2023 WL 3184028
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Court of Appeals of Texas, Houston (1st Dist.).

2017 YALE DEVELOPMENT, LLC, Appellant
v.
STEADFAST FUNDING, LLC; Carl Marc Sherrin; Initram, Inc.; Liberty Trust Company, Ltd.; Eternal Investments, LLC; Bruce L. Robinson; Dale Pilgeram, Trustee of the Pilgeram Family Trust; Joseph C. Hibbard; RJL Realty, LLC; Kornelia Peasley-Brown; Salvador Ballesteros; Margaret M. Serrano-Foster, Trustee of the Margaret M. Serrano-Foster Trust Dated 12/2/2005; Richard R. Metler, Trustee of the Richard R. Metler Revocable Living Trust; James T. Smith, Trustee of the James T. Smith Trust; Liberty Trust Company Ltd., Custodian FBO Vincent Paul Mazzeo, Jr. IRA; Joe Saenz; Patrick Grosse, Trustee of the Grosse Family Trust Dated 12/31/2004; Eric Verhaeghe; Stephen K. Zupanc; Liberty Trust Company Ltd., Custodian FBO Adam K. Hruby IRA #TC005383; Vincent Investments; ELM 401K PSP, Laurel Mead and Edwin A. Mead, Trustees; Equity Trust Company, Custodian FBO Steven Krieger IRA; Julio M. Schnars; Joseph Dersham; Joyce Dersham; Walter Kaffenberger; Christel Kaffenberger; Mike Berris; Jason Sun; Equity Trust Company, Custodian FBO Erica Ross-Krieger IRA; Brandoria, Ltd.; ELB Investments, LLC; Benjamin K. Williams, Individually; Law Office of Ben Williams, PLLC; Matthew Aycock; Pratt Aycock & Associates, PLLC; and Pratt Aycock, Ltd., Appellees

NO. 01-20-00027-CV
|
Opinion issued May 2, 2023

On Appeal from the 190th District Court, Harris County, Texas, Trial Court Case No. 2016-64847

Attorneys and Law Firms

Michelle Fraga, for Appellant.

Christopher Ramey, Chester Joseph Makowski, for Appellee Steadfast Funding, LLC et al.

H. Miles Cohn, for Appellees Greg Pratt, Pratt Aycock, Ltd., Pratt Aycock & Associates, PLLC.

H. Miles Cohn, David Polsinelli, for Appellee Matthew C. Aycock.

Panel consists of Justices Kelly, Hightower, and Farris.

MEMORANDUM OPINION

April L. Farris, Justice

***1** This dispute arises out of an unsuccessful attempt to build a condominium development in Houston. 2017 Yale Development, LLC ("Yale") acquired title to property in Houston and borrowed funds from Steadfast Funding and numerous lenders [1] to complete construction of a condominium. After the lenders gave notice of foreclosure, Yale sued Steadfast Funding, the lenders, attorney Matthew Aycock, and several other parties. Yale asserted multiple causes of action including breach of contract, fraud, negligent misrepresentation, and breach of fiduciary duty. Steadfast Funding and the lenders, in turn, asserted numerous counterclaims against Yale. The trial court rendered summary judgment in favor of Aycock on Yale's claims against him and rendered partial summary judgment in favor of Steadfast Funding and the lenders on the claims asserted against them. The court also granted summary judgment in favor of the lenders on their own breach of contract claim. After a jury trial on damages and attorney's fees, the trial court rendered judgment awarding over $8,000,000 in damages and attorney's fees to the lenders.

On appeal, Yale raises thirty-three issues. These issues include complaints that: (1) the trial court erred by failing to enforce a Rule 11 Agreement; (2) the trial court erroneously granted summary judgment in favor of Steadfast Funding, the lenders, and Aycock because their summary judgment motions were procedurally defective and Yale presented evidence raising a fact issue; (3) the trial court erred by directing a verdict on damages in favor of the lenders; (4) the trial court erred by refusing to submit liability and damages questions in the jury charge, as well as by failing to submit separate attorney's fees questions for Yale and another party that did not appeal; (5) the trial court erred by failing to

require the lenders to segregate their attorney's fees; (6) the trial court committed multiple errors in the final judgment; and (7) the trial court erred by failing to file findings of fact and conclusions of law after denying a motion to recuse.

***2** We affirm in part and reverse and remand in part.

Background

A. Construction Project and Initial Loans from Lenders

Terry Fisher is a real estate developer in the Houston area. In 2016, Fisher had multiple ongoing development projects. He obtained numerous loans to finance his various projects, but these loans had unfavorable terms and he defaulted on several of the loans unrelated to this project. Facing imminent foreclosure, litigation ensued. [2]

Fisher controlled 829 Yale St, LLC, an entity that owned 829 Yale St. in the Heights neighborhood of Houston ("the subject property"). He sought to build a 28-unit condo development on the property. As his legal and financial troubles with respect to other loans and projects grew, Fisher approached appellee Carl Marc Sherrin, the owner of appellee Steadfast Funding, LLC ("Steadfast"). Steadfast has relationships with various individuals and entities who loan money to finance real estate projects. Fisher had worked with Sherrin and Steadfast before, and he asked Sherrin whether any of Sherrin's investors would be interested in loaning funds for construction of the condo development at 829 Yale. This loan was designed to be a short-term loan to assist with a portion of construction until Fisher could obtain more traditional financing.

Approximately thirty lenders ("the lenders") were interested in financing this project. On July 7, 2016, the lenders loaned 829 Yale $4,200,000. Each lender loaned a different amount of funds. Steadfast agreed to service this loan, release funds to Fisher, and make payments to the lenders. Appellee Matthew Aycock, a Dallas attorney who has worked with Sherrin before, served as the fee attorney and closing agent for this transaction. [3]

Despite this loan from the lenders, Fisher still needed additional funds. The lenders were unwilling to lend more money, but Sherrin agreed to search for an additional source of funds. He mentioned Fisher's dilemma to Aycock, who raised this investment opportunity with one of his clients, David Alvarez. [4] Alvarez had completed multiple real estate investment transactions with Aycock and a title company affiliated with Aycock. Aycock and Alvarez discussed the possibility of the lenders and Alvarez entering into an "Intercreditor Agreement" to protect Alvarez's lien in the event 829 Yale defaulted on the lenders' lien, which was first in priority. No such agreement was ever signed.

***3** Nevertheless, after speaking with Aycock and Sherrin, reviewing documents related to the development project, and viewing pictures and videos of the property, Alvarez agreed to loan $2,250,000 through his company, D&A Alvarez Group. On July 14, 2016, Fisher executed a promissory note and deed of trust, and D&A Alvarez acquired a lien on the property subordinate to the lenders' lien. Aycock again served as the fee attorney and closing agent. D&A Alvarez entered into a loan servicing agreement with ELB Investments with respect to this loan.

The promissory notes for both loans required 829 Yale to make monthly interest payments to the lenders and D&A Alvarez beginning September 1, 2016. Both deeds of trust named appellee Benjamin K. Williams, an Austin attorney at appellee the Law Office of Ben Williams, PLLC, as the trustee. The maturity date for both loans was set at August 1, 2017. Both deeds of trust also contained a provision stating that 829 Yale was not to "sell, transfer, or otherwise dispose" of the property without the prior written consent of the lenders and D&A Alvarez. The deeds of trust also provided that 829 Yale could not allow any liens on the property without the prior written consent of the lenders and D&A Alvarez.

B. Default, Renegotiation, and April 2017 Loan

In August 2016, mechanic's and materialman's liens were filed against the subject property in the Harris County property records. Additionally, in September 2016, 829 Yale transferred ownership of the property to Jetall Companies, Inc., an entity controlled by Ali Choudhri, a real estate owner and developer in Houston. Neither Jetall nor Choudhri are parties to the underlying suit or to this appeal.

The lenders and Alvarez did not learn about the transfer of the property to Jetall until later. In January 2017, Williams, as the trustee, sent 829 Yale a notice of default and acceleration of the second lien held by D&A Alvarez. This notice of default was based on the transfer of the property to Jetall, not on a failure to make required interest payments. A non-judicial foreclosure sale was originally scheduled for February 7,

2017. However, Fisher, Choudhri, and Brad Parker, Jetall's chief financial officer, began negotiating with Sherrin to avoid foreclosure on the property and obtain additional funding to complete construction of the condo development. Due to the ongoing negotiations, Sherrin agreed to pass the foreclosure sale that had been scheduled.

Sherrin met face-to-face with Choudhri and Parker for dinner on February 2, 2017. The next day, Sherrin sent Choudhri and Parker an email summarizing what they had discussed the previous evening. Among other information, Sherrin stated:

> Summary of terms:
>
> The first lien [held by the lenders] will be extended from August 1, 2017 until July 1st, 2018.
>
> The second lien [held by D&A Alvarez] will be extended from August 1, 2017 until July 1st, 2018.
>
> The first lien will be modified from $4,200,000 to $8,200,000. Stage funded monthly as needed, initial additional funding of $2,000,000.
>
> The first lien will be 14% interest only.

In a later email, sent February 28, 2017, Sherrin proposed "reduc[ing] the interest carry" such that the borrower would not be required to pay anything at closing. The "interest carry is estimated to take you through the payment due on October 1st, 2017." The first interest payment on the modified loan would be due November 1, 2017. Sherrin also proposed that Steadfast would temporarily fund several vendor's and construction liens on the property.

After several weeks of negotiations, Sherrin, Choudhri, and Parker reached an agreement concerning modification of the loan and continuation of construction. Parker created a new entity, 2017 Yale Development, to take title to the property from Jetall and to borrow funds from the lenders. On April 4, 2017, Jetall conveyed the property to Yale.

***4** Also on April 4, 2017, Yale executed a promissory note in favor of the lenders. The principal amount of this loan was $8,200,000, with a 14% interest rate, and a maturity date of October 1, 2018. Yale agreed to "pay reasonable attorney's fees and court and other costs if an attorney is retained to collect or enforce the note." Yale also executed a deed of trust, which again named Williams as trustee. The deed of trust stated that the promissory note "renews and extends" the $4,200,000 balance that 829 Yale St, LLC owes to the lenders.

The parties also executed a construction loan agreement which set out, among other things, how Steadfast was to disburse loan proceeds to Yale for construction costs. Additionally, the parties signed an escrow agreement, in which Steadfast, as the escrow agent, committed to deliver funds to Yale "in stages" for construction costs.

No extension or modification was made to the loan that 829 Yale St had taken from D&A Alvarez. That loan thus retained its original maturity date of August 1, 2017. Alvarez, on behalf of his company, signed an agreement acknowledging that his lien was subordinate to the new lien in favor of the lenders.

C. Second Default and January 2018 Purchase of Loan

Sherrin, on behalf of Steadfast, handled the receipt of draw requests by Yale for construction funds, necessary inspections during construction, and the disbursement of funds to Yale. Beginning in September 2017, he sent emails to Yale, reminding it that the interest carry was about to expire and its first interest payment would be due November 1, 2017. It is undisputed that Yale did not make this interest payment.

Sherrin, Aycock, and Alvarez prepared to initiate foreclosure proceedings. On October 27, 2017, Aycock emailed Sherrin and Alvarez and stated that they "all seem to be in agreement that the default/foreclosure process should be started on the second lien," referring to the lien held by D&A Alvarez. On November 14, 2017, Williams posted a notice of trustee's sale. Around this same time, vendors began filing affidavits claiming mechanic and materialman's liens on the property due to invoices that had not been paid by Yale or its general contractor.

After Williams posted the property for foreclosure, Yale attempted to negotiate with Sherrin, Aycock, and Alvarez to restructure the loans and complete construction. These negotiations were unsuccessful.

However, instead of proceeding to foreclosure, Alvarez consulted with both Aycock and independent counsel. He decided to buy the April 2017 promissory note from the lenders. On January 30, 2018, the lenders assigned the April 2017 note "and all indebtedness now or hereafter evidenced thereby," as well as all rights accruing under the deed of trust and other documents for that loan, to D&A Alvarez Group.

As consideration, the lenders agreed to loan D&A Alvarez $5,700,000, and D&A Alvarez agreed to pay this amount plus nearly $340,000 in accrued unpaid interest and late fees. D&A Alvarez executed a promissory note for $5,700,000,[5] with a 14% interest rate and a maturity date of August 1, 2018. Under the note, D&A Alvarez promised to pay monthly interest payments from March 2018 until August 2018, at which time the balance of the loan would become due. The lenders also executed an "Allonge to Promissory Note,"[6] which reflected the initial balance of the April 2017 note executed by Yale and stated, "Pay to the order of D&A Alvarez, LLC." It is undisputed that D&A Alvarez made no payments under the January 2018 note.

D. Procedural Background and History

1. The parties' claims

***5** Fisher initiated the underlying lawsuit in September 2016. None of the parties to this appeal was an original party to this suit. In early 2018, Yale joined the existing lawsuit as a plaintiff and asserted claims against Steadfast, Sherrin, the lenders, Alvarez, Williams, and Aycock.

Originally, Alvarez was a defendant in the underlying lawsuit. However, on July 14, 2018, Alvarez released his lien against the property. Alvarez and Yale also signed a Rule 11 Agreement releasing all claims that they had against each other. Among other things, Alvarez agreed to "forever release any and all Notes and or debts from 829 Yale St. LLC and or 2017 Yale Development, LLC." Yale then dropped its claims against Alvarez. Alvarez and D&A Alvarez Group then became plaintiffs.

Yale's live pleading is its tenth amended petition, filed on April 5, 2019. Yale and Alvarez asserted claims for common-law fraud, fraud in a real estate transaction, fraudulent inducement, negligent misrepresentation, civil conspiracy, securities violations, DTPA violations, money had and received, and breach of contract against the defendants.[7] In addition to actual and punitive damages, the plaintiffs also sought injunctive and declaratory relief, including declarations that the defendants failed to provide an opportunity to cure the default on the July 2016 lien held by D&A Alvarez and that Steadfast breached the loan agreement first.

Steadfast and the lenders asserted numerous counterclaims against Yale and the Alvarez parties,[8] including conversion, common-law fraud, fraud in a real estate transaction, fraudulent inducement, breach of contract, tortious interference with contract and prospective business relations, quantum meruit, malicious civil prosecution, private nuisance, promissory estoppel, money had and received, negligent misrepresentation, civil conspiracy, fraudulent transfer, unjust enrichment, and wrongful injunction. Steadfast and the lenders sought actual and exemplary damages, imposition of a constructive trust, and an accounting. They also sought declaratory relief and attorney's fees.

2. Summary judgment motions and rulings

In April and May 2019, the Steadfast defendants—Steadfast, the lenders, Sherrin, ELB Investments, and Williams—filed a series of nine partial motions for summary judgment on specific, discrete issues. These issues included arguments that: (1) Steadfast properly funded the loan in stages and therefore the plaintiffs' breaches of the loans were not excused by a prior material breach; (2) Williams owed no duties to the plaintiffs and breached no duties; (3) Yale defaulted on its loan obligations as a matter of law and its loan documents included a merger clause, precluding enforcement of prior agreements; (4) as a matter of law, Yale could not recover for its claims of usury, DTPA violations, and securities law violations; (5) no evidence supported Yale's claims that any defendant committed criminal acts; and (6) the lenders had no contact with Yale or D&A Alvarez and could not be held liable for any misrepresentations.[9] The Steadfast defendants also filed a no-evidence summary judgment motion on all of Yale's affirmative claims for relief.

***6** In April 2019, the Aycock defendants filed a traditional and no-evidence motion for summary judgment on Yale's claims against them. With respect to Yale's fraud and negligent misrepresentation claims, the Aycock defendants argued that the statute of frauds applied and barred consideration of any alleged promises made to Yale outside of the written loan documents themselves. They also argued that Yale could not establish that it reasonably relied on any representations by the Aycock defendants because any representations would have occurred in the context of arm's length business negotiations. The Aycock defendants also argued that no-evidence summary judgment should be granted on all Yale's claims.

In early May 2019, Yale and D&A Alvarez filed separate motions for summary judgment on the Steadfast defendants'

counterclaims and affirmative defenses. Yale's motion asserted that the Steadfast defendants could present no evidence to support their affirmative claims and their affirmative defenses.

