

CAUSE NO. DC-13-09969

JO N. HOPPER,

Plaintiff,

v.

LAURA S. WASSMER AND
STEPHEN B. HOPPER,

Defendants.

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IN THE DISTRICT COURT

DALLAS COUNTY, TEXAS

44th JUDICIAL DISTRICT

**PLAINTIFF’S MOTION TO STRIKE REPLY BRIEF OF
DEFENDANTS LAURA S. WASSMER AND STEPHEN B. HOPPER**

The “motion for summary judgment” is a procedural tool designed to narrow issues for trial and dispose of claims without legal or evidentiary support. Summary judgment procedure was not designed to allow a defendant to “sand bag” the plaintiff by disclosing its true grounds for summary judgment in a “reply brief” in support of its motion for summary judgment filed 3 days before a hearing rather than at least 21 days before that hearing. Because Defendants Laura S. Wassmer and Stephen B. Hopper (the “Heirs”) filed a reply brief that violates both the letter and spirit of summary judgment procedure as well as the Court’s deadline, Plaintiff Jo N. Hopper (“Plaintiff”) moves to strike the Heirs’ reply brief.

I.

ARGUMENT AND AUTHORITIES

The Heirs’ reply brief is improper and should be stricken for two reasons: (1) the Heirs’ assertion of new grounds in its reply brief that were not first included in their motion for partial summary judgment is improper, and (2) to the extent their reply brief raises new grounds or

reasons for summary judgment, the reply brief is untimely under the Court's dispositive motion scheduling order.

1. The Heirs' Assertion Of New Grounds For Summary Judgment In Their Reply Brief Is Improper.

TEX. R. CIV. PROC. 166a(c) requires that a motion for summary judgment must itself state specific grounds on which judgment is sought.¹ The term "grounds" refers to the "reasons entitling the movant to summary judgment."² The motion for summary judgment must stand or fall on the grounds that it specifically and expressly sets forth; grounds not asserted in the motion cannot form the basis for summary judgment.³ In determining whether grounds have been expressly presented, reliance may not be placed on briefs or summary judgment evidence.⁴ The Texas Supreme Court has recognized that Rule 166a(c) is "an admittedly rigorous rule," stating that "carving exceptions to this simple requirement that the motion for summary judgment state the specific grounds frustrates the purpose of Rule 166a(c)."⁵

The purpose of requiring the movant to state in the motion the grounds for summary judgment, and the specific evidence supporting those grounds, is to provide the opposing party with adequate information for opposing the motion and to define the issues.⁶ Consistent with general principles of fairness and efficient motion practice, if a party asserts new grounds for

¹ See TEX. R. CIV. PROC. 166a; *McConnell v. Southside Independent School Dist.*, 858 S.W.2d 337, 339 (Tex. 1993).

² *Id.*

³ *Id.*

⁴ *Id.*; see also *Shade v. City of Dallas*, 819 S.W.2d 578, 583 (Tex. App. -- Dallas 1991, no writ) (holding that raising other summary judgment grounds in a brief in support of the motion was not sufficient and summary judgment on those grounds was improper); see i.e., *Watkins v. Hammerman & Gainer*, 814 S.W.2d 867, 869 n.1 (Tex. App. -- Austin 1991, no writ) (summary judgment must stand or fall on grounds expressly alleged in the motion, and not in additional grounds argued in trial appellate briefs); *Roberts v. Southwest Texas Methodist Hospital*, 811 S.W.2d 141, 145 (Tex. App. -- San Antonio 1991, writ denied) (summary judgment grounds discussed in the brief and not in the motion could not provide the basis for summary judgment.)

⁵ *McConnell*, 858 S.W.2d at 341.

⁶ See *Westchester Fire Ins. Co. v. Alvarez*, 576 S.W.2d 771, 772 (Tex. 1978); *PR Publication and Production Co., Inc. v. Lewisville Ind. School District*, 917 S.W.2d 472, 473 (Tex. App.—Fort Worth 1996, no writ).

summary judgment in a reply brief, the court should disregard it.⁷ Further, there is a requirement that no hearing be set on a motion for summary judgment for at least 21 days to allow the respondent sufficient time to respond. If a movant could assert new grounds for summary judgment in a reply, by definition the respondent would be denied that 21 day period to formulate a response.

