AFFIRMED; Opinion Filed September 7, 2012.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-10-00095-CV

BOOKLAB INC. AND JEFFREY SLOSAR, Appellants

V.

KONICA MINOLTA BUSINESS SOLUTIONS, INC. AND CIT TECHNOLOGY FINANCING SERVS., INC., Appellees

On Appeal from the 193rd Judicial District Court
Dallas County, Texas
Trial Court Cause No. 08-1769-L

MEMORANDUM OPINION

Before Justices O'Neill, Richter, and Lang-Miers
Opinion By Justice O'Neill

Appellants Booklab Inc. and Jeffrey Slosar appeal summary judgments granted in favor of appellees Konica Minolta Business Solutions, Inc. and CIT Technology Financing Services, Inc. Booklab[1] asserts the trial court erred in: (1) granting Konica's no-evidence motion for summary judgment without giving it an "adequate time" for discovery, (2) not granting it a continuance to conduct further discovery, (3) not allowing it to amend a defective affidavit, and (4) "ignoring" its special exceptions. Appellants assert the trial court also erred in granting CIT's motion for summary

[1] Although appellants have filed a single brief and have often failed to differentiate between Booklab and Slosar, the claims and motions for summary judgment as it relates to the parties are not identical. We will refer to the specific party involved when relevant to the issue presented.

judgment because (1) CIT improperly "used" deemed admissions that had been undeemed, (2) CIT relied on exhibits "admitted" in violation of the trial court's scheduling order, and (3) appellants were not given notice of the summary judgment hearing. For the following reasons, we affirm the trial court's judgment.

Booklab sued Konica and CIT alleging various claims in association with a printer it had acquired from Konica. Booklab acquired the printer by entering into a "finance lease" with CIT. Booklab alleged claims against Konica and CIT for fraudulent inducement, declaratory judgment, breach of contract, and deceptive trade practices. CIT filed a counterclaim against Booklab for breach of the finance lease, and a third-party petition against appellant Slosar based on his guaranty of the finance lease. The trial court granted summary judgment in favor of Konica and CIT on all issues. This appeal followed.

Konica's No-Evidence Motion for Summary Judgment

Booklab first filed suit against Konica on February 15, 2008. Nearly sixteen months later, Konica filed a "no evidence" motion for partial summary judgment on Booklab's claim for damages. Booklab responded to the motion asserting it was premature because it had not yet had an adequate time for discovery. Booklab also responded to the merits of the motion, relying on the affidavit of Jeffrey Slosar to raise a fact question on damages. In his affidavit, Slosar contended Booklab suffered damages because the printer did not operate as promised and, if it had operated as promised, Booklab would have obtained lucrative printing contracts from Major League Baseball and others.

Konica objected to Slosar's affidavit asserting, among other things, the affidavit (1) did not show Slosar's competence to testify, (2) lacked a foundation, and (3) was conclusory and speculative. The trial court sustained Konica's objections to Slosar's affidavit, struck the affidavit, and granted Konica's motion for summary judgment.

In the first issue, Booklab contends the trial court erred in granting Konica's "no-evidence" motion because it did not have an adequate time for discovery. A party may not move for a no-evidence summary judgment until after the opposing party has had an "adequate time" to conduct discovery. *See* TEX. R. APP. P. 166a(i). To show it did not have an adequate time for discovery, Booklab relies heavily on the fact that the discovery period set forth in the trial court's agreed scheduling order was not over when Konica filed its motion. However, the rules do not require that the discovery period applicable to the case to have ended before a no-evidence summary judgment may be granted. *See* TEX. R. CIV. P. 166a(i); *Rest. Teams Intern., Inc. v. MG Sec. Corp*, 95 S.W.3d 336, 339 (Tex. App.—Dallas 2002, no pet.). Whether a nonmovant has had an adequate time for discovery is case specific. *Id; McClure v. Attebury*, 20 S.W.3d 722, 729 (Tex.App.-Amarillo 1999, no pet.). To determine whether an adequate time for discovery has passed, we examine such factors as: (1) the nature of the case; (2) the nature of evidence necessary to controvert the no-evidence motion; (3) the length of time the case was active; (4) the amount of time the no-evidence motion was on file; (5) whether the movant had requested stricter deadlines for discovery; (6) the amount of discovery that had already taken place; and (7) whether the discovery deadlines in place were specific or vague. *Martinez v. City of San Antonio*, 40 S.W.3d 587, 591 (Tex. App.—San Antonio 2001, pet. denied). We review a trial court's determination that there has been an adequate time for discovery for an abuse of discretion. *Specialty Retailers, Inc. v. Fuqua*, 29 S.W.3d 140, 145 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

