Affirmed and Memorandum Opinion filed April 7, 2011



In The

Fourteenth Court of Appeals

NO. 14-10-00320-CV

RAMESES SCHOOL, INC, Appellant

V.

CITY OF SAN ANTONIO AND COUNTY OF BEXAR, TEXAS, Appellee

On Appeal from the 285th District Court Bexar County, Texas Trial Court Cause No. 2009-CI-16498

MEMORANDUM OPINION

Appellant Rameses School, Inc. appeals the summary judgment granted in favor of appellees City of San Antonio and County of Bexar, Texas, on its challenge to the validity of a tax suit. We affirm.

BACKGROUND

On May 7, 1999, the City, the County, and the San Antonio Independent School District filed a delinquent property tax suit to collect delinquent real property taxes on a tract of land owned by appellant. On October 19, 2000, the trial court entered judgment in favor of the taxing authorities for delinquent property taxes, years 1987 to 1996. The Bexar County Sherriff conducted the tax sale on May 4, 2004, after appellant's effort to

obtain a federal injunction failed. The Sheriff did not receive the minimum bid and therefore sold to property to the County. The County recorded its deed on June 21, 2004. Appellant did not exercise its statutory right to redeem the property.¹ The County subsequently sold the property to the City in a private sale.

On October 8, 2009, appellant filed an original petition, application for temporary restraining order, and application for temporary injunction, seeking to set aside as void the Sheriff's deed to the County and the County's deed to the City. The City and the County answered, each pleading the affirmative defense of the statute of limitations. The City and the County each moved for summary judgment on, *inter alia*, the statute of limitations under the Texas Tax Code.² The County also moved for summary judgment alleging appellant's failure to meet the statutory prerequisites set forth in the Tax Code for maintaining suit challenging the validity of a tax sale.³ On December 7, 2009, the trial court held a hearing on the motions and granted both. Appellant contends on appeal that the trial court erred by granting summary judgment.

STANDARD OF REVIEW

To prevail on a motion for summary judgment, the movant must establish that no material fact issue exists and that it is entitled to judgment as a matter of law. *Browning* v. *Prostok*, 165 S.W.3d 336, 344 (Tex. 2005). In conducting our review of the summary

¹ See Tex. Tax Code Ann. § 34.21(e) (West 2008).

² See TEX. TAX CODE ANN. § 33.54 (West 2008).

³ Section 34.08(a) requires the person challenging the tax sale to deposit into the court's registry an amount equal to the delinquent taxes, penalties, and interest specified in the judgment, or file an affidavit of inability to pay under Rule 145 of the Texas Rules of Civil Procedure. TEX. TAX CODE ANN. § 34.08(a) (West 2008). The County asserted in its motion for summary judgment that appellant did not deposit the required amount into the court's registry. Appellant, however, fails to challenge this ground for summary judgment on appeal. Because the trial court's judgment order did not specify the grounds on which it granted summary judgment, we must affirm the trial court's summary judgment in favor of the County on appellant's challenge to the validity of the tax sale. *See Roberts v. T.P. Three Enters., Inc.*, 321 S.W.3d 674, 676–77 (Tex. App.—Houston [14th Dist.] 2010, pet. denied) (holding that the appellants' failure to deposit the amount required by section 34.08(a) into the registry of the court, while only attacking the statute of limitations summary judgment ground, required affirmance of the summary judgment).

judgment, we take as true all evidence favorable to the nonmovant, and make all reasonable inferences in the nonmovant's favor. *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 846 (Tex. 2005). A defendant, as movant, is entitled to summary judgment if it either disproves at least one essential element of each of the plaintiff's causes of action or establishes all the elements of an affirmative defense. *Friendswood Dev. Co. v. McDade & Co.*, 926 S.W.2d 280, 282 (Tex. 1996). A defendant moving for summary judgment on a statute of limitations defense must (1) conclusively prove when the cause of action accrued, and (2) negate the discovery rule if it applies and has been otherwise pleaded or raised. *KPMG Peat Marwick v. Harrison County Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999).

