AFFIRMED; Opinion Filed June 3, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00857-CV

KENNETH BUHOLTZ, Appellant
V.
LEAP PROPERTY MANAGEMENT, JASON FALCON, EMERGENT REALTY PARTNERS, AND BRADLEY WILLIS, Appellees

On Appeal from the County Court at Law No. 2
Dallas County, Texas
Trial Court Cause No. CC-18-05525-B

MEMORANDUM OPINION

Before Justices Schenck, Molberg, and Nowell
Opinion by Justice Nowell

Kenneth Buholtz[1] sued LEAP Property Management, Emergent Realty Partners, Jason Falcon, and Bradley Willis for breach of contract, breach of fiduciary duty, and fraud. In three issues, Buholtz asserts the trial court erred by granting appellees' no-evidence motions for summary judgment, failing to observe the prison mailbox rule, and violating the Administrative Procedures Act. We affirm the trial court's judgment.

[1] Buholtz was incarcerated throughout the course of this litigation and appeared pro se.

FACTUAL AND PROCEDURAL BACKGROUND

1. Buholtz's Allegations

On October 12, 2018, Buholtz filed his original petition against LEAP Property Management, Emergent Realty Partners, Jason Falcon, and Bradley Willis; his allegations arise from a Residential Leasing and Property Management Agreement (RLPMA) he entered into with LEAP to manage a property he owns in McKinney, Texas. He alleges LEAP is owned by Emergent, and Jason Falcon and Bradley Willis[2] were assigned by LEAP and Emergent as agents and representatives. Buholtz claims appellees mishandled repairs to his property in breach of the RLPMA and LEAP breached its fiduciary duty to him, perhaps fraudulently, when it "failed to disburse all monies due [to Buholtz]; charged Plaintiff for repairs beyond [those] authorized per RLPMA; and has apparently kept two different ledgers as 'Owner Statement(s).'"

2. Production of Documents

Buholtz filed a "Motion for Production of Documents (Initial)" on March 12, 2019. He filed a motion to compel LEAP and Emergent to respond to his requests for production of documents on June 19, 2019. Buholtz's motion states that in response to his initial motion for production of documents, "LEAP responded on 3

[2] An affidavit executed by Willis is in the record. Willis avers: (1) he is the sole owner of Emergent Realty Partners; (2) Emergent is not, and has never been, a parent company of LEAP Property Management; (3) there is no relationship between Emergent and LEAP; (4) Emergent never entered into a contract or agreement with Buholtz; and (5) Willis was never a property manager for LEAP or Buholtz's property.

April 2019, and Emergent responded on 5 April 2019. Both responses objected the requests were overly broad and vague and referred Buholtz to their documents from the TREC[3] matter." The record does not show the motion to compel was set for hearing or Buholtz secured a ruling on the motion.

3. Motions for Summary Judgment

On May 15, 2019, LEAP and Falcon filed a no-evidence motion for summary judgment. The motion set forth the elements of each cause of action and asserted Buholtz had no evidence of any element of any claim. Nine days later, Emergent and Willis filed a similar motion. The motions for summary judgment were set for hearing on June 28, 2019. On June 6, 2019, Buholtz filed a motion to appear telephonically at the hearing, which the trial court granted eight days later. On June 28, 2019, the trial court granted the motions for summary judgment, and this appeal followed.[4]

LAW & ANALYSIS

In his first issue, Buholtz argues the trial court erred by granting appellees' no-evidence motions for summary judgment because LEAP and Emergent did not

[3] Evidence in the record shows that before filing this lawsuit, Buholtz filed a complaint against Willis, Falcon, and LEAP with the Texas Real Estate Commission (TREC). TREC investigated the complaint and found insufficient evidence of negligence or violations.

[4] The appellate record does not include a reporter's record of the summary judgment hearing. Buholtz's filings in the trial court, as well as his arguments on appeal, indicate he did not appear telephonically at the hearing.

produce documents despite his motion to compel, and the trial court failed to consider documents attached to his petition as part of the summary judgment record.

Although Buholtz complains the trial court's order granting summary judgment is in error because appellees failed to produce documents he requested or because the trial court had not ruled on his motion to compel, his argument has not been preserved for our review. To preserve a complaint for appellate review, a party must make a timely request, objection, or motion with sufficient specificity to apprise the trial court of the complaint, and the trial court must rule on the motion or refuse to rule on the motion and the complaining party must then object to the refusal. TEX. R. APP. P. 33.1. The record does not show Buholtz requested a hearing on his motion to compel. It also does not show the trial court ruled on Buholtz's motion or refused to do so. To the extent Buholtz argues the trial court erred by not ruling on his motion, he failed to preserve that complaint for our review. *See Buholtz v. Gibbs*, No. 05-18-00957-CV, 2019 WL 3940973, at *6 (Tex. App.—Dallas Aug. 21, 2019, pet. denied) (mem. op.) (citing TEX. R. APP. P. 33.1; *In re Hearn*, 137 S.W.3d 681, 685 (Tex. App.—San Antonio 2004, orig. proceeding) ("Merely filing [a motion] with the district clerk is not sufficient to impute knowledge of the pending pleading to the trial court."); *Morris v. Cozby*, No. 11-16-00169-CV, 2018 WL 2749804, at *2 (Tex. App.—Eastland June 7, 2018, no pet.) (mem. op.) (failure to request hearing or otherwise obtain ruling on motion waived complaint for appellate review)).

