Tori Woods, Gloria Woods and M.W. v. BW Midtown Cedar Hill, L.L.C.

2022 | Cited 0 times | Court of Appeals of Texas | September 19, 2022

Affirm and Opinion Filed September 19, 2022

In The Court of Appeals Fifth District of Texas at Dallas

No. 05-21-00615-CV

GLORIA WOODS AND TORI WOODS, INDIVIDUALLY AND AS NEXT FRIEND OF M.W., A CHILD, Appellants V. BW MIDTOWN CEDAR HILL, L.L.C., Appellee

On Appeal from the 134th Judicial District Court Dallas County, Texas Trial Court Cause No. DC-20-11275

MEMORANDUM OPINION Before Justices Myers, Pedersen, III, and Garcia Opinion by Justice Myers Gloria Woods and Tori Woods, individually and as next friend of M.W., a

motion for summary judgment on their claims. Appellants bring one issue on appeal

contending t judgment.

BACKGROUND

On May 23, 2019, Gloria signed on an

apartment with Midtown. Gloria was the only resident designated on the lease. The lease ran from June 7, 2019 to June 30, 2020. On November 6, 2019, Gloria sent letters to

Midtown air quality in the apartment. She also stated she had purchased an air quality test kit,

mold in the apartment. She did not specifically request that Midtown fix the

uesting to be let out of my lease and

requesting a full return of all monies paid for the lease When Midtown

received and opened the letter on November 11, 2019, it sent an employee to the

apartment who changed the air filter on the HVAC unit. Midtown also offered to

schedule an air-duct cleaning. Tori sent an e-mail to Midtown stating she declined

having the air ducts cleaned and requested to be let out of the lease. On November

20, 2019, Midtown sent a letter to Gloria stating it would have the air tested if Gloria

shared the result of her air testing and if those results suggested there were dangerous

be

released from the lease. Neither Gloria nor Tori made a complaint about mold or

submitted work orders related to the presence of mold in the apartment after

November 11, 2019. Tori moved out of the apartment on May 31, 2020. Midtown

issued Gloria a rent credit for June.

Appellants filed suit against Midtown alleging causes of action for negligence,

failure to repair or remedy, retaliation, and breach of contract. Midtown moved for a no- action. Appellants filed a response to the motion for summary judgment and

attached affidavits, discovery responses, and a report from a professional air-quality

testing company. Midtown objected to some of the evidence. The trial court granted

s take nothing on their

other

objections.

SUMMARY JUDGMENT

Appellants contend the trial court erred by g summary judgment. When a party moves for both no-evidence and traditional

summary judgments, we first consider the no-evidence motion. First United

Pentecostal Church of Beaumont v. Parker, 514 S.W.3d 214, 219 (Tex. 2017). Any

claims that survive the no-evidence review will then be reviewed under the

traditional standard.

We review a no-evidence summary judgment under the same legal sufficiency

standard used to review a directed verdict. See TEX. R. CIV. P. 166a(i); Flood v.

Katz, 294 S.W.3d 756, 762 (Tex. App. Dallas 2009, pet. denied). We must

determine whether the nonmovant produced more than a scintilla of probative

evidence to raise a fact issue on the material questions presented. See Flood, 294

S.W.3d at 762. When analyzing a no-evidence summary judgment, we consider all the evidence in the light most favorable to the nonmovant, we indulge every

reasonable inference, and we resolve any doubts against the movant. Sudan v.

Sudan, 199 S.W.3d 291, 292 (Tex. 2006) (quoting City of Keller v. Wilson, 168

S.W.3d 802, 824 (Tex. 2005)). A no-evidence summary judgment is improperly

granted if the respondent brings forth more than a scintilla of probative evidence to

raise a genuine issue of material fact. King Ranch, Inc. v. Chapman, 118 S.W.3d

742, 751 (Tex. 2003). rises to a level that would enable reasonable, fair-minded persons to differ in their

Id. (quoting Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706,

711 (Tex. 1997)).

Id. (quoting Kindred v. Con/Chem, Inc., 650 S.W.2d 61, 63 (Tex. 1983)).

In a traditional summary judgment, 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. 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, 168 S.W.3d at 824.

