AFFIRM; and Opinion Filed June 9, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00838-CV

AUTOSOURCE DALLAS, LLC, ROBERT AICKLEN, TRUNG M. TANG A/K/A JOHN TANG AND CHRIS VILLANUEVA, Appellants
V.
ADDISON AERONAUTICS, LLC, Appellee

On Appeal from the 191st Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-15-09506

MEMORANDUM OPINION

Before Justices Francis, Brown, and Schenck
Opinion by Justice Schenck

Appellants AutoSource Dallas, LLC ("AutoSource") and Robert Aicklen, Trung M. Tang a/k/a John Tang, and Chris Villanueva (collectively "Individual Defendants") appeal the trial court's order granting summary judgment in favor of appellee Addison Aeronautics, LLC ("Addison") in a suit Addison initiated against appellants alleging breaches of a commercial lease agreement and guarantees of performance. Appellants contend the judgment must be reversed because: (1) material fact issues exist as to the causation and damage elements of the breach of contract claim; and (2) the trial court should have granted appellants leave to file their late response to Addison's motion. We affirm the trial court's judgment. Because all issues are settled in law, we issue this memorandum opinion. TEX. R. APP. P. 47.4.

BACKGROUND

AutoSource entered into a commercial lease with 15500 Wright Bros., LP on May 2, 2011. The lease term was from May 15, 2011 to August 15, 2014. AutoSource occupied the leased property (the "Property") rent free for the first two months of the lease term.

Addison acquired title to the Property in July 2013, subject to the existing lease. In June 2014, Addison and AutoSource entered into a Renewal and Amendment to Lease Agreement (the "Renewal Lease"), which, among other things, extended the lease term through August 2017. In addition, the Renewal Lease increased the monthly base rent from $10,000 to $11,500 and increased the security deposit from $10,000 to $12,000. The Renewal Lease also allowed either party to terminate the lease prior to August 2017 with six months' written notice. The Individual Defendants signed the Renewal Lease as guarantors.

A few months after signing the Renewal Lease, AutoSource decided to wind down the business it was operating at the Property. At the end of October 2014, AutoSource exercised the termination option and gave Addison written notice of its intent to terminate the lease early, effective as of April 30, 2015. AutoSource vacated the Property during the last week of December 2014. AutoSource paid full rent through December 2014, paid $10,000 towards rent in January 2015, and ceased making payments thereafter. As a result, Addison claimed AutoSource and the Individual Defendants, as guarantors of AutoSource's performance under the lease, owed unpaid rent of $36,000 plus a ten-percent late charge. Thus, before offsets, Addison claimed unpaid rent and late fees totaling $39,600.

Addison secured a new tenant for the Property in February 2015, and entered into a new lease. The term of that lease began on January 30, 2015. The base monthly rent under the lease was $10,500, with the first monthly payment due on April 1, 2015. Base rent for the first two months was abated, subject to being reinstated upon an event of default.

Addison sued AutoSource for breach of the lease and sought to hold the Individual Defendants accountable on their guarantees. On January 22, 2016, Addison filed a motion for summary judgment. Addison initially set its motion for hearing on February 26, 2016. On February 9, 2016, appellants asked Addison to pass the scheduled hearing to allow them to conduct discovery they claimed they needed to adequately respond to the summary judgment motion. Addison agreed to do so and represented that it would not re-notice the hearing until after April 29, 2016, in exchange for appellants' agreement not to file a motion for continuance of a properly set hearing.

Addison rescheduled the hearing on its motion to May 13, 2016, and sent notice of the new hearing date to appellants on April 30, 2016. Appellants responded to the motion two days before the hearing. The day before the hearing, they filed a motion for leave to file their late response. On June 7, 2016, the trial court signed an order granting Addison's motion and awarding Addison $17,100, the amount Addison claimed was due and owing after crediting AutoSource with AutoSource's security deposit and the April payment it received from the new tenant. This appeal followed.

SUMMARY JUDGMENT

I. Standard of Review

The standard of review in traditional summary-judgment cases is well established. *Gonzalez v. VATR Constr.* LLC, 418 S.W.3d 777, 782 (Tex. App.—Dallas 2013, no pet.). The issue on appeal is whether the movant met its summary-judgment burden by establishing 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). The movant bears the burden of proof and all doubts about the existence of a genuine issue of material fact are resolved against the movant. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985). All evidence and any reasonable inferences must be

viewed in the light most favorable to the nonmovant. *Id.* Evidence favoring the movant's position will not be considered unless it is not controverted. *Great Am. Reserve Ins. Co. v. San Antonio Plumbing Supply Co.*, 391 S.W.2d 41, 47 (Tex. 1965).

