AFFIRM in Part, REVERSE in Part, and REMAND; Opinion Filed February 17, 2016.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-14-00810-CV

BENCHMARK BANK, Appellant/Cross-Appellee
V.
AMERICAN NATIONAL BANK OF TEXAS, Appellee/Cross-Appellant

On Appeal from the 429th Judicial District Court
Collin County, Texas
Trial Court Cause No. 429-00988-2010

MEMORANDUM OPINION

Before Justices Fillmore, Brown, and Richter[1]
Opinion by Justice Fillmore

Appellant/cross-appellee Benchmark Bank appeals the trial court's judgment in favor of appellee/cross-appellant American National Bank of Texas (ANBOT). Benchmark raises six issues on appeal. In three of those issues, Benchmark asserts the trial court erred by failing to give legal effect to an assignment by ANBOT to its subsidiary, American National Bank Special Assets, LLC (ANBSA); allowing ANBOT to bring suit against Benchmark to recover expenses ANBSA incurred; and subjecting Benchmark to liability for expenses ANBSA incurred. In its fourth, fifth, and sixth issues, Benchmark asserts the trial court's judgment creates an involuntary tenancy in common, but does not afford Benchmark the rights attendant to that involuntary relationship; the trial court erred by excluding portions of Benchmark's summary judgment

[1] The Honorable Martin Richter, Justice, Assigned.

evidence; and the trial court erred by granting summary judgment in favor of ANBOT on Benchmark's defenses and claims because genuine issues of material fact exist on those defenses and claims. By cross-appeal, ANBOT contends in a single issue that the trial court committed reversible error by granting summary judgment in favor of Benchmark on ANBOT's claim for costs, disbursements, and attorney's fees. We affirm the trial court's judgment in part, reverse the trial court's judgment in part, and remand this case to the trial court for further proceedings.

Factual Background

In order to secure additional financing for construction of a movie theater and restaurant and to obtain an IMAX® projection system and license, on July 19, 2006, Metro Cinema Colleyville, L.P., MC Colleyville Operations, L.P., and MC Colleyville Realty, L.P. (collectively Metro Cinema) entered into an Amended and Restated Loan Agreement (the Loan Agreement) with ANBOT, whereby ANBOT loaned Metro Cinema $5,400,000 (the Loan). The Loan terms were evidenced by several documents (collectively the Loan Documents): (1) an Amended and Restated Promissory Note; (2) an Amended and Restated Leasehold Deed of Trust, conveying to ANBOT an interest in construction project structures, the equipment and fixtures therein (including the IMAX® license), and Metro Cinema's leasehold of the land, which served as security for repayment of the Loan (the Collateral)[2]; and (3) the Loan Agreement. The obligation of Metro Cinema to repay the loan was also secured by a July 16, 2006 guaranty agreement by guarantor William E. Baldridge.

The Loan Documents required Metro Cinema to make monthly payments to ANBOT over a four-year period beginning on August 19, 2006. Metro Cinema's monthly installments for the first year were to be in the form of interest-only payments. On August 19, 2006, ANBOT

[2] According to ANBOT's summary judgment evidence, the Collateral consisted of "an eight screen theater including one screen with IMAX[®] technology (the Metro Cinema in Colleyville, Texas), the Indigo-Grill Restaurant, and equipment and other leases as well as all fixtures and inventory necessary for the operation of the cinema and restaurant," and "Collateral documents" "include an Amended and Restated Leasehold Deed of Trust, Assignment of Leases and Rents, Security Agreement and Fixture Filing."

advanced funds to cover Metro Cinema's first interest-only payment due under the Loan. On September 18, 2006, Benchmark entered into an agreement with ANBOT whereby Benchmark purchased for $1,900,000 a 35.1851852 percent participating interest in ANBOT's loan to Metro Cinema and collateral in which ANBOT was granted a security interest under the terms of the Loan Documents (the Participation Agreement). On September 19, 2006 and October 19, 2006, ANBOT advanced funds to cover Metro Cinema's second and third interest-only payments due under the Loan.

On July 23, 2007, ANBOT notified Metro Cinema it was in default under the Loan Documents and, on August 6, 2007, ANBOT accelerated the Promissory Note and initiated foreclosure proceedings. At a nonjudicial foreclosure sale on February 5, 2008, ANBOT paid $4,600,000 to acquire Metro Cinema's ground lease and take title to the cinema and restaurant. After acquiring the Collateral, ANBOT created ANBSA, a Texas limited liability company and wholly owned subsidiary of ANBOT. On June 16, 2008, through an "Assignment of Deed of Ground Lease and Retail Lease," ANBOT assigned its leasehold interests and the IMAX® license to ANBSA, and ANBOT executed an assignment of its rights, title and interest in and to the Participation Agreement to ANBSA. On February 9, 2012, ANBOT and ANBSA executed a mutual rescission of the assignment by ANBOT of the Participation Agreement to ANBSA.

ANBOT demanded that Benchmark pay its proportionate share of expenses incurred in connection with ANBOT's foreclosure, attempts to sell the Collateral, and continued operation of the Collateral. ANBOT asserted that as of April 30, 2012, those expenses were $4,416,189.43, and Benchmark's proportionate share of the expenses was $1,553,844.42.

Procedural Background

In March 2010, Benchmark filed suit against ANBOT alleging breach of the Participation Agreement and seeking declaratory relief regarding the parties' rights and obligations under the

Participation Agreement. ANBOT and ANBSA filed counterclaims seeking a declaratory judgment that the Participation Agreement is in full force and effect and Benchmark is not excused from compliance with its terms, and asserting Benchmark breached the Participation Agreement by failing to pay its pro rata portion of fees and expenses incurred in ANBOT's efforts to preserve the Collateral. ANBOT and ANBSA also sought attorney's fees pursuant to the Participation Agreement and chapters 37 and 38 of the civil practice and remedies code.

In February 2012, ANBSA filed a petition in intervention, asserting that as a result of the assignment of ANBOT's leasehold interests, it holds the Collateral and is "an interested party as to Benchmark's attempts to avoid its legal obligations to preserve and maintain the Collateral." That pleading alleges that ANBOT and ANBSA "have elected to operate the cinema to avoid forfeiture of the Collateral," and "[e]xpenses have accrued and continue to accrue in connection with the foreclosure and attempts to sell the Collateral, and for the continued operation of the cinema and the Collateral." ANBSA asserts Benchmark's claims "impact and affect ANBSA's right, title and interest in the Collateral."

Benchmark filed a motion for partial summary judgment on ANBOT's and ANBSA's counterclaims. The record contains no order on that motion for partial summary judgment. Benchmark filed second no-evidence motions for summary judgment on ANBOT's and ANBSA's counterclaims. The trial court denied those no-evidence motions for summary judgment.

