REVERSE and REMAND; and Opinion Filed March 30, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-01229-CV

IAN ACREY, PETROLIA GROUP, LLC, PETROLIA WEST I, LLC AND QUANAH ACME, LLC, Appellants
V.
KILGORE & KILGORE, PLLC, Appellee

On Appeal from the 193rd Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-15-03110

MEMORANDUM OPINION

Before Chief Justice Wright and Justices Fillmore, and Brown
Opinion by Justice Brown

Appellants Ian Acrey, Petrolia Group, LLC, Petrolia West I, LLC and Quanah Acme, LLC appeal a summary judgment granted in favor of appellee Kilgore & Kilgore on its claims for breach of contract and on a sworn account. In a single issue, appellants generally contend the trial court erred in granting K & K's motion for summary judgment. For the following reasons, we reverse the trial court's judgment and remand to the trial court for further proceedings.

BACKGROUND

In 2013, Kilgore & Kilgore and Ian Acrey executed an engagement letter in which Kilgore & Kilgore agreed to represent Acrey and "related entities" as local counsel in a suit that was then pending in Dallas County. Under the terms of the engagement letter, Acrey and the related entities agreed to pay Kilgore & Kilgore $450 per hour for Robert Thornton's legal

services. The letter did not name the related entities, but was signed by Acrey individually, and on behalf of "Petrolia Group, LLC, Petrolia Weset, [sic] LLC, and Quanah Acme LLC." Kilgore & Kilgore subsequently represented Acrey, Petrolia Group, Petrolia West I, and Quanah Acme in the Dallas County suit.

Kilgore & Kilgore was paid for its services through the end of 2013, when the litigation resulted in a settlement agreement. Kilgore & Kilgore continued to provide services to appellants in 2014 in connection with a claim to enforce the terms of the settlement agreement.[1] Kilgore & Kilgore sued Acrey, Petrolia Group, Petrolia West, and Quanah Acme on a sworn account and for breach of contract seeking to recover amounts due for services it rendered in 2014.[2] Appellants, including Petrolia West ***I***, who had not yet been named as a defendant, answered and filed verified denials asserting there was a defect in parties and there was no joint and several liability.

Kilgore & Kilgore subsequently filed a Second Amended Petition naming "Petrolia West, I, LLC" as a party and also changing the date it asserted prejudgment interest began to accrue.[3] Kilgore & Kilgore then moved for summary judgment asserting it was entitled to judgment on the sworn account because appellants failed to file a verified denial. Kilgore & Kilgore also

[1] The record is silent with respect to whether appellants brought a separate action to enforce the terms of the settlement agreement.

[2] Under rule 185 of the rules of civil procedure:

> When any action or defense is founded upon an open account or other claim for goods, wares and merchandise, including any claim for a liquidated money demand based upon written contract or founded on business dealings between the parties, or is for personal service rendered, or labor done or labor or materials furnished, on which a systematic record has been kept, and is supported by the affidavit of the party, his agent or attorney taken before some officer authorized to administer oaths, to the effect that such claim is, within the knowledge of affiant, just and true, that it is due, and that all just and lawful offsets, payments and credits have been allowed, the same shall be taken as prima facie evidence thereof, unless the party resisting such claim shall file a written denial, under oath. A party resisting such a sworn claim shall comply with the rules of pleading as are required in any other kind of suit, provided, however, that if he does not timely file a written denial, under oath, he shall not be permitted to deny the claim, or any item therein, as the case may be. No particularization or description of the nature of the component parts of the account or claim is necessary unless the trial court sustains special exceptions to the pleadings.

[3] Kilgore & Kilgore also changed the date on which it alleged prejudgment interest began to accrue. Although it asserted each invoice was subject to a thirty-day grace period, Kilgore & Kilgore asserted it was only seeking prejudgment interest from the date appellants "were supposed to make a final payment under an attempted workout."

moved for summary judgment asserting it showed it was entitled to recover on its claim for breach of contract as a matter of law. After Kilgore & Kilgore filed its motion for summary judgment, appellants filed an amended answer with additional verified denials alleging Kilgore & Kilgore did not apply all lawful offsets and credits to the debt, and that Kilgore & Kilgore was not the only attorney that represented it in the prior litigation and it had duplicated the efforts of appellants' other attorneys and/or overbilled them.

