

AFFIRM; and Opinion Filed September 27, 2023



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-22-00874-CV

**THE THEATRE OF LEGACY L.P. AND ANGELIKA PLANO HOLDINGS
LLC, Appellants**

V.

THE SHOPS AT LEGACY (RPAI) L.P., Appellee

**On Appeal from the 380th Judicial District Court
Collin County, Texas
Trial Court Cause No. 380-02958-2021**

MEMORANDUM OPINION

Before Justices Carlyle, Smith, and Kennedy
Opinion by Justice Smith

The trial court granted summary judgment in favor of appellee The Shops at Legacy (RPAI) L.P. on its claim against appellants The Theatre of Legacy and Angelika Plano Holdings LLC for breach of a commercial lease. In two issues, appellants contend that the trial court erred in (1) considering a receivables ledger offered without a proper foundation as summary judgment evidence, and (2) concluding there was no fact issue as to Shops' damages when the ledger and several notices of default "contain[ed] inconsistent figures." For the following reasons, we affirm the trial court's order.

Background

In 2003, The Cinema at Legacy L.L.C. entered into a written agreement with Shops' predecessor in interest to lease retail space at The Shops at Legacy, Plano, Texas (shopping center). The term of the lease was ten years. In 2004, Cinema assigned its interest in the lease to Theatre. In 2007, Shops' predecessor assigned its interest in the lease to Shops. In 2013, Theatre exercised a renewal of the lease for an additional five years, through June 2019. And, in December 2018, Theatre, through its general partner Angelika Plano Holdings LLC, exercised a renewal of the lease for an additional five years, through June 2024.

In July 2020, Shops and Theatre amended the lease to provide for a temporary deferral of rent due for April, May, June, and July 2020. Theatre was to repay the deferred rent in twelve installments starting in January 2021. Theatre, however, failed to pay the rent and other charges due under the lease and lease amendment. Notices of default were sent to Theatre, but the default was not cured.

Shops brought this action against Theatre and Angelika Plano Holdings LLC to recover the amounts due under the lease. Shops subsequently filed a summary judgment motion, asserting there were no genuine issues as to any material facts necessary to establish that appellants were liable for its breach of contract claim against them. In response, appellants argued that Shops failed to conclusively demonstrate the contractual damages due under the lease. The trial court entered an order granting the summary judgment motion and awarding Shops \$1,173,643.11 in

damages, \$4,500.00 in attorney's fees, and post-judgment interest. Appellants filed a motion for new trial, which was denied by operation of law. This appeal followed.

Standard of Review

We review a trial court's order granting summary judgment de novo; in doing so, we indulge every reasonable inference in favor of the nonmovant, resolve any doubts in favor of the nonmovant, and take as true all evidence favorable to the nonmovant. *See Cmty. Health Sys. Pro. Servs. Corp. v. Hansen*, 525 S.W.3d 671, 680 (Tex. 2017). Under the traditional summary-judgment standard, the movant has the burden to show there is no genuine issue of material fact and it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Vince Poscente Int'l, Inc. v. Compass Bank*, 460 S.W.3d 211, 213–14 (Tex. App.—Dallas 2015, no pet.). If the movant establishes its right to summary judgment as a matter of law, the burden shifts to the non-movant to present evidence raising a genuine issue of material fact to preclude summary judgment. *Id.* A genuine issue of material fact exists if the non-movant produces more than a scintilla of probative evidence to support the challenged element. *Ward v. Stanford*, 443 S.W.3d 334, 342 (Tex. App.—Dallas 2014, pet. denied).

We review the trial court's admission or exclusion of summary judgment evidence for an abuse of discretion. *Harris v. Showcase Chevrolet*, 231 S.W.3d 559, 561 (Tex. App.—Dallas 2007, no pet.); *Bay Area Healthcare Group, Ltd. v. McShane*, 239 S.W.3d 231, 234 (Tex. 2007) (“Evidentiary rulings are committed to

trial court's sound discretion."'). A trial court abuses its discretion when it acts without reference to guiding rules and principles. *U-Haul Int'l, Inc. v. Waldrip*, 380 S.W.3d 118, 132 (Tex. 2012). We uphold the trial court's evidentiary ruling if there is any legitimate basis for the ruling. *See Enbridge Pipelines (E. Tex.) L.P. v. Avinger Timber, LLC*, 386 S.W.3d 256, 264 (Tex. 2012) (quoting *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998)).