ANBOT filed a motion for summary judgment and ANBOT and ANBSA filed a supplement to that motion for summary judgment. The record contains no order on that motion for summary judgment or ANBOT and ANBSA's supplement to that motion for summary judgment. ANBOT and ANBSA filed a second motion for summary judgment on Benchmark's breach of contract and declaratory relief claims and on their request for a declaration in their

favor that the Participation Agreement is in full force and effect and that Benchmark is not legally excused from compliance with its terms. ANBOT and ANBSA also sought recovery of attorney's fees pursuant to the Participation Agreement and under chapters 37 and 38 of the civil practice and remedies code. ANBOT and ANBSA raised objections to summary judgment evidence filed by Benchmark in response to their second motion for summary judgment.

Benchmark's live pleading, filed after ANBOT and ANBSA's second motion for summary judgment was filed but before it was ruled upon, asserts claims against ANBOT for breach of contract, conversion, and fraudulent inducement. In that pleading, Benchmark seeks recovery of the $1,900,000 it expended in purchasing its interest under the Participation Agreement, its attorney's fees, and exemplary damages.

The trial court granted ANBOT and ANBSA's second motion for summary judgment, and sustained ANBOT and ANBSA's objections to Benchmark's summary judgment evidence.[3] In that order, the trial court: (1) declared the Participation Agreement to be in full force and effect; (2) declared Benchmark is in default of its obligations under the Participation Agreement; (3) denied Benchmark's claims for affirmative relief against ANBOT; (4) ordered Benchmark is liable to ANBOT and ANBSA in the amount of $1,553,844.43, plus pre-judgment interest; (5) ordered Benchmark is liable under the Participation Agreement for 35.1851852 percent of "all ongoing expenses" incurred by ANBOT and ANBSA in connection with the preservation of the Collateral and operation of Metro Cinema; (6) ordered Benchmark is liable for ANBOT's attorney's fees incurred in the trial court and on appeal; (7) awarded ANBOT and ANBSA post-judgment interest; and (8) assessed costs against Benchmark.

[3] The trial court's final judgment states the trial court entered an "Amended Order" granting ANBOT and ANBSA's Second Motion for Summary Judgment. However, the record contains only a December 12, 2012 order granting ANBOT and ANBSA's Second Motion for Summary Judgment and no amended order.

Thereafter, Benchmark filed a motion for summary judgment on ANBOT's claim for attorney's fees. The trial court signed a final judgment in which it ordered ANBOT is not entitled to recovery of its costs, disbursements, or attorney's fees under paragraph 7(g) of the Participation Agreement. The trial court's final judgment: (1) sustained ANBOT and ANBSA's objections to Benchmark's summary judgment evidence; (2) declared the Participation Agreement between ANBOT and Benchmark to be in full force and effect; (3) declared Benchmark breached its obligations under the Participation Agreement; (4) declared Benchmark's failure to comply with the Participation Agreement is not excused; (5) denied Benchmark's causes of action against ANBOT as barred under the terms of the Participation Agreement; (6) awarded ANBOT the sum of $1,553,844.43, plus pre-judgment interest; (7) ordered Benchmark is liable for 35.1851852 percent of "all ongoing expenses" incurred by ANBOT in connection with the preservation of the Collateral; and (8) awarded post-judgment interest to ANBOT.

Benchmark's motion for new trial or for modification of the judgment was denied. Benchmark appealed the trial court's final judgment, and ANBOT cross-appealed the trial court's denial of its costs, disbursements, and attorney's fees under paragraph 7(g) of the Participation Agreement.[4]

ANBOT's Expenses

In its first three issues, Benchmark asserts the trial court erred by failing to give legal effect to an assignment by ANBOT of the Participation Agreement to its subsidiary, ANBSA; "authorizing" ANBOT to bring suit against Benchmark to recover expenses ANBSA incurred; and subjecting Benchmark to liability for expenses ANBSA incurred. Benchmark contends the

[4] Although the trial court's order on ANBOT and ANBSA's second motion for summary judgment ordered Benchmark is liable to ANBOT and ANBSA for $1,553,844.43, the final judgment contains no award in favor of ANBSA, and ANBSA is not a party to this appeal.

trial court erred by granting summary judgment and final judgment in favor of ANBOT for expenses incurred by ANBSA because ANBOT lacks standing to assert claims for expenses incurred pursuant to the Participation Agreement during the period June 16, 2008 to February 9, 2012, when ANBOT's rights, title, and interest in the Participation Agreement were assigned to ANBSA. Because these issues all relate to the judgment granted ANBOT for expenses allegedly incurred by ANBSA, we consider these issues together.

We review the grant of summary judgment de novo. *Masterson v. Diocese of Nw. Tex.*, 422 S.W.3d 594, 607 (Tex. 2013), *cert. denied*, 135 S. Ct. 435 (2014). The standards of review for traditional and no-evidence summary judgments are well known. *See Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985). With respect to a traditional motion for summary judgment, the movant has the burden to demonstrate that no genuine issue of material fact exists and judgment should be rendered as a matter of law. TEX. R. CIV. P. 166a(c); *Nixon*, 690 S.W.2d at 548–49. We review a no-evidence summary judgment under the same legal sufficiency standard used to review a directed verdict. TEX. R. CIV. P. 166a(i); *Gish*, 286 S.W.3d at 310. To defeat a no-evidence summary judgment, the nonmovant is required to produce evidence that raises a genuine issue of material fact on each challenged element of its claim. *Gish*, 286 S.W.3d at 310; *see also* TEX. R. CIV. P. 166a(i). In reviewing both traditional and no-evidence summary judgments, we consider the evidence in the light most favorable to the nonmovant. *Smith v. O'Donnell*, 288 S.W.3d 417, 424 (Tex. 2009); *20801, Inc. v. Parker*, 249 S.W.3d 392, 399 (Tex. 2008). We credit evidence favorable to the nonmovant if a reasonable fact-finder could, and we disregard evidence contrary to the nonmovant unless a reasonable fact-finder could not. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009); *Gish*, 286 S.W.3d at 310.

