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ARKANSAS COURT OF APPEALS

DIVISION II
No. CA10-754

JOHN H. GOLD, JR. APPELLANT V. BIRD E. VINES APPELLEE	**Opinion Delivered** April 27, 2011 APPEAL FROM THE SCOTT COUNTY CIRCUIT COURT [No. CIV-2007-76] HONORABLE DAVID H. McCORMICK, JUDGE AFFIRMED

LARRY D. VAUGHT, Chief Judge

Appellant John H. Gold argues on appeal that the trial court erred in its grant of summary judgment to appellee Bird E. Vines. Specifically Gold argues that the trial court failed to consider the allegations in Gold's complaint and the sworn testimony that, according to Gold, raised legitimate questions of fact surrounding his alleged breach of contract. Although we are concerned that the trial court seemingly misstated the law to require that Gold file a response to Vines's summary-judgment motion, we are satisfied that summary judgment was proper and affirm the decision of the trial court.

This case concerns a contract that Gold and Vines entered into in 2003 for the purchase of a parcel of real property. In accordance with the contract, Gold agreed to tender $25,000 to Vines as a down payment, then pay the remaining $100,000, plus a five-percent interest charge in monthly installments of $924.89. Gold ceased making his scheduled monthly payment in

December 2006. In response to the non-payment, on February 1, 2007, Vines notified Gold that their contract had been breached. Vines further executed the contract provision whereby the payments Gold had made to date were forfeited (converted to rent), and the contract was rescinded.

Furthermore, Vines refused to accept either late payments or the balance of the purchase price from Gold, filed a quitclaim deed, and took possession of the property. In response, Gold filed suit for specific performance, and Vines answered and moved for summary judgment. The trial court granted summary judgment (dated May 10, 2010) and specifically found

> that the pleadings filed herein, [Gold's] deposition and the affidavit of [Vines] establishes that [Vines] is entitled to Summary Judgment.

In a separate order denying Gold's request for reconsideration, the trial court used a series of unfortunate phrases that seem to indicate the court was laboring under the false impression that Gold was required to file some sort of response to Vines's motion for summary judgment. Specifically, the court stated

> [Gold] failed to file a response to [Vines's] motion for Summary Judgment . . . based upon [Gold's] failure to timely respond to [Vines's] motion for Summary Judgment this Court entered an Order Granting Summary Judgment on May 10, 2010.

On appeal, Gold argues that the trial court erred as a matter of law in granting Vines's summary-judgment motion and correspondingly denying Gold's motion to set aside the order. The crux of Gold's argument is that the trial court erred by holding him to a standard that was not required under the law—requiring that he respond to the motion—then relying on his failure to meet the unjust standard as a basis for the grant of a default judgment (masked as a summary judgment), when material issues of fact were unanswered. We disagree and note that the trial

court did specifically state in its first order that in finding that Vines was entitled to summary judgment it relied on the pleadings, Gold's deposition, and the affidavit of Vines.

However, in an abundance of caution and to correct any potential misunderstanding of the proof requirements in the summary-judgment context, we note that Gold is absolutely correct. It is certainly his right not to respond to a motion for summary judgment, but we caution that he does so at his own risk. Assuming Vines's initial summary-judgment motion was accompanied by sufficient proof to establish that there are no genuine issues of material fact to be litigated, and that proof goes unanswered or undisputed by Gold, the failure to respond will be fatal.

In Vines's motion for summary judgment the following proof was advanced: 1) the parties agreed that Gold paid a total of $33,264 in monthly payments to Vines; 2) notice that Vines was rescinding the contract was tendered to Gold on May 1, 2007; 3) as of that date Gold owed Vines $37,920.49; 4) the difference between the amount that Vines had been paid and what he should have been paid (based on monthly installments of $924.89) was $4,656.49; 5) that amount totals a five-payment lapse (or 120 days late). Furthermore, according to the proof submitted, if late-payment penalties (which the contract contemplates) are added to Gold's arrearage, there is proof of an additional $1,479.68 owed to Vines (for a total of $6,136.17) as of May 1, 2007. Finally, there was proof (via deposition) that Gold further breached the contract by allowing the property to go uninsured for two years.

By the clear and unambiguous language of the parties' contract, rescission is allowed after ninety days of default. The issue before the trial court was strictly whether Vines was entitled to

rescind the contract. Accompanying his motion for summary judgment was proof—affidavit, pleading, and deposition—that the property had not been insured as required and that Gold was more than ninety days behind in monthly payments. This proof was enough to establish a prima facie showing that the contract could be rescinded and that Vines was entitled to summary judgment. Once Vines established his prima facie entitlement to summary judgment, the burden shifted to Gold to meet proof with proof and demonstrate the existence of a material issue of fact. *Seth v. St. Edward Mercy Med. Ctr.*, 375 Ark. 413, 291 S.W.3d 179 (2009). Although there is no technical requirement that Gold answer proof with proof, his failure to do so after Vines's sufficient prima facie showing of entitlement to summary judgment halted the case.

Based on the undisputed factual evidence presented by Vines that established two independent grounds under the contract to justify his rescission, there were no material facts unanswered, and summary judgment was appropriate. *Martin v. Arthur*, 339 Ark. 149, 3 S.W.3d 684 (1999).

Affirmed.

GLADWIN and HOOFMAN, JJ., agree.