

Reverse and Remand; Opinion Filed June 19, 2017.



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

No. 05-16-00281-CV

**ANALYTICAL TECHNOLOGY CONSULTANTS, INC. AND HECTOR BASS,
Appellants**

V.

AXIS CAPITAL, INC., Appellee

**On Appeal from the 95th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-15-08507-D**

MEMORANDUM OPINION

Before Justices Bridges, Myers, and Brown
Opinion by Justice Myers

Analytical Technology Consultants, Inc. and Hector Bass appeal the trial court's judgment awarding Axis Capital, Inc. damages and attorney's fees. Appellants bring three issues on appeal contending (1) the trial court's judgment is indefinite and void; (2) the trial court erred by granting Axis's motion for summary judgment; and (3) the trial court abused its discretion by denying appellants' motion for new trial. We conclude the trial court erred by granting the motion for summary judgment. Therefore, we reverse the trial court's judgment and remand the cause for further proceedings.

BACKGROUND

In September 2014, Analytical agreed to lease a "Ditch Witch" from Axis for forty-nine months. The lease required Analytical to pay \$23,000 for the first month's rent and \$3,956.36

per month for the next forty-eight months. Bass executed a personal guaranty of the lease. Analytical stopped paying the monthly rent in January 2015. In March of that year, Axis notified Analytical that it was in default under the lease, and Axis demanded payment of the past and future rentals discounted to current value and demanded the return of the leased equipment. Despite repeated demands, appellants did not return the equipment or tell Axis where the equipment was located. In July, Axis filed suit against Analytical for breach of the lease and against Bass for breach of his guaranty. Axis also sought recovery of the equipment in its suit and applied for a writ of sequestration for the equipment. Appellants answered the suit but did not assert any affirmative defenses. On August 3, the trial court issued an order for writ of sequestration. Sometime between then and October 23, appellants returned the equipment to Axis.

On November 3, 2015, Axis moved for summary judgment seeking damages of \$217,654.75 plus any additional amounts accruing before judgment, postjudgment attorney's fees, and permanent possession of the property. The motion was set for hearing on December 18, 2015. On November 13, appellants' attorney received an electronic notification of the December 18 setting. Appellants did not file a response to the motion for summary judgment, and they and their attorney did not appear at the hearing on the motion for summary judgment. On December 18, the trial court granted the motion for summary judgment, awarded Axis damages of \$196,233.12 and attorney's fees of \$25,201.12, and ordered that Axis recover any additional attorney's fees and expenses for enforcement of the judgment. The judgment also ordered that Axis was entitled to permanent possession of the equipment and to sell the equipment, retain the proceeds, and apply the proceeds to the amounts owed by appellants.

Appellants timely filed a motion for new trial asserting that their attorney did not see the e-mail notification setting the motion for summary judgment for a hearing and therefore was

unaware of the deadline for appellants' response to the motion for summary judgment. *See* TEX. R. CIV. P. 166a(c) (response to motion for summary judgment due "not later than seven days prior to the day of hearing"). Appellants also argued Axis miscalculated the discount of future rental payments and that the judgment was \$13,325.33 higher than it should have been. The trial court denied the motion for new trial.

After the trial court signed the judgment Axis filed documents stating it had sold the property on January 26, 2016 for \$72,500 to a third party and credited the net sales proceeds, \$65,250, toward the judgment. Axis also filed documents showing it had credited the judgment by \$13,325.33 retroactive to the date of the judgment, which was the amount appellants asserted the judgment was too high due to Axis's alleged miscalculation of the discount for future rental payments.

SUMMARY JUDGMENT

In their second issue, appellants contend the trial court erred by granting Axis's motion for summary judgment. The standard for reviewing a traditional summary judgment is well established. *See Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985); *McAfee, Inc. v. Agilysys, Inc.*, 316 S.W.3d 820, 825 (Tex. App.—Dallas 2010, no pet.). The movant has the burden of showing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). In deciding whether a disputed material fact issue exists precluding summary judgment, evidence favorable to the nonmovant will be taken as true. *Nixon*, 690 S.W.2d at 549; *In re Estate of Berry*, 280 S.W.3d 478, 480 (Tex. App.—Dallas 2009, no pet.). Every reasonable inference must be indulged in favor of the nonmovant and any doubts resolved in its favor. *City of Keller v. Wilson*, 168 S.W.3d 802, 824 (Tex. 2005). We review a summary judgment de novo to determine whether a party's right to

prevail is established as a matter of law. *Dickey v. Club Corp.*, 12 S.W.3d 172, 175 (Tex. App.—Dallas 2000, pet. denied).

A nonmovant need not respond to a motion for summary judgment. However, the failure to file a response limits the issues the nonmovant may assert on appeal:

[T]he non-movant's failure to answer or respond cannot supply by default the summary judgment proof necessary to establish the movant's right. If a non-movant fails to present any issues in its response or answer, the movant's right is not established and the movant must still establish its entitlement to summary judgment. The effect of such a failure is that the non-movant is limited on appeal to arguing the legal sufficiency of the grounds presented by the movant.