The Participation Agreement between ANBOT and Benchmark was entered into on September 18, 2006. On July 23, 2007, ANBOT notified Metro Cinema it was in default under the Loan Documents and, on August 6, 2007, ANBOT accelerated the Note and initiated foreclosure proceedings, purchasing the Collateral for the amount of $4,600,000 at a nonjudicial foreclosure sale on February 5, 2008. ANBOT assigned its leasehold interests and the IMAX® license to ANBSA in June 2008, and effective June 16, 2008, ANBOT executed an assignment of the Participation Agreement to ANBSA, whereby ANBOT expressly assigned its rights, title, and interest in and to the Participation Agreement to ANBSA. On February 9, 2012, ANBOT and ANBSA executed a mutual rescission of the assignment by ANBOT of the Participation Agreement to ANBSA. The Participation Agreement provides that Benchmark shall reimburse ANBOT on demand in accordance with its participating interest for all expenses, including attorney's fees, incurred by ANBOT in connection with collection of Loan principal and interest and for all advances made by ANBOT in its discretion for taxes, insurance premiums and other items deemed by it to be necessary to preserve any Collateral.[5] ANBOT demanded repayment by Benchmark of its proportionate share of expenses incurred in connection with foreclosure, attempts to sell the Collateral, and continued maintenance and operation of the Collateral. ANBOT asserted that as of April 30, 2012, those expenses were $4,416,189.43, and Benchmark's proportionate share of the expenses was $1,553,844.42. The trial court entered

[5] Paragraph 4(b) of the Participation Agreement provides:

> Reimbursement and Indemnification. [Benchmark] shall reimburse [ANBOT] on demand in accordance with its then applicable Participating Interest for all expenses, including attorney's fees, incurred by [ANBOT] in connection with the making, restructuring, renegotiating or collection of the Loan and for all advances made by [ANBOT] in its discretion for taxes, insurance premiums and other items deemed by [ANBOT] to be necessary to preserve any Collateral. [Benchmark] agrees that it shall indemnify and hold [ANBOT] harmless in accordance with its then applicable Participating Interest from any and all costs, expenses (including attorney's fees and disbursements), claims, damages, actions, suits, or liabilities specifically including, but expressly not limited to, those arising under any federal, state, or local statute, ordinance, rule, or regulation, that [ANBOT] may suffer or incur in connection with or arising out of the Loan Documents, any transactions contemplated by the Loan Documents, any monitoring, restructuring or collection of the Loan, or any action taken or not taken by [ANBOT] relating in any manner to the Loan or Loan Documents except such as result from [ANBOT]'s own gross negligence or willful misconduct. . . .

summary judgment and final judgment in favor of ANBOT, ordering Benchmark is liable to ANBOT for the sum of $1,553,844.43.

The summary judgment evidence establishes that ANBSA, as assignee, held the Collateral described in the Metro Cinema Loan Documents from June 16, 2008 to February 9, 2012. The summary judgment evidence further establishes ANBSA "has its own [demand deposit] operating account into which revenues are deposited and expenses paid"; ANBOT provides funds "needed by" ANBSA for the operation and maintenance of the Collateral; and "ANBOT's financial statements and books reflect all losses related to the operation of Metro Cinema and its related Collateral," and the "net income/losses for ANBSA are reflected in ANBOT's financial statements and ANBOT's [sic] absorbs all losses suffered in connection with the operation of the Metro Cinema and its related Collateral." Dan Trollinger, Senior Vice President of ANBOT and Treasurer of ANBSA, testified that in connection with ANBSA's operation of Metro Cinema, ANBSA paid the rent, property taxes, personnel taxes, insurance, and all utilities, including water and electricity, and that checks for payment of the expenses for operation of Metro Cinema were written on ANBSA's bank account, since ANBSA "owns" the Collateral. Trollinger testified he wrote those ANBSA checks as an employee of ANBSA.[6]

Because ANBSA owned the Collateral and paid expenses incurred for maintenance and operation of the Collateral during the period June 16, 2008 to February 9, 2012, claims against Benchmark for contribution to such expenses during that period were claims of ANBSA (as assignee of ANBOT's rights and obligations arising out of the Participation Agreement), not claims of ANBOT. *See Docudata Records Mgmt. Servs., Inc. v. Wieser*, 966 S.W.2d 192, 197

[6] Excerpts of Trollinger's deposition testimony are attached to the affidavit of Michael K. Haines, which is attached to Benchmark's response to ANBOT and ANBSA's second motion for summary judgment. As is more fully discussed below with regard to ANBOT's objections to Benchmark's summary judgment evidence, ANBOT did not object to the deposition excerpts attached to Haines's affidavit, and ANBOT did not take the position that excerpts of deposition transcripts are incompetent summary judgment evidence. We also note that excerpts of Trollinger's deposition containing testimony regarding payment by ANBSA of expenses relating to the operation of Metro Cinema (including rent, property taxes, personnel taxes, insurance, and utilities) were also attached to ANBOT and ANBSA's Response to Benchmark's Motion to Strike ANBSA's Counterclaim.

(Tex. App.—Houston [1st Dist.] 1998, pet. denied) "[A] parent corporation and its subsidiaries are distinct legal entities."); *Pulaski Bank & Trust Co. v. Tex. Am. Bank, N.A.*, 759 S.W.2d 723, 731 (Tex. App.—Dallas 1998, writ denied) ("Under Texas law, the separate identity of corporations will be observed by the courts, even in instances where one may dominate or control the other, or may even treat it as a mere department, instrumentality or agency of the other."). However, the summary judgment evidence regarding the $4,416,189.43 expenses incurred in connection with foreclosure, attempts to sell the Collateral, and continued maintenance and operation of the Collateral, and Benchmark's purported $1,553,844.42 proportionate share "thru [sic] April 30, 2012," does not segregate the amount of expenses incurred by ANBOT before June 16, 2008, or after February 8, 2012. Here, the trial court's judgment in favor of ANBOT is in the total amount demanded, despite the fact ANBSA owned the Collateral and incurred and paid maintenance and operational expenses related to the Collateral from June 16, 2008 to February 9, 2012.

A genuine issue of material fact exists regarding the amount of expenses incurred "in connection with foreclosure, attempts to sell the Collateral, and continued operation of the cinema and the Collateral" as sought by ANBOT from Benchmark under the Participation Agreement. Therefore, we reverse the trial court's judgment awarding ANBOT the sum of $1,553,844.43. *Nixon*, 690 S.W.2d at 548–49. Accordingly, we resolve Benchmark's first, second, and third issues in its favor.

Tenants in Common

In its fourth issue, Benchmark contends the trial court's judgment erroneously permits ANBOT to demand that Benchmark continue paying its proportionate share of all costs of continued maintenance and operation of the Collateral, thus creating an involuntary tenancy in common, without affording Benchmark rights attendant to such an involuntary relationship. The

trial court denied Benchmark's motion for new trial on Benchmark's rights as a "co-tenant" with regard to the Collateral, in which Benchmark asserted the trial court's judgment "enforces Benchmark's pre-foreclosure obligations, without acknowledging any rights and benefits of the (compulsory) cotenancy that ANBOT has elected." A trial court possesses broad discretion in ruling on a motion for new trial, *Ward v. Hawkins*, 418 S.W.3d 815, 824 (Tex. App.—Dallas 2013, no pet.), and we review the trial court's denial of a motion for new trial for an abuse of discretion. *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 813 (Tex. 2010).

