

Affirmed and Opinion Filed March 21, 2016



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-14-01392-CV

**K.W. MINISTRIES, INC., Appellant
V.
AUCTION CREDIT ENTERPRISES, LLC, Appellee**

**On Appeal from the 116th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-13-14570**

MEMORANDUM OPINION

Before Justices Fillmore, Myers, and Whitehill
Opinion by Justice Whitehill

This case involves the application of well-known rules of trial and appellate procedure applicable to the trial court's grant of summary judgment in favor of Auction Credit Enterprises, L.L.C. (ACE) on K.W. Ministries, Inc.'s (KWM) claims.

In three issues, KWM argues that the trial court erred by not considering KWM's amended summary judgment response because (i) that response was on file at the time of the summary judgment hearing and (ii) the amended response relates back to the original response date. From those premises, KWM urges that it raised fact issues defeating ACE's summary judgment motions.

We reject KWM's arguments because (i) KWM did not obtain court leave to file its amended response; (ii) the pleadings relation back statute does not apply to summary judgment

responses; and (iii) we need not consider whether KWM's amended response raised a fact issue because it was not properly before the court. We thus affirm the trial court's judgment.

I. Background

Because the facts and procedural posture of this litigation are well-known to the parties, we focus only on specific facts germane to this appeal.

KWM sued ACE for breach of contract, fraud, defamation, and deceptive trade practices regarding a motor vehicle floorplan financing agreement. ACE answered and asserted various affirmative defenses.

On July 8, 2014, ACE filed a traditional summary judgment motion. ACE's motion was originally set for hearing on Friday, August 8, 2014, but that hearing was continued until Monday, September 15, 2014.

ACE amended its motion for summary judgment on August 25, 2014 to assert both traditional and no evidence summary judgment grounds. ACE's motions were set for hearing on September 15, 2014.

On September 8, 2014, KWM filed a response that addressed only one of its claims and did not include any summary judgment evidence. Then, three days before the hearing, KWM filed a "Document Supplement" to its response. The supplement was not accompanied by a motion seeking leave to file it.

On September 15, 2014, the morning of the hearing, KWM filed an amended summary judgment response accompanied by an affidavit and other materials. During the hearing, KWM asked the court to "receive my oral motion for leave to amend and accept our response to the summary judgment that was filed this morning." The trial judge asked why counsel had not provided an affidavit to support the response on the day it was due instead of on the morning of

the hearing, and counsel replied, “I don’t have a satisfactory answer for that, Your Honor.” Later, the judge noted that KWM had not offered any good cause for the untimely filing.

The trial court’s final judgment granted summary judgment for ACE, expressly denied KWM’s request for leave to file the amended response, and ordered that KWM take nothing on its claims. This appeal followed.

II. Analysis

A. **KWM’s First Issue: Did the trial court err by not considering KWM’s amended summary judgment response?**

1. **Did KWM’s untimely amended response relate back in time to the initial response under rule 166a(c)?**

KWM contends that Tex. R. Civ. P. 166a(c) requires that the trial court consider any evidence or response that is on file when the summary judgment hearing occurs, regardless of when those items were filed. In support of this argument, KWM relies on only an isolated phrase in a portion of the rule referencing materials “on file at the time of the hearing.” Specifically, the part of the rule upon which KWM relies states:

The judgment sought shall be rendered forthwith if (i) the deposition transcripts, interrogatory answers, and other discovery responses referenced or set forth in the motion or response, and (ii) the pleadings, admissions, affidavits, stipulations of the parties, and authenticated or certified public records, if any, *on file at the time of the hearing*, or filed thereafter and before judgment with permission of the court, show that, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion or in an answer or any other response.

TEX. R. CIV. P.166a(c) (Emphasis added).

But the rule also provides that, “Except on leave of 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.” TEX. R. CIV. P.166a(c); *see also Benchmark Bank v. Crowder*, 919 S.W.2d 657, 663 (Tex. 1996) (late-filed summary judgment evidence requires leave of court). Read as a whole,

rule 166a(c) thus requires a non-movant to file its summary judgment response and related evidence at least seven days before the hearing date unless the non-movant obtains court leave to file the materials at a different time.

