thereafter, the trial court signed a scheduling order directing Davis to designate experts and provide medical evidence regarding causation by January 15, 2014. State Farm was ordered to designate its experts by March 1, 2014. The order also set April 30, 2014 as the deadline for amending pleadings and completing discovery. The court denied the Davises' motion to transfer venue.

On January 15, 2014, Davis filed an unverified motion to extend the time to designate her experts, asserting that when she "sought to confirm the date of the scheduling order" she "discovered that the scheduling order required more than a simple designation, but rather expert reports and causation information, which [were] not currently in her possession." According to Davis, the order "exceed[ed] the scope of the designation anticipated by counsel," and she did not have any causation affidavits or expert reports to produce at that time. Davis additionally asserted that her case load, ill health, and "pending surgery" caused her to be unable to obtain the information required to be produced per the scheduling order. On February 1, 2014, Davis filed a motion to abate on the ground that her medical impairments made her unable to "fully engage or respond to the discovery process." State Farm opposed the motion for extension of time to designate experts by motion filed on March 28, 2014. State Farm recounted that, although Davis had asked for a two month extension of time, which would have made her expert reports due on March 14, 2014, that date had already passed, and Davis had still not provided State Farm with any evidence of medical causation regarding James Davis's alleged injuries arising out of State Farm's handling of the 2002 mold claim.

The trial court held a hearing on the Davises' motion for extension of time to designate experts on April 11, 2014. At the hearing, Davis again mistakenly argued that the homeowners insurance claim had been abated, stating "the mold case is abated until after the auto case is over." Based on that misunderstanding, Davis took the position that she did not have to produce anything to State Farm related to the mold claim. She also argued, somewhat inconsistently, that her medical issues prevented her from obtaining the requested information. For its part,

State Farm recounted the protracted nature of the litigation and expressed its frustration with Davis's failure to engage in the discovery process. After hearing Davis's argument, the trial court stated:

> Then what I see is that you filed this motion for extension in January, which was more than three months ago. And what you said in that motion is that you needed—you didn't have the reports and that you discovered that the scheduling order required more than simple designation. I don't know how it is that you discovered that in January when the order was signed and filed in October. You further, in your motion for extension, say—and this motion was three months ago—say that you need time to get a lawyer. You're here today telling me you need to get a lawyer. That was three months ago that you put that in writing. And what I hear you telling me today is, I've talked to a lawyer and if, underscore if, I hire a lawyer, then we'll be ready to go to trial after that lawyer has been hired and after that lawyer has had an opportunity to get ready. . . . So we're looking at something that over six months ago was ordered after having given you the opportunity to say when you could do this. Months have passed and months have passed since you filed your motion for extension, and all I'm hearing is, if I get a lawyer, we can then do what we should have been doing for the last six months or longer. What I also hear you saying is, you thought you were going to have surgery, but you haven't had surgery. So the excuse or the justification or the rationale that I have a medical procedure that is going to take me out of commission is not what I'm hearing. . . . So the potential that [something medically] will occur in the future does not, in my mind, justify things that were required to occur in the past and have not occurred in the past.

The trial court took the motion for extension of time to designate experts under advisement and subsequently denied it on April 14, 2014.

In May 2014, State Farm filed a traditional and a no-evidence motion for summary judgment and set the motion for hearing on June 5. Rather than filing a response to the motion for summary judgment, Davis filed a motion for rehearing of the denial of her motion to extend the time to file experts. On June 4, the day before the hearing, Davis filed a document entitled "Opposition to Motion for Summary Judgment, Motion for Continuance, and Opposition to Timeliness of Motion or Setting." In that motion Davis complained that she was not timely served with State Farm's

motion for summary judgment. She also stated that she would not be able to appear at the summary-judgment hearing on June 5 due to a scheduling conflict and asked that the hearing be continued. On June 5, the trial court signed an order granting State Farm's traditional and no-evidence motions for summary judgment. Davis then filed a motion to set aside the order granting summary judgment, arguing that she had not received proper notice of the hearing. She also repeated her mistaken assertion that the homeowners insurance claim had been severed and abated and that it was therefore improper for State Farm to move for summary judgment. The trial court denied the motion and this appeal followed.

DISCUSSION

When, as here, a party moves for summary judgment under both rule 166a(c) and rule 166a(i), we first review the trial court's summary judgment under the standards of rule 166a(i). *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004). Under rule 166a(i), a movant must assert that, after adequate time for discovery, there is no evidence of one or more essential elements of a claim or defense on which the adverse party would have the burden of proof at trial. Tex. R. Civ. P. 166a(i); *see Fort Worth Osteopathic Hosp., Inc. v. Reese*, 148 S.W.3d 94, 99 (Tex. 2004). To defeat a rule 166a(i) summary-judgment motion, the nonmovant must produce summary-judgment evidence raising a genuine issue of material fact as to each of the challenged elements. Tex. R. Civ. P. 166a(i); *Ford Motor Co.*, 135 S.W.3d at 600. A genuine issue of material fact exists if the nonmovant produces more than a scintilla of evidence establishing the existence of the challenged elements. *Ford Motor Co.*, 135 S.W.3d at 600. More than a scintilla of evidence exists if the evidence would allow reasonable and fair-minded people to differ in their conclusions. *City of*

Keller v. Wilson, 168 S.W.3d 802, 827 (Tex. 2005); *see Goodyear Tire & Rubber Co. v. Mayes*, 236 SW.3d 754, 755 (Tex. 2007). If the nonmovant fails to produce more than a scintilla of evidence under that burden, there is no need to analyze whether the movant's proof satisfies the rule 166a(c) burden. *Ford Motor Co.*, 135 S.W.3d at 600.