On appeal, Benchmark argues the trial court's judgment, which provides Benchmark is liable under the Participation Agreement for 35.185185 percent of all ongoing expenses incurred by ANBOT in connection with the preservation of the Collateral, permits ANBOT to demand that Benchmark continue paying expenses relating to operation and maintenance of the Collateral "in perpetuity." According to Benchmark, by foreclosing and assuming operational control over the Collateral, ANBOT "removed Metro Cinema from the equation, shifting *both* ANBOT and Benchmark into Metro Cinema's shoes as tenants in common." *See Frazier v. Donovan*, 420 S.W.3d 463, 467 (Tex. App.—Tyler 2014, no pet.) ("A 'tenancy in common' is a tenancy by two or more persons, in equal or unequal undivided shares, where each person has an equal right to possess the whole property, but with no right of survivorship."). ANBOT argues on appeal that by raising its tenancy-in-common claim in a motion for new trial, Benchmark attempted to assert a new cause of action against it. Benchmark responded to that argument by explaining it was not asserting a new cause of action, but was, instead, complaining about the purported liability for ongoing expenses incurred in connection with the preservation of the Collateral that the trial court's final judgment imposes on Benchmark.

ANBOT's appellate brief indicates the Collateral was sold on January 9, 2014, and at oral submission, Benchmark stated that after the final judgment was signed, ANBOT sold the

Collateral to a third-party. Accordingly, we conclude Benchmark's fourth issue is moot, as Benchmark has no liability to ANBOT "in perpetuity" for ongoing expenses incurred in connection with preservation of Collateral that admittedly has been sold. *See Seals v. City of Dallas*, 249 S.W.3d 750, 754–55 (Tex. App.—Dallas 2008, no pet.) ("An issue is moot if either a party seeks a judgment on a controversy that does not really exist or a party seeks a judgment which, when rendered for any reason, cannot have any practical legal effect on a then-existing controversy"; when issue becomes moot, we dismiss that issue).[7]

Exclusion of Evidence

ANBOT and ANBSA objected to Benchmark's evidence in support of its response in opposition to ANBOT's and ANBSA's second motion for summary judgment. In its final judgment, the trial court sustained ANBOT's objections to Benchmark's summary judgment evidence. In its fifth issue, Benchmark contends the trial court erred by refusing to consider portions of Benchmark's summary judgment evidence.

Standard of Review

The admission or exclusion of evidence is reviewed under an abuse of discretion standard. *See Enbridge Pipelines (E. Tex.) L.P. v. Avinger Timber L.L.C.*, 386 S.W.3d 256, 262 (Tex. 2012); *Harris v. Showcase Chevrolet*, 231 S.W.3d 559, 561 (Tex. App.—Dallas 2007, no pet.) (we review trial court's admission or exclusion of summary judgment evidence under abuse of discretion standard). A trial court abuses its discretion when it acts arbitrarily or unreasonably, that is, when it acts without reference to any guiding rules or principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985); *Medicus, Ins. Co. v. Todd*, 400 S.W.3d 670, 681 (Tex. App.—Dallas 2013, no pet.) (citing *Downer*). For the exclusion of

[7] Accordingly, it is unnecessary for us to address whether Benchmark's "tenancy in common" claim may properly be raised for the first time in a motion for new trial.

evidence to constitute reversible error, the complaining party must show that the trial court committed error and that the error probably caused the rendition of an improper judgment. *See State v. Cent. Expressway Sign Assocs.*, 302 S.W.3d 866, 870 (Tex. 2009).

Benchmark's Summary Judgment Evidence

Benchmark's summary judgment evidence in response to ANBOT and ANBSA's second motion for summary judgment consists of the affidavit of Benchmark's President, Bill G. Brewer, and the affidavit of Benchmark's attorney, Michael K. Haines, with attached documents. The following documents are attached to Haines's affidavit: the Amended and Restated Promissory Note; the Amended and Restated Leasehold Deed of Trust, the Assignment of Leases and Rents, the Security Agreement and Fixture Filing; the Amended and Restated Loan Agreement; the Guaranty; the Participation Agreement; the Trustee's Deed; the Assignment of Deed of Ground Lease and Retail Lease; the Assignment of Participation Agreement; the Advance Requests for Metro Cinema's August 19, 2006, September 19, 2006, and October 19, 2006 interest-only payments; the July 23, 2007 Notice of Default to Metro Cinema; and excerpts of deposition testimony of Robert R. Messer and Dan Trollinger.

Affidavit of Michael K. Haines

In the trial court, ANBOT and ANBSA objected to Section VIII of Benchmark's response in opposition to their second motion for summary judgment and the Haines's affidavit "to the extent the Affidavit and the arguments set forth in that section [of the response] are attempted to be used to interpret legal documents and provide conclusory, irrelevant and inadmissible 'testimony' as to the meaning of legal documents [sic] the imposition of duties upon ANBOT." We do not construe the language in the trial court's final judgment sustaining ANBOT's objections to Benchmark's summary judgment evidence as sustaining an objection to, or striking, any portion of Section VIII of Benchmark's response in opposition to ANBOT and

ANBSA's second motion for summary judgment. "Generally, pleadings are not competent evidence, even if sworn or verified." *Laidlaw Waste Sys. (Dallas), Inc. v. City of Wilmer*, 904 S.W.2d 656, 660 (Tex. 1995). Therefore, any averments contained in pleadings are not proper summary judgment evidence and will not sustain a summary judgment. *Cedyco Corp. v. Whitehead*, 253 S.W.3d 877, 880 (Tex. App.—Beaumont 2007, pet. denied). *See Madeksho v. Abraham, Watkins, Nichols & Friend*, 57 S.W.3d 448, 455 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (both motion for summary judgment and response to motion are pleadings; conclusory statements in response do not constitute summary judgment proof).

Haines's affidavit contains no affirmative statements interpreting the documents attached to his affidavit. Rather, the affidavit consists solely of statements identifying the documents. ANBOT and ANBSA did not object in the trial court to the documents attached to Haines's affidavit or assert the documents are incompetent summary judgment evidence. Accordingly, we do not construe the language in the trial court's final judgment sustaining ANBOT's objections to Benchmark's summary judgment evidence as sustaining an objection to, or striking, the documents attached to Haines's affidavit. Although ANBOT argues on appeal that none of the documents attached to Haines's affidavit are self-authenticating, again there was no trial court objection to the documents. Further, the parties have raised no dispute regarding the documents underlying the Loan or contractual obligations arising under the Participation Agreement, and the parties repeatedly reference the majority of the documents attached to Haines's affidavit throughout their pleadings. With regard to the excerpts of deposition transcripts attached to Haines's affidavit, deposition transcripts may be considered in summary judgment proceedings. *See Wilson v. Burford*, 904 S.W.2d 628, 628 (Tex. 1995) (evidence that may be considered in granting summary judgment includes deposition transcripts referenced or set forth in the motion or response); *Neely v. Comm'n for Lawyer Discipline*, 302 S.W.3d 331, 344 n.14 (Tex. App.—

Houston [14th Dist.] 2009, pet. denied) ("Deposition transcripts . . . need no authentication and constitute proper summary judgment evidence."). We also note that three of the five pages of the transcript of Trollinger's deposition attached to Haines's affidavit were attached by ANBOT and ANBSA to their response to Benchmark's motion to strike ANBSA's counterclaim.

