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Summary Judgment Proof

Bruce A. Atkins

Bruce A. Atkins
Attorney at Law
12826 Willow Centre Drive
Suite A
Houston, Texas 77066

attyatkins@aol.com
832-249-7900

SUMMARY JUDGMENT PROOF

APPENDIX

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Admissible evidence is critical in summary judgment. The burden for production of evidence depends upon the type of proceeding, whether it is a traditional motion or a no-evidence motion.

The movant in a traditional motion for summary judgment must satisfy its burden of proof by admissible evidence. The movant must produce admissible summary judgment evidence to prove there is no genuine issue of material fact and that it is entitled to judgment as a matter of law.[1] The court will consider only the grounds expressly alleged in the motion and the fact issues expressly asserted in the response.[2] Admissible summary judgment evidence must support the grounds alleged in the motion or the fact issues expressly asserted in the response. When the movant produces admissible evidence supporting its burden of proof, the burden shifts to the non-movant to produce admissible judgment evidence to prove either that there is a genuine issue of material fact or that the movant is not entitled to judgment as a matter of law. Traditional summary judgment cannot be granted by default because the non-movant does not file an answer or response to the motion.[3]

The movant in a no-evidence motion for summary judgment must allege there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial and must specify the elements of the claim on which there is no evidence.[4] The movant is not required to affirmatively negate an element of the claim for which evidence is lacking.[5] A non-movant in a no-evidence motion for summary judgment must

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1. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844 (Tex. 2009); *Southwestern Elec. Power Co. v. Grant*, 73 S.W.3d 211 (Tex. 2002); *Ryland Group, Inc. v. Hood*, 924 S.W.2d 120 (Tex. 1996); *Calvillo v. Gonzalez*, 922 S.W.2d 928 (Tex. 1996); *Sysco Food Services, Inc. v. Trapnell*, 890 S.W.2d 796 (Tex. 1994); *McFadden v. American United Life Insurance Co.*, 658 S.W.2d 147 (Tex. 1983); *City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671, 673 (Tex. 1979); TEX. R. CIV. P. 166a(c).988 S.W.2d 746, 748 (Tex. 1999).

2. *Id*.

3. *Holmes v. Ottawa Truck, Inc.*, 960 S.W.2d 866 (Tex. App. - El Paso 1997, rev. denied) [Nonmovant's failure to answer or respond cannot supply by default the summary judgment proof necessary to establish movant's right]; *Frasier v. Schauweker*, 915 S.W.2d 601 (Tex. App. - Houston [14th Dist.] 1996, no writ) [Trial court may not grant summary judgment by default for lack of a response by nonmovant when movant's summary judgment proof is legally insufficient); *Gulf Ins. Co. v. Clarke*, 902 S.W.2d 156 (Tex. App. - Houston [1st Dist.] 1995, reh. overruled); *Blake v. Lewis*, 886 S.W.2d 404 (Tex. App. - Houston [1st Dist.] 1994); *Bean v. Bluebonnet Sav. Bank FSB*, 884 S.W.2d 520, 523 (Tex. App. - Dallas 1994, no writ) [Nonmovant's failure to respond to summary judgment cannot supply by default summary judgment proof necessary to establish movant's entitlement to judgment]; *Clemons v. State Farm Fire and Cas. Co.*, 879 S.W.2d 385, 390 (Tex. App. - Houston [14th Dist.] 1994, no writ); *Townsend v. Employers Mut. Cas. Co.*, 817 S.W.2d 401, 402 (Tex. App. - Fort Worth 1991, no writ) [Non-movant's failure to answer or respond cannot supply by default summary judgment proof necessary to establish movant's rights]; *Seaman v. Seaman*, 686 S.W.2d 206 (Tex. App. - Houston [1st Dist.] 1984, writ ref'd n.r.e.) *appeal after remand* 756 S.W.2d 56 [Summary judgment motion must stand on the merits of its own supporting evidence, and if legally insufficient, a summary judgment cannot be granted even by default]; *Lloyd v. Holland*, 659 S.W.2d 103, 105 (Tex. App. - Houston [14th Dist.] 1983, no writ); *Byke v. City of Corpus Christi*, 541 S.W.2d 661, 664 (Tex. Civ. App. - Corpus Christi 1976), *appeal after remand* 569 S.W.2d 469 [Summary judgment is not to be granted to movant on default of opposite party, but only on merit of summary judgment proof adduced by movant].

