2017 WL 526310
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SEE TX R RAP RULE 47.2 FOR
DESIGNATION AND SIGNING OF OPINIONS.

Court of Appeals of Texas,
Fort Worth.

Richard Seim and Linda Seim, Appellants
v.
Allstate Texas Lloyds and Lisa Scott, Appellees

NO. 02–16–00050–CV
|
DELIVERED: February 9, 2017

FROM THE 141ST DISTRICT COURT OF TARRANT COUNTY, TRIAL COURT NO. 141–270531–14

Attorneys and Law Firms

David G. Allen, for Allstate Texas Lloyds and Lisa Scott.

Andrew B. Bender, for Linda Seim and Seim, Richard.

PANEL: LIVINGSTON, C.J.; WALKER, J.; and CHARLES BLEIL (Senior Justice, Retired, Sitting by Assignment).

MEMORANDUM OPINION [1]

1 *See* Tex. R. App. P. 47.4.

Sue Walker, Justice

I. INTRODUCTION

***1** Appellants Richard and Linda Seim sued Appellees Allstate Texas Lloyds and its adjuster, Lisa Scott, following Allstate's denial of a claim under the Seims' homeowners' policy. Appellees moved for summary judgment on the Seims' claims, asserting limitations and that the Seims had no evidence to support certain elements of their claims. The trial court granted summary judgment in Appellees' favor without specifying the grounds on which the judgment was based. In two issues, the Seims argue that summary judgment was improper because their claims are not barred by limitations and because they presented a genuine issue of material fact on each of the challenged elements of their claims. We will affirm.

II. FACTUAL AND PROCEDURAL BACKGROUND

Allstate provided the Seims with a homeowners' policy covering their property in Bedford, Texas. The policy period began on April 27, 2013, and ended on April 27, 2014. On August 28, 2013, the Seims notified Allstate that their home had been damaged by a storm that occurred earlier in August. Scott, an adjuster for Allstate, inspected the Seims' property on or about September 10, 2013. [2] Scott testified at her deposition that the Seims' property had some interior water damage, but the roof did not have any wind or hail damage. Scott further testified that in order for the interior water damage to be covered under the Seims' policy, "there ha[d] to be an opening in the roof [caused] by wind or hail ... and [the Seims] did not have that." [3] Allstate denied the Seims' claim on September 10, 2013.

2 One document in the record reflects that Scott's inspection took place on September 11, 2013. Scott testified, however, that she conducted the inspection on September 10, 2013. The Seims' petition gives credence to the view that the inspection took place on September 10, 2013, as it describes Scott inspecting the property and then "without haste" sending the Seims a September 10, 2013 letter informing them that "no storm created opening was found to cause the roof to leak and there was no coverage for the interior water damage." The Seims' petition also states that "Scott never contacted the Seims again" after sending the September 10, 2013 letter.

3 The policy states that it does not cover "loss caused by rain ... unless the direct force of wind or hail makes an opening in the roof or wall and the rain ... enters through this opening and causes the damage."

On February 11, 2014, the Seims brought suit against Allstate alleging certain causes of action arising from Allstate's denial of their homeowners' claim. In their original petition, the Seims claimed that the damage to their property resulted from the August 2013 storm. On April 15, 2014, the Seims amended their petition. In their first amended petition, the Seims removed all references

to the August 2013 storm and asserted that the damage to their property stemmed from an April 2007 storm.[4] On May 6, 2014, the Seims amended their petition again. In their second amended petition, the Seims added Scott as a defendant and asserted that the damage to their property stemmed from storms occurring in April 2007, April 2008, and May 2012.[5]

4 In their first amended petition, the Seims also added Maria Golseth and Michael Pierce as defendants. Both were later voluntarily dismissed without prejudice.

5 In their second amended petition, the Seims also added Chad Golseth as a defendant. He was later voluntarily dismissed without prejudice.