Evidence of Damages

To prevail on its breach of contract claim, Shops had to establish: (1) a valid contract existed between it and Theatre; (2) it tendered performance or was excused from doing so; (3) Theatre breached the terms of the contract; and (4) Shops sustained damages as a result of Theatre's breach. *See USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 501 n.21 (Tex. 2018); *Paragon Gen. Contractors, Inc. v. Larco Constr., Inc.*, 227 S.W.3d 876, 882 (Tex. App.—Dallas 2007, no pet.). Here, appellants challenge only whether Shops conclusively established the damages it sustained as a result of Theatre's breach of the lease.

In their first issue, appellants contend that the trial court erred in considering as summary judgment evidence a receivables ledger attached to the declaration of Justin Roche, the general manager of the shopping center and an authorized agent for Shops. Appellants complain the ledger was inadmissible hearsay because its header indicates that it was prepared by a third party, KRG Management LLC, and Shops offered it into evidence without a proper foundation. Specifically, appellants

assert that the ledger was inadmissible because Roche's declaration failed to address how he had knowledge of KRG Management LLC's record-keeping, failed to attest to having verified its accuracy, and did not otherwise indicate how it was trustworthy.¹

Hearsay is a statement, other than one made by the declarant while testifying at a trial or hearing, offered in evidence to prove the truth of the matter asserted. TEX. R. EVID. 801(d). Hearsay is inadmissible unless a rule or statute authorizes its admission. TEX. R. EVID. 802; *see Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 908 n.5 (Tex. 2004).

Otherwise inadmissible hearsay may be admitted into evidence if it meets the hearsay exception for business records. *See* TEX. R. EVID. 803(6). Under the exception, a business record may be admissible if its proponent demonstrates that: (1) the record was made and kept in the course of a regularly conducted business activity; (2) it was the regular practice of the business activity to create such records; (3) the record was created at or near the time of the event recorded; and (4) the record was created by, or from information transmitted by, a person with knowledge who was acting in the regular course of business. TEX. R. EVID. 803(6), 902(10); *see In re E.A.K.*, 192 S.W.3d 133, 141 (Tex. App.—Houston [14th Dist.] 2006, pet.

¹ Shops responds in part that appellants did not preserve this issue for appellate review because they did not obtain a ruling on their hearsay objection in the trial court. Although the record does not contain an explicit ruling on appellants' objection, we conclude that the trial court, in granting Shops' summary judgment motion, clearly implied that it was overruling the objection. *See FieldTurf USA, Inc. v. Pleasant Grove Indep. Sch. Dist.*, 642 S.W.3d 829, 837 (Tex. 2022) (summary judgment ruling can imply a ruling on objection to evidence, but only if the implication was clear).

denied). These prerequisites to admissibility may be provided in the form of an affidavit or unsworn declaration that complies with rule 902(10). TEX. R. EVID. 803(6)(D), 902(10).

A company's document can comprise the records of a second company if the second company determines the accuracy of the information generated by the first company. *Diaz v. Multi Serv. Tech. Sols. Corp.*, No. 05-17-00462-CV, 2018 WL 6521916, at *8 (Tex. App.—Dallas Dec. 12, 2018, no pet.) (mem. op.). And, documents received by a second company may constitute admissible business records upon proof that (1) the records were incorporated and kept in the course of the second company's business, (2) the second company typically relies upon the accuracy of the records' contents, and (3) the circumstances otherwise indicate the documents' trustworthiness.² *Nat'l Health Resources Corp. v. TBF Fin., LLC*, 429 S.W.3d 125, 130 (Tex. App.—Dallas 2014, no pet.); *Simien v. Unifund CCR Partners*, 321 S.W.3d 235, 240–41 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (op. on reh'g) (following three-step analysis to determine whether documents created by third-party business were admissible as business records when affiant did not state that he had knowledge of third-party business's recordkeeping practices).

In his declaration, Roche states, under penalty of perjury, that he is: (1) the general manager of the shopping center and an authorized agent for Shops; (2)

² Of course, a company also may seek admission of a document it received from a second company if the proponent of the document is qualified to testify as to the record keeping of the second company. *See Powell v. Vavro, McDonald, & Assoc., L.L.C.*, 136 S.W.3d 762, 765 (Tex. App.—Dallas 2004, no pet.).

authorized on behalf of Shops to make the declaration; (3) custodian of the records attached to the declaration; and (4) directly responsible for collecting the amounts of rent unpaid by Theatre. He averred that the records were Shops' records kept in the regular course of Shops' business; it was in the regular course of Shops' business for its representative with knowledge of the act, event and condition recorded to make the records or to transmit information thereof to be included in the record; and the record was made at or near the time or reasonably soon thereafter. Referring to the receivables ledger as showing the rent charges and amount due under the lease, he further averred that Shops had suffered damages for Theatre's breach of the lease and, as of December 1, 2021, Theatre owed Shops unpaid rent in the amount of \$1,173,643.11, with amounts continuing to accrue until the lease's June 2024 expiration.