The trial court held an off-the-record hearing on the pending summary judgment motions on June 12, 2019, but it did not immediately rule on the motions. At this hearing, the Steadfast defendants withdrew some of their claims and defenses, including their claim for private nuisance. Several days later, Williams nonsuited his and his firm's claims.

On June 25, 2019, the trial court extended the time for Yale to respond to any summary judgment motions to which it had not yet responded to 3:00 p.m. on June 28, 2019. This order also set the trial date for July 9 on "the issues outstanding, if any, following rulings on all motions for Summary Judgment currently before the Court."

On July 2, 2019, the trial court issued several orders concerning the outstanding summary judgment motions. The court granted the Aycock defendants' amended summary judgment motion on all claims brought by both Yale and D&A Alvarez. The court denied two of the Steadfast defendants' partial summary judgment motions that related to D&A Alvarez. However, the trial court granted the Steadfast defendants' seven other partial motions for summary judgment.

With respect to Yale's summary judgment motions, the court noted that the Steadfast defendants were no longer pursuing their counterclaim for private nuisance. The court granted Yale's summary judgment motion on the defendants' counterclaims for quantum meruit and malicious prosecution, but the court denied the motion in all other respects. [10]

After the trial court's rulings, no claims remained pending against the Aycock defendants. Similarly, the trial court's summary judgment rulings resolved all of Yale's and Alvarez's claims against the Steadfast defendants. The trial court ruled as a matter of law that Yale and D&A Alvarez defaulted on their loans and thus breached the loan documents. The Steadfast defendants subsequently nonsuited without prejudice all tort claims asserted against Yale and D&A Alvarez. The defendants continued to assert their claims for damages for breach of the loan documents against both Yale and D&A Alvarez.

3. Jury trial and final judgment

The trial court held a jury trial on two issues: the lenders' damages for breach of the loan documents and their attorney's fees. Sherrin testified on behalf of the lenders concerning the outstanding principal balance of both the April 2017 promissory note executed by Yale and the January 2018 promissory note executed by D&A Alvarez. He also provided testimony concerning accrued interest and late fees, "vendor invoices," tax liens that had been placed on the property, and the lenders' attorney's fees. Sherrin stated that the lenders sought a total of $8,534,674.84 in damages and fees.

***7** The lenders' attorney, Christopher Ramey, testified that his clients had incurred $951,195.10 in attorney's fees up to July 5, 2019. He estimated that his clients would incur an additional $70,000 in fees for the remainder of July 2019. He requested appellate attorney's fees in the range of $150,000 to $200,000 for an appeal to the intermediate appellate court and an additional $200,000 in fees for an appeal to the Texas Supreme Court. He opined that these amounts of attorney's fees were reasonable and necessary. The trial court admitted invoices to support Ramey's testimony.

After the lenders rested, all parties moved for a directed verdict. Yale and D&A Alvarez moved for a directed verdict on failure to segregate attorney's fees and insufficient evidence of attorney's fees, which the trial court denied. The lenders moved for directed verdict on damages under the two notes, and the trial court granted it.

The jury charge ultimately contained only one question: what is a reasonable and necessary fee for the services of the attorneys for the lenders? The jury awarded $765,899.95 in trial-level attorney's fees, $50,000 in fees for an appeal to the court of appeals, and $50,000 in fees for proceedings before the Texas Supreme Court.

The trial court signed a final judgment on October 22, 2019. The judgment recited the court's pre-trial summary judgment rulings and ordered that Yale, Alvarez, and D&A Alvarez Group take nothing on their claims against the defendants. The judgment also recited that the court had directed a verdict on damages against both Yale and D&A Alvarez in the following amounts on the lenders' breach of contract claim: "(1) $5,700,000.00; (2) $1,526,175.00 as interest and late fees under the terms of the contract; (3) $133,444.32 for vendor invoices[;] and (4) $229,585.62 for a tax lien, for a total of $7,589,204.94." The court ordered that the lenders recover these amounts from both Yale and D&A Alvarez. The

judgment further recited that the jury awarded $765,899.95 against both Yale and D&A Alvarez for trial-level attorney's fees and a total of $100,000 in appellate-level attorney's fees.

The court ordered that the liability of D&A Alvarez and Yale is "separate, but is subject to only one recovery under the one satisfaction rule." As a result, both Yale and D&A Alvarez are entitled to an offset and credit for any amounts awarded upon foreclosure on the property, as well as for any recovery collected by the lenders from the other party. The court ordered that the lenders recover from Yale and D&A Alvarez a total of $8,355,104.89, which includes damages, attorney's fees, and court costs. The court also ordered that the lenders were entitled to pre- and post-judgment interest. Finally, the court ordered Yale to "defend and indemnify ELB Investments, LLC and Steadfast Funding, LLC, and their affiliates as set forth in the Loan Documents."

After the trial but before the trial court signed the final judgment, Yale and Alvarez sought recusal of the trial judge. The trial court denied the request, as did the local administrative judge. After the trial court signed the final judgment, Yale and D&A Alvarez requested that the trial court file findings of fact and conclusions of law pursuant to Rule of Civil Procedure 296. When the trial court did not respond, they filed a notice of past due findings and conclusions, and this notice specified that findings and conclusions were sought on the recusal of the trial court. The trial court never filed findings and conclusions.

Yale and D&A Alvarez also filed motions to vacate, modify, or reform the judgment. They also moved for a new trial. The trial court denied these motions. [11] Only Yale appealed the trial court's final judgment.

Enforceability of Rule 11 Agreement

***8** In its first and fourth issues, Yale argues that the trial court erred by refusing to enforce a Rule 11 Agreement from November 2018 that concerned discovery matters and the setting of summary judgment motions. Yale argues that the trial court should have denied summary judgment motions filed by the Steadfast defendants because the filing of these motions violated the Rule 11 Agreement.

A. Governing Law

Texas Rule of Civil Procedure 11 provides that "no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record." TEX. R. CIV. P. 11; *Padilla v. LaFrance*, 907 S.W.2d 454, 459 (Tex. 1995).

The purpose of Rule 11 is "to ensure that agreements of counsel affecting the interests of their clients are not left to the fallibility of human recollection and that the agreements themselves do not become sources of controversy." *ExxonMobil Corp. v. Valence Operating Co.*, 174 S.W.3d 303, 309 (Tex. App.—Houston [1st Dist.] 2005, pet. denied); *see* *Fortis Benefits v. Cantu*, 234 S.W.3d 642, 651 (Tex. 2007) ("Rule 11 aims to remove misunderstandings and controversies that accompany verbal assurances, and the written agreements 'speak for themselves.' ") (quoting *Padilla*, 907 S.W.2d at 460).

A trial court has a ministerial duty to enforce a valid Rule 11 agreement. *Shamrock Psychiatric Clinic, P.A. v. Tex. Dep't of Health & Hum. Servs.*, 540 S.W.3d 553, 560 (Tex. 2018) (per curiam); *ExxonMobil*, 174 S.W.3d at 309. Rule 11 agreements are "contracts relating to litigation." *Shamrock Psychiatric Clinic*, 540 S.W.3d at 560; *Trudy's Tex. Star, Inc. v. City of Austin*, 307 S.W.3d 894, 914 (Tex. App.—Austin 2010, no pet.). As with any other contract, in construing a Rule 11 agreement, our primary objective is to ascertain and give effect to the intentions that the parties have objectively manifested in the written instrument. *Trudy's Tex. Star*, 307 S.W.3d at 914. We give contract terms their plain and ordinary meanings and construe the contract as a whole to harmonize and give effect to all provisions of the contract. *Id.* Although courts may imply covenants in a contract in limited situations, courts "cannot make contracts for parties." *Universal Health Servs., Inc. v. Renaissance Women's Grp., P.A.*, 121 S.W.3d 742, 747–48 (Tex. 2003).

B. Enforcement of November 2018 Rule 11 Agreement

1. Relevant facts

Discovery among the parties was contentious, and multiple motions to compel and motions to quash were filed throughout the pendency of the litigation. In 2018, Yale and the Steadfast defendants entered into a Rule 11 Agreement concerning discovery and scheduling matters. In

this agreement, the Steadfast defendants agreed that they would withdraw all objections to Yale's interrogatories and requests for production and would respond to these discovery requests and produce unredacted emails by November 20, 2018.

Prior to the agreement, Yale had noticed the depositions of six individual lenders. In the Rule 11 Agreement, the Steadfast defendants agreed to provide availability dates for these individuals by November 20. The parties then would work together to finalize the deposition dates within the next thirty days. The parties agreed that different individual lenders could be substituted "as agreed in writing." The parties further agreed that the defendants would withdraw a summary judgment motion that had been filed in October 2018 and would not "file or refile any further summary judgments until the discovery agreed to in this Rule 11 is completed."

***9** The parties were not able to agree on deposition dates for the lender defendants. The lenders' counsel informed Yale that several of the individual lenders would not be available for deposition until January 2019. However, the defendants noticed their previously filed summary judgment motion for a hearing on January 7, 2019. In response, Yale moved for sanctions and to enforce the Rule 11 Agreement. Yale sought dismissal of the defendants' summary judgment motion with prejudice. It also amended its pleadings to assert a claim for breach of the Rule 11 Agreement.

On January 1, 2019, a new presiding judge of the trial court took office. Immediately thereafter, on January 3, 2019, the trial court held a hearing concerning the Rule 11 Agreement. At this hearing, the parties discussed the agreement and various discovery and scheduling matters. The trial court requested that the parties meet off the record to work out a deposition schedule. After a recess, the hearing reconvened and Yale's counsel read the parties' agreement into the record. The parties agreed to comply with all outstanding discovery requests by January 11. The parties set a deposition schedule for Alvarez, Fisher, Choudhri, Parker, Sherrin, and Aycock to take place in January and February 2019. With respect to the lender defendants, the parties agreed on specific deposition dates for five lenders and agreed to take the depositions of seven more lenders "[s]ubject to future agreement." The parties also agreed on deadlines for filing various motions, including the filing of dispositive motions by March 29, 2019.

The trial court signed an order memorializing this agreement. [12] The order set out the deposition schedule agreed to at the hearing and stated that the parties could "agree to substitute deponents or alter the above deposition dates" by Rule 11 agreement. The order also set deadlines for filing motions, including the following: "March 29, 2019, the Parties may set for oral hearing any properly filed and noticed dispositive summary judgment motion."

All parties filed traditional and no-evidence summary judgment motions in April and May 2019. On May 15, 2019, the trial court held a status conference and issued a written order on several summary judgment related issues. Among other things, this order required the parties to confer on any outstanding discovery matters and provide a letter to the court describing any missing documents. All parties provided letters to the trial court stating that they still had outstanding discovery requests. [13]

On June 6, 2019, Yale objected to the Steadfast defendants' summary judgment motions and moved to strike their pleadings. Yale raised numerous objections, including an objection that the Steadfast defendants did not comply with the November 2018 Rule 11 Agreement or the court's January 2019 order, and therefore the Steadfast defendants should not be allowed to file summary judgment motions. Specifically, Yale objected that the Steadfast defendants never produced for deposition a particular lender defendant identified in the court's January 2019 order. Yale objected to the trial court hearing any of the Steadfast defendants' summary judgment motions.

***10** After the trial court issued its summary judgment rulings on July 2, 2019, Yale continued arguing that it was not proper for the court to have heard the Steadfast defendants' summary judgment motions because they did not comply with the November 2018 Rule 11 Agreement. The trial court agreed that it is "duty-bound to enforce [properly] executed Rule 11 agreements between the parties," but it also noted that it has inherent power to "dictate dispositive motions." The court acknowledged that the parties had entered into the November 2018 Rule 11 Agreement, an agreement "designed to facilitate certain discovery steps needed at the time to progress the case." However, after the January hearing, the court issued a new order based on the parties' agreement on the record that "was more extensive in its scheduling" and that "effectively updated and replaced the November Rule 11." The court noted that the January 2019 order allowed the parties to "set for oral hearing any properly filed and noticed dispositive summary

judgment motion." The trial court overruled Yale's objections concerning the enforceability of the November 2018 Rule 11 Agreement.

2. Whether the January 2019 agreement and order modified the November 2018 Rule 11 Agreement

Steadfast argues that the trial court's January 3, 2019 order, which memorialized an oral agreement made on the record between counsel for Yale and the Steadfast defendants, superseded the November 2018 Rule 11 Agreement, such that compliance with the prior agreement was no longer required. We agree.

Rule 11 agreements are contracts related to litigation, and we apply the general rules of contract construction when construing Rule 11 agreements. *Shamrock Psychiatric Clinic*, 540 S.W.3d at 560; *Trudy's Tex. Star*, 307 S.W.3d at 914. Parties to a contract have the power to modify or amend the contract. *Hathaway v. Gen. Mills, Inc.*, 711 S.W.2d 227, 228 (Tex. 1986); *In re F.C. Holdings, Inc.*, 349 S.W.3d 811, 815 (Tex. App.—Tyler 2011, orig. proceeding [mand. denied]). Additionally, when parties enter into two contracts on the same subject matter but the terms of the agreements are so inconsistent that they cannot be read together, we presume that the later contract supersedes the earlier contract. *Title Res. Guar. Co. v. Lighthouse Church & Ministries*, 589 S.W.3d 226, 234 (Tex. App.—Houston [1st Dist.] 2019, no pet.); *IP Petroleum Co. v. Wevanco Energy, L.L.C.*, 116 S.W.3d 888, 899 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).

In the November 2018 Rule 11 Agreement, the Steadfast defendants agreed to withdraw discovery objections, respond to discovery requests, produce certain lenders for deposition, and withdraw a summary judgment motion that had been filed in October 2018. Steadfast also agreed that it would not file a further summary judgment motion "until the discovery agreed to in this Rule 11 is completed."

Discovery disputes between the parties continued, however, and Yale alleged that the Steadfast defendants did not comply with the terms of the Rule 11 Agreement. In January 2019, the trial court held a hearing on these matters. During a recess, counsel for Yale and the Steadfast defendants reached an agreement that was read into the record and later memorialized by a trial court order. Counsel agreed to deposition dates for several of the lenders, as well as dates to depose other individuals involved in the case, such as Alvarez, Choudhri, and Sherrin. The parties also agreed to several deadlines, including an agreement that "[d]ispositive motions will be heard on March 29th, 10 a.m." The trial court's order stated, "March 29, 2019, the Parties may set for oral hearing any properly filed and noticed dispositive summary judgment motion." Neither the agreement read into the record nor the trial court's order imposed any conditions on filing summary judgment motions, other than that the motion had to be "properly filed and noticed."

We conclude that the parties modified the November 2018 Rule 11 Agreement at the January 3, 2019 hearing when they agreed to specific deposition dates for multiple witnesses and a schedule for filing various motions, including dispositive motions. This agreement—and the trial court's subsequent order—did not require Steadfast, the lenders, or any other party to meet certain requirements before they could file a summary judgment motion. We hold that the trial court did not err by refusing to enforce the November 2018 Rule 11 Agreement because that agreement had been modified and superseded by a later agreement of the parties. We therefore overrule Yale's first and fourth issues.

Summary Judgment Rulings

***11** In multiple issues, Yale challenges the trial court's summary judgment rulings in favor of the lenders and the Aycock defendants on numerous grounds, both procedural and substantive.

A. Standard of Review

We review a trial court's summary judgment ruling de novo. *Odyssey 2020 Acad., Inc. v. Galveston Cent. Appraisal Dist.*, 624 S.W.3d 535, 540 (Tex. 2021). To be entitled to traditional summary judgment, the moving party must demonstrate that no genuine issue of material fact exists and the party is entitled to judgment as a matter of law. *JLB Builders, L.L.C. v. Hernandez*, 622 S.W.3d 860, 864 (Tex. 2021); *see* TEX. R. CIV. P. 166a(c). When a party moves for traditional summary judgment on a claim on which it bears the burden of proof, it must show that it is entitled to prevail on each element of the cause of action. *Pelco Constr. Co. v. Chambers Cnty.*, 495 S.W.3d 514, 520 (Tex. App.—Houston [1st Dist.] 2016, pet. denied). When the party moves for traditional summary judgment on a claim for which it does not bear the burden of proof, the party must either (1) disprove at least one element of the plaintiff's claim or (2) plead and conclusively establish each element of an affirmative defendant to rebut

the plaintiff's claim. *Id.* In either case, if the moving party carries its burden, the burden shifts to the nonmovant to raise a genuine issue of material fact precluding summary judgment. *Lujan v. Navistar, Inc.*, 555 S.W.3d 79, 84 (Tex. 2018).