McConnell v. Southside Indep. Sch. Dist., 858 S.W.2d 337, 343 (Tex. 1993) (citation omitted); *see also*, TEX. R. APP. P. 166a(c) (issues not expressly presented in the motion or response shall not be considered on appeal as grounds for reversal).

In this case, appellants did not file a response to the motion for summary judgment. Therefore, they can contend only that the motion for summary judgment was legally insufficient to support the summary judgment.

Appellants argue Axis was not entitled to summary judgment because it failed to establish as a matter of law the amount of damages under the lease. The lease provided that upon an event of default, such as failing to make a payment when due, Axis could declare the accelerated balance under the lease immediately due and payable. The accelerated balance was the sum of all past-due rent payments, plus the present value of all future rent payments discounted at three percent per annum, plus the anticipated residual value of the equipment at the end of the lease discounted at a rate of three percent per annum. Besides recovery of the accelerated balance, Axis also had the right to:

terminate this lease and enter upon the premises where the Equipment is located, take possession of and remove same, and exercise any one or more of the following rights and remedies, without liability to lessee therefore and without affecting Lessee's obligations hereunder:

(i) sell, Lease or otherwise dispose of the Equipment or any part thereof at one or more public or private sales, Leases or other dispositions, at wholesale or retail, for such consideration, on such terms, for cash or on credit, as Lessor may deem advisable, on at least ten (10) days' prior notice to Lessee of any public sale or of the time after which private sale, Lease or other disposition may be made (which notice Lessee acknowledges is reasonable); and/or

(ii) retain the Equipment or any part thereof, crediting Lessee with the then reasonable rental value thereof for the balance of the Entire Term of this Lease[;] and/or

(iii) require Lessee to assemble all Equipment at Lessee's sole expenses, for Lessor's benefit, at a place reasonably designated by Lessor; and/or

(iv) pursue any other remedy granted by any existing or future document executed by Lessee or by law.

The lease also provided that if Axis sold the equipment, then Axis could deduct from the net proceeds of the sale "the anticipated residual value of the Equipment and all expenses," keep that amount for itself, and apply the remaining net proceeds to "the discounted unpaid rentals hereunder through the end of the Entire Term of this Lease, and any other amounts due hereunder, with Lessee to remain liable for any deficiency."

Thus, under the lease, if Analytical failed to make a payment, Axis could declare the accelerated balance immediately payable without terminating the lease. However, if Axis chose to terminate the lease because of an event of default, it could declare the accelerated balance immediately payable and take one or more of the actions listed in (i) through (iv) in the lease. If Axis took possession of the equipment, then it had to follow the requirements of options (i) or (ii). If Axis chose option (i), sale of the equipment, then it had to apply the net proceeds of the sale to the amount Analytical owed after deducting the amount of the residual value of the equipment. If Axis chose option (ii), retaining the equipment, then it had to credit Analytical with the reasonable rental value of the equipment for the remainder of the term of the lease.

In this case, Axis demanded the accelerated balance. The record does not show that Axis expressly declared the lease terminated. However, Axis's demand for the return of the

equipment and Analytical's surrender of the equipment to Axis established the termination of the lease. The affidavit of Axis's collections manager established that as of the time of the filing of the motion for summary judgment, Axis had possession of the equipment "and Axis is presently making arrangements to sell the same." Because Axis demanded and received the return of the equipment, its damages under the lease were the accelerated balance minus either the amount of the net proceeds or the reasonable rental value of the equipment. Therefore, to meet its summary judgment burden, Axis had to prove as a matter of law both the accelerated balance and the amount of the net sale proceeds or reasonable rental value to be deducted from the accelerated balance.

Axis presented evidence of the amount it believed to be the accelerated balance, although it may have miscalculated the discount rate for the future payments. However, it presented no evidence establishing as a matter of law the amount of the net sale proceeds or the reasonable rental value for the remainder of the lease term to be applied to the accelerated balance.

Axis asserts it was not required to sell the property before obtaining summary judgment. It also argues that any delay in the sale was the result of appellants' malfeasance in failing to return the equipment to Axis when Axis demanded it. Axis is correct that it did not have to sell the property to obtain a judgment against appellants. However, to prove its damages under the lease without selling the property, it had to prove the reasonable rental value for the remainder of the lease term and deduct that amount from the accelerated unpaid rent. Axis presented no such evidence. Because Axis repossessed the equipment but presented no evidence of the net proceeds from the sale of the equipment or the reasonable rental value for the remainder of the term of the lease, Axis failed to prove as a matter of law the amount of its damages.

After the trial court entered judgment for Axis, appellants filed a motion for new trial that included a complaint that Axis failed to prove the amount of its damages because the property

had not been sold. In its response to the motion for new trial, Axis reported that it had sold the property, and it attached the affidavit of its collections manager who stated:

After entry of the Judgment, on or about January 26, 2016, Axis sold the Equipment to a third party for the net amount of \$65,250.00, after deducting the costs of removal, storage and sale (the "Equipment Net Sale Proceeds").