We conclude the trial court did not sustain an objection to, and accordingly did not strike, the documents attached to Haines's affidavit, as no such objection was raised by ANBOT and ANBSA. With regard to Section VIII of Benchmark's response in opposition to ANBOT and ANBSA's second motion for summary judgment, to which ANBOT and ANBSA objected as containing argument constituting "testimony," we conclude the argument in the response is not, and does not purport to be, summary judgment evidence. *Madeksho,* 57 S.W.3d at 455. Further, the record contains no indication the trial court struck this section of Benchmark's response to ANBOT and ANBSA's second motion for summary judgment.

Affidavit of Bill G. Brewer

ANBOT also objected to Brewer's affidavit as containing irrelevant and conclusory statements and incompetent summary judgment evidence. ANBOT objected to, and moved to strike, paragraphs 3 and 4 of the affidavit because they purportedly contradicted Brewer's prior deposition testimony. ANBOT also objected to, and moved to strike, paragraphs 4, 5, 6, 7, and 8 of Brewer's affidavit as containing irrelevant and inadmissible legal conclusions and unsupported conclusory statements.

ANBOT objected to paragraph 3 of Brewer's affidavit as purportedly contradictory to deposition testimony previously given by Brewer in which he admitted that the interest/debt reserve account held to pay interest on the Loan was fully disclosed to Benchmark. Therefore, ANBOT contends this contradiction renders that attestation irrelevant, incompetent, and inadmissible. Paragraph 3 of Brewer's affidavit provides:

> 3. [The records of Benchmark concerning the Participation Agreement] show that Benchmark was never provided any e-mail notice of any advances requested by [Metro Cinema] as required by the Participation Agreement. That [sic] [Benchmark] was never advised prior to this lawsuit that advances were made by ANBOT for the payment of [Metro Cinema]'s interest payments in August, September and October of 2006. Had Benchmark been aware that such advances were made before the execution of the Participation Agreement, it would not have entered into the Participation Agreement and would not have advanced payment to ANBOT on September 22, 2006 after the September advance.

Generally, a deposition does not have controlling effect over an affidavit in determining whether a motion for summary judgment should be granted. *See Randall v. Dallas Power & Light Co.*, 752 S.W.2d 4, 5 (Tex. 1988); *Shaw v. Maddox Metal Works, Inc.*, 73 S.W.3d 472, 478 (Tex. App.—Dallas 2002, no pet.). Thus, when a deposition and an affidavit filed by the same party in opposition to a motion for summary judgment conflict, a fact issue is presented that will preclude summary judgment. *Randall*, 752 S.W.2d at 5. However, ANBOT apparently contends the purported conflict between Brewer's deposition testimony and his affidavit are so disparate as to amount to nothing more than a "sham" fact issue. *See Farroux v. Denny's Rests., Inc.*, 962 S.W.2d 108, 111 (Tex. App.—Houston [1st Dist.] 1997, no pet.)("[a] party cannot file an affidavit to contradict his own deposition testimony without any explanation for the change in the testimony, for the purpose of creating a fact issue to avoid summary judgment"); *Johnston v. Kruse*, 261 S.W.3d 895, 901–902 (Tex. App.—Dallas 2008, no pet.). ANBOT asserts statements in Brewer's affidavit regarding lack of notice to Benchmark of loan interest advances to Metro Cinema contradict Brewer's deposition testimony that Benchmark was aware of an interest/reserve account to pay interest on the Loan. The statements in paragraph 3 of Brewer's affidavit regarding lack of notice to Benchmark of loan interest advances are not so contradictory to a purported acknowledgment during Brewer's deposition that an interest/reserve account existed, that Brewer's statements in paragraph 3 of his affidavit should be disregarded. We

conclude the trial court abused its discretion in sustaining ANBOT's objection to paragraph 3 of Brewer's affidavit.

ANBOT objected to paragraph 4 of Brewer's affidavit as purportedly contradictory to his deposition testimony in which he admitted Benchmark had verbal notice of defaults under the Loan by Metro Cinema. Paragraph 4 of Brewer's affidavit provides:

> 4. [The records of Benchmark concerning the Participation Agreement] also show that Benchmark was never notified of ANBOT's foreclosure of the collateral securing the Metro Cinema loan. Benchmark was never advised by ANBOT of the foreclosure bid or sales price, never provided any accounting or pro rata distribution after the foreclosure and was never notified of ANBOT's assignment of the leasehold which secured the Loan. Benchmark was never notified of the demand and notice of default letter dated July 23, 2007 sent to [Metro Cinema] on behalf of ANBOT. Benchmark was never notified of any defaults of [Metro Cinema] with its landlord or defaults under the Loan Documents as a result of liens and lawsuits filed against the [Metro Cinema]. Benchmark was never provided any information in the possession of ANBOT concerning the continued creditworthiness of [Metro Cinema] or Guarantor [Baldridge]. Benchmark was never notified of defaults nor notified of enforcement actions of ANBOT as provided in the Participation Agreement. Benchmark was not notified of the lawsuit filed by ANBOT against [Metro Cinema] and [Baldridge] nor was Benchmark notified of the dismissal of the suit and abandonment of collection efforts thereby forgiving and waiving [Metro Cinema]'s and Guarantor's debts.

In his deposition, Brewer stated he was told the Loan was past due and the Loan had been transferred to the collection department of ANBOT, and the deposition questioning indicates Brewer could not have been aware of this prior to July 2007. ANBOT apparently contends the purported conflict between Brewer's deposition testimony and his affidavit are so disparate as to amount to nothing more than a "sham" fact issue. *See Farroux*, 962 S.W.2d at 111; *Johnston*, 261 S.W.3d at 901–902. But even if Brewer at some point received verbal notice of defaults under the loan, that fact does not present a direct conflict with the statement in paragraph 4 of his affidavit that Benchmark did not receive the form of notice of default required by the Participation Agreement. Further, the purported conflict asserted by ANBOT between Brewer's deposition testimony and paragraph 4 of his affidavit does not relate to the statements in

Brewer's affidavit on subjects other than notice of default under the Loan. We conclude the statements in paragraph 4 of Brewer's affidavit are not so contradictory to his deposition testimony that he was aware at some point that the Loan had been moved to ANBOT's collection department, that Brewer's statements in paragraph 4 of his affidavit should be disregarded.