We review a summary judgment de novo to determine whether a party s right

to prevail is established as a matter of law. Sandberg v. STMicroelectronics, Inc., 600 S.W.3d 511, 521 (Tex. App. Dallas 2020, pet. denied). order granting the motion for summary judgment does not specify the grounds on

which the order is based, the appealing party must negate each ground upon which

the judgment could have been based. Rosetta Res. Operating Co., LP v. Martin, 645

S.W.3d 212, 226 (Tex. 2022). that the trial court erred by

granting s motion for summary judgment may be sufficient to allow

argument on all possible grounds that the summary judgment motion was granted,

but if a party does not brief those arguments to the court of appeals, the court of

appeals cannot properly reverse summary judgment on those grounds. Id. at 227

(internal punctuation omitted); see also id. at 228 (court of appeals erred by reversing

summary judgment when appellant did not address each independent ground on

which trial court have based its summary judgment).

Who is a Tenant

M.W. and that Tori and M.W. had no authority to bring certain causes of action

because they were not tenants. Section 1 of the lease stated list all people signing the Lease): Gloria

Woods and us, the owner: Midtown The lease did not list Tori or M.W.

Section 2, directly below section 1, you and (list all other occupants not signing the Lease): Above Only and no one

else. Anyone not listed here cannot stay in the apartment for more than 7 days in one week without our prior written consent, and no more than twice that many days

Gloria signed the lease; Tori and M.W. did not sign it.

Tori signed a rental application with Midtown on May 31, 2019. She testified

in her affidavit that a Midtown employee told her before she moved into the

apartment leased by Gloria

She testified she moved into the unit with Gloria and M.W., and since that time, she

- had received numerous packages that she had to collect from the on-site

that she and M.W.

were on the lease until she learned in October 2019 that she and M.W. were not on

The record contains no evidence that she ever signed the lease or that she and M.W.

were listed on the lease as residents of the apartment.

Midtown argued Tori and M.W. were not tenants under the lease because they

were not listed on the lease, which required that all residents be listed, and they did

not sign the lease. The lease stated no lease changes (with certain inapplicable

exceptions) would be permitted during the ter representatives . . . have no authority to . . . amend . . . this Lease or any part of it

unless in writing, and no authority to make promises, representations, or agreements that impose security duties or other obligations on us or our representatives unless

Midtown pleaded the statute of frauds, and it argued in its motion for summary

judgment that section 26.01(a) and (b)(5) of the Texas Business and Commerce

Code barred oral amendment of the lease. Section 26.01(a) and (b)(5) requires that

In this case, the

lease was for longer than one year, June 7, 2019 to June 30, 2020. Thus, the lease is

subject to the statute of frauds, and an oral modification of a written contract is

enforceable under the Statute of Frauds only if the modification does not materially

alter the obligations imposed by the underlying ag White v. Harrison, 390

S.W.3d 666, 674 (Tex. App. Dallas 2012, no pet.). Midtown asserted in its motion

for summary judgment that adding Tori and M.W. to the lease would materially alter

Appellants assert on appeal, without explanation or citation of authority, that

to the lease issue of material fact whether she and M.W. were tenants under the lease. Appellants

presented no evidence that the lease was modified in writing to include Tori and

M.W. as tenants. Appellants that the statute of frauds barred an oral modification of the lease adding Tori and M.W. to the lease [the statute of

frauds] was not before the court; the only issue was whether Tori and M.W. could

be considered tenants at the time of reporting the pleaded the statute of frauds and asserted it in its supplemental motion for summary

judgment. Appellants present no argument on appeal explaining why the statute of

frauds would not apply to bar oral amendment of the lease to add Tori and M.W. to

the lease. We conclude Midtown established that Tori and M.W. were not tenants

under the lease because the lease was not amended in writing to include them as

tenants.

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Negligence

Appellants alleged that Midtown was negligent in making its repairs to the air conditioning system by only changing the air filter and not making any repairs to the issue of mold growing in the apartment. The elements of a premises-liability negligence cause of action are: (1) actual or constructive knowledge by the owner/operator of the premises of some condition on the premises; (2) the condition posed an unreasonable risk of harm; (3) the owner/operator did not exercise

r Keetch v. Kroger Co.,

845 S.W.2d 262, 264 (Tex. 1992). Midtown moved for no-evidence summary judgment on the ground that

appellants had no evidence that Midtown owed a duty to Tori and M.W. because they were trespassers and there were no allegations that Midtown acted willfully, wantonly, or through gross negligence. Midtown asserted it did not owe a duty to Gloria because she did not live in the apartment. Midtown also moved for summary judgment on the grounds that appellants had no evidence of a harmful condition in the apartment, no evidence of personal injuries, and no evidence that any mold in the apartment was a proximate cause of injuries to appellants.

