

Court of Appeals
Tenth Appellate District of Texas

10-24-00247-CV

Nic's Beverages, LLC,
Appellant

v.

Waco Bottling LLC d/b/a Waco Bottling Company,
Appellee

On appeal from the
74th District Court of McLennan County, Texas
Judge Gary R. Coley, presiding
Trial Court Cause No. 2021-1392-3

JUSTICE HARRIS delivered the opinion of the Court.

MEMORANDUM OPINION

Nic's Beverages, LLC (“NB”) appeals the trial court’s order granting summary judgment in favor of Waco Bottling LLC d/b/a Waco Bottling Company (“Waco Bottling”). Because we find no evidence of at least one element of NB’s breach of contract and negligence claims, we affirm the trial court’s order.

Background

NB contends it entered into an agreement wherein Waco Bottling agreed to produce, package, store, and arrange transportation for shipments of NB's Cold Brew, a CBD-infused cold brew coffee drink. Per the agreement, Waco Bottling would store NB's Cold Brew, bottle it, cool it down, maintain its temperature at 35-40°, store the product on its property until it could be transported, and organize its transportation with a third-party refrigerated trucking company. Waco Bottling needed additional cold storage to house NB's Cold Brew bottles on its property. The parties agreed that the bottles would be stored in a refrigerated truck on Waco Bottling's property. Waco Bottling rented the refrigerated truck and was responsible for fueling it.

Waco Bottling worked with a third-party to arrange transportation for NB's Cold Brew. The bottles were transported from Waco Bottling to US Cold Storage by third-party companies with third-party transportation vehicles and drivers.¹ A Waco Bottling employee stated in sworn deposition that when the first transportation truck arrived, it was not cold. Waco Bottling's employees instructed the third-party driver to turn on the refrigeration and waited before transferring the product from the storage truck to the transportation truck. Another Waco Bottling employee stated in sworn

¹ The third-party transportation companies were co-defendants in this suit; however, they are not parties to this appeal.

deposition that the first transportation truck driver asked what the temperature requirements were, was told the temperature requirements, the problem was cleared up, and the driver was allowed to leave and deliver the bottles to US Cold Storage.

The US Cold Storage receipts show the two transportation trucks arrived at US Cold Storage with an ambient temperature of 69° and 80°, respectively. NB filed suit alleging that Waco Bottling breached their contract and negligently caused NB to lose two shipments of Nic's Cold Brew totaling 80,000 pounds as well as profits, shipment costs, storage costs, and business opportunities.

Waco Bottling filed a no-evidence motion for summary judgment asserting: (1) NB can produce no evidence that Waco Bottling breached any contract that it had with NB or that it suffered injuries or damages from any alleged breach of contract; and (2) NB can produce no evidence concerning the essential elements of duty, breach, cause, or harm required to succeed on a negligence claim. Following a hearing, the trial court entered its order granting Waco Bottling's motion for summary judgment. This appeal followed. The sole issue on appeal is whether the trial court erred in granting Waco Bottling's motion for summary judgment on both claims on no evidence grounds. We affirm the trial court's summary judgment order.

Discussion

We review a summary judgment *de novo*. *Double Diamond, Inc. v. Hilco Elec. Co-op., Inc.*, 127 S.W.3d 260, 264 (Tex. App.—Waco 2003, no pet.). We review the evidence presented by the motion and response in the light most favorable to the party against whom the summary judgment was rendered, crediting evidence favorable to that party if reasonable jurors could and disregarding contrary evidence unless reasonable jurors could not. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006).

After adequate time for discovery, a party, without the burden of proof at trial, may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense. TEX. R. CIV. P. 166a(i). “The motion must state the elements as to which there is no evidence.” *Id.* Once the movant specifies the elements lacking evidence, the burden shifts to the respondent to raise a fact issue on the challenged elements. *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 207 (Tex. 2002).

A no-evidence summary judgment will be sustained when there is a complete absence of evidence of a vital fact or the evidence offered to prove a vital fact is no more than a scintilla. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003).

To establish negligence in Texas, three elements must be satisfied. There must be a legal duty owed by one person to another, a breach of that duty, and damages proximately caused by the breach. *D. Houston, Inc. v. Love*, 92 S.W.3d 450, 454 (Tex. 2002). The essential elements in a suit for breach of contract are: (1) the existence of a valid contract; (2) the plaintiff performed or tendered performance; (3) the defendant breached the contract; and (4) that the plaintiff was damaged as a result of the breach. *Runge v. Raytheon E-Systems, Inc.*, 57 S.W.3d 562 (Tex. App.–Waco, 2001, no pet.).

We turn to the breach and damages elements of both claims. NB claims its product was heat shocked to the point of damage due to the ambient temperature of the refrigerated transport truck. NB presents no evidence that the product itself ever exceeded the required temperature or suffered heat shock. There is no evidence that the Cold Brew bottles were tested, tasted, or temperature checked upon arrival. In contrast, a Waco Bottling employee testified that the bottles were checked four times a day, that the refrigerated storage truck temperature was also checked, and that none of the bottles tested above the required temperature range. Equating the ambient transport truck temperature to the temperature of the actual Cold Brew bottle is an assumption that we, like the trial court, will not make. Texas courts have firmly and repeatedly held that assumptions, speculation,

conjecture, and surmise do not constitute legally sufficient evidence to survive a no-evidence summary judgment. *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598 (Tex. 2004).

Even if we were to follow the logic of NB, the fact that the Cold Brew bottles were thrown out and unused is itself evidence of damage and loss, we cannot find evidence that links a specific action or inaction by Waco Bottling to cause the damages alleged. In *Ford Motor Co.*, the plaintiff's inability to pinpoint a cause or rule out other causes was found to be insufficient to raise a fact issue beyond suspicion. *Id.* Some suspicion linked to other suspicion produces only more suspicion, which is not the same as some evidence. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742 (Tex. 2003).

Here, NB speculates that Waco Bottling allowed the refrigerated storage truck where the bottles were held to run out of fuel, allowing the Cold Brew bottles to overheat. As evidence, they point to testimony that a Waco Bottling employee kicked the fuel tank of the refrigerated storage truck and refilled it because it sounded empty. That alone does not provide evidence that the fuel ran out, that the fuel tank ever was empty for any duration, that the temperature of the refrigerated storage truck overheated, or that the Cold Brew bottles overheated while in the possession or control of Waco Bottling. "When the evidence offered to prove a vital fact is so weak as to do no more

than create a mere surmise or suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence.” *Forbes Inc. v Granada Biosciences, Inc.*, 124 S.W.3d 167, 172 (Tex. 2003). NB did not provide more than a scintilla of evidence of a breach by Waco Bottling that caused damage.

A defendant who moves for summary judgment needs only negate one element of the plaintiff’s cause of action. *Perdue v. Pattern Corp.*, 142 S.W.3d 596, 604 (Tex. App.–Austin, 2004, no pet.). Because we cannot find evidence of an action or inaction by Waco Bottling to constitute a breach and because we cannot find evidence of the temperature of the Cold Brew bottles beyond the ambient temperature to constitute damage, we need not address the other elements of NB’s negligence and breach of contract claims. We find the trial court did not err in granting Waco Bottling’s motion for summary judgment on no evidence grounds.

Conclusion

We affirm the trial court’s order granting Waco Bottling’s motion for summary judgment.

LEE HARRIS
Justice

OPINION DELIVERED and FILED: August 27, 2026

Before Chief Justice Johnson,
Justice Smith, and
Justice Harris

Affirmed
CV06