In accordance with the contracts, applicable law and the Order for Issuance of Writ of Sequestration and the Judgment, Axis then credited Defendants with the Equipment Net Sale Proceeds and filed an amended abstract of judgment on February 9, 2016.

Axis also attached to its response to the motion for new trial the abstract of judgment from February 9, 2016, which stated,

that said Plaintiff recovered judgment against the said Defendants, jointly and severally, on the 18th day of December 2015 for the sum of \$196,233.12/plus \$25,201.12 attorneys' fees

with interest on said amount from the 18th day of December 2015 at the rate of 5 percent per annum. Said judgment is of record in Volume 458D, page 538, of Records of Said Court.

There is now still due on said Judgment \$stated [sic] above with interest on \$amount [sic] stated from the 18th day of December 2015, at the rate of 5 percent per annum/plus \$65,250.00 credit.

(Underlining and capitalization omitted.) Evidence presented in a motion for new trial and response can supplement the summary judgment record if the trial court expressly grants leave to supplement the summary judgment record or if the record clearly shows the trial court admitted the evidence at the hearing on the motion for new trial and considered the evidence in reevaluating whether summary judgment was proper. *See Morris v. JTM Materials*, 78 S.W.3d 28, 47 n.19 (Tex. App.—Fort Worth 2002, no pet.). In *Morris*, at the hearing on the motion for new trial, the trial court admitted affidavits into evidence and considered them in reaffirming the summary judgment. *Id.* On appeal, the court of appeals considered the affidavits in determining whether the trial court properly granted the motion for summary judgment. *Id.* In this case, however, the record does not show there was a hearing on the motion for new trial or that the

court considered the affidavit and abstract of judgment. Therefore, we cannot consider them in reviewing the trial court's order granting Axis's motion for summary judgment.

Because Axis failed to present any summary judgment evidence of the amount of the sale or of the reasonable rental value of the property for the remainder of the term of the lease, we conclude Axis failed to prove as a matter of law the amount of its damages. Therefore, the trial court erred by granting Axis's motion for summary judgment.

Having found the trial court erred by granting the motion for summary judgment, we must determine whether the error is reversible. See TEX. R. APP. P. 44.1(a). Axis asserts that appellants' damages argument is moot because it presented evidence of the amount of the sale and of the credit to the judgment for the amount of the sale. We disagree. An attachment to a motion for new trial is not evidence. *In re J.R.W.*, No. 05-15-00493-CV, 2015 WL 5050169, at *4 (Tex. App.—Dallas Aug. 27, 2015, pet. denied) (mem. op.); *Hagood v. Fishborn, Inc.*, No. 05-07-00690-CV, 2009 WL 264627, at *2 (Tex. App.—Dallas Feb. 5, 2009, pet. denied) (mem. op.). To constitute evidence, the attachment must be introduced at the hearing on the motion for new trial. *J.R.W.*, 2015 WL 5050169 at *4; *Hagood*, 2009 WL 264627, at *2. If there is no hearing, then the document never becomes evidence. *J.R.W.*, 2015 WL 5050169 at *4. Cf. *Morris*, 78 S.W.3d at 47 n.19 (affidavit admitted at hearing on motion for new trial was evidence that could be considered by court of appeals). In this case, the affidavit, abstract of judgment, and e-mails were attached to Axis's response to the motion for new trial and to Axis's motion to strike appellants' reply to Axis's response to the motion for new trial. Although *J.R.W.*, *Hagood*, and the cases they cite concern only attachments to motions for new trial, we perceive no reason why the same rule should not apply to documents responsive to the motion for new trial. Therefore, we conclude Axis presented no evidence of the sale price or of the credit to the

judgment, and the trial court's error in granting the motion for summary judgment probably caused the rendition of an improper judgment. *See* TEX. R. APP. P. 44.1(a)(1).

We sustain appellants' second issue.¹

CONCLUSION

We reverse the trial court's judgment and remand the cause for further proceedings.

/Lana Myers/
LANA MYERS
JUSTICE

160281F.P05

¹ Having reversed the second issue, we need not discuss appellants' first and third issues. *See* TEX. R. APP. P. 47.1



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

JUDGMENT

ANALYTICAL TECHNOLOGY
CONSULTANTS, INC. and HECTOR
BASS, Appellants

No. 05-16-00281-CV V.

AXIS CAPITAL, INC., Appellee

On Appeal from the 95th Judicial District
Court, Dallas County, Texas
Trial Court Cause No. DC-15-08507-D.
Opinion delivered by Justice Myers. Justices
Bridges and Brown 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 this opinion.

It is **ORDERED** that appellants ANALYTICAL TECHNOLOGY CONSULTANTS, INC. and HECTOR BASS recover their costs of this appeal from appellee AXIS CAPITAL, INC.

It is **ORDERED** that the obligations of ACSTAR Insurance Company as surety on appellants' supersedeas bond are **DISCHARGED**.

Judgment entered this 19th day of June, 2017.