In this case, on January 28, 2016, the Heirs filed their Motion for Partial Summary Judgment on Plaintiff's Causes of Action for Breach of Contract and Specific Performance (the "MPSJ"), asserting that the elements of acceptance, meeting of the minds, and execution and delivery were conclusively established in favor of the Heirs with respect to an agreement to divide the Wine at Issue and the Golf Clubs at Issue⁸ in this case (the "Agreement"). In support thereof, the Heirs submitted as evidence with the MPSJ a proposed Rule 11 agreement sent from Mr. Jennings (Plaintiff's counsel at the time) to Mr. McNeill (counsel for the Heirs) on August 20, 2013 (the "August 20 Rule 11 Agreement") and the sole allegation and ground in the MPSJ was that the offer at issue was the August 20 Rule 11 Agreement and it was never accepted or filed with the Court.

On February 19, 2016, Plaintiff filed her response to the MPSJ (the "Response"), which is fully incorporated herein by reference, which argued that the August 20 Rule 11 Agreement was not the offer with respect to the Agreement, but instead, the offer was contained in the August 6 Email from Mr. Jennings to Mr. McNeill and the acceptance was contained in the August 13 Email from Mr. McNeill to Mr. Jennings.

⁷ See *Sanchez v. Mulvaney*, 274 S.W.3d 708, 711 (Tex.App.—San Antonio 2008, no pet.) ("a movant may not use a reply brief to meet the specificity requirement or to assert new grounds for summary judgment.").

⁸ The defined terms used herein shall have the same meaning as defined in Plaintiff's Response to Defendants' Motion for Partial Summary Judgment on Plaintiff's Causes of Action for Breach of Contract and Specific Performance.

On February 23, 2016, three days before the scheduled hearing on the MPSJ, the Heirs filed a Reply to Plaintiff's Response to Defendants' Motion for Partial Summary Judgment on Plaintiff's Causes of Action for Breach of Contract and Specific Performance (the "Reply") in which they raised for the first time new grounds. The Heirs did not directly respond to the evidence offered in the Response which established that it is in fact the August 6 Email and the August 13 Email that Plaintiff is relying on as the offer and acceptance, respectively. Instead, the Heirs shift their argument from the only argument in the MPSJ (that the August 20 Rule 11 Agreement was the offer) and now assert that "the offer" was made in an August 5, 2013 email from Mr. Jennings to Mr. McNeill, and that offer was not accepted because an August 6, 2013 email from Mr. McNeill to Mr. Jennings (which precedes the August 6 Email Plaintiff contends is the offer) was not an acceptance of the offer made in Mr. Jennings' August 5, 2013 email but instead was a counteroffer.

The Heirs clearly must have realized, after reading the Plaintiff's Response, that they had failed to provide the proper grounds in their MPSJ. Rather than concede that their MPSJ is defective, they have attempted to hide this fact by filing a purported "reply" brief containing new reasons that the Heirs urged entitled them to summary judgment. This, by its very nature, is not a proper reply brief and it should be stricken.

2. The Heirs' Reply Was Not Timely Served.

Pursuant to the Court's Order, dated December 10, 2015, all dispositive motions were to be filed no later than February 8, 2016.⁹ To the extent the Heirs' Reply raises new grounds for summary judgment, the Reply is untimely under the Court's dispositive motion scheduling order. On this ground alone, the Reply should be stricken.

⁹ See Court's Order, attached as Exhibit "A".

PRAYER FOR RELIEF

For the reasons given herein, Plaintiff hereby moves this Court to strike the Heirs' Reply.