Booklab's claims against Konica had been pending for almost sixteen months when Konica filed its motion for summary judgment, and the summary judgment motion was pending for another two months before the summary judgment hearing. Thus, Booklab had eighteen months to conduct discovery. According to Booklab, this was not an adequate time because its case was a "complex

case" involving multiple parties, multiple claims, and $500,000 in damages. However, the issues presented in the motion for summary judgment concerned only Booklab's claims against Konica and challenged only Booklab's own damages.[2] The nature of the evidence necessary to establish a plaintiff's own damages in this type of case is not evidence that would ordinarily require significant, if any, discovery. Booklab's damages claim was based on alleged loss of its own business opportunities with its own clients. The only discovery Booklab complains it was prevented from obtaining concerned depositions of Konica's employees and corporate executives. Booklab wholly fails to articulate how such deposition testimony was necessary to raise a fact question on damages. To the extent Booklab asserts it needed additional time to obtain "discovery" from its clients and an expert witness, Booklab had well over a year to do so. We cannot conclude the trial court abused its discretion in concluding Booklab had an adequate time for discovery.

In the second issue, Booklab contends the trial court erred in not granting its motion for continuance. Booklab's motion for continuance was based on its assertion it had not had an adequate time for discovery. We have previously decided this issue against Booklab. Booklab now asserts it was entitled to a continuance to conduct additional discovery under Texas Rule of Civil Procedure 252. Even if we were to conclude Booklab preserved this complaint, Booklab has not shown it was entitled to a continuance under rule 252. If a continuance is sought to pursue further discovery, the motion must be supported by affidavit describing the evidence sought, explaining its materiality, and showing the party requesting the continuance has used due diligence to obtain the evidence. *See* TEX. R. CIV. P. 252; *Wal-Mart Stores Tex., L.P. v. Crosby*, 295 S.W.3d 346, 356 (Tex. App.—Dallas 2009, no pet.). Conclusory allegations are not sufficient. *Lee v. Haynes & Boone, L.L.P.*, 129 S.W.3d 192, 198 (Tex. App.—Dallas 2004, pet. denied).

Booklab relied on the affidavit of John T. Wilson to support its motion for continuance.

[2] Although Konica had filed an earlier broader motion for summary judgment, the trial court did not consider that motion.

Wilson's affidavit did not set forth Booklab's diligence in obtaining evidence necessary to oppose the motion for summary judgment. Nor did the affidavit show materiality of any evidence it was seeking to obtain. The affidavit did generally assert it needed to take certain depositions to show the leased equipment caused damages and how the damages were caused. The affidavit did not set forth how any of the witnesses might be able to provide such damages evidence, much less what that damages evidence might be. We conclude the affidavit was conclusory and did not meet the requirements of rule 252. We resolve the second issue against Booklab.

In its third issue, Booklab contends the trial court erred in granting Konica's motion for summary judgment without first giving it an opportunity to amend a defective affidavit. Booklab relied on Slosar's affidavit to respond to Konica's motion. Konica raised several objections to the affidavit, including its contention that the affidavit was irrelevant and conclusory. The trial court sustained Konica's objections and Booklab has not challenged that ruling. Instead, it asserts it should have been given an opportunity to amend the affidavit. A trial court is required to provide an opportunity to amend a summary judgment affidavit only were the defect is one of form. *Threlkeld v. Urech*, 329 S.W.3d 84, 89 (Tex. App.—Dallas 2010, pet. denied). A conclusory statement in an affidavit is a defect of substance. *Id.* Because the affidavit was stricken for defects of substance, as well as form, the trial court was not required to give Booklab an opportunity to amend. Moreover, even if the trial court erred in striking the affidavit, we would not reverse unless the error "probably caused the rendition of an improper judgment. TEX. R. APP. P. 44.1(a)(1); *Mira Mar Dev. Corp. v. City of Coppell*, 364 S.W.3d 366, 376 (Tex. App.—Dallas 2012, no pet.). It is the appellant's burden to show harm from an erroneous evidentiary ruling. *Mira Mar*, 364 S.W.3d at 376; *cf. Hewitt v. Biscaro*, 353 S.W.3d 304, 308 (Tex. App.—Dallas 2011, no pet.) (when trial court improperly strikes affidavit, this court will consider the affidavit in our review of the merits of the appeal). Booklab has

not challenged the merits of the summary judgment ruling and has not shown the affidavit would have been sufficient to raise a fact question on damages. Therefore, Booklab has not shown any error in striking the affidavit was reversible. We resolve the third issue against Booklab.

In the fourth issue, Booklab contends the trial court erred in "ignoring" its special exceptions to Konica's motion for summary judgment. Booklab has cited no legal authority and has provided no substantive analysis showing the trial court should have granted its special exceptions. Therefore, this issue is inadequately briefed and presents nothing to review. TEX. R. APP. P. 38.1(h); *Bullock v. Am. Heart Ass'n*, 360 S.W.3d 661, 665 (Tex. App.—Dallas 2012, pet. denied).