***2** On October 28, 2015, the Seims amended their petition one last time. In their third amended petition, the Seims removed references to the April 2007, April 2008, and May 2012 storms, and once again asserted that the damage to their property stemmed from an August 2013 storm. The Seims alleged the following claims in their third amended petition: (1) breach of contract; (2) breach of the duty of good faith and fair dealing; (3) unfair settlement practices in violation of the Texas Insurance Code; (4) violation of the prompt-payment provisions of the Texas Insurance Code; and (5) violation of the Texas Deceptive Trade Practices Act (DTPA).[6] *See* Tex. Ins. Code Ann. §§ 541.060 (unfair settlement practices), 542.060 (prompt payment of claims) (West 2009); Tex. Bus. & Com. Code Ann. § 17.41 et seq. (West 2011).

6 The Seims' third amended petition also included claims of fraud and conspiracy to commit fraud. The Seims, however, do not challenge the trial court's judgment with respect to their claims of fraud and conspiracy to commit fraud. We will thus limit are analysis to the Seims' five other pleaded claims.

Appellees moved for summary judgment on both traditional and no-evidence grounds. Appellees argued that the Seims' claims were barred by limitations, asserting that the October 28, 2015 filing date of the third amended petition, rather than the February 11, 2014 filing date of the original petition, should be considered the date in which the Seims' claims were filed.[7] Appellees also argued that the Seims had no evidence to support their claims. Amongst other challenges, Appellees asserted that the Seims could not prove that they sustained a loss that fell within the coverage afforded by the policy and, therefore, summary judgment was proper on all of the Seims' claims.

7 The subject policy provided for a limitations period of two years and one day. *See* *Jett v. Truck Ins. Exch.*, 952 S.W.2d 108, 109 (Tex. App.–Texarkana 1997, no writ) ("Insurance provisions that limit the time within which to file a suit to two years and a day are valid and binding.").

The Seims filed their response to Appellees' motion for summary judgment seven days prior to the summary judgment hearing. Due to what the Seims describe as a "technical failure," their response did not include any attached summary judgment evidence. On the day of the summary judgment hearing, the Seims filed a response that included attached summary judgment evidence. Six days after the hearing, the Seims once again filed their response with attached summary judgment evidence.[8] A week later, the Seims filed a supplemental response to Appellees' motion for summary judgment that included additional summary judgment evidence. A week after that, the Seims filed an amended supplemental response to Appellees' motion for summary judgment that included more summary judgment evidence. The Seims did not ask for leave to file any of the responses that were filed later than seven days prior to the summary judgment hearing. *See* Tex. R. Civ. P. 166a(c) ("Except on leave of court, the adverse party, not later than seven days prior to the day of hearing may file and serve opposing affidavits or other written response.").

8 The only discernible difference between the response filed on the day of the hearing and the response filed six days after the hearing was that the response filed six days after the hearing contained page numbers at the bottom of the response, while the response filed the day of the hearing did not.

The trial court ultimately granted Appellees' no-evidence and traditional motion for summary judgment. The summary judgment order reflected that the trial court had considered "all responses [and] all competent summary judgment evidence." The order did not specify the grounds on which the judgment was based. This appeal ensued following the entry of the summary judgment order.

III. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT?

***3** When a party seeks both a traditional and no-evidence summary judgment on the nonmovant's claims, we first review the trial court's summary judgment under the no-evidence standard of Texas Rule of Civil Procedure 166a(i). *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004). Thus, we will first address the Seims' second issue—whether they presented a genuine issue of material fact on each the challenged elements of their claims.

A. Standard of Review

After an adequate time for discovery, the party without the burden of proof may, without presenting evidence, move for summary judgment on the ground that there is no evidence to support an essential element of the nonmovant's claim or defense. Tex. R. Civ. P. 166a(i). The motion must specifically state the elements for which there is no evidence. *Id.*; *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009). The trial court must grant the motion unless the nonmovant produces summary judgment evidence that raises a genuine issue of material fact. *See* Tex. R. Civ. P. 166a(i) & cmt.; *Hamilton v. Wilson*, 249 S.W.3d 425, 426 (Tex. 2008).