Following a hearing, the trial court granted Kilgore & Kilgore's motion for summary judgment, awarding it $40,832.91 in actual damages, jointly and severally, against appellants. This appeal followed.

APPLICABLE LAW

A party moving for summary judgment carries the burden of establishing that no material fact issue exists and that it is entitled to judgment as a matter of law. Tex. R. Civ. P. 166 a(c); *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000). When a plaintiff moves for summary judgment, it has the burden to conclusively establish all elements of its claim as a matter of law. *Affordable Motor Co., Inc. v. LNA, LLC*, 351 S.W.3d 515, 519 (Tex. App.—Dallas 2011, pet. denied). A matter is conclusively established if reasonable people could not differ as to the conclusion to be drawn from the evidence. *See City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005); *Lam v. Phuong Nguyen*, 335 S.W.3d 786, 789 (Tex. App.—Dallas 2011, pet. denied). If the plaintiff satisfies this burden, the burden shifts to the defendant to present some evidence to raise a genuine issue of material fact. *Affordable Motor*, 351 S.W.3d at 519. When reviewing a motion for summary judgment, the court indulges every reasonable inference in favor of the non-movant, and resolves all doubts in its favor. *See Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985).

Texas Rule of Civil Procedure 166a(f) requires that affidavits supporting or opposing summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall affirmatively show that the affiant is competent to testify to the matters stated therein." TEX. R. CIV. P. 166a(f); *Ryland Grp., Inc. v. Hood*, 924 S.W.2d 120, 122 (Tex. 1996) (per curiam). *VSR Fin. Servs., Inc. v. McLendon*, 409 S.W.3d 817, 826 (Tex. App.—Dallas 2013, no pet.) (affidavit not based on personal knowledge is legally insufficient).

A summary judgment affidavit must "positively and unqualifiedly" represent that the facts stated in the affidavit are true. *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984); *Burke v. Satterfield*, 525 S.W.2d 950 (Tex. 1975). Statements predicated to the best of the affiants knowledge and belief do not constitute a positive and unqualified representation that such facts are true. *Burke v. Satterfield*, 525 S.W.2d 950, 955 (Tex. 1975); *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984). *See Pinkston v. Wills*, 200 S.W.2d 843, 845 (Tex. Civ. App.—Dallas 1947, no writ) ("affidavit" stating that allegations are true 'to the best of [affiant's] knowledge and belief' is fatally defective"); *VSR Fin. Services, Inc. v. McLendon*, 409 S.W.3d 817, 826 (Tex. App.—Dallas 2013, no pet.).

An objection that summary judgment evidence is conclusory is a defect of substance that may be raised for the first time on appeal. *S & I Mgmt., Inc. v. Sungju Choi*, 331 S.W.3d 849, 855–56 (Tex. App.—Dallas 2011, no pet.); *Brown v. Brown*, 145 S.W.3d 745, 751 (Tex. App.—Dallas 2004, pet. denied). The absence of records referenced in an affidavit may make the affidavit conclusory. *Brown*, 145 S.W.3d at 752 ; *Ceballos v. El Paso Health Care Sys*., 881 S.W.2d 439, 445 (Tex. App.—El Paso 1994, writ denied); *see also* Tex. R. Civ. P 166a(f) (sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith). Specifically, if records referenced in an affidavit are what provides

the affidavit with a factual basis, the absence of such records will render the affidavit conclusory. *See, e.g., Brown*, 145 S.W.3d at 752.

ANALYSIS

To show it was entitled to summary judgment on its claim, Kilgore & Kilgore was required to conclusively establish its damages and specifically that the fees and expenses it sought to recover were incurred pursuant to the engagement letter. *Schum v. Munck Wilson Mandala, LLP*, 497 S.W.3d 121, 127 (Tex. App.—Texarkana 2016, no pet.). Initially, we note Kilgore & Kilgore did not attach the engagement letter to its motion for summary judgment. However, it asserts the engagement letter "can be used to support [the] summary judgment" because it was attached to its petition and "pleadings" are part of the "summary judgment record." However, pleadings are not summary judgment evidence. *See Laidlaw Waste Sys. (Dallas), Inc. v. City of Wilmer*, 904 S.W.2d 656, 660 (Tex. 1995) (pleadings are not competent summary judgment evidence, even if sworn or verified).