ANALYSIS

Statute of Limitations

The Texas Tax Code provides the statute of limitations for challenging the validity of a tax sale. *See* TEX. TAX CODE ANN. § 33.54; *W.L. Pickens Grandchildren's Joint Venture v. DOH Oil Co.*, 281 S.W.3d 116, 119 (Tex. App.—El Paso 2008, pet. denied). An action for title to property may not be maintained against the purchaser of the property at a tax sale unless the action is commenced "before the first anniversary of the date that the deed executed to the purchaser at the tax sale is filed of record." TEX. TAX CODE ANN. § 33.54(a)(1). "When actions are barred by this section, the purchaser at the tax sale or the purchaser's successor in interest has full title to the property, precluding all other claims." *Id.* § 33.54(c).

In its first issue, appellant argues that section 33.54 is not applicable here because the statute refers to a "purchaser" at a tax sale and the County did not purchase the property. Appellant contends that the County did not purchase the property, but merely "acquired" it, because the property was removed from the tax sale after appellant and the County entered into a payment agreement for the delinquent taxes.

The undisputed summary judgment evidence shows that after the property was initially set for a tax sale, appellant and the County entered into an agreement for the payment of the delinquent property taxes. However, appellant failed to make the payments and defaulted on the agreement. After the Sheriff set the property for another tax sale, appellant and the County entered into a second payment agreement. Again, appellant defaulted, and the property was set for a tax sale on May 4, 2004. When the Sherriff did not receive the minimum bid at the tax sale, he bid the property off to the County as provided by Section 34.01(j) of the Tax Code.⁴ Appellant does not cite to any case authority or Tax Code provision to support its construction of the term "purchaser." However, the Tax Code does offer guidance. Section 33.51 of the Tax Code, regarding writs of possession following a tax sale, specifically defines "a taxing unit to which property is bid off under section 34.01(j)" as a "purchaser." TEX. TAX CODE ANN. § 33.51(i)(2) (West 2008). Moreover, when the Tax Code uses the term "purchaser" in a way not intended to apply to a taxing unit to which property is bid off, the plain language of the tax code contains such limitation. See, e.g., TEX. TAX CODE ANN. § 34.21(a) (stating, in pertinent part, "[t]he owner of real property sold at a tax sale to a purchaser other than a taxing unit"). Therefore, we hold that the County did not merely "acquire" the property; instead, the County is a "purchaser" entitled to rely upon the statute of limitations of section 33.54.

To support its summary judgment on limitations, the County offered undisputed evidence that it recorded its deed on June 21, 2004. As there is no genuine issue of material fact that the County recorded the Sheriff's deed on June 21, 2004, appellant had until June 21, 2005, to commence an action challenging the validity of the tax sale. Because appellant waited more than five years after the recording of the Sheriff's deed to

⁴ See TEX. TAX CODE ANN. § 34.01(j) (West 2008) (providing that if a sufficient bid is not received, the taxing unit that requested the order of sale may terminate the sale; if it does not terminate the sale, the officer making the sale shall bid the property off to the taxing unit that requested the order of sale for the aggregate amount of the judgment against the property or for the market value of the property as specified in the judgment, whichever is less).

file this action challenging the validity of the tax sale, appellant's action against the County is barred under section 33.54. *See W.L. Pickens Grandchildren's Joint Venture*, 281 S.W.3d at 122 (affirming the summary judgment where the plaintiff filed suit challenging the validity of the tax sale "three years beyond the limitations period"); *John K. Harrison Holdings, LLC v. Strauss*, 221 S.W.3d 785, 788 (Tex. App.—Beaumont 2007, pet. denied) (holding that section 33.54 precluded the plaintiff's claim because it did not file s suit within one year of the filing of the constable's deed).

Appellant likewise challenges the City's right to rely upon the limitations provisions of section 33.54, asserting that the County "donated" the property to the City. Appellant asserts this theory for the first time on appeal. In its reply to the City's motion for summary judgment, appellant stated that the County "sold" the property to the City. Moreover, the only ground appellant argued in its response to the City's motion was that the City's title is not valid because it could only take the County's title, which appellant also asserted is defective.