When reviewing a no-evidence summary judgment, we examine the entire record in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts against the motion. *Sudan v. Sudan*, 199 S.W.3d 291, 292 (Tex. 2006). We review a no-evidence summary judgment for evidence that would enable reasonable and fair-minded jurors to differ in their conclusions. *Hamilton*, 249 S.W.3d at 426 (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005)). We credit evidence favorable to the nonmovant if reasonable jurors could, and we disregard evidence contrary to the nonmovant unless reasonable jurors could not. *Timpte Indus.*, 286 S.W.3d at 310 (quoting *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006)). If the nonmovant brings forward more than a scintilla of probative evidence that raises a genuine issue of material fact, then a no-evidence summary judgment is not proper. *Smith v. O'Donnell*, 288 S.W.3d 417, 424 (Tex. 2009); *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003), *cert. denied*, 541 U.S. 1030 (2004).

B. Appellees' Motion

In their motion, Appellees argued that summary judgment was proper on the Seims' breach of contract claim because the Seims had no evidence that their loss occurred during the policy period.[9] *See* *Emp'rs Cas. Co. v. Block*, 744 S.W.2d 940, 944 (Tex. 1988) ("An insured cannot recover under an insurance policy unless facts are pleaded and proved showing that damages are covered by his policy."); *see also* *Ulico Cas. Co. v. Allied Pilots Ass'n*, 262 S.W.3d 773, 778 (Tex. 2008) ("[W]hen a policy covers risks for a certain time period, the time of the event allegedly triggering coverage is a precondition to coverage and is not considered a defensive matter to be pleaded and proved by the insurer.").

9 The policy stated that it "applies only to loss ... which occurs during the policy period stated on the declarations page." The declarations page reflected that the policy period was from April 27, 2013 through April 27, 2014.

Appellees then argued that because the Seims had no evidence to support their breach of contract claim, summary judgment was proper on their extracontractual claims. *See* Tex. Ins. Code Ann. § 542.060 (providing that in order to be liable for a prompt-payment violation, the insurer must also be "liable for a claim under an insurance policy"); *State Farm Lloyds v. Page*, 315 S.W.3d 525, 532 (Tex. 2010) ("When the issue of coverage is resolved in the insurer's favor, extra-contractual claims do not survive."); *Archer v. Med. Protective Co. of Fort Wayne, Indiana*, 197 S.W.3d 422, 426 (Tex. App.–Amarillo 2006, pet. denied) (holding insured could not maintain claims against insurer for unfair settlement practices where insurer had no liability for underlying policy claim); *Lundstrom v. United Servs. Ass'n–CIC*, 192 S.W.3d 78, 95–97 (Tex. App.–Houston [14th Dist.] 2006, pet. denied) (holding insurer was not liable for insureds' claims of bad faith, violation of the DTPA, and unfair insurance practices when the policy did not provide coverage for the claimed loss); *Toonen v. United Servs. Auto. Ass'n*, 935 S.W.2d 937, 941 (Tex. App.–San Antonio 1996, no writ) ("As a general rule, an insured does not have a bad faith claim in the absence of a breach of contract by the insurer.").

C. The Seims' Responses

***4** Seven days prior to the summary judgment hearing, the Seims filed their summary judgment response. In their response, the Seims referenced an expert report made by Dr. Neil B. Hall, an affidavit made by Dr. Hall, and certain deposition testimony of Linda Seim to support their claim that their property damage stemmed from an August 2013 storm. While this evidence was referenced in their response, no evidence was actually attached to the Seims' initial summary judgment response.

On the day of the summary judgment hearing, the Seims once again filed their summary judgment response. Again, the Seims referenced Dr. Hall's report, Dr. Hall's affidavit, and Linda Seim's deposition testimony to support their claim that their property damage stemmed from an August 2013 storm. The Seims attached two reports made by Dr. Hall to their summary judgment response. In his initial report, Dr. Hall is equivocal as to the cause of the Seims' property damage, acknowledging that some of their property damage occurred prior to the August 2013 storm. In his second report, Dr. Hall emphatically states that the damage to the Seims' property "resulted from [an] August 13, 2013, windstorm." Notably, neither of Dr. Hall's reports are verified. Also of note, the Seims did not attach any of Linda Seim's deposition testimony to their response. The Seims did, however, attach Dr. Hall's affidavit to their summary judgment response. Dr. Hall's affidavit states:

> BEFORE ME, the undersigned authority, personally appeared Dr. Neil B. Hall, who is personally known to me, and being duly sworn by law upon his oath, deposed and stated:
>
> 1. "My name is Dr. Neil B. Hall of GROUNDTRUTHFORENSICS. I am of sound mind and capable of making this. I am over the age of twenty-one and have personal knowledge of the facts stated herein, which are true and correct. At all times material hereto I have been retained as an expert for Plaintiffs, Linda Seim and Richard Seim, in the above-styled cause in the 141st Judicial District Court of Tarrant County Texas."
>
> 2. "I issued an Initial Report dated August 16, 2014, concerning the Plaintiffs' residence at 1712 Wimbleton Drive, Bedford, Texas 76021 and their claim for damages sustained to their home cause[d] by a storm on August 13, 2013."
>
> 3. "I issued a Supplemental Report dated November 24, 2015, concerning the damage I observed to the interior, the radiant barrier between the rafters and battens, and the concrete tiles during my initial inspection the Plaintiffs' residence and their claim for damages sustained to their home caused by a storm on August 13, 2013."
>
> I personally attest that all the facts stated in this Affidavit are true and accurate to the best of my knowledge.
>
> Further Affiant sayeth not.

Six days after the summary judgment hearing, the Seims filed another summary judgment response. This response did not contain any summary judgment evidence that was not already included in the summary judgment response filed the morning of the summary judgment hearing. [10] The Seims later filed a supplemental summary judgment response and an amended supplemental summary judgment response, neither of which contained evidence to support their claim that their property damage stemmed from an August 2013 storm.

10 As mentioned above, the only discernible difference between these two responses is that the later-filed response contains page numbers at the bottom of the response while the earlier-filed response does not.

D. Analysis

As a preliminary matter, we address Appellees' argument that summary judgment was proper because the Seims' summary judgment evidence was untimely. Appellees correctly point out that a summary judgment response, including opposing summary judgment evidence, may be filed no later than the seventh day before the date of the summary judgment hearing except on leave of court. *See* Tex. R. Civ. P. 166a(c). The record must contain an affirmative indication that the trial court permitted the late filing of a response or the response is a nullity. *K–Six Television, Inc. v. Santiago*, 75 S.W.3d 91, 96 (Tex. App.–San Antonio 2002, no pet.). Permission to file a late response may be reflected in a recital in the summary judgment order. *Id.*

***5** Here, the order on Appellees' motion for summary judgment reflects that the trial court considered "all responses [and] all competent summary judgment evidence." We hold that that this recital in the summary judgment order is an affirmative indication that the trial court permitted the Seims' various untimely summary judgment responses and evidence. *See* *Auten v. DJ Clark, Inc.*, 209 S.W.3d 695, 702–03 (Tex. App.–Houston [14th Dist.] 2006, no pet.) (considering, on appeal, late-filed affidavit where trial court's order recited that it considered affidavit); *K–Six Television*, 75 S.W.3d at 96 (considering, on appeal, late-filed summary judgment response where trial court's order recited that it considered the response); *Hendricks v. Thornton*, 973 S.W.2d 348, 371 (Tex. App.–Beaumont 1998, pet. denied) ("[T]he trial court's order granting the summary judgment specifically states the trial judge reviewed the investors' responses. We conclude, therefore, the record indicates the trial court permitted the late response."). Accordingly, we will also consider the Seims' various untimely summary judgment responses and evidence.

We next turn to whether the Seims brought forth more than a scintilla of probative evidence to raise a genuine issue of material fact as to whether their loss occurred during the policy period—namely whether it occurred between April 27, 2013, and April 27, 2014. The only evidence that the Seims pointed to in their various summary judgment responses to establish when their loss occurred was Dr. Hall's reports, Dr. Hall's affidavit, and Linda Seim's deposition testimony.