A fact issue is not raised if the nonmovant presents less than a scintilla of evidence, that is, when the evidence is so weak as to do no more than create a mere surmise or suspicion of a fact. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003) (quoting *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983)). The nonmovant presents more than a scintilla of evidence when the evidence rises to a level that would enable reasonable and fair-minded people to differ in their conclusions. *Id.* (quoting *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)). When reviewing a summary judgment ruling, we take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Hillis v. McCall*, 602 S.W.3d 436, 440 (Tex. 2020) (quoting *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005)); *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 551 (Tex. 2019).

B. Procedural Challenges to Summary Judgment Rulings

1. Due process

In its second, third, and fifth issues, Yale argues that the trial court, in granting the Steadfast defendants' summary judgment motions, denied Yale due process. According to Yale, these motions violated a May 15, 2019 order of the court. Yale contends that it did not have adequate notice of which summary judgment motions the court would be hearing or an adequate opportunity to respond.

The rules of civil procedure do not require an oral hearing on a motion for summary judgment, but notice of hearing or submission of a summary judgment motion is required. *Martin v. Martin, Martin & Richards, Inc.*, 989 S.W.2d 357, 359 (Tex. 1998) (per curiam); *Tex. Integrated Conveyor Sys., Inc. v. Innovative Conveyor Concepts, Inc.*, 300 S.W.3d 348, 363 (Tex. App.—Dallas 2009, pet. denied). Under the rules, a nonmovant is entitled to twenty-one days' notice before a summary judgment hearing. TEX. R. CIV. P. 166a(c); *Ready v. Alpha Bldg. Corp.*, 467 S.W.3d 580, 584 (Tex. App.—Houston [1st Dist.] 2015, no pet.) ("Notice of hearing for submission of a summary-judgment motion is mandatory and essential to due process."). The nonmovant may file a response to the motion not later than seven days before the hearing date; thus, without notice of the hearing date, the nonmovant would not know when its response is due. *Tex. Integrated Conveyor Sys.*, 300 S.W.3d at 363; *Whiteside v. Ford Motor Credit Co.*, 220 S.W.3d 191, 194 (Tex. App.—Dallas 2007, no pet.); TEX. R. CIV. P. 166a(c).

***12** Both the United States Constitution and the Texas Constitution protect against the deprivation of life, liberty, or property without due process—or due course—of law. *Tex. Integrated Conveyor Sys.*, 300 S.W.3d at 363 (quoting U.S. CONST. amend. XIV, § 1; TEX. CONST. art. I, § 19). At a minimum, due process requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *Id.* For example, a trial court violates a nonmovant's procedural due process rights when a hearing has been scheduled on a summary judgment motion, but the court grants the motion before the scheduled hearing date. *Id.*; *see* *Whiteside*, 220 S.W.3d at 194–95 (stating that when court did not hold oral hearing, nonmovant's due process rights were satisfied as long as he received reasonable opportunity to present written response and evidence).

The parties all filed summary judgment motions in late April and early May 2019. On April 22 and May 3, the Steadfast defendants filed nine partial summary judgment motions on discrete issues relevant to the claims of both Yale and D&A Alvarez, as well as their own affirmative claims. They also filed a no-evidence summary judgment motion on Yale's affirmative claims on May 3. The Aycock defendants filed a traditional and no-evidence summary judgment motion on April 26. On May 3, Yale and D&A Alvarez filed no-evidence summary judgment motions on the Steadfast defendants' affirmative claims for relief and on their affirmative defenses. The Aycock defendants and the Steadfast defendants noticed their summary judgment motions for hearing on June 12, 2019.

On May 15, 2019, the trial court held a status conference and addressed various procedural issues pertaining to the defendants' pleadings and the summary judgment motions. After this hearing, the trial court signed an order requiring the Aycock and Steadfast defendants to replead their affirmative defenses, removing any that they did not intend to rely upon at trial.

The court ordered the Aycock defendants to replead their summary judgment motions and file no more than three affirmative motions on specific issues, including a motion addressing the allegations raised by Yale. The court ordered the Steadfast defendants to "replead an existing affirmative Motion for Summary Judgment on specific and narrowly tailored grounds or they may replead one no evidence Motion for Summary that addresses one specific element of Plaintiffs' claims." The court ordered Yale and D&A Alvarez to "replead their summary judgments and may file no-evidence Summary Judgment Motions as to any remaining responsible third-party claims by Defendants and a no-evidence summary judgment as to any remaining element of a claim or affirmative defense that has been re-plead by Defendants." Additionally, the court ordered that no motion could exceed fifteen pages, no response could exceed ten pages, and no party could file any replies.

The Aycock defendants filed an amended summary judgment motion on May 24, 2019. Neither the Steadfast defendants nor Yale amended their summary judgment motions.

On June 6, 2019, six days before the hearing, Yale objected to the Steadfast defendants' summary judgment motions. Yale argued that the Steadfast defendants never repleaded their summary judgment motions, in violation of the court's May 15 order. Instead, the Steadfast defendants had filed more than thirteen summary judgment motions "that have never been properly set for a hearing." Yale argued that because the Steadfast defendants had not complied with the court's order, it could not comply with the court's order with respect to its responses. According to Yale, "Plaintiffs would have to violate the Court's Order or guess at what motion would be presented and that is the opposite of due process and adequate notice." As such, the Steadfast defendants had not provided it with proper notice pursuant to Rule 166a and due process requirements.

***13** Yale did not file substantive summary judgment responses to the Steadfast defendants' motions before the hearing on June 12. Instead, Yale filed a response to the Steadfast defendants' no-evidence summary judgment motion on June 18, 2019, attaching Parker's declaration as evidentiary support. [14] After the trial court extended the time for filing substantive responses to the Steadfast defendants' motions, Yale filed responses to the Steadfast defendants' partial summary judgment motions. The trial court ruled on the pending summary judgment motions on July 2.

The Steadfast defendants filed multiple summary judgment motions on April 22 and May 3, 2019. They noticed these motions for a hearing on June 12, 2019. Although the filing date of the notice of submission is illegible, the certificate of service reflects that Steadfast served the notice on May 13, 2019, more than 21 days in advance of the summary judgment hearing. Yale therefore received at least 21 days' notice of the hearing, as required by Rule 166a. *See* TEX. R. CIV. P. 166a(c); *Ready*, 467 S.W.3d at 584.

It is undisputed that the Steadfast defendants did not re-draft their summary judgment motions as required by the trial court in the May 15 order. Yale objected on this basis prior to the June 12 hearing date, but it did not file substantive responses to any of Steadfast's summary judgment motions before the hearing. The trial court allowed Yale over two additional weeks of time—until June 28, 2019—to respond to the motions. Yale filed its responses on this date, and the trial court ruled on the motions on July 2, four days later.

We conclude that the trial court did not violate Yale's due process rights even though the Steadfast defendants did not comply with the May 15 order. Yale received more than 21 days' notice that certain summary judgment motions filed by Steadfast would be heard at a hearing on June 12. The trial court did not rule on the motions at the hearing. Instead, after the hearing, the trial court granted Yale additional time to respond to the motions. It did not rule on the motions until several days after it had received Yale's responses. We conclude that the trial court did not violate Yale's due process right to be heard at a meaningful time and in a meaningful manner. *See* *Tex. Integrated Conveyor Sys.*, 300 S.W.3d at 363; *Whiteside*, 220 S.W.3d at 194–95 (stating that when summary judgment motion was submitted without oral hearing, nonmovant's due process rights were satisfied as long as he received reasonable opportunity to present written response and evidence).

We overrule Yale's second, third, and fifth issues.

2. Timeliness of Aycock's amended motion

Yale argues that the trial court erred by granting Aycock's amended summary judgment motion because the amended motion was filed less than twenty-one days before the hearing on the motion. Yale also argues that Aycock violated the court's May 15 order because Aycock's amended motion impermissibly raised no-evidence points.

As stated above, a nonmovant is entitled to twenty-one days' notice before a summary judgment hearing. TEX. R. CIV. P. 166a(c). The notice provisions associated with the summary judgment procedures are strictly construed. *Ready*, 467 S.W.3d at 584. This Court has held that when new grounds for summary judgment are asserted in a reply, the newly asserted grounds restart the twenty-one-day notice period. *Sams v. N.L. Indus., Inc.*, 735 S.W.2d 486, 487–88 (Tex. App.—Houston [1st Dist.] 1987, no writ). However, even post-hearing filings do not require an additional twenty-one days' notice when the filings seek only to supplement the summary judgment evidence and do not add additional grounds for summary judgment. *DMC Valley Ranch, L.L.C. v. HPSC, Inc.*, 315 S.W.3d 898, 902 (Tex. App.—Dallas 2010, no pet.); *Beavers v. Goose Creek Consol. Ind. Sch. Dist.*, 884 S.W.2d 932, 935 (Tex. App.—Waco 1994, writ denied) (stating that court has discretion under Rule 166a(c) to allow evidence to be filed after hearing and before summary judgment is rendered).

***14** The Aycock defendants first moved for traditional and no-evidence summary judgment on April 26, 2019. The Aycock defendants asserted that Yale could present no evidence to support its claims for fraud, negligent misrepresentation, breach of fiduciary duty, money had and received, securities violations, and civil conspiracy. With respect to the traditional portion of its motion, Aycock argued that Yale's fraud and negligent misrepresentation claims were all based on an alleged promise to extend the maturity date of the July 2016 note held by D&A Alvarez to October 1, 2018. Because this promise allegedly referred to a modification of a real estate loan and was made outside of the loan documents signed by Yale in April 2017, the statute of frauds applied and limited the damages Yale could recover to reliance damages. Aycock argued that Yale could not present any evidence of reliance damages. Aycock also argued that because the alleged promise was made during arm's length business negotiations while he represented D&A Alvarez, Yale could not establish reasonable reliance on the alleged promise. Aycock set this motion for a hearing on June 12.

After the trial court signed the May 15, 2019 order, the Aycock defendants filed an amended summary judgment motion on May 24, 2019, nineteen days before the hearing scheduled for June 12. Although the introduction to the amended motion stated that the Aycock defendants were moving "for traditional and no-evidence summary judgment" on Yale's claims, the amended motion did not include any arguments listing the elements of Yale's claims and stating that there was no evidence to support the identified elements. Instead, Aycock re-asserted, albeit not verbatim, the grounds stated in the traditional portion of the original summary judgment motion: statute of frauds and no reasonable reliance. Aycock also included two paragraphs briefly arguing that, under the attorney immunity doctrine, Aycock could not be held liable for statements made to Yale, a non-client, during his representation of Alvarez. Aycock made this argument as part of his broader argument that a party cannot reasonably rely on statements made by an attorney for an opposing party in an arm's length business negotiation.

We disagree with Yale's contention that Aycock's amended summary judgment motion violated the trial court's May 15 order by asserting no-evidence grounds. The introduction to the amended motion stated, as did the original motion, that the Aycock defendants were moving "for traditional and no-evidence summary judgment" on Yale's claims. However, the amended motion deleted the portions of the original motion that made no-evidence arguments and listed the elements of Yale's claims that allegedly lacked evidentiary support. *See* TEX. R. CIV. P. 166a(i) (requiring no-evidence summary judgment motions to "state the elements as to which there is no evidence"). Aycock also amended the prayer for relief to delete the request that the trial court grant no-evidence summary judgment in his favor. We therefore conclude that Aycock's amended summary judgment motion did not impermissibly include no-evidence arguments in violation of the court's May 15 order.

We further conclude that Aycock's amended summary judgment motion did not add additional grounds for summary judgment that had not been raised in his original motion. In both his original and amended summary judgment motions, Aycock argued that Yale's claims against him could not succeed because "[t]here can be no claims against attorneys for representations made in arms-length negotiations." He argued that at the time of the allegedly fraudulent statements concerning extension of the maturity date of the loan made by Alvarez, Yale and the lender parties—including Steadfast and Alvarez—were on opposing sides of arm's length negotiations. At that time, Aycock represented Alvarez. He argued that, as a matter of law, Yale could not reasonably rely on any statements made by Aycock during those negotiations, and therefore any claims for fraud or negligent misrepresentation against Aycock failed.

In his amended motion, Aycock additionally argued that he could not be held liable for any alleged statements made during the negotiations while he represented Alvarez due to the attorney immunity doctrine. *See Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C.*, 595 S.W.3d 651, 657 (Tex. 2020) (stating that, as general rule, attorneys are immune from civil liability to non-clients for actions taken in connection with representing client in litigation). Aycock did not make this particular argument in his original summary judgment motion. However, Aycock did argue in his original motion that because he represented Alvarez at the time of the negotiations, he could not be held liable for any statements allegedly made during these negotiations.

***15** We conclude that Aycock did not raise a new summary judgment ground triggering a restart of the twenty-one-day notice deadline. Although Aycock may have used different wording, the original summary judgment motion captured the substance of the amended summary judgment motion. Even assuming that Aycock's amended summary judgment motion contained a new *argument* for why he could not be held liable for statements made during the arm's length negotiations while he represented Alvarez, the amended motion did not raise a new *ground* for summary judgment. [15] *Cf. Greene v. Farmers Ins. Exch.*, 446 S.W.3d 761, 764 n.4 (Tex. 2014) ("We do not consider *issues* that were not raised in the courts below, but parties are free to construct new *arguments* in support of issues properly before the Court."). We therefore overrule Yale's argument that Aycock's amended motion was not timely filed before the summary judgment hearing. *See DMC Valley Ranch*, 315 S.W.3d at 902 (concluding that because post-summary-judgment-hearing filings only supplemented summary judgment evidence but did not add summary judgment grounds, filings were not subject to twenty-one-day notice requirement).

3. Sufficiency of Sherrin's declaration

In its seventh, tenth, and thirteenth issues, Yale argues that a summary judgment declaration by Sherrin, purporting to verify the authenticity of the Steadfast defendants' summary judgment evidence, was defective because Sherrin declared that the exhibits were true and correct "to the best of [his] knowledge" instead of based on his personal knowledge. As a result of this uncured defect, which effectively rendered the summary judgment evidence "no evidence," the trial court erred by not sustaining Yale's hearsay and authenticity objections to the evidence.

Documents that are submitted as summary judgment proof must be sworn to or certified. *Heirs of Del Real v. Eason*, 374 S.W.3d 483, 488 (Tex. App.—Eastland 2012, no pet.); *Llopa, Inc. v. Nagel*, 956 S.W.2d 82, 87 (Tex. App.—San Antonio 1997, pet. denied); TEX. R. CIV. P. 166a(f) (providing that party shall attach "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit"). Unauthenticated or unsworn documents do not constitute competent summary judgment evidence. *Heirs of Del Real*, 374 S.W.3d at 488; *Llopa*, 956 S.W.2d at 87. It is not necessary to "separately authenticate documentary evidence or to use 'magic words' so long as the affiant has verified the accuracy of the documents." *Mackey v. Great Lakes Invs., Inc.*, 255 S.W.3d 243, 252 (Tex. App.—San Antonio 2008, pet. denied); *Kleven v. Tex. Dep't of Crim. Just.–Inst. Div.*, 69 S.W.3d 341, 345 (Tex. App.—Texarkana 2002, no pet.) ("A properly sworn affidavit stating that the attached documents are true and correct copies of the originals authenticates the copies so they may be considered as summary judgment evidence."); *Coastal Cement Sand, Inc. v. First Interstate Credit All., Inc.*, 956 S.W.2d 562, 567 (Tex. App.—Houston [14th Dist.] 1997, pet. denied).

An affidavit that does not positively and unqualifiedly represent the facts as disclosed in the affidavit to be true and within the affiant's personal knowledge is insufficient. *Humphreys v. Caldwell*, 888 S.W.2d 469, 470 (Tex. 1994) (per curiam) (orig. proceeding); TEX. R. CIV. P. 166a(f) (providing that supporting or opposing affidavits "shall be made on personal knowledge"). "It is a long[-]established rule in Texas that affidavits, in order to constitute summary judgment proof, must be sworn to on personal knowledge and that those sworn to on best knowledge and belief are insufficient." *Lightfoot v. Weissgarber*, 763 S.W.2d 624, 628 (Tex. App.—San Antonio 1989, writ denied). An affidavit is not sufficient unless the statements contained in it are direct and unequivocal and perjury can be assigned upon them. *Coastal Cement Sand*, 956 S.W.2d at 567.