We conclude the trial court reasonably could have determined that Roche's declaration satisfied the prerequisites for the ledger's admissibility as a business record. Roche's position and job responsibilities provide a basis for his personal knowledge of the relevant facts and establish how he learned of the facts. *See Scott v. U.S. Bank, Nat'l Ass'n*, No. 02-12-00230-CV, 2014 WL 3535724, at *3 (Tex. App.—Fort Worth July 17, 2014, no pet.) (mem. op). His declaration establishes that the ledger, made by a Shops representative, was incorporated and kept in the regular course of Shops' business. It also indicates that Roche, as custodian of Shops' records and by virtue of his direct responsibility for collecting payments

under the lease from Theatre, relied upon the ledger's accuracy. And, the trial court reasonably could have concluded that the circumstances indicated the ledger's trustworthiness. The ledger references the Theatre lease at the shopping center, and a review of the lease documents attached to Roche's declaration show that the charges reflected in the ledger are contemplated by the lease and lease amendment.

The primary concern with the admission of third-party business records is the records' reliability. *Simien*, 321 S.W.3d at 245. In this case, the declaration could, and perhaps should, have provided more detail to support Roche's reliance on the ledger and its trustworthiness. However, we conclude that the trial court did not abuse its discretion in overruling appellants' hearsay objection to the ledger. *See, e.g., Roper v. CitiMortgage, Inc.*, No. 03-11-00887-CV, 2013 WL 6465637, at *12 (Tex. App.—Austin Nov. 27, 2013, pet. denied) (mem. op.) (affiant's testimony that business incorporated third-party payment statements into its business and payment had not been made in accordance with note and deed of trust showed business relied on note's accuracy; references indicating note was part of same loan transaction as other documents showed its trustworthiness). Accordingly, we overrule appellant's first issue.

Fact Question on Damages

In their second issue, appellants contend the trial court erred in concluding that there were no genuine issues of fact regarding the amount of Shops' damages. We disagree.

Roche averred, and the ledger reflects, that Theatre owed Shops unpaid rent in the amount of \$1,173,643.11. To raise a fact issue on the amount owed under the lease, appellants rely on several notices of default that Theatre received between September 2020 and April 2021. Each notice advised Theatre of its failure to pay a certain amount due and owing under the lease and that failure to pay within five days would constitute an event of default. According to appellants, the amounts shown as due and owing on the notices do not match the balances that the ledger shows due on the same dates. For example, a notice of default dated September 21, 2020, recites that Theatre failed to pay “\$111,817.88 due and owing,” but the ledger reflects a balance of \$338,734.63.

Our review of the summary judgment evidence explains the discrepancies, a majority of which relate to deferred rent charges for the months of April through July 2020. The ledger, consistent with the terms of the parties’ lease amendment, shows that the deferred rent charges were due and payable as of August 2020. The notices of default, however, did not include those charges as amounts that Theatre failed to pay until the month in which each deferred rent repayment was due, but unpaid. The remaining discrepancies are: (1) September 2020 reconciliation charges totaling \$9,116.23 and a December 2020 reconciliation credit of \$10,233.42 that were not included in a notice of default until January 2021; and (2) a March 2021 direct recovery water escrow charge of \$888.00 that was not included in a notice of default until April 2021. Appellants do not dispute that Theatre owes Shops payment

for these charges or any of the other amounts shown on the ledger as unpaid. Accordingly, we conclude that appellants failed to raise a genuine issue of material fact as to the amount of Shops' damages. We overrule appellant's second issue.

Conclusion

We affirm the trial court's judgment.

/Craig Smith/

CRAIG SMITH
JUSTICE

220874F.P05



**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

THE THEATRE OF LEGACY L.P.
AND ANGELIKA PLANO
HOLDINGS LLC, Appellants

No. 05-22-00874-CV V.

THE SHOPS AT LEGACY (RPAI)
L.P., Appellee

On Appeal from the 380th Judicial
District Court, Collin County, Texas
Trial Court Cause No. 380-02958-
2021.

Opinion delivered by Justice Smith.
Justices Carlyle and Kennedy
participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee THE SHOPS AT LEGACY (RPAI) L.P. recover its costs of this appeal from appellants THE THEATRE OF LEGACY L.P. and ANGELIKA PLANO HOLDINGS LLC.

Judgment entered this 27th day of September 2023.