Respectfully submitted,

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COUNSEL FOR PLAINTIFF

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was served upon the following counsel of record via e-filing this 25th day of February, 2016:

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/s/ Alan S. Loewinsohn

ALAN S. LOEWINSOHN

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Plaintiff,	§	
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vs.	§	44 th JUDICIAL DISTRICT
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LAURA S. WASSMER and	§	
STEPHEN B. HOPPER,	§	
	§	
Defendants.	§	DALLAS COUNTY, TEXAS

SECOND AGREED AMENDED SCHEDULING ORDER

In accordance with Rules 166, 190 and 192 of the Texas Rules of Civil Procedure, the Court makes the following order to control discovery and the schedule of this cause:

1. Pretrial matters will be complete by the following dates:

Deadline for Objections to Self-Authentication of Document. A party must serve written objections to the self-authentication of documents it has produced, as provided for by Rule 193.7, within 10 days after receiving written notice of an opposing Party's intent to use those documents at trial, or such objection is waived.

DATE	DEADLINE
11/16/2015	<p>Deadline for filing Amended Pleadings Asserting New Claims or Defenses * - Parties shall file all amended pleadings asserting new claims or defenses by this date.</p> <p>*Amended pleadings responsive to timely filed pleadings under this scheduling order may be filed after this deadline, if filed within 2 weeks after the pleadings to which they respond.</p>



- 09/22/2015 Deadline to Join Additional Parties. No additional parties may be joined after this date, except on motion to leave showing good cause, this paragraph does not otherwise alter the requirements of Rule 38. This paragraph does not limit a claimant's ability to join a person designated as a responsible third party, as provided for under §33.004 Civ. Prac. & Rem. Code. This party joining an additional party shall serve a copy of this Order on the new party concurrently with the pleading joining the party.
- 12/14/2015 Deadline for Any Party Seeking Affirmative Relief to Designate Expert Witnesses and Produce Expert Reports. Any party seeking affirmative relief shall designate all witnesses from whom that Party intends to elicit expert opinion testimony no later than the date and shall simultaneously produce written reports, containing information described in Rule 195.5 for all experts retained by, employed by, or otherwise subject to that Party's control.
- 01/15/2016 Deadline for Any Party Opposing Affirmative Relief to Designate Expert Witnesses and Produce Expert Reports. Any Party opposing affirmative relief shall designate all witnesses from whom that Party intends to elicit expert opinion testimony no later than this date and shall simultaneously produce written reports, containing information described in Rule 195.5 for all other experts retained by, employed by, or otherwise subject to that Party's control.
- 01/29/2016 Deadline for Designation of Rebuttal Experts and Provide Reports. The Parties shall designate rebuttal experts from whom they intend to elicit expert opinion testimony regarding matters not reasonably anticipated prior to that Party's original expert designation deadline. Any Party designating a rebuttal expert shall simultaneously produce written reports, containing information described in Rule 195.5 for all rebuttal experts retained by, employed by, or otherwise subject to the designation Party's control.
- 02/05/2016 Deadline to file Motions Challenging Expert Qualifications (Daubert/Robinson Motions). Any objection or motion to exclude or limit expert testimony due to qualifications of the expert of reliability of opinions must be filed no later than this date. All evidence to offer in support of such motion must be filed with the motion.
- 02/08/2016 Deadline to file Dispositive Motions: All dispositive motions shall be filed no later than this date.
- 12/08/2015 Deadline to Designate Responsible Third Parties. Defendants shall file any motions for leave to designate responsible third parties, under §33.04 Civ. Prac. & Rem.Code by this date.

- 02/29/2016
HLL
Discovery Closes. All depositions other than if rebuttal experts, if any, are deposed, shall be completed by this date and all written discovery requests shall be served so that responses are due no later than this date. Depositions of rebuttal experts, if any, shall be completed by 02/12/2016.
- 01/29/2016
Deadline to File Motion to Compel. Any motion to compel responses to discovery must be filed and heard no later than this date, except for motions for sanctions as provided for by Rule 193.6
- 11/15/2015
Mediation Deadline. The Parties shall mediate the case no later than this date.
- 03/04/2016
Exchange Trial Deadline Materials. The Parties shall exchange* the following materials by this date.
1. Proposed jury panel questionnaires, if any;
2. Motions in Limine;
3. Information described in Rule 166(h) (*fact witness information*), (i) (*expert witness information*), and (k) (*jury charge information*);
4. Designations of deposition testimony to be offered in direct examination;
5. List of Exhibits;
6. Any affidavits; and
7. Any Exhibits not previously produced.
*The Parties shall not file these materials with the Court at this time.
**Each exhibit must be identified separately (rather than by category or group), except for records to offered by way of business records affidavit.
***Over-designation is strongly discouraged and may be sanctioned.
- 03/18/2016
Deadline to Exchange Objections to Opposing Party's Trial Materials. The Parties shall exchange* the following materials by this date:
1. Objections to opposing Party's proposed jury panel questionnaires, if any;
2. Written objections to the opposing Party's Motion in Limine;
3. Cross-designation of deposition testimony to be offered in direct examination;
4. Written objections to the opposing Party's proposed exhibits, or affidavits; and
5. Written objections to the opposing Party's designations of deposition testimony to be offered in direct examination.