***16** An affidavit in which the affiant states that the facts and allegations are "true and correct to the best of his knowledge" does not "positively and unqualifiedly represent the facts" as being within the affiant's personal knowledge. *Burke v. Satterfield*, 525 S.W.2d 950, 954–55 (Tex. 1975); *Martinez v. IBP, Inc.*, 961 S.W.2d 678, 686 (Tex. App.—Amarillo 1998, pet. denied) (stating that "affirmation that is equivocal or based upon the 'best of [one's] knowledge' " does not

positively and unqualifiedly represent facts as being within affiant's personal knowledge). Similarly, an affidavit that is based on information and belief "is insufficient as verification by oath and its content is not factual proof in a summary judgment proceeding." *Wells Fargo Constr. Co. v. Bank of Woodlake*, 645 S.W.2d 913, 914 (Tex. App.—Tyler 1983, no writ); *see* *Kerlin v. Arias*, 274 S.W.3d 666, 668 (Tex. 2008) (per curiam) ("An affiant's *belief* about the facts is legally insufficient.").

This Court has held that an affiant's lack of personal knowledge is a defect of form, and as such, a party objecting to an affidavit on that basis must timely object and obtain a ruling to preserve the error for appellate review. *See Fort Bend Cent. Appraisal Dist. v. Am. Furniture Warehouse Co.*, 630 S.W.3d 530, 539–40 (Tex. App.—Houston [1st Dist.] 2021, no pet.); *UT Health Sci. Ctr.–Houston v. Carver*, No. 01-16-01010-CV, 2018 WL 1473897, at *5 (Tex. App.—Houston [1st Dist.] Mar. 27, 2018, no pet.) (mem. op.) (stating that objections to formal defects are waived if contesting party does not object and secure adverse ruling, and formal defects include, among other things, affiant's lack of personal knowledge); *see also Washington DC Party Shuttle, LLC v. iGuide Tours, LLC*, 406 S.W.3d 723, 733–36 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (en banc) (collecting cases from intermediate appellate courts and concluding "that the better course is to hold that a litigant must object and obtain a ruling from the trial court to preserve a complaint that an affidavit fails to reveal the basis for the affiant's personal knowledge of the facts stated therein"). A ruling on the merits of a summary judgment motion does not necessarily imply a ruling on objections to summary judgment evidence. *Seim v. Allstate Tex. Lloyds*, 551 S.W.3d 161, 165–66 (Tex. 2018) (per curiam); *see FieldTurf USA, Inc. v. Pleasant Grove Indep. Sch. Dist.*, 642 S.W.3d 829, 837 (Tex. 2022) (stating that summary judgment ruling can imply ruling on objection to evidence "only if the implication was clear") (internal quotations omitted).

Throughout the summary judgment proceedings, Sherrin filed multiple declarations and affidavits attached to different filings by the Steadfast defendants. In one declaration, Sherrin stated as follows:

> I have reviewed [two no-evidence and three partial summary judgment motions], and the recitation of facts contained therein, which are required to be verified under the Texas Rules of Civil Procedure and otherwise, are all true and correct to the best of my knowledge; copies of the Exhibits attached to said instruments are true and correct copies of the originals to the best of my knowledge.
>
> I declare under penalty of perjury that the foregoing is true and correct.

Several of Sherrin's other declarations contain similar language.

Two of Sherrin's affidavits, including the affidavit attached to the Steadfast defendants' first partial summary judgment motion, which purported to verify most of the summary judgment evidence, stated as follows:

> 2. I am over the age of 18 years, of sound mind and otherwise fully competent to make this affidavit, and have never been convicted of a felony or a crime of moral turpitude. I am the Managing Member of Stea[d]fast Funding, L.L.C. I have personal knowledge of the facts stated in this affidavit and know them to be true and correct.
>
> ***17** 3. I have reviewed the Motion for Summary Judgment to which this Affidavit is attached, and all the facts asserted therein, and hereby state that said facts are all true and correct to the best of my knowledge. I also have reviewed the Exhibits attached to the Motion and hereby state that they are all true and correct copies of the original documents to the best of my personal knowledge.

In its responses to the Steadfast defendants' partial summary judgment motions, Yale objected to a declaration by Sherrin. It appears from the responses that Yale objected to Sherrin's declaration purporting to verify documents relevant to the Steadfast defendants' no-evidence motions and its third, fourth, and fifth partial summary judgment motions. [16] Yale argued that this declaration was defective because Sherrin stated that the documents were true and correct "to the best of his knowledge," but he did not base the declaration on personal knowledge. Yale argued that, due to the defective declaration, all the documents purportedly verified by that declaration constituted hearsay and no evidence to support the summary judgment motions. It does not appear that Yale objected to Sherrin's affidavit attached to the Steadfast defendants' first partial summary judgment motion, which stated that the attached exhibits were true and correct copies "to the best of [his] personal knowledge."

A declaration not made on personal knowledge is a defect in form that must be objected to and ruled upon in the

trial court for the error to be preserved for appellate review. *See Am. Furniture Warehouse Co.*, 630 S.W.3d at 539–40; *see also FieldTurf USA*, 642 S.W.3d at 837 ("Without both an objection and a ruling, the complained-of evidence remains part of the summary judgment record and should be considered by the court of appeals in reviewing the trial court's judgment."). The appellate record does not contain a ruling on Yale's objections. None of the orders on the various summary judgment motions include a ruling on any objections or mention that Yale had objected to Sherrin's declaration. An order overruling Yale's objections to Sherrin's declaration is not implicit in the court's order granting several of the Steadfast defendants' partial summary judgment motions. *See* *Seim*, 551 S.W.3d at 165–66.

In the absence of a ruling in the appellate record by the trial court overruling Yale's objections to Sherrin's declaration, we conclude that Yale has failed to preserve this question for appellate review. *See Am. Furniture Warehouse Co.*, 630 S.W.3d at 539–40; *Washington DC Party Shuttle*, 406 S.W.3d at 736. We overrule Yale's seventh, tenth, and thirteenth issues.

4. Yale's special exceptions to Steadfast's motions

***18** In its ninth issue, Yale argues that the trial court erred by denying all of its objections and special exceptions to Steadfast's summary judgment motions, "which failed to provide [Yale] notice of the actual claims moved upon."

"When a summary judgment is attacked on specificity grounds, a special exception is required." *Franco v. Slavonic Mut. Fire Ins. Ass'n*, 154 S.W.3d 777, 784 (Tex. App.—Houston [14th Dist.] 2004, no pet.); *see* *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 342 (Tex. 1993) ("An exception is required should a non-movant wish to complain on appeal that the [summary judgment] grounds relied on by the movant were unclear or ambiguous.").

To preserve the issue for appellate review, the excepting party must obtain a ruling on the special exception. *Franco*, 154 S.W.3d at 784; *see* *McConnell*, 858 S.W.2d at 343 n.7 ("[A] party asserting exceptions must obtain a ruling at or prior to the hearing of the motion for summary judgment."). The trial court's ruling on the merits of the summary judgment motion does not necessarily imply a ruling on the special exception. *See Franco*, 154 S.W.3d at 784–85.

Yale has provided no substantive argument or authority in support of this issue on appeal. *See* TEX. R. APP. P. 38.1(i). Yale also has not directed this Court to any place in the record where the trial court ruled on its special exceptions to the Steadfast defendants' summary judgment motions. Yale asserted special exceptions to eight of the motions filed by the Steadfast defendants. However, neither of the trial court's written orders on the merits of these motions include any ruling on Yale's special exceptions. The reporter's record on appeal also contains transcripts of hearings on June 12, 2019, and June 18, 2019. The trial court discussed summary judgment issues at both hearings, but the court did not deny Yale's special exceptions on the record at either of these hearings.

We conclude that a ruling denying Yale's special exceptions, as well as a ruling on any other objection to the Steadfast defendants' summary judgment motions asserted by Yale, cannot be inferred from the trial court's orders disposing of the Steadfast defendants' motions. *See Franco*, 154 S.W.3d at 784–85. We therefore hold that Yale failed to preserve this issue for appellate review. *See id.* at 785. We overrule Yale's ninth issue.

C. Whether Fact Issues Exist on Claims Against Steadfast Defendants

In its sixth, eighth, and eleventh issues, Yale argues that it presented summary judgment evidence that raises a fact issue on its claims against the Steadfast defendants for fraud, breach of fiduciary duty, and breach of contract. [17] In making these arguments, however, Yale cites no legal authority, instead relying solely on citations to Parker's declaration. *See* TEX. R. APP. P. 38.1(i) ("The brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record."); *Green v. Richard D. Davis, L.L.P.*, 593 S.W.3d 842, 851 (Tex. App.—Houston [14th Dist.] 2019, pet. denied) ("Briefing waiver occurs when a party fails to make proper citations to authority or to the record, or to provide any substantive legal analysis.").

***19** Furthermore, the Steadfast defendants filed multiple partial summary judgment motions on specific issues. Among other grounds, the Steadfast defendants argued that Yale's breach of contract claim failed as a matter of law because the loan documents expressly allowed Steadfast to fund the loan in stages and there was no evidence that Steadfast ever lacked funds to pay any draw requests submitted by Yale. The Steadfast defendants also argued that Yale's fraud claim

failed as a matter of law based on the statute of frauds, the economic loss rule, and because the loan documents included a merger clause and a provision disclaiming reliance on extra-contractual representations. The trial court granted seven of these partial motions.

On appeal, Yale does not specifically address the arguments that the Steadfast defendants made in each partial motion, nor does it address how the trial court erred when it granted each motion. *See Britton v. Tex. Dep't of Crim. Just.*, 95 S.W.3d 676, 681 (Tex. App.—Houston [1st Dist.] 2002, no pet.) ("Generally speaking, an appellant must attack all independent bases or grounds that fully support a complained-of ruling or judgment."); *Ellis v. Precision Engine Rebuilders, Inc.*, 68 S.W.3d 894, 898 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (stating that when multiple grounds for summary judgment are presented and ruling does not specify ground on which summary judgment was granted, appellant must negate all grounds on appeal, and if appellant does not do so, appellate court must affirm trial court's judgment). Although Yale relies upon Parker's declaration in arguing that it raised a fact issue, Yale does not argue that the loan documents did not permit the Steadfast defendants to fund the loan in stages. Yale also does not address the Steadfast defendants' arguments concerning the statute of frauds and the economic loss rule. Nor does Yale challenge the Steadfast defendants' argument that a disclaimer of reliance provision bars any claims for fraud or fraudulent inducement.

Because Yale does not challenge on appeal these grounds for summary judgment raised by the Steadfast defendants in the trial court, we must uphold the trial court's summary judgment rulings in favor of the Steadfast defendants. *See Britton*, 95 S.W.3d at 681; *Ellis*, 68 S.W.3d at 898. We therefore overrule Yale's eighth and eleventh issues as they relate to the Steadfast defendants.

D. Whether Fact Issues Exist on Claims Against Aycock Defendants

In its twelfth issue, Yale argues that it presented summary judgment evidence that raises a fact issue on its fraud claims against Aycock. It further argues that the trial court erred to the extent that it granted Aycock's summary judgment motion based on the statute of frauds. It also argues that Aycock's contention that Yale could present no evidence of reliance damages was flawed, and Yale did present such evidence.

In his amended summary judgment motion, Aycock argued that Yale's claims were subject to the statute of frauds because the claims were predicated on alleged misrepresentations concerning mortgage terms, and the statute of frauds applies to mortgages and loan commitments, which are secured by title to real property. This case involved the modification of a real estate loan, but none of the alleged misrepresentations "were actually included in the loan documents." Aycock acknowledged that the statute of frauds would not bar recovery under fraud or negligent misrepresentation theories, but Yale would be limited to the recovery of reliance damages. Aycock argued that Yale's "only claimed damages are based on contract expectancy—that is, what [Yale] claims it would have earned if the loans on the property had been extended and performed as purportedly promised." Because Yale did not invest its own money into the development project, it "expended no sums and suffered no loss in reliance" on anything Aycock might have said, and therefore Yale could not demonstrate that it had any reliance damages. [18]

***20** The Aycock defendants also argued that Yale's claims for both fraud and negligent representation require that any reliance on the alleged misrepresentation must be reasonable, but Yale could not establish this element because Aycock was an attorney representing another party in an arm's length business negotiation.

The reliance element of a fraud claim has two components: the plaintiff actually relied on the defendant's representation, and that reliance was justifiable. *JPMorgan Chase Bank, N.A. v. Orca Assets G.P., L.L.C.*, 546 S.W.3d 648, 653 (Tex. 2018); *Simulis, L.L.C. v. Gen. Elec. Cap. Corp.*, 439 S.W.3d 571, 577 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (stating that both fraud and negligent misrepresentation claims require reliance on representation to be both reasonable and justified). Typically, justifiable reliance is a question of fact, but in some circumstances it can be negated as a matter of law. *JPMorgan Chase Bank*, 546 S.W.3d at 654; *see Mercedes-Benz USA, LLC v. Carduco, Inc.*, 583 S.W.3d 553, 558 (Tex. 2019). In examining this element, courts consider the nature of the parties' relationship and the contract. *JPMorgan Chase Bank*, 546 S.W.3d at 654. In an arm's length transaction, the plaintiff must exercise ordinary care for the protection of its own interests, and a failure to exercise reasonable diligence is not excused by mere confidence in the honesty and integrity of the other party. *Id.* If a party fails to exercise such diligence, it is charged with

knowledge of all facts that would have been discovered by a reasonably prudent person in a similar situation. *Id.*

The Texas Supreme Court, in the context of a negligent misrepresentation claim brought against a law firm by nonclients, has emphasized consideration of the nature of the relationship between the parties. *McCamish, Martin, Brown & Loeffler v. F.E. Appling Ints.*, 991 S.W.2d 787, 794 (Tex. 1999). The court noted that courts, generally, have "acknowledged that a third party's reliance on an attorney's representation is not justified when the representation takes place in an adversarial context." *Id.*; *Valls v. Johanson & Fairless, L.L.P.*, 314 S.W.3d 624, 635 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (acknowledging "well settled" rule that party may not justifiably rely on opposing attorney's statements made in adversarial setting); *Chapman Children's Tr. v. Porter & Hedges, L.L.P.*, 32 S.W.3d 429, 443 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (stating that any reliance on attorney's alleged misrepresentation would not have been justifiable "given the adversarial nature of the parties' relationship"). An attorney, "hired by a client for the benefit and protection of the client's interests, must pursue those interests with undivided loyalty (within the confines of the Texas Disciplinary Rules of Professional Conduct), without the imposition of a conflicting duty to a nonclient whose interests are adverse to the client." *McCamish*, 991 S.W.2d at 794.

As evidence that Yale's reliance upon any representation by Aycock was not reasonable, Aycock relied on excerpts from Parker's deposition. Parker testified that after the property was posted for foreclosure sale in January 2017, he and Choudhri negotiated with Sherrin and Aycock concerning the property. Parker's understanding was that Sherrin "was representing the first lien and the second lienholders for this property" and Aycock was "an attorney that [Parker] assumed was at least assisting or working with or counseling Mr. Sherrin" and was "also [with the] title company."[19] Parker could not recall who he believed that Aycock represented, but he knew that Aycock was "on the side of the lenders." Parker did not characterize the negotiations as heated, but he agreed with Aycock's counsel that Sherrin and Aycock were on the "other side of the issue" from him and Choudhri.

***21** Yale's fraud and negligent misrepresentation claims were based on statements allegedly made after the subject property had been scheduled for foreclosure and while Sherrin, Aycock, Choudhri, and Parker were attempting to renegotiate the transaction and salvage the condo development deal. We agree with Aycock that this was an adversarial context. *See Valls*, 314 S.W.3d at 635 (acknowledging "well settled" rule that party may not justifiably rely on opposing attorney's statements made in adversarial setting); *Chapman Children's Tr.*, 32 S.W.3d at 443 (stating that any reliance on attorney's alleged misrepresentation would not have been justifiable "given the adversarial nature of the parties' relationship"). Parker's deposition testimony establishes that while he may not have been sure who Aycock's actual client was, he knew that Aycock and Sherrin were aligned and, thus, that Aycock was on "the other side" of the transaction from Yale. We conclude that Yale has not raised a fact issue on whether its reliance on any alleged statements from Aycock was reasonable and justifiable. *See JPMorgan Chase Bank*, 546 S.W.3d at 653–54; *McCamish*, 991 S.W.2d at 794.