Neither of the Davises filed a substantive response to State Farm's no-evidence motion for summary judgment. Neither party adduced any summary-judgment evidence supporting any of the elements of their claims against State Farm. Absent a timely response, a trial court must grant a no-evidence motion for summary judgment that meets the requirements of rule 166a(i). If a nonmovant wishes to assert that, based on the evidence in the record, a fact issue exists to defeat a no-evidence motion for summary judgment, she must timely file a response to the motion raising this issue before the trial court. Tex. R. Civ. P. 166a(i). Before the advent of rule 166a(i), summary judgment could not be rendered based on the default of the opposing party. *See McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 343 (Tex. 1993). The nonmovant was not required to file a response to defeat the motion for summary judgment because deficiencies in the movant's own proof or legal theories might defeat the movant's right to judgment as a matter of law. *See City of Hous. v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979). However, as Texas courts have repeatedly held, the traditional prohibition against summary judgment by default is inapplicable to motions filed under rule 166a(i). *See Roventini v. Ocular Scis., Inc.*, 111 S.W.3d 719, 723 (Tex. App.—Houston [1st Dist.] 2003, no pet.). When, as here, the movant has filed a motion that identifies the elements as to which there is no evidence, and in a form that is neither conclusory nor a general no-evidence challenge, summary judgment must be rendered absent a timely and legally

adequate response by the nonmovant. *See id.* at 727. In this case, because neither of the Davises filed a timely response to the motion, we hold that the trial court did not err in granting the no-evidence motion for summary judgment. *See* Tex. R. Civ. P. 166a(i) ("The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact."). Nevertheless, we must address the Davises' arguments for why the trial court's actions were improper.

In their first appellate issue, the Davises again argue that the trial court should not have ruled on State Farm's motion for summary judgment because the severance order abated the claims made under Davis's homeowners insurance policy—the mold claims—from the claims made under Davis's automobile insurance policy—the auto claims. Alternatively, the Davises maintain that the severance order varies from the relief sought in State Farm's motion to sever and is ambiguous and, consequently, void and that "the court committed reversible error with respect to the order complained of and all resulting therefrom [sic] are also void." As set forth above, however, the severance order plainly severed the mold claims from the auto claims and abated some of the issues related to the auto claim, but not the mold claims. The trial court was not requested to, and did not, abate the mold claims. The order is not ambiguous or inconsistent with State Farm's motion to sever. As has already been described, the substance and legal effect of the severance order was explained to Davis in detail by the trial court. Moreover, even had the trial court's severance order differed from the relief State Farm requested in its motion, Davis has not explained how that could serve as a basis for reversing the trial court's summary-judgment order resulting from the Davises' failure to provide any summary-judgment evidence whatsoever to create a fact issue with regard to

any of the elements of their causes of action against State Farm. We overrule the Davises' first appellate issue.

In their second issue, the Davises raise a challenge to the validity of the scheduling order. Specifically, the Davises claim, citing no authority, that because the judge filled in the date of the order as October 24, 201**4** instead of 201**3** (the date the order was actually signed), it is a void order and "any deadlines or mandates pertaining to said order is void." We note that the scheduling order was file-marked October 24, 2013, and that Veronica Davis was at the hearing at which the trial court signed the order and, in fact, was the person who requested that the deadline for designating experts and providing evidence of medical causation be set at January 15, 2014. In any event, Davis has wholly failed to explain how any question regarding the "validity" of the scheduling order could constitute error requiring reversal of the trial court's order granting State Farm's no-evidence motion for summary judgment. Davis does not contend that an adequate time for discovery had not transpired. Nor does she complain that the trial court ignored summary-judgment evidence from an untimely-designated expert witness. And, as State Farm points out, in the absence of a valid scheduling order, the Davises' case would have been governed by Level 2 discovery deadlines and the discovery period would have closed on January 1, 2014. Consequently, in the absence of a scheduling order, Davis's expert designation would have been due 90 days earlier, on or about October 1, 2013. *See* Tex. R. Civ. P. 195.2 (schedule for designating experts). We overrule the second appellate issue.

In their third appellate issue, the Davises contend that the trial court's denial of the motion for extension of time to designate experts and the motion to abate was an abuse of discretion

and denied them due process for a host of reasons that were, for the most part, not presented to the trial court. As we have already held, the trial court's denial of the motion for extension of time to designate experts does not constitute error requiring reversal of the order granting State Farm's no-evidence summary-judgment motion. And the trial court did not abuse its discretion by denying the Davises' motion to abate, the reasons for which the trial court clearly stated in the record as set forth above. *See Dolenz v. Continental Nat'l Bank of Fort Worth*, 620 S.W.2d 572, 575 (Tex. 1981) (holding that trial court "did not act arbitrarily or unreasonably" in denying plea in abatement). The third issue is overruled.