In summary judgment practice, "[i]ssues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal." TEX. R. CIV. P. 166a(c); see also D.R. Horton-Tex., Ltd. v. Markel Int'l Ins. Co., Ltd., 300 S.W.3d 740, 743 (Tex. 2009) ("A non-movant must present its objections to a summary judgment motion expressly by written answer or other written response to the motion in the trial court or that objection is waived."). To "expressly present" the nonmovant's reasons for avoiding summary judgment, the written answer or response must fairly apprise the movant and the trial court of the issues the nonmovant contends should defeat the motion for summary judgment. Shih v. Tamisiea, 306 S.W.3d 939, 944 (Tex. App.—Dallas 2010, no pet.). Because appellant did not raise its "donation" argument in response to the City's motion for summary judgment, appellant has waived this argument on appeal. As explained above, section 33.54 bars appellant's challenge to the validity of the Sheriff's sale of the property to the County.

We conclude that the County and the City conclusively established the affirmative defense of the statute of limitations, and appellant has not raised a fact issue to avoid the statute of limitations. Therefore, the trial court did not err by granting the motions for summary judgment. We overrule appellant's first issue.

Summary Judgment Affidavits

In its second issue, appellant contends that the affidavits submitted in support of the motions for summary judgment are conclusory, prove only that the County "donated" the property, and do not support the affirmative defense of the statute of limitations. Appellant did not object to the County's and City's affidavits as conclusory in the trial court. However, an objection that statements in an affidavit are conclusory is one that relates to a defect in substance and may be raised for the first time on appeal. *Cruse v. O'Quinn*, 273 S.W.3d 766, 777 (Tex. App.—Houston [14th Dist.] 2008, pet. denied). Affidavits containing conclusory statements that fail to provide the underlying facts to support the conclusion are not proper summary judgment evidence. *Dolcefino v. Randolph*, 19 S.W.3d 906, 930 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

Appellant does not point out the specific alleged defects with regard to the affidavit submitted by the City or the four affidavits submitted by the County and has not provided a single citation to the record in support of this issue. Therefore, appellant has not adequately briefed this issue. See Tex. R. App. P. 38.1(i); WorldPeace v. Comm'n for Lawyer Discipline, 183 S.W.3d 451, 460 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). However, a review of each of the affidavits submitted by the County and the City shows that they are not conclusory but support the affirmative defense of the statute of limitations as discussed above. Each affidavit is based on the personal knowledge of the affiant, and those affidavits submitting records substantially comply with Texas Rule of Evidence 902(10)(b) and properly authenticate the relevant business records. See Tex. R. Evid. 901(10)(b); McFarland v. Citibank (S.D.), N.A., 293 S.W.3d 759, 762 (Tex. App.—Waco 2009, no pet.); McElroy v. Unifund CCR Partners, No. 14-07-00661-CV,

2008 WL 4355276, at *3 (Tex. App.—Houston [14th Dist.] Aug. 26, 2008, no pet.) (mem. op.). We overrule appellant's second issue.

Other Material Fact Issues

In its third issue, appellant argues that its response to the motions for summary judgments, along with a supporting affidavit, raised the following material fact issues, which appellant claims the trial court failed to consider: the disputed legal description of the property, the status of the tax exemption granted to appellant, and the disposition of the "back tax" agreement. However, assuming these purported fact issues, summary judgment is nonetheless proper. Appellant did not timely assert these issues by the one-year anniversary date of the filing of sheriff's deed of record. *See* TEX. TAX. CODE ANN. § 33.54(a). We overrule appellant's third issue.

Having overruled all of appellant's issues, we affirm the judgment of the trial court.⁵

/s/ Sharon McCally Justice

Panel consists of Justices Anderson, Seymore, and McCally.

⁵ Appellant has not complained in this appeal about the summary judgment on its cause of action to remove an alleged cloud on its title and therefore has waived any complaint. *See San Jacinto River Auth. v. Duke*, 783 S.W.2d 209, 209–10 (Tex. 1990) (stating that it is a "well-established rule that grounds of error not asserted by points of error or argument in the court of appeals are waived").

Appellant raised a claim for adverse possession in its first amended petition but abandoned that claim in its second amended petition. An amended pleading supersedes and supplants earlier original pleadings. Tex. R. Civ. P. 65; *Smith v. CDI Rental Equip.*, *Ltd.*, 310 S.W.3d 559, 565 (Tex. App.—Tyler 2010, no pet.). The City and the County moved for summary judgment on this claim before appellant abandoned it, and the City addresses it in this appeal. However, because appellant has not raised any issue related to the adverse possession claim in this appeal, we do not address it. *See San Jacinto River Auth.*, 783 S.W.2d at 209–10.