*The Parties shall not file these materials with the Court at this time.

03/21/2016

The Parties shall exchange:

1. Written objections to the Parties cross-designations of deposition testimony; and
2. Rebuttal designations of deposition testimony.

03/23/2016

The Parties shall exchange objections to rebuttal deposition designations.

03/24/2016

Deadline to Confer on Trial Matters. The attorneys in charge for all Parties shall meet in person to confer on agreements and stipulations regarding the materials listed below and make every effort to maximize agreement:

1. Jury panel questionnaires, if any;
2. Motions in Limine;
3. Exhibits, or affidavits;
4. Designations (and cross-designations) of deposition testimony to be offered at trial; and
5. Items and Materials specified in Rule 168(d)-(m).

03/24/2016

Deadline for Parties* ** to File Materials with the Court. The Parties shall file the following materials with the Court by this date:

1. An estimate of the length of trial;
2. Motions in Limine;
3. Items and Materials stated in Rule 166(d)-(m);
4. Designation of deposition testimony to be offered in direct examination;
5. Cross-designation of deposition testimony to be offered; and
6. Objections to opposing Parties; Proposed jury panel questionnaire; Motion in Limine; Designation of deposition testimony; Proposed exhibits; and Affidavits.

*Plaintiff shall be responsible for filing a joint Pre-Trial Statement of the Parties containing all information required under this deadline that is agreed upon by the Parties.

**Each Party shall file materials separately that are not agreed upon by the Parties.

03/21/2016

Pretrial Conference. ***A conference shall be held with the Court on this date, during which the Court shall consider (*and rule upon, to the extent possible*): Motions in Limine; Designations (*and cross-designations*) of deposition

testimony; Exhibits; Witness lists; Demonstrative Aids; Affidavits; and Proposed jury instruction and questions.

*The Parties shall be prepared to present to the Court all documentary evidence (*including deposition designations, exhibits*) for consideration of authenticity and admissibility to which stipulation could not be reached.

** Evidence may be used during Voir Dire and Opening Statements. The Parties will be permitted to use pre-admitted exhibits, documentary evidence, and pre-admitted deposition testimony (*either by written transcript or videotape*) during voir dire and opening statements. **Parties shall exchange by 7:00 p.m. the night before any trial day all demonstrative aids intended to be used the following the trial day and any objections to those aids shall be exchanged by 9:00 p.m. that same night.**

03/24/2016

Deadline to Announce Ready for Trial.

03/28/2016

TRIAL DATE NON-JURY DOCKET

The parties may by written agreement alter these deadlines.

1. A Mediation Order was signed by the Court on December 30, 2013 and a mediator was appointed, Mr. Paul Salzburger. The Parties have agreed to substitute Ross Stoddard as the mediator.
2. All pleadings, papers or notices required to be served pursuant to Rule 21a of the Texas Rules of Civil Procedure (unless personal service is required after citation, under the Rules) may be served by email and email service shall be treated the same as facsimile service under the Rules (i.e., that is service by email will be considered to be served, just like facsimile service, on the date emailed, if emailed on or before 5:00 p.m. on said day, and if emailed after 5:00 p.m., will be considered served the next day). For all purposes hereunder, whenever email service is employed, three additional counting days shall be added to the prescribed period for response, just as the Rule applies under Rule 21a for facsimile service.

SIGNED on this 10th day of December, 2013.



PRESIDING JUDGE

APPROVED:

/s/ Alan S. Loewinsohn

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