Linda Seim's deposition testimony was not attached to any of the Seims' summary judgment responses; it, therefore, does nothing to raise a fact issue as to whether the Seims' loss occurred during the policy period. [11] While Dr. Hall's reports—particularly the second one—maintain that the Seims' property damage occurred as a result of an August 2013 storm, neither report is verified. As neither report is verified, neither report is competent summary judgment evidence. *See* Tex. R. Civ. P. 166a(f); *Kolb v. Scarbrough*, No. 01–14–00671–CV, 2015 WL 1408780, at *4 (Tex. App.–Houston [1st Dist.] Mar. 26, 2015, no pet.) (mem. op.) ("Because the expert report is not verified, it is not competent summary-judgment evidence and cannot defeat the Scarbroughs' no-evidence motion."); *Bayou City Fish Co. v. S. Texas Shrimp Processors, Inc.*, No. 13–06–00438–CV, 2007 WL 4112003, at *3 (Tex. App.–Corpus Christi Nov. 20, 2007, no pet.) (mem. op.) ("If, therefore, a statement is unauthenticated, unsworn, and unaccompanied by an affidavit, it is not competent summary judgment evidence."); *Moron v. Heredia*, 133 S.W.3d 668, 671 (Tex. App.–Corpus Christi 2003, no pet.) ("The only document produced by appellants in response to appellee's motion for summary judgment was McAllister's report. This document was neither verified nor accompanied by an affidavit. As such, it did not constitute admissible evidence.").

11 In their brief, the Seims do not mention Linda Seim's deposition testimony to support their argument that their loss occurred during the policy period; rather, they point to Dr. Hall's reports and affidavit to support their argument.

We next turn to Dr. Hall's affidavit. We begin by noting that the affidavit does not explain how the Seims' loss was caused by an August 2013 storm. [12] While the affidavit references an initial report dated August 16, 2014, and a supplemental report dated November 24, 2015, neither of the reports are attached to the affidavit. We are thus left to guess whether the reports referenced in Dr. Hall's affidavit are the same as the unverified reports attached to the summary judgment evidence. [13] More problematic, while the affidavit states that the facts stated *therein* are "true and accurate," there is nothing to indicate that the statements made in *Dr. Hall's reports*—particularly the statements concerning when the Seims' loss occurred—are "true and accurate." *See* *Coastal Cement Sand Inc. v. First Interstate Credit All., Inc.*, 956 S.W.2d 562, 567 (Tex. App.–Houston [14th Dist. 1997] pet. denied) ("The Little affidavit swears the unsworn Mehl Declaration is a true and correct copy. However, it does not swear *the facts* contained within the Mehl Declaration are true and correct .... Therefore, ... we cannot consider the facts contained within the Declaration as proper summary judgment evidence."). We are thus left with no sworn evidence that the Seims' loss occurred during the policy period. *See* Tex. R. Civ. P. 166a(f); *Kolb*, 2015 WL 1408780, at *4; *Bayou City Fish Co.*, 2007 WL 4112003, at *3; *Moron*, 133 S.W.3d at 671.

12 Indeed, the only reference to an August 2013 storm is Dr. Hall's statement that the Seims' claim that their damages arose out of an August 2013 storm.

13 We note, however, that the dates listed for the reports in the affidavit correspond to the dates listed on the unverified reports.

***6** As the Seims have produced no competent evidence to raise a genuine issue of material fact as to whether their loss occurred during the policy period, summary judgment was proper as to all of the Seims' claims. *See* *Page*, 315 S.W.3d at 532; *Allied Pilots Ass'n*, 262 S.W.3d at 778; *Block*, 744 S.W.2d at 944; *Archer*, 197 S.W.3d at 426; *Lundstrom*, 192 S.W.3d at 95–97; *Toonen*, 935 S.W.2d at 941. We thus overrule the Seims' second issue.

IV. CONCLUSION

Having overruled the Seims' second issue, [14] we affirm the trial court's judgment.

14 Because we have overruled the Seims' second issue, we need not decide their first issue regarding whether summary judgment was proper based on limitations. *See* Tex. R. App. P. 47.1.

All Citations

Not Reported in S.W.3d, 2017 WL 526310

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