4. TEX. R. CIV. P. 166a(i); *Morris v. JTM Materials, Inc*., 78 S.W.3d 28 (Tex. App. - Fort Worth 2002, no pet.); *Lampasas v. Spring Center, Inc*., 988 S.W.2d 428, 436 (Tex. App. - Houston [14th Dist.] 1999, no pet.).

5. TEX. R. CIV. P. 166a(i).

respond by producing evidence raising a genuine issue of material fact.[6] The respondent need only point out evidence that raises a fact issue on the challenged elements."[7] The non-movant raises a genuine issue of material fact by producing "more than a scintilla of evidence" establishing the challenged elements existence and may use both direct and circumstantial evidence.[8] More than a scintilla exists when the evidence "would enable reasonable and fair-minded people to differ in their conclusions."[9] No-evidence summary judgment can be granted by default. In fact, summary judgment must be granted by default in a no-evidence motion when the non-movant does not produce summary judgment evidence raising a genuine issue of material fact. If the non-movant does not respond, judgment shall be rendered against the non-movant, summarily disposing of the challenged cause of action or defense.[10]

Evidence to support or oppose a summary judgment motion must be provided by affidavit or by sworn or authenticated copies of other documentary evidence.[11] The trial court's only duty in a traditional motion is to determine if a material question of fact exists and in a no-evidence motion whether there is evidence to support an identified element of a claim alleged to be without evidentiary support.[12] The trial courts must not weigh the evidence.[13]

A. General Provisions.

Recently, the Texas Supreme Court held that Rule 193.6 excludes discovery not timely disclosed and witnesses, including expert witnesses, not timely identified in summary judgment proceedings just as they would be in a conventional trial.[14] Rule 195.2 permits a party to satisfy the designation requirement by furnishing the information listed in Rule 194.2(f) in response to a request for disclosure.[15]

There is no difference between the standards for admissibility of evidence in a summary judgment proceeding and those applicable at a regular trial.[16] Summary judgment evidence must

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6. TEX. R. CIV. P. 166a(i); *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004).
7. TEX. R. CIV. P. 166a cmt. - 1997*; see also Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 207 (Tex. 2002).
8. 135 S.W.3d at 600-01.
9. *Id.* at 601 (quoting *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)).
10. *McCrea v. Commerce Title Co*., ___ S.W.3d ___ (Tex. App. - San Antonio 2009, no pet.), 2009 Tex. App. LEXIS 5597 [Summary judgment granted when no response was filed to the no-evidence motion]**;** *Renfro v. Renfro*, ___ S.W.3d ___, 2009 (Tex. App. - Dallas 2009, no pet.), 2009 Tex. App. Lexis 7747 [Movant is entitled to no-evidence summary judgment when the respondent did not bring forth any evidence in response to the motion for summary judgment to raise a genuine issue of material fact on the challenged elements]; *Roventini v. Ocular Sciences, Inc.*, 111 S.W.3d 719, 722-23 (Tex. App. - Houston [1 Dist.] 2003, no pet.) [A trial court may render a summary judgment by default on a no-evidence motion for summary judgment for lack of a response by the respondent, provided the movant's motion warranted rendition of a final summary judgment based on lack of evidence to support the respondent's claim or defense].
11. Tex. R. Civ. Proc. 166a(f).
12. *See Gulbenkian v. Penn*, 252 S.W.2d 929, 931 (1952) [traditional motion]; see TEX. R. CIV. P. 166a(i) [no-evidence motion].
13. *Id.*
14. *Fort Brown Villas III Condominium Ass'n, Inc. v. Gillenwater*, 285 S.W.3d 879 (Tex. 2009).
15. TEX. R. CIV. P. 193.6, 194.2(f), 195.2.
16. *United Blood Servs. v. Longoria*, 938 S.W.2d 29, 30, 40 (Tex. 1997).

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