MICHAEL KOLANDER, INDIVIDUALLY, MICHAEL KOLANDER & ASSOCIATES, A FORMER TEXAS PARTNERSHIP, AND MICHAEL KOLANDER & ASSOCIATES, INC., A TEXAS CORPORATION, Appellants v. FIRST STATE BANK OF RIO VISTA, NORWEST BANK TEXAS, SAN ANTONIO, N.A., AND WELLS FARGO BANK OF TEXAS, N.A., Appellees

No. 10-04-00312-CV

COURT OF APPEALS OF TEXAS, TENTH DISTRICT, WACO

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PRIOR HISTORY: From the 249th District Court Johnson County, Texas. Trial Court No. C200200123.
Kolander v. First State Bank of Rio Vista, 2004 Tex. App. LEXIS 8349 (Tex. App. Waco, Sept. 15, 2004)

COUNSEL: For APPELLANT/RELATOR: Michael J. Rogers, MICHAEL J. ROGERS PC, Cleburne, TX.

For APPELLEE/RESPONDENT: Shayne D. Moses, MOSES PALMER & HOWELL LLP, Fort Worth, TX.

JUDGES: Before Chief Justice Gray, Justice Vance, and Justice Reyna. (Justice Vance concurs in the judgment).

OPINION BY: TOM GRAY

OPINION

MEMORANDUM OPINION

Appellants (collectively "Kolander") appeal the trial court's summary judgment in favor of Appellees (collectively "the Bank"). We affirm.

Evidence. In Kolander's second issue, he complains of the trial court's overruling of Kolander's objections to the Bank's summary-judgment evidence.

First, Kolander contends that two of the Bank's affidavits do not state that the facts in the affidavits are true. "An affidavit which does not positively and unqualifiedly represent the facts as disclosed in the affidavit to be true . . . is legally insufficient." *Humphreys v. Caldwell, 888 S.W.2d 469, 470, 38 Tex. Sup. Ct. J. 61 (Tex. 1994)* (orig. proceeding) (per curiam). Kolander ignores the Bank's amended affidavits stating that the facts that the affidavits contain are "true and correct." (*See* 1 Supp. C.R. at 7, 9.)

Next, Kolander contends that one of the Bank's affidavits is conclusory. "A legal conclusion in an affidavit is insufficient . . . to establish the existence of a fact in support of a motion for summary judgment." *Mercer v. Daoran Corp., 676 S.W.2d 580, 583, 27 Tex. Sup. Ct. J. 470 (Tex. 1984)*; *accord IHS Cedars Treatment Ctr. of Desoto, Tex., Inc. v. Mason, 143 S.W.3d 794, 803, 47 Tex. Sup. Ct. J. 666 (Tex. 2004)*. Lastly, Kolander contends that one of the Bank's affidavits contains inadmissible hearsay. *See TEX. R. EVID. 801(d)*, *802*. Summary-judgment affidavits must "set forth such facts as would be admissible in evidence." *TEX. R. CIV. P. 166a(f)*.

"Under *Texas Rule of Appellate Procedure 44.1*, wrongfully admitted evidence is harmful only if it 'probably caused the rendition of an improper judgment.'" *Sw. Elec. Power Co. v. Burlington N. R.R. Co., 966 S.W.2d 467, 474, 41 Tex. Sup. Ct. J. 529 (Tex. 1998)* (quoting *Tex. R. App. P. 44.1(a)(1)*). "Typically, a successful challenge to a trial court's evidentiary rulings requires the complaining party to demonstrate that the judgment turns on the particular evidence excluded or admitted." *Interstate Northborough P'ship v. State, 66 S.W.3d 213, 220, 45 Tex. Sup. Ct. J. 40 (Tex. 2001)* (condemnation).

As to Kolander's conclusory-evidence and hearsay objections, he does not suggest how he suffered harm from the trial court's admission of the evidence of which Kolander complains. That evidence has no bearing on the summary-judgment grounds on which we decide Kolander's other issue below.

We overrule Kolander's second issue.

Summary Judgment. In Kolander's first issue, he contends that the trial court erred in granting the Bank's motion for summary judgment on Kolander's breach-of-contract claim.

In a traditional summary-judgment motion, "[t]he judgment sought shall be rendered forthwith if" the summary-judgment evidence "show[s] that . . . there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law . . . ." *TEX. R. CIV. P. 166a(c)*; *see W. Invs., Inc. v. Urena, 162 S.W.3d 547, 550, 48 Tex. Sup. Ct. J. 556 (Tex. 2005)*. "In reviewing a summary judgment, we consider the evi-

dence in the light most favorable to the non-movant and resolve any doubt in the non-movant's favor." *W. Invs. at 550*; *accord Nixon v. Mr. Prop. Mgmt. Co., 690 S.W.2d 546, 548-49, 28 Tex. Sup. Ct. J. 384 (Tex. 1985)*.

The Bank's motion for summary judgment contended, first, that Kolander's claims were barred in that they accrued beyond the limitations period. *See Little v. Smith, 943 S.W.2d 414, 417-18, 40 Tex. Sup. Ct. J. 278 (Tex. 1997)*; *Robinson v. Weaver, 550 S.W.2d 18, 20, 20 Tex. Sup. Ct. J. 262 (Tex. 1977)*. "If the movant establishes that the statute of limitations bars the action, the nonmovant must then adduce summary judgment proof raising a fact issue in avoidance of the statute of limitations." *Diversicare Gen. Partner, Inc. v. Rubio, 185 S.W.3d 842, 846, 49 Tex. Sup. Ct. J. 19 (Tex. 2005)* (citing *KPMG Peat Marwick v. Harrison County Hous. Fin. Corp., 988 S.W.2d 746, 748, 42 Tex. Sup. Ct. J. 428 (Tex. 1999)*).

In Kolander's response to the Bank's motion, he contended, "Non-Movants base their claim upon the unreasonable notice that [the Bank] provided them regarding the closing of the account" and that Kolander received notice on April 15, 1998; and argued that the limitations period ran from that date. (3 C.R. at 444; *see* Kolander Br. at 15.) Otherwise, Kolander does not attempt to avoid limitations. Kolander concedes that he filed suit on March 28, 2002. We assume without deciding that Kolander's claim concerning the closing of the account avoids limitations.

Next, however, the Bank points to evidence that Kolander and his partners "agreed and instructed the bank to close the . . . accounts" on April 13, 1998. (3 C.R. at 310.) Considering that evidence in Kolander's favor, because Kolander instructed the Bank to close the accounts, there is no genuine issue as to any material fact concerning the Bank's breaching the account agreement in closing the accounts. The Bank is entitled to judgment as a matter of law on Kolander's notice claim. [1] We overrule Kolander's first issue.

1 Kolander does not complain as to his other breach-of-contract theories or his other claims.

Having overruled Kolander's issues, we affirm.

TOM GRAY

Chief Justice

Before Chief Justice Gray,

Justice Vance, and

Justice Reyna

(Justice Vance concurs in the judgment)

Affirmed

Opinion delivered and filed March 21, 2007