In their fourth appellate issue, the Davises claim that the trial court erred by denying their motion for rehearing of the trial court's denial of the motion for extension of time to designate experts and the motion to abate as well as denying their motion for rehearing of the trial court's order granting State Farm's no-evidence motion for summary judgment. The Davises complain of Travis County's central docket system, which can result in different judges hearing different motions in the same case. The Davises' argument under this issue appears to be an assertion that the central docket system violates the Texas Rules of Civil Procedure in an unspecified manner and repeats complaints about the validity of the scheduling order. To the extent this issue presents anything for review, it does not provide a basis for reversing the trial court's order granting State Farm's no-evidence motion for summary judgment and it is overruled.

In their fifth appellate issue, the Davises assert that summary judgment should not have been granted in State Farm's favor for three reasons: (1) Davis did not receive adequate notice of the motion for summary judgment; (2) her inability to participate in the hearing resulted in a

denial of her right to due process; and (3) State Farm's motion did not adequately provide notice of its intent to use discovery as summary judgment evidence. First, the record reveals that State Farm's summary-judgment motion was timely filed and served. The record indicates that State Farm filed and electronically served its motion on Davis by e-file on May 14, 2014. State Farm also arranged for a process server to hand deliver the motion for summary judgment to Veronica Davis's law office in West Columbia, Texas. The process server's affidavit states that it was delivered to the address on the Davises' pleadings on May 14, 2014. Davis presented no evidence to contradict this affidavit; rather, she confirmed such delivery, stating in her motion to continue the summary-judgment hearing that "[a] copy of the Motion was delivered to the office of the Plaintiff on May 14, 2014. However, no one was at the office at the time of the delivery. The package was discovered on the porch of the office on May 16, 2014." The implication that Davis was unaware that the process server was delivering a package to her office on May 14 is belied by the process server's affidavit in which he averred that he called the telephone number listed on the Davises' pleadings and asked when someone would be available to accept the package. The process server was told to come to the office at 3 p.m., which he did. After knocking on the door and waiting for thirty minutes with no answer, he left the package by the front door to the office. State Farm complied with the requirement that it file and serve its motion for summary judgment at least twenty-one days before June 5, the date specified for the hearing. *See* Tex. R. Civ. P. 166a(c).

Davis maintains that scheduling conflicts prevented her from attending the June 5 hearing on the motion for summary judgment and that her due process rights were denied when the trial court rendered summary judgment on that date. As an initial matter, the record indicates that

Davis had agreed that the hearing could go forward on June 5. Moreover, while due process requires that a party have adequate notice of a summary-judgment hearing, there is no prohibition against the trial court acting on a motion when the nonmovant does not appear; in fact, summary-judgment motions are often acted on without an oral hearing. *See Martin v. Martin, Martin & Richards, Inc.*, 989 S.W.2d 357, 359 (Tex. 1998) (per curiam) (oral hearing is not mandatory, but notice of hearing or submission is required because hearing date determines time for response). Davis's inability to appear at the hearing in no way prejudiced her right to present summary-judgment evidence because that evidence was required to have been filed seven days before the hearing. *See* Tex. R. Civ. P. 166a(c) ("Except on leave of the court, the adverse party, not later than seven days prior to the day of the hearing may file and serve opposing affidavits or other written response. No oral testimony shall be received at the hearing."). Davis did not seek leave to rely on late-filed summary-judgment evidence and does not, in this appeal, point to any evidence she was prevented from presenting to the trial court in response to State Farm's motion for summary judgment.

Finally, Davis complains that State Farm failed to provide adequate notice of its intent to use discovery as summary-judgment evidence. *See* Tex. R. Civ. P. 166a(d) (setting forth requirements for use of discovery not otherwise on file with clerk as summary-judgment evidence). We need not address this argument because the trial court properly granted State Farm's no-evidence summary-judgment motion. Therefore whether the evidence supporting its traditional summary-judgment motion was properly before the trial court is of no consequence. We overrule the Davises' fifth appellate issue.

In their sixth appellate issue, the Davises complain that the trial court "erred in allowing irrelevant information to support a denial of an extension when said information, pleadings, and argument are violative of the Rules of Professional Conduct for attorneys." We have already concluded that the trial court's denial of the motion for extension of time was not an abuse of discretion and could not serve as a basis for reversing the order granting State Farm's no-evidence motion for summary judgment. Moreover, the record does not support the contention that the trial court based its decision to deny the motion for continuance on any reasons other than those stated on the record. We overrule the sixth appellate issue.

CONCLUSION

Having overruled each of the Davises' appellate issues, we affirm the trial court's judgment.

_____

Scott K. Field, Justice

Before Chief Justice Rose, Justices Goodwin and Field

Affirmed

Filed: March 17, 2016