Because we conclude that Yale has not raised a fact issue on whether its reliance on any alleged statements by Aycock was reasonable and justifiable—an essential element for both its fraud and negligent misrepresentation claims—we conclude that the trial court did not err by granting summary judgment in Aycock's favor on these claims. We therefore overrule Yale's twelfth issue.

E. Summary Judgment on Yale's Affirmative Defenses

In its fourteenth issue, Yale argues that the trial court erred by dismissing all its affirmative defenses, which had never been the subject of a summary judgment or another proper procedure for dismissal.

In support of this issue, Yale argues:

> At the start of the July 23, 2019 trial, the court *sua sponte* dismissed on the record all of Appellant's claims and affirmative defenses against Steadfast without any summary judgment or other procedure recognized by the Texas Rules of Civil Procedure. The Court stated[:]
>
> > THE COURT: [Counsel] and 2017 Yale, D&A Alvarez, you are Defendants in this case. You have no affirmative claims. You have no affirmative defenses. You are for all purposes of this trial Defendants.
>
> The court signed an order dismissing all of Appellant's affirmative defenses, and overruled all of its objections

without hearing evidence and without any dispositive pre-trial motion filed as to those affirmative defenses.

Yale does not provide any other argument concerning this issue, and it cites no authority in support of this issue. *See* TEX. R. APP. P. 38.1(i).

In general, when a party moves for summary judgment on its own claims, that party is under no obligation to negate a defendant's pleaded affirmative defenses to those claims. *Mulvey v. U.S. Bank Nat'l Ass'n, as Tr. for SASCO Mortg. Loan Tr. 2006-WF2*, 570 S.W.3d 355, 359 (Tex. App.—El Paso 2018, no pet.); *Tesoro Petroleum Corp. v. Nabors Drilling USA, Inc.*, 106 S.W.3d 118, 124 (Tex. App.—Houston [1st Dist.] 2002, pet. denied). "Rather, an affirmative defense only prevents the granting of summary judgment if each element of the affirmative defense is supported by summary judgment evidence." *Mulvey*, 570 S.W.3d at 359. A party raising an affirmative defense in opposition to a summary judgment motion must either (1) raise a fact issue on the movant's failure to satisfy its burden of proof; or (2) raise a fact issue on each element of its affirmative defense. *Tesoro Petroleum*, 106 S.W.3d at 124. A defendant may also move for summary judgment based on an affirmative defense, but it bears the burden to conclusively prove all elements of the defense as a matter of law. *Fisher v. BNSF Ry. Co.*, 650 S.W.3d 880, 883 (Tex. App.—Fort Worth 2022, no pet.).

The Steadfast defendants asserted numerous affirmative claims for relief, including a claim for breach of contract. In response, Yale pleaded fourteen affirmative defenses in its live pleading. However, when the Steadfast defendants moved for summary judgment on their breach of contract claim and argued that Yale had defaulted on the April 2017 promissory note as a matter of law, Yale did not, in its summary judgment responses, argue that it could establish any of its pleaded affirmative defenses, nor did it attach evidence raising a fact issue on any element of any of its affirmative defenses. Yale also did not file a summary judgment motion that attempted to conclusively establish any of its affirmative defenses.

***22** We therefore conclude that because Yale did not raise and present evidence on any affirmative defenses in the summary judgment proceedings, the trial court did not err by "dismissing all of [Yale's] affirmative defenses." *See Mulvey*, 570 S.W.3d at 359; *Tesoro Petroleum*, 106 S.W.3d at 124; *see also Nash v. Beckett*, 365 S.W.3d 131, 141 (Tex. App.—Texarkana 2012, pet. denied) (stating that plaintiff moving for summary judgment on her own claim is entitled to judgment unless defendant "comes forward with a showing that there is a disputed fact issue upon [an] affirmative defense"); *Pollard v. Hanschen*, 315 S.W.3d 636, 639 (Tex. App.—Dallas 2010, no pet.) ("The party asserting the [affirmative] defense has the burden of pleading and proving it."). We overrule Yale's fourteenth issue.

Directed Verdict on Damages

In its fifteenth and twenty-second issues, Yale contends that the trial court erred by granting a directed verdict in favor of the lenders concerning the amount of damages attributable to Yale's breach of the April 2017 note. In its twenty-third and twenty-eighth issues, Yale argues that the lenders were not entitled to damages at all on the April 2017 note because that note undisputedly had been sold to D&A Alvarez, thereby precluding the lenders from maintaining a claim for breach of that loan obligation. Yale also argues that the court incorrectly determined that the damages were liquidated. According to Yale, the lenders needed to prove up their damages through Sherrin's testimony, which was speculative on some elements of damages.

A. Standard of Review

A trial court may direct a verdict if no evidence of probative force raises a fact issue on the material questions in the case. *Prudential Ins. Co. of Am. v. Fin. Rev. Servs., Inc.*, 29 S.W.3d 74, 77 (Tex. 2000); *Salazar v. Sanders*, 440 S.W.3d 863, 869 (Tex. App.—El Paso 2013, pet. denied). A directed verdict is also proper if the evidence conclusively establishes a fact and reasonable minds could reach but one conclusion under the available evidence. *Salazar*, 440 S.W.3d at 869 (quoting *Vance v. My Apartment Steak House of San Antonio, Inc.*, 677 S.W.2d 480, 483 (Tex. 1984)); *see Env't Processing Sys., L.C. v. FPL Farming Ltd.*, 457 S.W.3d 414, 425–26 (Tex. 2015); *Sohani v. Sunesara*, 546 S.W.3d 393, 406 (Tex. App.—Houston [1st Dist.] 2018, no pet.) ("A directed verdict is proper when the evidence conclusively establishes the right of the movant to judgment or negates the right of the opponent.").

When reviewing a directed verdict, we examine the evidence in the light most favorable to the party suffering an adverse judgment. *S.V. v. R.V.*, 933 S.W.2d 1, 8 (Tex. 1996); *Salazar*, 440 S.W.3d at 870. We resolve all reasonable inferences that arise from the evidence admitted at trial in the nonmovant's favor. *Mikob Props., Inc. v. Joachim*, 468 S.W.3d 587, 594 (Tex. App.—Dallas 2015, pet. denied). If there is conflicting evidence of probative value, a directed verdict is improper, and we must remand the case for the jury to determine the issue. *Szczepanik v. First S. Tr. Co.*, 883 S.W.2d 648, 649 (Tex. 1994) (per curiam). We consider the entire record to determine whether more than a scintilla of evidence exists creating a fact question. *Salazar*, 440 S.W.3d at 870. The evidence must demonstrate more than surmise or suspicion that the fact exists. *Id.*

B. The Lenders' Entitlement to Damages

In two summary judgment motions, Steadfast and the lenders argued that both Yale and D&A Alvarez breached their obligations under the April 2017 and January 2018 notes by, among other things, failing to make required interest payments. The trial court granted both of these summary judgment motions, effectively ruling as a matter of law that the April 2017 note and the January 2018 note were valid and enforceable contracts; Yale breached the April 2017 note; and D&A Alvarez breached the January 2018 note. The main issue at trial was the amount of damages suffered by Steadfast and the lenders due to Yale's and D&A Alvarez's breaches of the loan obligations.

***23** To prevail on a claim for breach of contract, the plaintiff must establish: (1) the existence of a valid contract; (2) the plaintiff performed or tendered performance as contractually required; (3) the defendant breached the contract by failing to perform or tender performance as contractually required; and (4) the plaintiff sustained damages as a result of the breach. *Pathfinder Oil & Gas, Inc. v. Great W. Drilling, Ltd.*, 574 S.W.3d 882, 890 (Tex. 2019); *Fortitude Energy, LLC v. Sooner Pipe LLC*, 564 S.W.3d 167, 180 (Tex. App.—Houston [1st Dist.] 2018, no pet.). A breach of contract occurs when a party fails or refuses to do something that he has promised to do. *Mays v. Pierce*, 203 S.W.3d 564, 575 (Tex. App.—Houston [14th Dist.] 2006, pet. denied).

A promissory note is a contract evincing an obligation to pay money. *Jim Maddox Props., LLC v. WEM Equity Cap. Invs., Ltd.*, 446 S.W.3d 126, 132 (Tex. App.—Houston [1st Dist.] 2014, no pet.); *DeClaire v. G&B McIntosh Fam. Ltd. P'ship*, 260 S.W.3d 34, 44 (Tex. App.—Houston [1st Dist.] 2008, no pet.). To recover on a promissory note, the plaintiff must prove (1) the note in question; (2) the defendant signed the note; (3) the plaintiff is the owner or holder of the note; and (4) a certain balance is due and owing on the note. *Dorsett v. Hispanic Hous. & Educ. Corp.*, 389 S.W.3d 609, 613 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (quoting *Geiselman v. Cramer Fin. Grp., Inc.*, 965 S.W.2d 532, 536 (Tex. App.—Houston [14th Dist.] 1997, no writ)). The legal owner of a promissory note may maintain a cause of action to enforce the note "even though actual or beneficial ownership of the note lies in another." *FFP Mktg. Co. v. Long Lane Master Tr. IV*, 169 S.W.3d 402, 411 (Tex. App.—Fort Worth 2005, no pet.).

Yale argues that the lenders could not conclusively establish that Yale caused their damages for breach of the April 2017 note because it is undisputed that the lenders sold the note to D&A Alvarez in January 2018. After D&A Alvarez purchased the note, "any such claim [to enforce the note] belonged exclusively to Alvarez as [the] owner of the April 4th Agreement." Essentially, Yale argues that, due to the sale of the note to D&A Alvarez, the lenders were no longer holders or owners of the April 2017 note and could no longer sue to enforce that obligation. *See* *Martin v. New Century Mortg. Co.*, 377 S.W.3d 79, 84 (Tex. App.—Houston [1st Dist.] 2012, no pet.) ("Ownership of the note is an essential element of the right to collect amounts due on it."); *Austin v. Countrywide Homes Loans*, 261 S.W.3d 68, 72 (Tex. App.—Houston [1st Dist.] 2008, pet. denied) (stating that to recover for debt due under promissory note, plaintiff must establish that it is legal holder of existing note).

As Yale points out, it is undisputed that Steadfast and the lenders assigned the April 2017 note to D&A Alvarez on January 30, 2018. Steadfast, the lenders, and D&A Alvarez executed numerous documents during this transaction, including an assignment of note and liens, a deed of trust, a promissory note, a note purchase and sale agreement, and a collateral transfer of note and lien.

The assignment recited that Yale executed a promissory note in the amount of $8,200,000 on April 4, 2017, "payable to the order of" Steadfast and the lenders. Steadfast and the lenders assigned to D&A Alvarez the April 2017 note, "all

indebtedness now or hereafter evidenced thereby," and all the rights, benefits, and privileges accruing to Steadfast and the lenders. The assignment included a provision stating, "As of the effective date hereof, all payments of principal, interest, or other amounts due on the [April 2017] Note, whether accrued or due and payable prior to the effective date hereof, shall be paid by [Yale] directly to [D&A Alvarez], and [Steadfast and the lenders] shall have no rights to any such amounts received by [D&A Alvarez]." Each of the lenders executed an "Allonge to Promissory Note" stating that the April 2017 note is payable to the order of D&A Alvarez.

***24** The note purchase and sale agreement set out the terms under which D&A Alvarez purchased the April 2017 note from Steadfast and the lenders, including the purchase price and various representations and warranties. Steadfast and the lenders represented, among other things, that they were "the sole holder[s] and owner[s] of the [April 2017] Note and the Loan Documents." This agreement provided that, upon closing of the transaction, the signature of Steadfast on the assignment "shall be sufficient to transfer beneficial title to [D&A Alvarez]" and D&A Alvarez "shall be considered to [be] the Holder of the Promissory Note."

Finally, the parties also executed a collateral transfer of note and lien, which defined D&A Alvarez as the "debtor," the lenders as the "secured party," the April 2017 note as the "collateral note," and the promissory note executed contemporaneously by D&A Alvarez in January 2018 as the "obligation." In this document, D&A Alvarez granted the lenders a security interest in the "Collateral"—D&A Alvarez's interest in the April 2017 note—and its proceeds to secure D&A Alvarez's obligation to the lenders. This agreement provided that all payments on the collateral note by Yale were to be made directly to D&A Alvarez "until after the occurrence of an event of default, at which time Secured Party may notify the Collateral Note maker [Yale] to make all future payments to Secured Party." The agreement listed several examples of a "default," including D&A Alvarez's failure to timely perform any obligation under its agreements with the lenders.

This agreement acknowledged that the lenders had signed allonges allowing D&A Alvarez to enforce the April 2017 note "unless the Secured Party determines otherwise," but it also provided that "Secured Party" was to maintain possession of the note "until Secured Party is paid off."[20] D&A Alvarez agreed that, "[o]n Secured Party's demand," it would "deposit all payments received as proceeds of the Collateral in a special bank account designated by Secured Party, who alone will have power of withdrawal." D&A Alvarez agreed not to renew, extend, or modify the April 2017 note without the lenders' written consent. D&A Alvarez had the power to authorize a foreclosure sale "unless Secured Party overrules [D&A Alvarez]."

The collateral transfer of note and lien also provided that the lenders could, at any time, "take control of any proceeds of the Collateral"; "demand, collect, convert, redeem, settle, compromise, receipt for, realize on, sue for, and adjust the Collateral either in Secured Party's or [D&A Alvarez's] name, as Secured Party desires"; and "exercise all other rights available to an owner of such Collateral."

We conclude that although D&A Alvarez became entitled to enforce the April 2017 note upon its purchase of the note in January 2018, the collateral transfer of note and lien executed as part of that transaction allowed the lenders to collect on the April 2017 note in the event of a default by D&A Alvarez under the January 2018 note. It is undisputed that D&A Alvarez did not make any payments to the lenders under the January 2018 note and that it defaulted under its agreements with the lenders. The lenders thus had the ability to notify Yale, as the "Collateral Note Maker," to make all payments under the April 2017 note to them, instead of to D&A Alvarez, which was in default.

***25** Under the facts of these particular transactions, we conclude that the lenders remained entitled to collect payments under the note and could sue Yale to enforce the note. We overrule Yale's twenty-eighth issue.

C. Sherrin's Testimony on Damages

On appeal, Yale argues that Sherrin's testimony on damages was speculative and that Sherrin admitted to guessing at amounts. Yale also argues that Sherrin testified about vendor fees and invoices without submitting documentary evidence.

A plaintiff may not recover damages for breach of contract if those damages are remote, contingent, speculative, or conjectural. *Peterson Grp., Inc. v. PLTQ Lotus Grp., L.P.*, 417 S.W.3d 46, 64 (Tex. App.—Houston [1st Dist.] 2013, pet. denied); *S. Elec. Servs., Inc. v. City of Houston*, 355 S.W.3d 319, 324 (Tex. App.—Houston [1st Dist.] 2011, pet. denied). Testimony is speculative if it is based on guesswork or conjecture. *Nat. Gas Pipeline Co. of Am. v. Justiss*, 397

S.W.3d 150, 156 (Tex. 2012); *Bd. of Trs. of Fire & Police Retiree Health Fund v. Towers, Perrin, Forster & Crosby, Inc.*, 191 S.W.3d 185, 194 (Tex. App.—San Antonio 2005, pet. denied) (" 'Speculate' means 'to take to be true on the basis of insufficient evidence.' "). Speculative testimony has no probative value. *Health Care Serv. Corp. v. E. Tex. Med. Ctr.*, 495 S.W.3d 333, 339 (Tex. App.—Tyler 2016, no pet.).

As documentary evidence with respect to damages, the trial court admitted the April 2017 promissory note; the assignment of the note and lien to D&A Alvarez; the written loan agreement signed by D&A Alvarez; the January 2018 promissory note; the note purchase and sale agreement executed by the lenders and D&A Alvarez; and the collateral transfer of note and lien. Sherrin also testified concerning damages.