ANBOT further objected that paragraph 4 of Brewer's affidavit contained purportedly conclusory and irrelevant statements. In paragraph 4, Brewer references specific matters as to which he claimed Benchmark did not receive notice (foreclosure of the collateral securing the Loan, ANBOT's foreclosure bid, accounting after the foreclosure, assignment of the leasehold securing the Loan, the July 23, 2007 demand and notice letter, defaults of Metro Cinema with its landlord or as a result of liens and lawsuits filed against Metro Cinema, information concerning continued creditworthiness of Metro Cinema or the guarantor, enforcement actions by ANBOT, and a lawsuit filed by ANBOT against Metro Cinema and the guarantor of the Loan or dismissal of that lawsuit). Conclusory statements in affidavits are not proper summary judgment proof if there are no facts to support the conclusions. *Dolcefino v. Randolph*, 19 S.W.3d 906, 930 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). On the other hand, logical conclusions are not improperly conclusory if they are based on underlying facts stated in the affidavit or its attachments. *Lenoir v. Marino*, 469 S.W.3d 669, 686-87 (Tex. App—Houston [1st Dist.] 2015, pet. filed) (op. on reh'g). We disagree Brewer's statements in paragraph 4 of his affidavit are conclusory; those statements assert facts concerning lack of notice to Benchmark of various events related to default under the Loan and foreclosure of the Collateral.

Further, we disagree with ANBOT's assertion the statements in paragraph 4 of Brewer's affidavit are irrelevant to ANBOT and ANBSA's second motion for summary judgment. In their second motion for summary judgment, ANBOT and ANBSA sought a summary judgment on Benchmark's breach of contract and declaratory relief claims and on their request for a

declaration in their favor that the Participation Agreement is in full force and effect and that Benchmark is not legally excused from compliance with its terms. Here, both Benchmark and ANBOT moved for summary judgment; the trial court granted ANBOT's motion with respect to Benchmark's breach of contract and declaratory relief claims and denied Benchmark's motion. When both parties move for summary judgment and the trial court grants one motion and denies the other, we review the summary judgment evidence presented by both sides and determine all questions presented. *Fielding*, 289 S.W.3d at 848; *Davis v. Texas Mut. Ins. Co.*, 443 S.W.3d 260 (Tex. App.—Dallas 2014, pet. denied). The statements in paragraph 4 of Brewer's affidavit are relevant to Benchmark's claims for affirmative relief addressed in its motion for summary judgment, to ANBOT and ANBSA's second motion for summary judgment on Benchmark's breach of contract claim, and to the declaratory relief sought in ANBOT and ANBSA's second motion for summary judgment. *See Fielding*, 289 S.W.3d at 848. We conclude the trial court abused its discretion in sustaining ANBOT's objection to paragraph 4 of Brewer's affidavit.

ANBOT objected to paragraph 5 of Brewer's affidavit as containing inadmissible legal conclusions and unsupported conclusory statements and asserted the "statements therein" are "irrelevant to any issue of material fact in ANBOT and ANBSA's motions for summary judgment." In paragraph 5, Brewer attested:

> 5. Benchmark did not consent to the assignment of servicing of the loan to any third party but is aware that such assignment was made in violation of the Participation Agreement. Benchmark did not consent to ANBOT's waiver of any payment defaults set forth in the Loan Agreement and is aware of such defaults and the waiver and concealment of such defaults from Benchmark. Benchmark was never told that the escrow accounts represented to be funded with [Metro Cinema]'s money on deposit were never established and instead ANBOT funded advances to [Metro Cinema].

We disagree Brewer's statements in paragraph 5 of his affidavit are conclusory; those statements assert facts concerning lack of Benchmark consent to ANBOT's assignment of loan servicing responsibilities to ANBSA, lack of Benchmark consent to ANBOT's waiver of Loan repayment

defaults, lack of notice to Benchmark that escrow accounts related to the Loan had not been funded, and lack of notice to Benchmark that interest payment advances had been made by ANBOT on behalf of Metro Cinema. Further, we disagree with ANBOT's assertion those statements are irrelevant to ANBOT and ANBSA's second motion for summary judgment. In their second motion for summary judgment, ANBOT and ANBSA sought summary judgment on Benchmark's breach of contract and declaratory relief claims and on their request for a declaration in their favor that the Participation Agreement is in full force and effect and that Benchmark is not legally excused from compliance with its terms. Brewer's statements are relevant to Benchmark's claims for affirmative relief addressed in its motion for summary judgment, to ANBOT and ANBSA's second motion for summary judgment on Benchmark's breach of contract claim, and to declaratory relief sought in ANBOT and ANBSA's second motion for summary judgment. *See Fielding*, 289 S.W.3d at 848. We conclude the trial court abused its discretion in sustaining ANBOT's objection to paragraph 5 of Brewer's affidavit.

ANBOT objected to paragraph 6 of Brewer's affidavit as containing inadmissible legal conclusions and unsupported statements and as "irrelevant to any issue of material fact in ANBOT and ANBSA's motions for summary judgment." ANBOT asserted the terms of the Participation Agreement control the parties' rights, duties and obligations, and Brewer's statements in paragraph 6 contradict those rights, duties and obligations and are irrelevant to enforcement of the terms of the Participation Agreement. In paragraph 6, Brewer attested:

> 6. Benchmark does not owe any money to ANBOT for money it has advanced as a volunteer to it's [sic] third party assignee. Benchmark is owed the repayment of it's [sic] investment in the Participation Agreement with ANBOT as the assignment of the leasehold to a third party assignee has taken all right, title and interest in such leasehold from Benchmark without any accounting or compensation.

Brewer's statements in paragraph 6 declare Benchmark is not liable to ANBOT for funds voluntarily advanced to ANBSA and that ANBOT is liable to Benchmark for repayment of

Benchmark's investment because ANBOT assigned the leasehold to ANBSA, effectively taking Benchmark's interest in the leasehold without accounting or compensation. These are conclusory statements concerning liability allegedly arising out of provisions of the Participation Agreement and are not proper summary judgment proof. *See Dolcefino*, 19 S.W.3d at 930. We conclude the trial court did not abuse its discretion by sustaining ANBOT's objection to Paragraph 6 of Brewer's affidavit.