Here, there is no dispute but that KWM's amended response was not timely filed under the rule. Moreover, by counsel verbally asking the court to consider the amended response KWM tacitly acknowledged that leave of court was required.

Finally, a party seeking to file a late summary judgment response must establish good cause for doing so. *See Carpenter v. Cimarron Hydrocarbons Corp.*, 98 S.W.3d 682, 684 (Tex. 2002). However, KWM's counsel said at the hearing that he had no good cause, and KWM does not rely on any such cause now.

Accordingly, we reject KWM's argument that rule 166a(c) required the the trial court to consider KWM's amended summary judgment response filed on the morning of the summary judgment hearing.

2. Does KWM's untimely response relate back in time to its timely response under civil practice and remedies code §16.068?

KWM nonetheless maintains that civil practice and remedies code §16.068 applies here to relate KWM's amended summary judgment response back to the date of KWM's original summary judgment response. *See TEX. CIV. PRAC. & REM. CODE ANN. §16.068.* But KWM offers no case supporting that argument, and we disagree with KWM's reading of that statute.

Specifically, § 16.068 provides that for purposes of tolling limitations certain pleadings may relate back in time to when an earlier pleading was filed:

If a filed **pleading** relates to a cause of action, cross action, counterclaim, or defense that is not subject to a plea of limitation when the **pleading** is filed, a subsequent amendment or supplement to the **pleading** that changes the facts or grounds of liability or defense is not subject to a plea of limitation unless the amendment or supplement is wholly based on a new, distinct, or different transaction or occurrence.

Id. (Emphasis added). By its terms, this statute stops the limitations clock for related claims when the original petition is timely filed. *See Almazan v. United Servs. Auto. Ass'n*, 840 S.W.2d 776, 779 (Tex. App.—San Antonio 1992, writ denied).

Significantly, the statute is entitled “Amended and Supplemental Pleadings.” TEX. CIV. PRAC. & REM. CODE ANN. §16.068. A summary judgment response, however, is not a pleading. *See In re S.A.P.*, 156 S.W.3d 574, 576.3 (Tex. 2005) (summary judgment motion not a pleading).

Moreover, applying § 16.068’s limitations and pleadings concept to rule 166a’s motion for summary judgment filing requirements would, as a practical matter, remove those requirements from rule 166a. We decline KWM’s request to do so because we are bound by plain statutory text and there is nothing in this statutory text indicating that the legislature intended that result. *See City of Rockwall v. Hughes*, 246 S.W.3d 621, 625–26 (Tex. 2008) (we rely on the plain meaning of statutory text unless a different meaning is supplied by legislative definition or is apparent from the context, or the construction leads to absurd results).

Because neither rule 166a(c)’s text nor the relation back doctrine support KWM’s arguments that the trial court should have considered the untimely filings when it ruled on ACE’s motions, we reject KWM’s first issue.

B. KWM’s Second and Third Issues: Did KWM raise a fact issue that would defeat ACE’s summary judgment motion?

KWM also contends the trial court erred in granting summary judgment because it raised a genuine issue of material fact. But because KWM’s summary judgment evidence and response were not timely filed, we need not consider whether such evidence raised a material issue of fact. *See TEX. R. APP. P. 47.1.*

III. Conclusion

Having resolved all of KWM's issues against it, we affirm the trial court's judgment.

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/Bill Whitehill/

BILL WHITEHILL
JUSTICE



**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

K.W. MINISTRIES, INC., Appellant

No. 05-14-01392-CV V.

AUCTION CREDIT ENTERPRISES, LLC,
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Opinion delivered by Justice Whitehill.

Justices Fillmore and Myers participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee AUCTION CREDIT ENTERPRISES, LLC recover its costs of this appeal from appellant K.W. MINISTRIES, INC..

Judgment entered March 21, 2016.