Sherrin testified that the principal balance of the January 2018 note was $5,700,000, and D&A Alvarez never made any payments on that note. Interest accrued on the loan balance at an annual rate of 18 percent, and the first interest payment was due on March 1, 2018.[21] The January 2018 note also provided that Steadfast could assess a 5 percent late fee charge. Sherrin calculated that D&A Alvarez had incurred $1,526,175 in interest charges and late fees. D&A Alvarez therefore owed a total of $7,226,175 in unpaid principal, interest, and late fees.

Sherrin also testified that although the April 2017 promissory note stated that the loan to Yale was for $8,200,000, because the loan was "stage funded," $5,700,000 represented the amount actually loaned to Yale that went unpaid. The April 2017 note also provided that interest accrued at a rate of 18 percent per annum and that a 5 percent late fee could be assessed each month for late payments. Sherrin testified that even though the April 2017 note went into default several months before the January 2018 note, the lenders were seeking the same amounts in interest and late fees because Yale had an "escrow credit for a construction account," which effectively made the interest and late fee amounts the same as under the January 2018 note.

***26** Both the April 2017 note and the January 2018 note authorized Steadfast and the lenders to recover attorney's fees in case of a default. Sherrin testified that Steadfast and the lenders had incurred $945,469.90 in attorney's fees up to July 1, 2019, and they had not received an invoice for July 2019 at the time of trial.

Sherrin also testified about additional expenses that had been incurred. The lenders had paid for court reporter fees but had not received those invoices yet. Steadfast had hired a 24-hour security guard for the property and paid $13,000 for insurance. When asked how much Steadfast and the lenders had incurred in "vendor invoices associated with this litigation," Sherrin testified that the amount as of three weeks before trial was $126,444.32, but more costs had been incurred since that date. When asked what categories of legal costs and other costs that figure included, Sherrin responded, "[a] lion's share, our transcripts and videos from depositions." Sherrin testified that the lenders sought $8,305,098.22 in unpaid principal, interest, late fees, attorney's fees, and vendor fees. Sherrin did not present any documentary evidence of the vendor fees incurred, but Yale did not object to any of this testimony.

Sherrin testified that two tax liens had attached to the property during the pendency of the litigation. These two liens totaled $229,585.62. The total amount that the lenders sought in damages was $8,534,674.84. Sherrin testified that the lenders were not seeking this amount from both Yale and D&A Alvarez; instead, they were seeking "[j]ust one 8 million figure."[22] Yale did not cross-examine Sherrin about any of the damages that the lenders were seeking, with the exception of their attorney's fees.

After Steadfast and the lenders rested, they moved for a directed verdict on the amount of damages, arguing that the documentary evidence and Sherrin's uncontradicted testimony established that the lenders had $8,534,674.84 in damages, including attorney's fees. Steadfast's counsel argued that this amount was liquidated and uncontroverted. In response, Yale and D&A Alvarez argued that only the amounts determinable from the loan documents—the principal and the interest—were liquidated, and the other amounts required a jury question. The trial court granted a directed verdict on damages against both Yale and D&A Alvarez. In the final judgment, the trial court awarded $7,589,204.94 in damages, not including the attorney's fees awarded by the jury.

***27** On appeal, the parties dispute whether the lenders' damages were unliquidated—which, in Yale's view, would require submission to the jury to determine the amount of damages—or liquidated—which, in the lenders' view, meant the trial court could determine the amount of damages as a matter of law based on the loan documents. However, although the unliquidated versus liquidated

damages distinction is relevant in the context of default judgments, it matters little in the context of this case.

Under the Rules of Civil Procedure, when a default judgment is rendered, the trial court shall assess damages "if the claim is liquidated and proved by an instrument in writing," unless the defendant demands and is entitled to a jury. TEX. R. CIV. P. 241. A claim is liquidated if the amount of damages caused by the defendant can be accurately calculated from (1) the factual, as opposed to conclusory, allegations in the petition, and (2) an instrument in writing. *Sherman Acquisition II LP v. Garcia*, 229 S.W.3d 802, 809 (Tex. App.—Waco 2007, no pet.); *Arenivar v. Providian Nat'l Bank*, 23 S.W.3d 496, 498 (Tex. App.—Amarillo 2000, no pet.). If, however, the claim is unliquidated or not evidenced by an instrument in writing, "the court shall hear evidence as to damages and shall render judgment therefor," unless the defendant demands and is entitled to a jury. TEX. R. CIV. P. 243. "[A] seemingly liquidated claim may be unliquidated because of pleading allegations which require proof for resolution." *Arenivar*, 23 S.W.3d at 498.

If the damages claimed are unliquidated, the trial court cannot render judgment on damages solely based on the pleadings; instead, it must hear evidence of the damages before rendering a default judgment. *Sherman Acquisition II*, 229 S.W.3d at 809; *Arenivar*, 23 S.W.3d at 498. The trial court errs if it fails to conduct a hearing and require proof of unliquidated damages before rendering a default judgment for such damages. *Arenivar*, 23 S.W.3d at 498.

This case, however, was not a default judgment. The court held a jury trial on the merits. At trial, the court admitted the loan documents for the April 2017 and January 2018 notes and the lenders presented Sherrin's testimony concerning the lenders' damages under both notes. Thus, the question whether the lenders' damages were liquidated or unliquidated is irrelevant. The key question on appeal is whether the lenders conclusively established the amount of their damages, such that the trial court could determine the amount as a matter of law and render a directed verdict, removing this issue from the jury's consideration.

We conclude that the lenders did so. The trial court admitted the loan documents—including the promissory notes and deeds of trust—from both the April 2017 and January 2018 transactions. These documents set out the principal amount of the loans, the applicable interest rate, and the provision for assessment of late fees. Both notes contained provisions in which the borrower promised "to pay reasonable attorney's fees and court and other costs if an attorney is retained to collect or enforce the note." Sherrin also testified concerning the outstanding principal balance on the notes; the interest charges and late fees assessed; the costs paid to vendors; and the tax liens imposed against the subject property. Sherrin provided specific dollar amounts for each of these requested items of damages. He did not guess or estimate the amount of damages. *See* *Nat. Gas Pipeline Co. of Am.*, 397 S.W.3d at 156 (stating that testimony is speculative if it is based on guesswork or conjecture).

***28** Yale did not object to Sherrin's damages testimony on speculation grounds. Although Yale cross-examined Sherrin about the attorney's fees the lenders had incurred, Yale did not cross-examine him about any of the other damages amounts. Yale also did not offer any evidence controverting Sherrin's testimony on damages. We therefore conclude that the lenders conclusively established the amount of their damages at trial. Thus, we hold the trial court did not err by granting a directed verdict in favor of the lenders that their damages were $7,589,204.94. *See* *Salazar*, 440 S.W.3d at 869 (stating that directed verdict is proper if evidence conclusively establishes fact and reasonable minds could reach but one conclusion under available evidence). We overrule Yale's fifteenth and twenty-second issues. [23]

Attorney's Fees

In its seventeenth issue, Yale argues that the trial court erred in its award of attorney's fees to the lenders. Specifically, it argues that because there were multiple parties and multiple claims involved, the lenders were required to segregate their attorney's fees, but they did not segregate their fees between Yale and D&A Alvarez, between the claim for breach of the April 2017 note and breach of the January 2018 note, or between the individual lenders. Yale further argues that the lenders sought all the attorney's fees they incurred even though (1) the lenders asserted numerous tort claims for which fees were not recoverable and (2) the lenders filed a separate suit against Yale and other parties that was assigned to another district court, but fees for that suit were included in the billing records admitted into evidence in this case.

Yale also argues that the court erred by awarding "joint and several" attorney's fees to different parties based on different

contracts and awarding fees to parties with no contractual relationship with Yale.[24] Additionally, in its nineteenth issue, Yale argues that the appellate attorney's fees awarded in the final judgment were not properly conditioned on an unsuccessful appeal.

A. Governing Law

Generally, in Texas, each party must pay its own attorney's fees. *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 483 (Tex. 2019). However, there are certain circumstances in which a prevailing party may recover attorney's fees from the opposing party, such as when fee-shifting is authorized by statute or contract. *Id.* at 484. When fee-shifting is authorized, the party seeking the fee award bears the burden to prove that the fees are reasonable and necessary. *Id.* The availability of attorney's fees under a particular statute is a question of law for the court. *Holland v. Wal-Mart Stores, Inc.*, 1 S.W.3d 91, 94 (Tex. 1999) (per curiam).

***29** Civil Practice and Remedies Code Chapter 38 authorizes shifting of attorney's fees in certain situations. Under section 38.001, a party may recover reasonable attorney's fees, in addition to the amount of a valid claim and costs, if the claim is for an oral or written contract. TEX. CIV. PRAC. & REM. CODE § 38.001(8). To recover attorney's fees under this section, a party must (1) prevail on a cause of action for which attorney's fees are recoverable and (2) recover damages. *Rohrmoos Venture*, 578 S.W.3d at 484 (quoting *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 390 (Tex. 1997)). However, parties are free to contract for a fee-recovery standard that is either looser or stricter than Chapter 38's standard. *Rohrmoos Venture*, 578 S.W.3d at 484; *Intercontinental Grp. P'ship v. KB Home Loan Star, L.P.*, 295 S.W.3d 650, 653 (Tex. 2009). Courts look to the plain language of the contract to determine whether it authorizes fee-shifting and under what circumstances. *See Rohrmoos Venture*, 578 S.W.3d at 485.

Absent a contract or statute, trial courts do not have inherent authority to require the losing party to pay the prevailing party's attorney's fees. *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 311 (Tex. 2006). Fee claimants, therefore, have always been required to segregate fees between claims for which they are recoverable and claims for which they are not. *Id.* Courts have also held that when a lawsuit involves multiple parties, the party seeking attorney's fees "must segregate recoverable fees from those incurred by parties or on claims for which fees are not recoverable." *Clearview Props., L.P. v. Prop. Tex. SC One Corp.*, 287 S.W.3d 132, 143 (Tex. App.—Houston [14th Dist.] 2009, pet. denied); *see also Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 10 (Tex. 1991) ("In order to show the reasonableness and necessity of attorney's fees, the plaintiff is required to show that the fees were incurred while suing the defendant sought to be charged with the fees on a claim which allows recovery of such fees."); *French v. Moore*, 169 S.W.3d 1, 17 (Tex. App.—Houston [1st Dist.] 2004, no pet.) ("A party seeking attorney fees has a duty to segregate nonrecoverable fees from recoverable fees, and to segregate the fees owed by different parties."). "Attorney's fees that relate solely to a claim for which fees are unrecoverable must be segregated." *Clearview Props.*, 287 S.W.3d at 143.

An exception to the rule on segregation of attorney's fees exists only when the fees are based on claims arising out of the same transaction that are so intertwined and inseparable as to make segregation impossible. *Kinsel v. Lindsey*, 526 S.W.3d 411, 427 (Tex. 2017). However, intertwined facts do not make otherwise unrecoverable fees recoverable; instead, "it is only when discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated." *Tony Gullo Motors*, 212 S.W.3d at 313–14.

In making this determination, "we do not look at the legal work as a whole but parse the work into component tasks, such as examining a pleading paragraph by paragraph to determine which ones relate to recoverable claims." *Clearview Props.*, 287 S.W.3d at 144; *see Tony Gullo Motors*, 212 S.W.3d at 313 (stating that when plaintiff's attorneys were "drafting [plaintiff's] pleadings or the jury charge relating to fraud, there is no question those fees were not recoverable"). Unrecoverable fees are not rendered recoverable "merely because they are nominal." *Tony Gullo Motors*, 212 S.W.3d at 313. The party seeking recovery of attorney's fees bears the burden to demonstrate that segregation is not required. *Sustainable Tex. Oyster Res. Mgmt., L.L.C. v. Hannah Reef, Inc.*, 623 S.W.3d 851, 872 (Tex. App.—Houston [1st Dist.] 2020, pet. denied).

***30** A failure to segregate attorney's fees when segregation is required does not preclude a recovery of attorney's fees. *Kinsel*, 526 S.W.3d at 428. Instead, the appropriate remedy is to remand the issue to the trial court "for reconsideration with sufficiently detailed information for a meaningful review of the fees sought." *Id.*; *Tony Gullo Motors*, 212 S.W.3d at 314 ("Unsegregated attorney's fees for the entire case are some evidence of what the segregated amount should be.").

B. Whether the Lenders Should Have Segregated Their Attorney's Fees

On appeal, Yale does not argue that the lenders failed to establish that their attorney's fees were reasonable and necessary. Likewise, Yale does not argue that the relevant notes fail to include provisions authorizing the recovery of attorney's fees. Rather, it argues that the lenders were required to segregate their attorney's fees in several different respects but they refused to do so. The lenders argue that segregation was not possible because all the claims against all parties were inextricably intertwined.

Both the April 2017 note and the January 2018 note contain an identical provision allowing the recovery of attorney's fees. That provision states:

> Borrower [2017 Yale and D&A Alvarez] also promises to pay reasonable attorney's fees and court and other costs if an attorney is retained to collect or enforce the note. These expenses will bear interest from the date of advance at the Annual Interest Rate on Matured, Unpaid Amounts. Borrower will pay Lender these expenses and interest on demand at the Place for Payment. These expenses and interest will become part of the debt evidenced by the note and will be secured by any security for payment.

The lenders sought recovery of attorney's fees based on this provision. [25]

***31** At trial, Steadfast and the lenders' counsel, Christopher Ramey, testified concerning the attorney's fees incurred by his clients. Ramey testified that he was engaged to represent the Steadfast defendants in June 2018, several months after they had been sued by Yale. He testified concerning the extensive discovery, filings, hearings, and depositions that occurred during the pendency of the litigation. His clients had incurred $951,195.10 in attorney's fees up to July 5, 2019, and he estimated that his clients would incur an additional $70,000 in fees for the remainder of July 2019. He further requested appellate attorney's fees in the range of $150,000 to $200,000 for an appeal to the intermediate appellate court and an additional $200,000 in fees for an appeal to the Texas Supreme Court. The trial court admitted invoices and billing records to support this testimony.

On cross-examination, Ramey testified that two attorneys who were not part of his law firm—Scott Breitenwischer and Chester Makowski—had performed legal work for the lenders in June and July 2019. Ramey was not sure whether Sherrin had signed separate engagement letters with either Breitenwischer or Makowski, and he did not know if his firm's invoices to Steadfast included work performed by these two attorneys. Ramey did not believe that his invoices included time billed by these two attorneys. [26] He testified that Steadfast and the lenders were not requesting that the jury award legal fees to any other law firm.

Ramey acknowledged that in the Steadfast defendants' first amended answer, filed in April 2019, the defendants asserted multiple tort counterclaims in addition to their claims for breach of the April 2017 and January 2018 notes. Ramey agreed that he billed for the time spent preparing and prosecuting the non-contract claims. He also acknowledged that, during the pendency of this lawsuit, he filed a separate lawsuit on behalf of Steadfast and the lenders against parties who were not signatories to the April 2017 and January 2018 notes, including Fisher, Parker, and Choudhri. This lawsuit was assigned to a different Harris County district court. Ramey testified that he had attempted on several occasions to have these additional parties designated as responsible third parties in the underlying lawsuit. In addition, he had tried to have the separate lawsuit consolidated with the underlying suit, but he was not successful. He agreed that his invoices for this case "probably" included time spent on the other lawsuit.

After Steadfast and the lenders rested, Yale and D&A Alvarez moved for a directed verdict on attorney's fees, [27] arguing that the lenders were not entitled to recover their fees because they

did not segregate between claims and parties. In response, Ramey argued:

> Further, with respect to segregation, the testimony is undisputed and it's very clear that all of their causes of action were pled against all of these parties, all in an exculpatory fashion. Their sole intent of bringing us into this lawsuit was to hinder our ability to chase the collateral, to prevent a foreclosure. And everything that they did against every party we represent was all lumped into that bundle and not segregated in its attack. And therefore, cannot be segregated in its defense.

The trial court overruled the request for a directed verdict. The trial court also refused to submit separate questions in the jury charge concerning attorney's fees to be assessed against Yale and against D&A Alvarez. Ultimately, the jury awarded the lenders $765,899.95 in trial-level and $100,000 in appellate-level attorney's fees against Yale and D&A Alvarez.