ANBOT raised the same objections to paragraphs 7 and 8 of Brewer's affidavit as it raised to paragraph 6. In paragraph 7 of his affidavit, Brewer attested:

> 7. The Participation Agreement was delivered to Benchmark for execution by ANBOT. There was no negotiation with respect to the terms of the [Participation] Agreement. Benchmark was not represented by counsel prior to the execution of the [Participation] Agreement. All of the knowledge Benchmark had concerning the loan was the result of representations by ANBOT as set forth in the Commercial Credit Authorization provided to Benchmark [attached to and incorporated in this affidavit][8] together with representations made by Mike Bartlett, President of the Commercial Real Estate Lending Group for ANBOT concerning the quality of the credit, their relationship with [Baldridge], the loan guarantor, as well as his strong and liquid financial condition. Unknown to Benchmark at the time it purchased the interest, there was no interest reserve funded by [Metro Cinema] and representations concerning [Metro Cinema]'s injection of $2,600,000 in the project were unsubstantiated and untrue. This transaction with ANBOT was not at arm's length as it was completed without any negotiation of the Agreement in a compressed time period as the loan had already been funded and the project was nearing completion. The Agreement was signed following the request of ANBOT which represented that it needed some assistance with credit limits in order for it to do more business with Baldridge. Only after the suit was filed did I learn this [Participation] Agreement was part of ANBOT's plan to spread risk on it's [sic] large loans.

We disagree Brewer's statements in paragraph 7 are conclusory; those statements assert facts concerning the circumstances under which Benchmark executed the Participation Agreement and information provided to Benchmark by ANBOT relating to the Loan, the financial condition of Metro Cinema, the funding of an interest reserve by Metro Cinema, and Metro Cinema's

[8] Although Brewer stated in his affidavit that the Commercial Credit Authorization provided to Benchmark was attached to his affidavit, the record does not contain such an attachment to Brewer's affidavit.

injection of capital into the project. Further, we disagree with ANBOT's assertion those statements are irrelevant to ANBOT and ANBSA's second motion for summary judgment. In their second motion for summary judgment, ANBOT and ANBSA sought summary judgment on Benchmark's breach of contract and declaratory relief claims and on their request for a declaration in their favor that the Participation Agreement is in full force and effect and that Benchmark is not legally excused from compliance with its terms. Brewer's statements are relevant to Benchmark's claims for affirmative relief addressed in its motion for summary judgment, to ANBOT and ANBSA's second motion for summary judgment on Benchmark's breach of contract claim, and to the declaratory relief sought in ANBOT and ANBSA's second motion for summary judgment. *See Fielding*, 289 S.W.3d at 848. We conclude the trial court abused its discretion by sustaining ANBOT's objection to paragraph 7 of Brewer's affidavit.

In paragraph 8 of his affidavit, Brewer attested:

> 8. Benchmark was told officer's [sic] of ANBOT had known Baldridge for years prior to this loan. If Benchmark had been aware of the fact ANBOT had no relationship with Baldridge prior to this loan, Benchmark would not have executed the Agreement and purchased a participating interest. If Benchmark had been aware of the requests made by [Metro Cinema] for advances, including advances for the first two months of the loan, Benchmark would not have executed the [Participation] Agreement or purchased an interest. If Benchmark had been aware that ANBOT had not properly verified [Metro Cinema] and guarantor's financial condition, Benchmark would not have executed the [Participation] Agreement or purchased an interest. If Benchmark had been made aware of the many [Metro Cinema] defaults, eroding financial condition of [Metro Cinema] and Baldridge as required by the [Participation] Agreement, and the resulting enforcement actions, lawsuits and foreclosure of the Collateral, Benchmark could have taken steps to protect its interests and prevent the foreclosure of the Collateral and urged ANBOT to collect the debt from Baldridge and [Metro Cinema]. ANBOT has acted recklessly and in disregard of the rights and interests of Benchmark as it has taken a path intended not to protect collateral but to earn back money loaned in it's [sic] self interest and in a manner never contemplated or imagined by Benchmark. The violations of the [Participation] Agreement by ANBOT and its failure to disclose information to Benchmark precluded any steps by Benchmark to protect itself or alter the path chosen by ANBOT that has led to this financial catastrophe. The actions and omissions of ANBOT were neither contemplated nor anticipated by Benchmark at the time the [Participation] Agreement was executed.

The last three sentences in paragraph 8 of Brewer's affidavit are argumentative and conclusory; they purport to assert as fact various conclusions about violations of, and ANBOT's motivations in executing, the Participation Agreement. *See Dolcefino*, 19 S.W.3d at 930. We conclude the trial court did not abuse its discretion by sustaining ANBOT's objection to the last three sentences of paragraph 8 of Brewer's affidavit.

We disagree that the remainder of Brewer's statements in paragraph 8 of his affidavit are conclusory. Those statements assert facts concerning: representations made to Benchmark by ANBOT relating to ANBOT's relationship with Baldridge; failure of ANBOT to advise Benchmark that requests for advances had been made by Metro Cinema and that ANBOT had not "properly verified" the financial condition of Metro Cinema and Baldridge; and failure of ANBOT to advise Benchmark of Metro Cinema defaults under the Loan, the "eroding" financial condition of Metro Cinema and Baldridge, and resulting enforcement actions, lawsuits and foreclosure of the Collateral. Further, we disagree with ANBOT's assertion those statements are irrelevant to ANBOT and ANBSA's second motion for summary judgment. In their second motion for summary judgment, ANBOT and ANBSA sought summary judgment on Benchmark's breach of contract and declaratory relief claims and on their request for a declaration in their favor that the Participation Agreement is in full force and effect and that Benchmark is not legally excused from compliance with its terms. Brewer's statements are relevant to Benchmark's claims for affirmative relief addressed in its motion for summary judgment, to ANBOT and ANBSA's second motion for summary judgment on Benchmark's breach of contract claim, and to the declaratory relief sought in ANBOT and ANBSA's second motion for summary judgment. *See Fielding*, 289 S.W.3d at 848. We conclude the trial court abused its discretion by sustaining ANBOT's objection to the remainder of paragraph 8 of Brewer's affidavit.

Benchmark argues on appeal that it relies on Brewer's affidavit as support for its breach of contract and fraudulent inducement claims. We conclude the trial court's exclusion of paragraphs 3, 4, 5, 7, and all but the last three sentences of paragraph 8 of Brewer's affidavit probably caused the rendition of an improper judgment, as those paragraphs are relevant to Benchmark's claims and defenses and, therefore, should have been considered in the context of the competing summary judgments of Benchmark and ANBOT and ANBSA. *See* TEX. R. APP. P. 44.1; *Cent. Expressway Sign Assocs.*, 302 S.W.3d at 870.