Buholtz also complains the trial court erred by granting the motions for summary judgment because the documents attached to his original petition were sufficient to meet his summary judgment burden. Appellees moved for summary judgment arguing there was no evidence of any element of any of the causes of action Buholtz asserted. Once appellees filed their no-evidence challenges, the burden shifted to Buholtz to produce more than a scintilla of probative evidence to raise a fact issue on each challenged element of each cause of action. *See Sandberg v. STMicroelectronics, Inc.*, No. 05-18-01360-CV, 2020 WL 1809469, at *3 (Tex. App.—Dallas Apr. 9, 2020, no pet. h.) ("we must determine whether the nonmovant produced more than a scintilla of probative evidence to raise a fact issue on the material questions presented."). Buholtz did not respond to the motions.

On appeal, he argues the trial court should have considered his petition and attached documents as his summary judgment response. We disagree. "Generally, pleadings are not competent evidence, even if sworn or verified." *Laidlaw Waste Systems (Dallas), Inc. v. City of Wilmer*, 904 S.W.2d 656, 660 (Tex. 1995); *see also Acrey v. Kilgore & Kilgore, PLLC*, No. 05-15-01229-CV, 2017 WL 1173830, at *3 (Tex. App.—Dallas Mar. 30, 2017, no pet.) (mem. op.) (rejecting party's request to consider a document attached to its petition as summary judgment evidence). Because pleadings are not competent summary judgment evidence, the trial court could not consider Buholtz's petition and the documents attached to it for this purpose.

Buholtz did not provide any evidence in response to appellees' motions for summary judgment. Therefore, he did not meet his burden to produce more than a scintilla of probative evidence to raise a fact issue on each challenged element of each cause of action, and the trial court did not err by granting appellees' motions for summary judgment. *See Sandberg*, 2020 WL 1809469, at *3.

We overrule Buholtz's first issue.

In his second issue, Buholtz argues the Dallas County Courts should consider the processing delays associated with prison mail. In support of his argument, Buholtz references an attachment to his "Motion in Objection to Mediation Order." The attachment is a memorandum to inmates purportedly created by the Federal Bureau of Prisons about changes to incoming mail processing and drug use.

On appeal, Buholtz argues he timely mailed his response to the motions for summary judgment, titled "Motion in Objection to No-Evidence Motion for Summary Judgment," and his filing was timely received by the clerk of court on June 8, 2019; Buholtz's "Motion in Objection to No-Evidence Motion for Summary Judgment" was filed on July 15, 2019. Buholtz asserts the clerk's delay in filing his objection shows "a collaborative effort within the Dallas County Court system to rush-to-judgment and/or thwart this pro se inmates [sic] litigation rights."

As an initial matter, Buholtz did not present his complaint about mail processing speed to the trial court. Therefore, he has not preserved this complaint for appeal. *See* TEX. R. APP. P. 33.1. Additionally, Buholtz relies on a document in

the appendix to his brief to show the clerk received his "Motion in Objection to No-Evidence Motion for Summary Judgment" on June 8, 2019; this document is not in the trial court record and, therefore, cannot be considered on appeal. *See Bertrand v. Bertrand*, 449 S.W.3d 856, 863 n.8 (Tex. App.—Dallas 2014, no pet.) ("We cannot consider documents cited in a brief and attached as an appendix if they are not formally included in the record on appeal."). Finally, Buholtz's "Motion in Objection to No-Evidence Motion for Summary Judgment" presents arguments requesting a continuance. A motion for continuance shall not be granted "except for sufficient cause supported by affidavit, or by consent of the parties, or by operation of law." TEX. R. CIV. P. 251. Buholtz's motion was not supported by affidavit, consent of the parties, or operation of law. Therefore, he has not shown he was entitled to a continuance.

For each of these reasons, we overrule Buholtz's second issue.

In his third issue, Buholtz asserts the "DCC @ Law #2 systematically, and with apparent wanton disregard, violated [his] judicial rights without fear of consequence" in violation of the Administrative Procedures Act, 5 U.S.C. § 500, et seq. In his argument, Buholtz discusses his motion to appear telephonically, motion for default judgment, "Motion in Objection to Mediation Order," "Motion for Production," "Motion for Clarification," "Motion to Compel Production," "Motion in Objection to No-Evidence Summary Judgment," "Motion to Compel Ruling on Mediation," and "Motion for Reconsideration of Dismissal." He also discusses

service of process of appellees' no-evidence motions for summary judgment. He concludes: "The fact that DCC @ Law #2 ignored all but the late noticed Motion for Telephonic Appearance, shows a distinct prejudice and/or covert changing of the rules; each a violation of U.S. Code and an afront [sic] to equal justice."

To the extent Buholtz complains the trial court failed to rule on the motions he filed, he did not set them for hearing or otherwise seek a ruling on them. *See Buholtz*, 2019 WL 3940973, at *6 (citing TEX. R. APP. P. 33.1; *In re Hearn*, 137 S.W.3d at 685; *Morris*, 2018 WL 2749804, at *2). We conclude he has not preserved these complaints for our review. To the extent Buholtz asserts the trial court did not timely rule on his motion to appear telephonically, we disagree. Appellant's motion to appear telephonically was filed on June 6, 2019, and the trial court granted the motion on June 14, 2019. We fail to see how the passage of eight days makes the ruling untimely, and Buholtz has not cited any cases demonstrating that it is. We overrule Buholtz's third issue.

CONCLUSION

We affirm the trial court's judgment.

/Erin A. Nowell/
ERIN A. NOWELL
JUSTICE

190857F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

KENNETH BUHOLTZ, Appellant No. 05-19-00857-CV V. LEAP PROPERTY MANAGEMENT, JASON FALCON, EMERGENT REALTY PARTNERS, AND BRADLEY WILLIS, Appellees	On Appeal from the County Court at Law No. 2, Dallas County, Texas Trial Court Cause No. CC-18-05525-B. Opinion delivered by Justice Nowell. Justices Schenck and Molberg participating.

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

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment entered this 3rd day of June, 2020.