To prove the amount of damages it suffered as a result of appellants' alleged breach of that letter, Kilgore & Kilgore relied on Thornton's affidavit, in which Thornton stated he reviewed Kilgore & Kilgore's invoices and computer records and that "after applying all credits and payments recorded on the records of Kilgore & Kilgore [] against the amounts charged to [appellants] for attorney's fees, costs and expenses during 2014, the net principal balance due and payable to Kilgore & Kilgore [] by [appellants] as of January 1, 2015 was the sum of [$40,832.91]."

To support his conclusion, Thornton stated that Kilgore & Kilgore periodically sent invoices to appellants and that he was attaching true and correct copies of those invoices "in redacted form" to his affidavit. Thornton attached nine of the ten invoices he relied on to establish Kilgore & Kilgore's damages to his affidavit. Those nine invoices contain redactions

but some are also missing entire pages. In addition, although Thornton stated that the invoices were sent to all of the appellants, the invoices attached to his affidavit are addressed only to Acrey individually. The invoices do not otherwise show to whom the services were rendered. *See Schum*, 497 S.W.3d at 126-27; *see also Sundance Oil Co. v. Aztec Pipe & Supply Co.*, 576 S.W.2d 780, 781 (Tex. 1978) (when the plaintiff's evidence fails to identify the defendant as the debtor on the account, "the sworn account is not considered as prima facie proof of the debt."); *Tandan v. Affordable Power*, L.P., 377 S.W.3d 889, 895 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (same).

Thornton also did not attach the computer records he relied on in his affidavit to establish Kilgore & Kilgore's damages. *See, e.g., Finn v. Finn*, 658 S.W.2d 735, 754 (Tex. App.—Dallas 1983, writ ref'd n.r.e.) (computer printouts are recognized as business records). Nor did he claim he had personal knowledge as to whether the computer records were accurate. Rather, he predicated his statement that those records were, "to the best of [his] knowledge and belief" accurate.

We conclude without the invoices or computer records Thornton relied on to support his affidavit, the affidavit was conclusory. *See Brown v. Brown*, 145 S.W.3d 745, 752 (Tex. App.—Dallas 2004, pet. denied); *Ceballos v. El Paso Health Care Sys*., 881 S.W.2d 439, 445 (Tex. App.—El Paso 1994, writ denied); *see also* Tex. R. Civ. P 166a(f). Accordingly, Kilgore & Kilgore failed to meet its burden to conclusively establish all elements of its claim as a matter of law. *Affordable Motor Co., Inc.* 351 S.W.3d at 519. Because the summary judgment record indicates there are genuine issues of material fact concerning the amount of damages allegedly sustained by Kilgore & Kilgore, the trial court erred in granting summary judgment. *See* TEX. R. CIV. P. 166 a(c); *Willrich*, 28 S.W. 3d 23.

We reverse the trial court's judgment and remand for further proceedings consistent with this opinion.

/Ada Brown/
ADA BROWN
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

IAN ACREY, PETROLIA GROUP, LLC, PETROLIA WEST I, LLC AND QUANAH ACME, LLC, Appellant

No. 05-15-01229-CV V.

KILGORE & KILGORE, PLLC, Appellee

On Appeal from the 193rd Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-15-03110.
Opinion delivered by Justice Brown. Chief Justice Wright and Justice Fillmore participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** and this cause is **REMANDED** to the trial court for further proceedings consistent with his opinion.

It is **ORDERED** that appellant IAN ACREY, PETROLIA GROUP, LLC, PETROLIA WEST I, LLC AND QUANAH ACME, LLC recover their costs of this appeal from appellee KILGORE & KILGORE, PLLC.

Judgment entered this 30th day of March, 2017.