***32** On appeal, the lenders argue that "given [Yale's] deliberate efforts to mix up the issues, the legal fees were inextricably intertwined and impossible to segregate." We disagree that the lenders' attorney's fees were impossible to segregate. In their "Amended Answer, Counterclaims, Designation of Responsible Third Parties, Motion to Consolidate, and Request for Disclosure," filed on April 5, 2019, the lenders asserted multiple claims for affirmative relief against Yale and D&A Alvarez. In addition to the lenders' claim for breach of the promissory notes—the only claim on which the lenders proceeded to trial and upon which the trial court awarded them a recovery—the lenders asserted numerous tort claims, including claims for conversion, fraud, fraudulent inducement, tortious interference with contract, quantum meruit, malicious prosecution, private nuisance, promissory estoppel, money had and received, negligent misrepresentation, civil conspiracy, fraudulent transfer, and wrongful injunction.

The lenders abandoned their private nuisance claims at the June 12, 2019 summary judgment hearing. The trial court granted summary judgment in Yale's favor on the lenders' counterclaims for quantum meruit and malicious prosecution. The lenders then nonsuited their remaining tort claims after the trial court granted their summary judgment motions on Yale's and D&A Alvarez's affirmative claims and ruled that Yale and D&A Alvarez had breached their respective promissory notes as a matter of law. None of these tort claims are claims for which attorney's fees are recoverable. However, Ramey made no attempt at trial to segregate the fees for these unrecoverable claims from fees for the lenders' breach of contract claims.[28] *See* *Tony Gullo Motors*, 212 S.W.3d at 314 (noting that standard for segregation of attorney's fees "does not require more precise proof for attorney's fees than for any other claims or expenses" and stating that attorney's opinion that certain percentage "of their drafting time would have been necessary even if there had been no fraud claim" would have sufficed); *Hillegeist Fam. Enters., LLP v. Hillegeist*, —— S.W.3d ——, No. 01-21-00121-CV, 2022 WL 3162367, at *5 (Tex. App.—Houston [1st Dist.] Aug. 9, 2022, no pet.) (stating that when segregation is required, attorneys do not have to keep separate time records for each claim). Ramey also acknowledged that the billing records "probably" included time spent on the lawsuit filed in another Harris County district court, but he did not attempt to quantify that time.

As the parties seeking attorney's fees, the lenders bore the burden of demonstrating that segregation was not required. *Sustainable Tex. Oyster Res. Mgmt.*, 623 S.W.3d at 872; *Clearview Props.*, 287 S.W.3d at 144. We conclude that the lenders have not met this burden.[29] At least some of the work performed by the lenders' attorneys related solely to claims for which attorney's fees are unrecoverable. *See* *Sustainable Tex. Oyster Res. Mgmt.*, 623 S.W.3d at 874 (concluding that party seeking attorney's fees must segregate fees for drafting portions of petitions relating solely to three tort claims for which fees are not recoverable); *see also* *Tony Gullo Motors*, 212 S.W.3d at 314 ("[W]hen, as here, it cannot be denied that at least some of the attorney's fees are attributable only to claims for which fees are not recoverable, segregation of fees ought to be required and the jury ought to decide the rest."); *CA Partners v. Spears*, 274 S.W.3d 51, 84 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (noting that each counterclaim, including claims for which attorney's fees were unrecoverable, required drafting separate portions of pleading, separate legal research, and possibly separate discovery requests, and party was therefore required to segregate fees); *7979 Airport Garage, L.L.C. v. Dollar Rent A Car Sys., Inc.*, 245 S.W.3d 488, 509–

10 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (concluding that segregation was required when petition contained paragraph asserting cause of action for which attorney's fees were unrecoverable and jury charge contained two questions pertaining solely to that claim).

***33** We hold that the trial court erred by failing to require the lenders to segregate their attorney's fees. Because the total amount of unsegregated fees incurred by the lenders is some evidence of the proper amount of attorney's fees to award, we remand this portion of the case to the trial court to allow the lenders to properly prove their recoverable attorney's fees. *See* *Tony Gullo Motors*, 212 S.W.3d at 314 (stating that party's failure to segregate attorney's fees "does not mean she cannot recover any" because unsegregated attorney's fees for entire case are "some evidence of what the segregated amount should be"); *Arrow Marble, LLC v. Est. of Killion*, 441 S.W.3d 702, 709 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (stating that failure to segregate "does not result in the denial of any fee" and that "remand is appropriate to determine the segregated fee amount due"). This includes a remand of both the attorney's fees incurred during the trial-court proceedings and the appellate attorney's fees.[30] *See* *Sustainable Tex. Oyster Res. Mgmt.*, 623 S.W.3d at 874.

We sustain Yale's seventeenth issue.[31]

Potential Errors in Final Judgment

In its twenty-first, twenty-fourth, twenty-seventh, twenty-ninth, thirtieth, and thirty-first issues, Yale contends that the final judgment contains several errors.

In its twenty-fourth and twenty-seventh issues, Yale argues that the trial court erred by "adjudicating and vaguely awarding relief for future claims to Steadfast Appellees' in the Final Judgment for any potential future 'deficiency' after a potential future foreclosure." In the final judgment, the trial court ordered that Yale's and D&A Alvarez's liability to the lenders is "separate, but is subject to only one recovery under the one satisfaction rule," and therefore both Yale and D&A Alvarez are "entitled to receive offset and credit for amounts for any foreclosure of the subject property" or for any recovery that the lenders collect from the other defendant. The trial court then ordered that Yale and D&A Alvarez "remain liable" to the lenders "for any deficiency of loss pursuant to the terms of the Loan Documents between them." We conclude that this portion of the trial court's judgment does not award relief for a "future claim." Instead, the trial court ordered that Yale may receive a credit or offset applied to the damages assessed against it for (1) any amounts collected from D&A Alvarez and (2) any amounts obtained by the lenders through the foreclosure process. However, if there is a deficiency during foreclosure, Yale remains liable to the lenders for the portion of the damages award that the deficiency does not cover. Yale has not demonstrated how the trial court erred in including this provision in the final judgment. We therefore overrule Yale's twenty-fourth and twenty-seventh issues.

***34** In its twenty-first and twenty-ninth issues, Yale argues that the trial court erred by ordering it to "defend and indemnify ELB Investments, LLC and Steadfast Funding, LLC, and their affiliates as set forth in the Loan Documents." D&A Alvarez expressly agreed to indemnify Steadfast Funding and the lenders in the loan documents signed in connection with the January 2018 note. Yale argues that it, however, never agreed to such an indemnity provision in any contract it signed with Steadfast and the lenders.[32] In its thirty-first issue, Yale argues that the trial court erroneously granted the Steadfast defendants "further relief" against Yale in the final judgment "when no such claim was plead for and no contractual obligation existed to support such relief." Yale does not cite to a specific portion of the final judgment—other than the portion awarding "future attorney's fees," discussed in footnote 30 of this opinion, and the indemnity portion—in which the trial court awarded "further relief" to the Steadfast defendants. *See* TEX. R. APP. P. 38.1(i).

In its thirtieth issue, Yale argues that the reference to "Loan Documents" in the final judgment is confusing and ambiguous because the litigation involved at least four different loan closings and transactions with different dates, different parties, and different obligations. Yale argues that in the absence of a definition of "Loan Documents," the final judgment is ambiguous and unenforceable.

Yale also argues that the court erred by not specifying in the judgment the amounts owed to each individual lender. The notes and the deeds of trust specified the amounts loaned by each lender and their percentage ownership of the indebtedness, but the judgment awarded a lump sum to the lenders collectively, without stating each lender's percentage of the damages award.

Because we reverse the portion of the trial court's final judgment awarding attorney's fees to the lenders and remand that portion of the case for a new trial, we need not address whether the trial court erred in including these provisions in the final judgment. This opinion does not preclude Yale from raising these specific issues—whether the court can require Yale to indemnify Steadfast and ELB Investments; whether the term "Loan Documents" should be specifically defined in the final judgment; and whether the final judgment should specify the amounts owed to each individual lender—before the trial court on remand.

Failure to File Findings of Fact and Conclusions of Law

Finally, in its thirty-second issue, Yale argues that the trial court erred when it failed to file findings of fact and conclusions of law. Yale's notice of past due findings and conclusions specified that it sought findings and conclusions on the denial of its motion to recuse the trial court.

***35** "In any case tried in the district or county court *without a jury*, any party may request the court to state in writing its findings of fact and conclusions of law." TEX. R. CIV. P. 296 (emphasis added); *AD Villarai, LLC v. Chan Il Pak*, 519 S.W.3d 132, 135 (Tex. 2017) (per curiam). The purpose of this rule is to "give a party a right to findings of fact and conclusions of law finally adjudicated after a conventional trial on the merits before the court." *IKB Indus. (Nigeria) Ltd. v. Pro-Line Corp.*, 938 S.W.2d 440, 442 (Tex. 1997). In other cases, findings and conclusions are proper, but a party is not entitled to them. *Id.*

"The trial court should not make, and an appellate court cannot consider, findings of fact in connection with a summary judgment." *Id.* at 441. Similarly, a party is not entitled to findings of fact and conclusions of law following a judgment after a directed verdict. *Id.* at 442. With respect to recusal hearings, findings and conclusions might be helpful, but they are not required. *See* *Chandler v. Chandler*, 991 S.W.2d 367, 388 (Tex. App.—El Paso 1999, pet. denied) (noting that hearing on motion to recuse is not "a case tried without a jury"), *disapproved of on other grounds by* *Agar Corp. v. Electro Circuits Int'l, LLC*, 580 S.W.3d 136 (Tex. 2019); *Cogsdil v. Jimmy Fincher Body Shop, LLC*, No. 07-16-00303-CV, 2017 WL 4944872, at *4 (Tex. App.—Amarillo Oct. 30, 2017, pet. denied) (mem. op.); *see also* TEX. R. CIV. P. 18a (setting out procedures to be followed when motion to recuse is filed).

After the trial court entered judgment, Yale requested that the court file findings of fact and conclusions of law. Parties are not entitled to findings and conclusions after summary judgment, a judgment following a directed verdict, or a jury trial. *See* *IKB Indus. (Nigeria) Ltd.*, 938 S.W.2d at 441–42. In its notice of past due findings and conclusions, Yale specified that it sought findings and conclusions with respect to the court's post-trial denial of a motion to recuse. A hearing on a motion to recuse is not a "case tried without a jury." *Chandler*, 991 S.W.2d at 388; TEX. R. CIV. P. 296. Although findings and conclusions might be helpful following denial of a motion to recuse, a party is not entitled to them. *Cogsdil*, 2017 WL 4944872, at *4; *Chandler*, 991 S.W.2d at 388. We hold that the trial court did not err when it did not file findings of fact and conclusions of law.

We overrule Yale's thirty-second issue. [33]

Conclusion

We affirm the portion of the trial court's judgment that rendered a take-nothing judgment against Yale on its affirmative claims asserted against the lenders, Steadfast, Sherrin, ELB Investments, Williams, the Law Office of Ben Williams, PLLC, and the Aycock defendants. We further affirm the portion of the trial court's judgment that awarded the lenders the following damages from Yale on their breach of contract claim: (1) $5,700,000; (2) $1,526,175.00 as interest and late fees under the terms of the contract; (3) $133,444.32 for vendor invoices; and (4) $229,585.62 for a tax lien, for a total of $7,589,204.94 in damages. [34]

***36** We reverse the portions of the trial court's judgment that require Yale to pay the lenders' trial-level and appellate-level attorney's fees and remand the lenders' claim for attorney's fees for a new trial.

All Citations

Not Reported in S.W. Rptr., 2023 WL 3184028

Footnotes

1 The individuals and companies that loaned money to Yale are: Initram, Inc.; Eternal Investments, LLC; Bruce L. Robinson; Dale Pilgeram, Trustee of the Pilgeram Family Trust; Joseph C. Hibbard; RJL Realty, LLC; Kornelia Peasley-Brown; Salvador Ballesteros; Margaret M. Serrano-Foster, Trustee of the Margaret M. Serrano-Foster Trust Dated 12/2/2005; Richard R. Metler, Trustee of the Richard R. Metler Revocable Living Trust; James T. Smith, Trustee of the James T. Smith Trust; Liberty Trust Company Ltd., Custodian FBO Vincent Paul Mazzeo, Jr. IRA; Joe Saenz; Patrick Grosse, Trustee of the Grosse Family Trust Dated 12/31/2004; Eric Verhaeghe; Stephen K. Zupanc; Liberty Trust Company Ltd., Custodian FBO Adam K. Hruby IRA #TC005383; Vincent Investments; ELM 401K PSP, Laurel Mead and Edwin A. Mead, Trustees; Equity Trust Company, Custodian FBO Steven Krieger IRA; Julio M. Schnars; Joseph Dersham; Joyce Dersham; Walter Kaffenberger; Christel Kaffenberger; Mike Berris; Jason Sun; and Equity Trust Company, Custodian FBO Erica Ross-Krieger IRA. These individuals and companies are referred to collectively in this opinion as "the lenders."

2 Fisher's construction company filed suit against its lenders in September 2016. At the time, that lawsuit was unrelated to the construction project at issue in this appeal. However, after the dispute involving this project escalated, Yale joined the ongoing lawsuit as a plaintiff and asserted claims against the appellees. The original parties to the lawsuit—Fisher, entities controlled by him, and his lenders—settled their disputes, leaving the claims pending between the parties to this appeal.

3 Aycock is a limited partner in a law firm, appellee Pratt Aycock, Ltd. The general partner of this firm is appellee Pratt Aycock & Associates, PLLC (collectively, these three appellees are "the Aycock defendants"). Steadfast and Pratt Aycock own appellee ELB Investments, LLC, an entity created by Sherrin to serve as a loan servicer for one of the loans involved in this case.

4 Alvarez and his company, D&A Alvarez Group, LLC, loaned funds to finance this project. Ultimately, Alvarez and his company became defendants in this lawsuit, and the trial court rendered judgment against them. Neither Alvarez nor his company appealed.

5 This amount—$5,700,000—differs from the amount loaned to Yale in the April 2017 transaction—$8,200,000—by $2,500,000. The "Note Purchase and Sale Agreement" executed by D&A Alvarez and the lenders in January 2018 acknowledged that $2,500,000 of the original loan had not yet funded. At trial, Sherrin testified concerning this discrepancy and stated that because only $5,700,000 of the original loan had been funded at the time D&A Alvarez purchased the April 2017 note, that was the amount the lenders sought as actual damages.

6 An "allonge" is "a slip of paper attached to a negotiable instrument for the purpose of receiving further indorsements." *Calvillo v. Carrington Mortg. Servs.*, 487 S.W.3d 626, 629 n.1 (Tex. App.—El Paso 2015, pet. denied); *see* *Sw. Resol. Corp. v. Watson*, 964 S.W.2d 262, 263 (Tex. 1997) (per curiam) ("The use of an allonge to add indorsements to an instrument when there is no room for them on the instrument itself dates from early common law.").

7 Alvarez and his company also asserted legal malpractice claims against Aycock and Williams; breach of fiduciary duty claims against Aycock; and aiding and abetting breach of fiduciary claims against Sherrin, Steadfast, and ELB Investments. Alvarez further asserted that Aycock violated multiple Rules of Professional Conduct and that Aycock and Sherrin violated multiple sections of the Texas Penal Code relating to bribery and securing execution of a document by deception. Because Alvarez and D&A Alvarez Group did not appeal the final judgment, these claims are not at issue in this appeal.

8 Williams and his law firm also asserted claims against Yale, Alvarez, and D&A Alvarez, but Williams nonsuited his and his firm's claims in June 2019.

9 The Steadfast defendants also filed three summary judgment motions that solely related to D&A Alvarez. Because D&A Alvarez is not a party to this appeal, we do not address these motions.

10 With respect to Alvarez's summary judgment motions, the trial court granted summary judgment in favor of Alvarez on the defendants' counterclaims for conversion, tortious interference, quantum meruit, malicious prosecution, promissory estoppel, money had and received, negligent misrepresentation, fraudulent transfer, and principal-agent liability.