On appeal, appellants argue that Tori and M.W. were tenants of Midtown. They also argued they proved a dangerous condition existed in the apartment because they submitted an expert report from a company that tested the air quality in the apartment. Appellants acknowledge that Midtown objected to the report and

that the trial court sustained the objections. But appellants is insufficiently specific upon which to base a summary jud cite any authority. objected to the lack of authentication of the report, its being hearsay, and the fact

that it was an expert report from undisclosed experts. The ruling stated:

Objection No. 6: Concerning the Report of the Limited mold Investigation dated December 2, 2019, prepared by advance Mold Report

X Sustained ___ Overruled It is the Order of this Court that any of the foregoing matters for which an objection was sustained shall not be considered as evidence at the Summary Judgment filed with the Court on May 13, 2021.

concerning the report were to the

and ordered

that the evidence would not be considered. There was no doubt that the order

excluded the report in its entirety. Because the trial court excluded this report,

appellants had no evidence of a harmful condition in the apartment.

Furthermore, appellants arguments on appeal do not address no-evidence grounds that appellants had no evidence of personal injuries and no

evidence that any mold in the apartment was a proximate cause of any injuries. An

appellant must attack every ground on which summary judgment could have been

granted in order to obtain a reversal. Rosetta Res., 645 S.W.3d at 226; Clark v.

, 460 S.W.3d 714, 727 (Tex. App. Dallas 2015, no pet.). Because

judgment, they have not s for summary judgment on appellants negligence cause of action. See Rosetta Res.,

645 S.W.3d at 228; Clark, 460 S.W.3d at 727.

cause of action. Failure to Repair and Remedy

for summary judgment on their cause of action under section 92.056(b) of the Texas

Property Code. See TEX. PROP. CODE ANN. § 92.056(b). That statute provides:

(b) A landlord is liable to a tenant as provided by this subchapter if:

(1) the tenant has given the landlord notice to repair or remedy a condition by giving that notice to the person to whom or to the s rent is normally paid;

(2) the condition materially affects the physical health or safety of an ordinary tenant;

(3) the tenant has given the landlord a subsequent written notice to repair or remedy the condition after a reasonable time to repair or remedy the condition following the notice given under Subdivision (1) or the tenant has given the notice under Subdivision (1) by sending that notice by certified mail, return receipt requested, by registered mail, or by another form of mail that allows tracking of delivery from the United States Postal Service or a private delivery service;

(4) the landlord has had a reasonable time to repair or remedy the condition after the landlord received the tenant s notice under Subdivision (1) and, if applicable, the tenant s subsequent notice under Subdivision (3);

(5) the landlord has not made a diligent effort to repair or remedy the condition after the landlord received the tenant's notice under Subdivision (1) and, if applicable, the tenant s notice under Subdivision (3); and

(6) the tenant was not delinquent in the payment of rent at the time any notice required by this subsection was given.

Id. Midtown moved for summary judgment on the grounds that Tori and M.W.

were not tenants and therefore did not meet the first element; Gloria did not provide

a notice to repair and therefore did not meet the first element; there was no evidence

that a condition materially affecting the physical health or safety of an ordinary

tenant was present in the dwelling unit and therefore did not meet the second

element; and that the evidence established Midtown met its statutory duties to repair

or remedy the alleged air quality condition by replacing the air conditioning filter

and agreeing to have the air ducts cleaned.

On appeal, appellants argue the notice from Tori was sufficient notice because

she was a tenant. They also argue that their expert report raised a genuine issue of

material fact concerning whether there was a condition materially affecting the

physical health or safety of an ordinary tenant. Concerning whether Tori was a

the ex Appellants presented no evidence that Tori was

authorized by the lease to occupy the apartment. The lease showed that Tori was

not listed on the lease and therefore had no authority to occupy the apartment to the

exclusion of others. The record also shows appellants had no evidence of a condition

materially affecting the physical health or safety of an ordinary tenant because the

trial court sustained Mis expert report, and the court

excluded the report from the evidence. Furthermore, a for summary judgment that it met its statutory duty to repair or remedy the condition.