II. Applicable Law

To prevail on a breach-of-lease-agreement claim, the lessor must prove (1) a valid contract exists between the lessor and lessee, (2) the lessor has a right under the contract to receive rental payments from the lessee, (3) the lessee breached the contract, and (4) because of that breach the lessor suffered damages. *Curtis v. AGF Spring Creek/Coit II, Ltd.*, 410 S.W.3d 511, 518 (Tex. App.—Dallas 2013, no pet.).

III. Application of Law and Facts

On appeal, appellants argue the summary-judgment evidence failed to establish Addison suffered damages in an amount in excess of the security deposit Addison held. We disagree. Addison presented evidence AutoSource was to pay a monthly base rent of $11,500 beginning in August 2014. The lease allowed either party to terminate early with six months' notice. On October 30, 2014, AutoSource gave written notice that it was exercising its right to terminate the lease early, effective as of April 30, 2015. AutoSource paid the agreed rent through December 2014, paid $10,000 in January, and made no further payments thereafter. Thus, the summary-judgment evidence establishes AutoSource did not perform as promised.

If the parties agree to a contractual remedy, that remedy will be enforced unless it is illegal or against public policy. *SAVA gumarska in kemijska industria d.d. v. Advanced Polymer Sciences, Inc.*, 128 S.W.3d 304, 317 (Tex. App.—Dallas 2004, no pet.). Here, AutoSource and Addison agreed to a number of remedies in the event AutoSource breached the lease. One of them allowed Addison to relet the Property. In that event, AutoSource agreed to pay any deficiency that arose from such reletting. This remedy is consistent with Texas law which

requires that a landlord mitigate its damages in the event of a tenant breach and credit the tenant for rent received from any new tenant. TEX. PROP. CODE ANN. § 91.006(a) (West 2014); *Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc.*, 948 S.W.2d 293, 300 (Tex. 1997). Thus, this remedy is not illegal or against public policy and will be enforced. Under this remedy, Addison is entitled to recover the contractual rent due, reduced by any amount "received" from the new tenant. *See id.*

The evidence established that had AutoSource fully performed the contract after giving notice of termination, Addison would have received full rent from January through April 2015 totaling $36,000. The evidence further established Addison held a security deposit of $12,000 in AutoSource's name, and received a rent payment from the new tenant in the amount of $10,500. Thus, Addison was entitled to recover the unpaid rent of $36,000, plus late fees of $3,600, less the security deposit, and the April payment Addison received from the new tenant. The uncontroverted summary-judgment evidence supports the award of $17,100 as damages.

While appellants urge that at some time in the future Addison might recover the abated two months' base rent from the new tenant if an event of default occurs that is not cured, and thus have a two-month windfall, they cite no authority recognizing such a contingent occurrence impacts the remedy available to Addison under the lease, and we find none. Moreover, there is no evidence as to when, if at all, AutoSource communicated to Addison that it would not fulfill its obligation to pay rent through April 2015, triggering Addison's obligation to mitigate its damages, and, even assuming AutoSource communicated its intent to breach the lease prior to its effective termination, there is no evidence Addison structured the new lease to avoid its obligation to mitigate its damages.

Appellants also urge that had AutoSource occupied the Property and paid rent through April 2015, Addison would have abated rent to the new tenant in May and June, so there was

always going to be a period of two months with no payment. But that is not what happened here and appellants should not benefit from a rent abatement during the period in which they were in default. To hold otherwise would create a windfall for appellants, not Addison, as appellants suggest. We overrule appellants' first issue.

LEAVE TO FILE RESPONSE TO SUMMARY JUDGMENT MOTION

In their second issue, appellants urge the trial court erred in denying their motion for leave to file a late response to the summary judgment.