11 In its thirty-third issue on appeal, Yale argues that the trial court erred in denying its motion for new trial. Although Yale listed this issue in the "Issues Presented" section of its appellate brief, it provided no argument or analysis in its brief concerning how the trial court erred in denying this motion. *See* TEX. R. APP. P. 38.1(i) ("The brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record."). Because Yale presents no substantive argument to support its issue challenging the trial court's denial of the motion for new trial, we conclude that Yale has not adequately briefed this issue for our consideration. *See In re Commitment of C.H.*, 606 S.W.3d 570, 576 (Tex. App.—Houston [14th Dist.] 2020, no pet.) ("A broad statement of the issues does not raise an issue on appeal that is not addressed in the body of the brief.").

12 The trial court later signed a new docket control order setting a new deadline for pleadings and dispositive motions and a trial date in June 2019.

13 The Steadfast defendants stated in their letter that they "still do not have the most fundamental documents produced by Plaintiffs" and they required "basic discovery" to be produced by Yale "before presenting for yet more depositions." The Steadfast defendants requested that they be allowed to review Yale's document production and obtain "basic expert discovery, prior to presenting for any further Defendant depositions." They stated, "Subject to this request and Order, and to timely obtaining expert depositions and documents, Defendants will produce the witnesses requested by Plaintiffs for up to 2 hours each, beginning on June 14, through the 20th." They also agreed to present their own experts for deposition "as soon as possible after the Plaintiffs' document production and expert depositions."

14 Yale also attached Microsoft Word documents purportedly setting out the contents of August 24, 2017 emails between Aycock and Sherrin; a February 3, 2017 email from Sherrin to Choudhri and Parker; and an August 24, 2017 email from Aycock to Alvarez. Yale did not attach the emails themselves.

15 We also note that the attorney immunity doctrine is an affirmative defense. *See Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C.*, 595 S.W.3d 651, 654 (Tex. 2020). Rule of Civil Procedure 94 requires parties to specifically plead matters that are affirmative defenses. TEX. R. CIV. P. 94; *CenterPoint Energy Houston Elec., L.L.P. v. Old TJC Co.*, 177 S.W.3d 425, 430 n.3 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). Aycock did not plead the attorney immunity doctrine as an affirmative defense in his third amended original answer, which was his live pleading at the time of the summary judgment proceedings.

16 Yale stated in its responses that "Sherrin's verification of the facts was limited to the affirmative summary judgment motions 3, 4 and 5 and their no-evidence motion." Yale attached a declaration by Sherrin as summary judgment evidence to its responses. This declaration, however, does not correspond to the declaration referenced in the responses themselves. In the attached declaration, Sherrin stated: "I have reviewed the Steadfast Defendants' Motions for Temporary Restraining Order, Verified Plea in Abatement, Motion to Dismiss and for Summary Judgment, [M]otion for Sanctions, and Motion to Reconsider Joinder/

Consolidation." Sherrin did not reference any of the Steadfast defendants' partial summary judgment motions in this declaration.

17 In its sixth issue, Yale argues that the trial court erred by granting "Appellees' no evidence summary judgment motions despite sufficient evidence on file that constitute more than a scintilla in contravention of the Texas Rules of Civil Procedure." The Steadfast defendants filed a no-evidence motion for summary judgment. However, the trial court did not sign an order granting this motion. Additionally, the Aycock defendants initially filed a combined traditional and no-evidence motion, but after the trial court's May 15 order, they amended the motion and no longer asserted any no-evidence arguments. The trial court then granted Aycock's amended motion. Because the trial court did not grant a no evidence summary judgment in favor of any party, we overrule Yale's sixth issue.

18 As evidentiary support for this argument, Aycock relied upon excerpts from Parker's deposition. Parker testified that Yale has a bank account, and the purpose of the account was to hold draw requests from the loan proceeds. Parker could not recall where the initial funds came from to set up that account or the highest balance the account ever had. He stated that a large capital contribution was not necessary when he formed Yale.

19 In a declaration attached as evidence to Yale's response to a no-evidence motion for summary judgment filed by the Steadfast defendants (but not attached to or relied upon in Yale's response to Aycock's amended summary judgment motion), Parker declared that he understood Aycock to be "acting as the fee attorney/ closing agent for the title company for a possible closing."

20 With respect to the January 2018 transaction between the lenders and D&A Alvarez, Sherrin testified: "We sold them the ability to perform as they wished under [the April 2017 note], as we retained the note until we were paid." Sherrin further testified that "[Alvarez] can do anything he wanted to under the note as long as he was keeping everything current, while we retained as the holder of the note the rights of the holder of a note." D&A Alvarez never had the April 2017 note in its physical possession, but it entered into the transaction "[s]o [Alvarez] could have the power of doing what he wanted to with authority of the note."

21 Both the April 2017 note and the January 2018 note provided that interest accrued on "[m]atured or accelerated unpaid, and past due, principal and interest" at the rate of 18 percent.

22 In its twentieth and twenty-sixth issues, Yale argues that the trial court erred by holding Yale "jointly and severally liable" with D&A Alvarez for over $8 million in damages when "the contracts sued upon were by unrelated parties contracted in different years covering different matters." However, Sherrin presented uncontradicted testimony that the lenders had loaned Yale $5,700,000 that went unpaid; that the April 2017 promissory note signed by Yale imposed an 18% interest rate on unpaid principal amounts and allowed for the assessment of late fees; and that the lenders had incurred expenses—including vendor's fees and tax liens—as a result of Yale's failure to pay under the April 2017 note. The lenders thus presented evidence that their damages were caused by both Yale and D&A Alvarez, and we conclude that the trial court did not err by including joint and several liability language in the jury charge and final judgment. We overrule Yale's twentieth and twenty-sixth issues.

23 In its sixteenth issue, Yale argues that the lenders failed to obtain jury findings on both liability and damages for its claim for breach of the April 2017 promissory note. Yale reasons that because the lenders did not obtain such findings, the lenders cannot recover on this claim. Because we have already held that the trial court did not err by rendering summary judgment in the lenders' favor on Yale's liability under the April 2017 note and that the court did not err by directing a verdict in favor of the lenders on their contractual damages,

the lenders' failure to obtain jury findings on these elements does not preclude their recovery because there was nothing to submit to the jury on either element. We overrule Yale's sixteenth issue.

24 Yale argues that several of the Steadfast defendants—Sherrin, Williams, Williams's law firm, and Brandoria, Ltd.—did not have a contractual relationship with Yale that would entitle them to attorney's fees under the April 2017 note, and therefore there was no basis for these parties to recover fees from 2017 Yale. These parties, however, were not awarded attorney's fees by the jury, nor were they awarded attorney's fees (or any monetary recovery at all) in the final judgment. Instead, the final judgment only awarded damages and attorney's fees to the individual lenders. The judgment also recited that Brandoria, Williams, and Williams's law firm had nonsuited their claims.

25 This Court has held that a party who pleads for attorney's fees only under Chapter 38 waives its claim for attorney's fees under a contractual provision. *Peterson Grp., Inc. v. PLTQ Lotus Grp., L.P.*, 417 S.W.3d 46, 61 (Tex. App.—Houston [1st Dist.] 2013, pet. denied); *see* TEX. R. CIV. P. 301 ("The judgment of the court shall conform to the pleadings ...."). The lenders alleged that Yale and D&A Alvarez owed the lenders "their attorney's fees for breach of contract, declaratory judgment, and other remedies including but not limited to under Chapters 37 and 38 of the Texas Civil Practice & Remedies Code." The lenders did not specifically plead that a provision in the April 2017 and January 2018 notes authorized recovery of attorney's fees.

At trial, however, the lenders relied on specific provisions in both the April 2017 and January 2018 notes in which Yale and D&A Alvarez, as the borrowers under the respective notes, promised "to pay reasonable attorney's fees and court and other costs if an attorney is retained to collect or enforce the note." The lenders made it clear throughout Sherrin's testimony that they were relying upon these provisions in the promissory notes to recover attorney's fees, but neither Yale nor D&A Alvarez objected or argued that this was outside the lenders' pleadings. Indeed, during closing argument, D&A Alvarez's counsel referred to the April 2017 note, quoted its attorney's fees provision, and stated that this was "one place that [the lenders are] entitled to collect some fees."

We therefore conclude that the parties tried the issue of the lenders' contractual right to attorney's fees by consent. *See* TEX. R. CIV. P. 67 (providing that when issues not raised by pleadings are tried with express or implied consent of parties, issues "shall be treated in all respects as if they had been raised in the pleadings"); *King v. Lyons*, 457 S.W.3d 122, 127 (Tex. App.—Houston [1st Dist.] 2014, no pet.) ("A party's unpleaded issue may be deemed tried by consent when evidence on the issue is developed under circumstances indicating both parties understood the issue was in the case, and the other party failed to make an appropriate complaint.").

26 Ramey's invoice for June 2019 included 22 hours billed by Breitenwischer for a total of $7,700. Ramey testified that he knew Breitenwischer had billed at least eighty hours for this case. The same invoice included an entry for $2,800 billed to Makowski's firm on June 21, 2019. Ramey classified the entry for Makowski's firm as a "vendor invoice," noting that his invoice did not include a time entry for Makowski in the hourly rates.

27 After Yale moved for a directed verdict on the basis that the lenders failed to segregate their attorney's fees and there was no "credible evidence on which attorneys' fees goes to which contract," Ramey argued that all of Yale's claims and all of the lenders' remedies were "inextricably intertwined." Yale's counsel responded, "I'll brief it later. I mean, I'm not going to argue with the Court. I think my objection's valid." On appeal, the lenders argue that, by making this statement, Yale "waived objection to segregation and conceded the issue of intertwined fees." We disagree. Yale cross-examined Sherrin and Ramey about whether Ramey segregated attorney's fees for the lenders' tort claims from attorney's fees for claims under the promissory notes, and Yale objected to Ramey's failure to segregate. Yale also moved for a directed verdict on the basis that Ramey did

not segregate attorney's fees. Yale's counsel's statement is not a concession that all attorney's fees incurred by the lenders were "inextricably intertwined."

28 On appeal, the lenders argue that their causes of action were "dependent upon the same facts or circumstances and are 'intertwined to the point of being inseparable,' " and therefore they are not required to segregate their attorney's fees. As support for this argument, the lenders largely rely upon the Dallas Court of Appeals' decision in *Flint & Associates v. Intercontinental Pipe & Steel, Inc.*, 739 S.W.2d 622 (Tex. App.—Dallas 1987, writ denied), and the Fourteenth Court of Appeals' decision in *Gill Savings Ass'n v. Chair King, Inc.*, 783 S.W.2d 674 (Tex. App.—Houston [14th Dist.] 1989), *aff'd in part and modified in part*, 797 S.W.2d 31 (Tex. 1990). Both of these opinions pre-date the Texas Supreme Court's opinion in *Tony Gullo Motors I, L.P. v. Chapa*, in which the supreme court stated that "[i]ntertwined facts do not make tort fees recoverable." *See* 212 S.W.3d 299, 313 (Tex. 2006). Instead, "it is only when discrete legal services advance both a recoverable and unrecoverable claim that [the fees] are so intertwined that they need not be segregated." *Id.* at 313–14. The lenders' claims asserted in this litigation all arose out of the same transaction, but not all of the "discrete legal services" advanced both a recoverable and an unrecoverable claim. Some services instead advanced only a claim for which attorney's fees are not recoverable. These fees must be segregated.

29 On appeal, the lenders argue that segregation of fees was not required because they were seeking attorney's fees under a provision in the April 2017 and January 2018 notes, the two applicable contracts. The lenders, however, cite no authority holding that a party seeking attorney's fees is not required to segregate unrecoverable fees from recoverable fees when they are seeking fees pursuant to a contractual provision, and Texas courts have required segregation of fees even in that circumstance. *See* *Varner v. Cardenas*, 218 S.W.3d 68, 69 (Tex. 2007) (per curiam) ("We recently held in *Tony Gullo Motors I, L.P. v. Chapa* that a prevailing party must segregate recoverable from unrecoverable attorney's fees *in all cases.*") (emphasis added); *Clearview Props., L.P. v. Prop. Tex. SC One Corp.*, 287 S.W.3d 132, 143–44 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (noting that party sought attorney's fees "based on a provision in its contract because it was a prevailing party in the breach of contract action," but concluding that trial court erred by not requiring party to segregate any of its attorney's fees).

30 Because we conclude that the lenders did not properly segregate their attorney's fees, we reverse the entire attorney's fees award in favor of the lenders—both trial-level and appellate-level attorney's fees—and remand the entire fee award to the trial court. We therefore need not reach Yale's nineteenth issue, in which it argues that the trial court improperly failed to condition the award of appellate attorney's fees to the lenders on an unsuccessful appeal. We note, however, that a trial court may not penalize a party for taking a successful appeal. *Keith v. Keith*, 221 S.W.3d 156, 171 (Tex. App.—Houston [1st Dist.] 2006, no pet.). To avoid this, the trial court must condition an award of appellate attorney's fees upon the appellant's unsuccessful appeal. *Id.*

Likewise, because we remand the entire attorney's fees award to the trial court, we need not reach Yale's eighteenth issue, in which it argues that the trial court erred by awarding the lenders an unspecified amount of "future attorney's fees" in the final judgment. In the final judgment, the court ordered that the lenders

> do have and recover of and from Counter-Defendants 2017 Yale Development, LLC, and D&A Alvarez Group, LLC, the sum of 8,355,104.89 including Attorney's fees to date of trial, plus future attorney's fees as awarded by the Jury in the event of appeal, *plus future attorney's fees and other costs as provided by the Loan Documents* which are hereby adjudicated to be valid, enforceable, and in default without excuse, and costs of suit in the amount of $7,888.75 for all of which let execution immediately issue.

(Emphasis added.) To the extent the lenders believe that the loan documents entitle them to an award of "future attorney's fees," they can present argument and evidence on that point to the trial court on remand.

31 In its twenty-fifth issue, Yale argues that the trial court erred by submitting a jury charge that improperly failed to condition the attorney's fees question on a jury finding of liability and damages and that did not require segregation of attorney's fees among parties or claims. Because we conclude that the trial court erred by not requiring the lenders to segregate their attorney's fees and we remand the attorney's fees issue for the lenders to present evidence of their properly segregated attorney's fees, we need not separately address Yale's twenty-fifth issue, as that would not grant Yale any greater relief. *See* TEX. R. APP. P. 47.1.

32 When Yale, Steadfast, and the lenders entered into the loan transaction in April 2017, they signed several documents, including an Escrow Agreement. This agreement defined Steadfast as the "Escrow Agent" and required Steadfast to fund the loan to Yale in stages and deposit funds in an escrow account. This agreement also included an indemnity section, in which the parties agreed that Steadfast "shall be liable only for loss or damage caused directly by its acts of gross negligence while performing as Escrow Agent under this agreement." The parties also agreed that if Steadfast became a party to "any litigation pertaining to this escrow or the subject matter thereof," the parties would "indemnify Escrow Agent against any loss, liability or expense incurred in any act or thing done by it hereunder." This agreement did not mention ELB Investments. In its live pleading, Steadfast asserted a declaratory judgment action and requested, among other things, a declaration that "2017 Yale and Parker parties owe Steadfast a full release, defense, and indemnity for all claims in this suit arising under the Escrow Agreement." At trial, the Escrow Agreement was not admitted into evidence. It is included in the appellate record solely as an exhibit in the summary judgment proceedings.

33 The parties have filed several motions throughout the pendency of this appeal. These motions include: (1) Yale's "Motion to Strike Steadfast Appellees' 'Appendix' of Newly Created Documents"; (2) Steadfast and the lenders' "Motion to Deny or Increase Supersedeas Bond"; (3) Steadfast and the lenders' "Motion to Dismiss and for Damages Under [Texas Rules of Appellate Procedure] 45, 52.11"; (4) Steadfast and the lenders' "Motion to Dismiss Appeal or in the Alternative Affirm the Trial Court's Judgment"; and (5) Steadfast and the lenders' "Multi-Jurisdictional Motion for Emergency Action—Receivership for Entities Used to Perpetrate Fraud." Steadfast and the lenders also objected to Yale's post-submission brief and supplemental clerk's record filed after oral argument in this case. We overrule Steadfast and the lenders' objection to Yale's post-submission brief and supplemental clerk's record. We deny all pending motions.

34 Because David Alvarez and D&A Alvarez Group are not parties to this appeal, this opinion does not affect any portion of the trial court's final judgment with respect to Alvarez or D&A Alvarez Group.

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