CIT's Motions for Summary Judgment

On August 18, 2009, CIT filed a traditional and no-evidence motion for summary judgment asserting (1) Booklab could not recover on its claims against CIT, (2) Booklab was liable as a matter of law on the finance lease, and (3) Slosar was liable as a matter of law on his guaranty of the lease. After a hearing, the trial court granted the motion only as to Booklab's claims against CIT. CIT filed another traditional motion for summary judgment, again asserting Booklab was liable on the lease and Slosar was liable on his guaranty. The trial court granted this motion and rendered judgment in favor of CIT on its claims against Booklab and Slosar.

In the fifth issue, appellants contend the trial court erred in granting CIT's motion for summary judgment because CIT "improperly used" deemed admissions. Appellants assert CIT's August 18, 2009 summary judgment motion "included as evidence" deemed admissions that were subsequently undeemed. Appellants have not however established the deemed admissions were necessary to the summary judgment. Indeed, the August 18, 2009 motion was granted only as to Booklab's claims against CIT and was thus supportable on CIT's no-evidence grounds alone.[3]

[3] CIT's subsequent motion for summary judgment also cited to the deemed admissions to support its recitation of undisputed facts. In that motion,

Because Booklab has not shown the summary judgment would have been improper absent the deemed admission, this issue presents nothing to review.

In their sixth issue, appellants contend CIT improperly "used" exhibits as summary judgment evidence that were not timely provided pursuant to the trial court's scheduling order. Appellants have not shown any such exhibits were necessary to support either of CIT's summary judgment motions. Further, appellants cite no legal authority and provide no legal argument or analysis to support this complaint. This issue is inadequately briefed and presents nothing to review. *See* TEX. R. APP. P. 38.1(h); *Bullock*, 360 S.W.3d at 665.

In their seventh issue, appellants assert they were not given sufficient notice of the hearing on CIT's October 1, 2009 motion for summary judgment. According to appellants, the trial court held the summary judgment hearing on that motion on October 9, 2009, seven days after it was filed. Appellants therefore assert summary judgment was error because they did not have twenty-one days notice as required by Texas Rule of Civil Procedure 166a(c). TEX. R. CIV. P. 166a(c). Appellants' representation of the record is incorrect. The trial court's orders make clear the hearing on the October 1, 2009 motion was conducted on November 2, 2009. Although the trial court held a summary judgment hearing on October 9, 2009, that hearing was on CIT's August 18, 2009 motion for summary judgment. In their reply brief, appellants acknowledge their error, but change their argument, asserting for the first time they did not have sufficient notice of the hearing on the earlier August 18, 2009 motion. A party may not raise a new issue in a reply brief. *Private Mini Storage Realty, L.P. v. Larry F. Smith, Inc.*, 304 S.W.3d 854, 859 (Tex. App.–Dallas 2010, no pet.). Moreover, appellants do not dispute they had twenty-one days notice of the August 18, 2009 motion, but complain CIT filed a supplemental affidavit less than twenty-one days before the hearing. Appellants cite no authority that a trial court cannot grant a motion for summary judgment when

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CIT acknowledged the admissions may not remain deemed, and specifically stated that it was providing other summary judgment evidence to support its motion. Thus, the motion did not purport to be based on deemed admissions and appellants have not shown otherwise.

summary-judgment evidence is not timely filed. Indeed, the remedy when evidence is not timely filed, and the trial court did not grant leave, is that the evidence should not be considered in our review. *See Benchmark Bank v. Crowder*, 919 S.W.2d 657, 663 (Tex. 1996). However, appellants have not sought review of the merits of the summary judgment in this appeal. So, again, this issue presents nothing to review. We resolve the seventh issue against appellants.

We affirm the trial court's judgment.

MICHAEL J. O'NEILL
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

BOOKLAB, INC. AND JEFFREY SLOSAR, Appellants

No. 05-10-00095-CV V.

KONICA MINOLTA BUSINESS SOLUTIONS, INC. AND CIT TECHNOLOGY FINANCING SERVS., INC., Appellees

Appeal from the 193rd Judicial District Court of Dallas County, Texas. (Tr.Ct.No. 08-1769-L).

Opinion delivered by Justice O'Neill, Justices Richter and Lang-Miers participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**. It is **ORDERED** that appellees Konica Minolta Business Solutions, Inc. and CIT Technology Financing Servs., Inc. recover their costs of this appeal from appellants Booklab, Inc. and Jeffrey Slosar.

Judgment entered September 7, 2012.

/Michael J. O'Neill/
MICHAEL J. O'NEILL
JUSTICE

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