I. Standard of Review

A trial court's ruling on a motion for leave to file a late summary-judgment response is subject to an abuse-of-discretion standard. *Carpenter v. Cimarron Hydrocarbons Corp.*, 98 S.W.3d 682, 686 (Tex. 2002). A trial court abuses its discretion when it acts without reference to any guiding rules or principles. *Id.* at 687. A motion for leave to file a late summary-judgment response should be granted when a litigant establishes good cause for failing to timely respond by showing that (1) the failure to respond was not intentional or the result of conscious indifference, but the result of accident or mistake, and (2) allowing the late response will occasion no undue delay or otherwise injure the party seeking summary judgment. *Id.* at 688; *Crooks v. Moses*, 138 S.W.3d 629, 635 (Tex. App.—Dallas 2004, no pet.).

II. Application Law and Facts

In exchange for Addison passing the first hearing on its summary-judgment motion, appellants agreed that they would not file a motion for continuance of a properly noticed hearing, and Addison agreed not to re-notice the hearing until after April 29, 2016. On April 30, 2016, Addison gave notice that the hearing on its motion for summary judgment was set for May 13, 2016. Appellants filed their response on May 11, 2016, and filed their motion for leave to file their summary-judgment response and evidence on May 12, 2016.

A movant is required to provide twenty-one days' notice when setting a summary-judgment hearing. TEX. R. CIV. P. 166a(c). This twenty-one day requirement is designed to give the nonmovant sufficient time to prepare and file a response for the original setting. *LeNotre v. Cohen*, 979 S.W.2d 723, 726 (Tex. App.—Houston [14th Dist.] 1998, pet. denied). The twenty-one-day notice requirement does not however apply to a resetting of the hearing, so long as the nonmovant received twenty-one days' notice of the original hearing. *Id.* Addison filed its motion for summary judgment on January 22, 2016. On January 25, 2016, Addison gave notice that its motion for summary judgment was set for hearing on February 26, 2016. Thus, appellants received twenty-one days' notice of the original hearing. By rescheduling a hearing, Addison actually gave appellants additional time to respond. *See id.* Therefore, Addison needed only to give reasonable notice that the hearing on its summary judgment had been rescheduled. *See id.* Reasonable notice means at least seven days before the hearing because a nonmovant may only file a response to a motion for summary judgment not later than seven days prior to the date of the hearing without leave of court. *Id.* Here, Addison gave appellants thirteen days' notice of the rescheduling of the hearing. Thus, Addison complied with the reasonable-notice requirement.

In their motion for leave to file their late response, appellants urged that they had good cause for not filing their response seven days before the hearing because: (1) Addison's counsel did not consult with appellants regarding availability for the hearing date selected; (2) appellants received only thirteen days' notice of the hearing; and (3) appellants and their counsel had a full calendar of commitments. Applying the good cause standard, we conclude that the trial court did not abuse its discretion in denying appellants leave to file a late response. While appellants complain Addison's counsel did not consult with them about the hearing date, there is no indication in the record that appellants' counsel was not available on that date. We previously

concluded Addison gave reasonable notice of the hearing date. A statement that a delay in responding was due to the attorney's busy schedule, without more, is not sufficient to show good cause for permitting the late filing of a response to a summary-judgment motion. *Curry v. Clayton*, 715 S.W.2d 77, 79 (Tex. App.—Dallas 1986, no writ). We conclude appellants failed to demonstrate their failure to timely respond to the motion for summary judgment was due to accident or mistake. Consequently, there is no showing of good cause for the late filing and the trial court did not abuse its discretion in denying the motion for leave to file the late response. We overrule appellants' second issue.

CONCLUSION

We affirm the trial court's judgment.

/David J. Schenck/
DAVID J. SCHENCK
JUSTICE

160838F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

AUTOSOURCE DALLAS, LLC, ROBERT AICKLEN, TRUNG M. TANG A/K/A JOHN TANG AND CHRIS VILLANUEVA, Appellants

No. 05-16-00838-CV V.

ADDISON AERONAUTICS, LLC, Appellee

On Appeal from the 191st Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-15-09506.
Opinion delivered by Justice Schenck.
Justices Francis and Brown participating.

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

It is **ORDERED** that appellee ADDISON AERONAUTICS, LLC recover its costs of this appeal from appellants AUTOSOURCE DALLAS, LLC, ROBERT AICKLEN, TRUNG M. TANG A/K/A JOHN TANG AND CHRIS VILLANUEVA.

Judgment entered this 9th day of June, 2017.