Because appellants have not addressed on appeal for summary judgment on this cause of action, they have not shown the trial court

action under section 92.056(b). See Rosetta Res., 645 S.W.3d at 228; Clark, 460

S.W.3d at 727.

We conclude the trial court did not err by summary judgment under section 92.056 of the

Property Code.

Breach of Contract

summary judgment on their cause of action for breach of contract. Appellants

alleged in their petition that Tori and M.W. had standing to enforce the lease because

would be added to it. They also alleged they fully performed under the lease and

that Midtown functions and upkeep of t They alleged they

incurred damages having to hire a

company to conduct a professional air quality inspection. Midtown moved for summary judgment on the grounds that there was no

privity of contract with Tori and M.W.; Gloria failed to perform her contractual

obligation of notifying Midtown in writing about the alleged mold condition;

appellants had no evidence Midtown did not perform the appropriate maintenance;

and that Midtown conclusively established it fulfilled any maintenance or repair

obligations it had under the lease.

On appeal, appellants present only this argument concerning their breach of

Breach of Contract: Midtown chiefly argues that there

could be no breach of contract if Tori and M.W. were no[t] in privity because they

were not on the lease. This argument has been disposed of in the standing portion

As discussed above, Tori and M.W. were not tenants under the

lease. They were not parties to the lease agreement, and they were not in privity of

contract with Midtown.

brief on appeal summary judgment

grounds that Gloria did not notify Midtown in writing of the mold problem, that

appellants had no evidence that Midtown did not provide the maintenance required

under the lease, or that Midtown conclusively proved it provided the maintenance

required under the lease. Because appellants do not address these summary

judgment grounds, they motion for summary judgment . See

Rosetta Res., 645 S.W.3d at 228; Clark, 460 S.W.3d at 727. Retaliation

Section 92.331 of

the Property Code provides that a landlord cannot take certain retaliatory measures

PROP. § 92.331. The

prohibited retaliatory actions include: nd

Id. § 92.331(b)(3), (5). Appellants alleged

in their petition that within six months after they gave Midtown notice of the

air-quality condition, Midtown retaliated by opening packages mailed to appellants

interfer

Midtown moved for summary judgment on the grounds that Tori and M.W.

were not tenants and therefore lacked authority under the statute to bring the cause

of action, and that appellants had no evidence Midtown retaliated against appellants affidavit, which described her had not

been delivered when UPS tracking showed the package had been delivered. When

more than a week later, the

package had been opened. mention of Midtown otherwise with

judgment, Midtown filed a supplemental motion for summary judgment. The

supplemental motion asserted s testimony that the package was opened

when sh Midtown also stated in the supplemental motion retaliation on the part of [Midtown] attributable

Midtown notes that Tori

identified only one package that was tampered with: therefore, this retaliation was

insufficiently harmful to constitute actionable retaliation. Appellants raised a

genuine issue of material fact on the issue of retaliation its pervasiveness was a

This argument addresses only the ground presented in

that a single complaint of

an open package did not demonstrate on appeal

do not address whether Tori could bring a retaliation cause of action if she was not a tenant, nor whether the fact she received the package in an opened condition was

Therefore, appellants have not

See Rosetta Res., 645 S.W.3d at 228; Clark,

460 S.W.3d at 727.

CONCLUSION

Appellants have for summary

210615f.p05 /Lana Myers// LANA MYERS JUSTICE Court of Appeals Fifth District of Texas at Dallas

JUDGMENT

GLORIA WOODS AND TORI WOODS, INDIVIDUALLY AND AS NEXT FRIEND OF M.W., A CHILD, Appellants

No. 05-21-00615-CV V.

BW MIDTOWN CEDAR HILL, L.L.C., Appellee On Appeal from the 134th Judicial District Court, Dallas County, Texas Trial Court Cause No. DC-20-11275. Opinion delivered by Justice Myers. Justices Pedersen, III and Garcia participating.

court is AFFIRMED.

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It is ORDERED that appellee BW MIDTOWN CEDAR HILL, L.L.C. recover its costs of this appeal from appellants GLORIA WOODS AND TORI WOODS, INDIVIDUALLY AND AS NEXT FRIEND OF M.W., A CHILD.

Judgment entered this 19 th day of September, 2022.