Conclusion

We conclude the trial court did not abuse its discretion with regard to its treatment of the Haines affidavit and attachments to that affidavit. We further conclude the record contains no indication the trial court struck argument, which does not constitute summary judgment evidence, contained in Section VIII of Benchmark's response in opposition to ANBOT and ANBSA's second motion for summary judgment. We conclude the trial court did not abuse its discretion by sustaining ANBOT's objection to Paragraph 6 and the final three sentences of paragraph 8 of Brewer's affidavit. Finally, we conclude the trial court abused its discretion in sustaining ANBOT's objections to paragraphs 3, 4, 5, 7, and all but the final three sentences of paragraph 8 of Brewer's affidavit, and that exclusion of those portions of Brewer's affidavit probably caused the rendition of an improper judgment. *See* TEX. R. APP. P. 44.1; *Cent. Expressway Sign Assocs.*, 302 S.W.3d at 870. Accordingly, we resolve Benchmark's fifth issue partially in its favor and partially against it.

Benchmark's Claims and Defenses

In its sixth issue, Benchmark contends the trial court's summary judgment in favor of ANBOT was erroneous because there are genuine issues of material fact as to whether the alleged cumulative breaches of the Participation Agreement by ANBOT amount to a material

breach which would discharge Benchmark's performance and whether Benchmark was fraudulently induced into entering the Participation Agreement, and because ANBOT and ANBSA's second motion for summary judgment did not address Benchmark's claim for conversion.

Fraudulent Inducement

Benchmark alleges it was fraudulently induced by ANBOT to enter into the Participation Agreement. Fraudulent inducement is established by proving that a false material misrepresentation was made that (1) was known to be false when it was made; (2) was intended to be acted upon; (3) was relied upon; and (4) caused injury. *Desta v. Anyaoha*, 371 S.W.3d 596, 600 (Tex. App.—Dallas 2012, no pet.). A contract is subject to avoidance on the ground of fraudulent inducement. *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 327, 331 (Tex. 2011) ("We recognized decades ago that agreeing to a merger clause does not waive the right to sue for fraud should a party later discover that the representations it relied upon before signing the contract were fraudulent."); *Dallas Farm Machinery Co. v. Reaves*, 158 Tex. 1, 307 S.W.2d 233, 238–39 (Tex. 1957) (one who is induced by fraud to enter into contract has his choice of remedies; he may stand to the bargain and recover damages for the fraud, or he may rescind the contract, and return the thing bought, and receive back what he paid).

The Loan Agreement provides that failure or refusal of Metro Cinema to "pay all or any part of the monthly installments of accrued interest or monthly installments of accrued interest and principal" on the promissory note entered into with ANBOT as and when they become due and payable constitutes an "Event of Default." Metro Cinema did not make its very first interest-only payment due under the Loan Agreement; ANBOT advanced the funds to cover the interest-only payment on August 19, 2006. The Participation Agreement, effective September 18, 2006, contains ANBOT's representation and warranty that, to ANBOT'S knowledge, a monetary

"Event of Default under the Loan" did not exist as of the date of the Participation Agreement.[9] Brewer attested that Benchmark was never advised prior to this lawsuit that an advance was made by ANBOT for the payment of Metro Cinema's interest-only payments in August and September 2006. Brewer further attested that, had Benchmark been aware of the August 19, 2006 advance made before the execution of the Participation Agreement, it would not have entered into the Participation Agreement, and had Benchmark been aware of the September 19, 2006 advance, it would not have made payment for its participation interest to ANBOT on September 22, 2006.

On this record, a genuine issue of material fact exists as to each of the elements of Benchmark's claim of fraudulent inducement. *Anyaoha*, 371 S.W.3d at 600. Therefore, we conclude the trial court abused its discretion in granting summary judgment to ANBOT on Benchmark's claim of fraudulent inducement.

Breach of Contract

Benchmark asserts on appeal that ANBOT's breaches of the Participation Agreement cumulatively amount to a material breach of that agreement, and the trial court erred by granting ANBOT summary judgment on Benchmark's breach of contract claim. In response to ANBOT and ANBSA's second motion for summary judgment, Benchmark asserted ANBOT breached terms of the Participation Agreement by: assigning servicing of the Loan to a third party without Benchmark's consent; failing to account for Benchmark's pro rata share of the foreclosure proceeds and transferring the leasehold to ANBSA; breaching the representation and warranty that no monetary event of default existed as of the date of the Participation Agreement; failing to provide Benchmark prompt written or e-mail notice of each interest-only payment advance

[9] ANBOT also advanced funds to cover Metro Cinema's second interest-only payment due on September 19, 2006, the day after the effective date of the Participation Agreement.

requested by Metro Cinema; failing to provide Benchmark information regarding Metro Cinema's creditworthiness; failing to notify Benchmark of events of default within twenty-four hours; failing to notify Benchmark of enforcement actions within twenty-four hours; failing to administer the Loan in the same manner as other loans; releasing security for the Loan without Benchmark's consent, including assigning the IMAX® license to ANBSA; and waiving payment of defaults without Benchmark's consent.

Benchmark pleaded that a week after the nonjudicial foreclosure, ANBOT "conveyed, transferred and assigned" the IMAX® license, purchased by Metro Cinema for at least $1,300,000 and serving as collateral securing payment of the Loan, to ANBSA. Benchmark asserts that, by failing under the terms of the Participation Agreement to pay Benchmark its pro rata interest or account for the foreclosure sale proceeds and assignment of the IMAX® license, ANBOT has converted Benchmark's interests for which Benchmark is entitled to recover breach of contract and conversion damages. According to Benchmark, this alleged conversion "amount[s] to . . . a material breach of the Participation Agreement."[10] We construe Benchmark's conversion allegations as an element of its breach of contract claim relating to ANBOT's foreclosure on, and assignment of, the Collateral (including IMAX® license) to ANBSA. *See Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986) (nature of the claimed injury usually determines whether the breached duty lies in tort or contract).

[10] Paragraph 3(d) of the Participation Agreement provides:

> 3(d) Enforcement of Loan. Bank may in its sole discretion determine whether to exercise or refrain from exercising its rights under the Loan Documents with respect to enforcing payment of the Loan, performance by [Metro Cinema] of its obligations under any of the Loan Documents, or compliance with the terms thereof, including the modification or waiver of any of the terms of the Loan Documents, but without [Benchmark]'s consent, [ANBOT] shall not (1) release any security for the Loan other than in accordance with the provisions of the Loan Documents; provided that [ANBOT] may release Collateral to the extent [ANBOT] determines that such Collateral is obsolete or no longer needed in the conduct of [Metro Cinema]'s business; (2) waive any payment default set forth in the Loan Agreement; (3) waive any Event of Default arising out of the bankruptcy or insolvency of [Metro Cinema] or of any guarantor; or (4) forgive any principal or interest under the Loan. If [ANBOT] shall ever acquire any Collateral through foreclosure or by a conveyance in lieu of foreclosure or by retaining the Collateral in satisfaction of all or a part of the Loan, [ANBOT] shall not be required to remit to [Benchmark] its pro rata share of the Loan or portion thereof that has been satisfied and [Benchmark] shall only be entitled to a pro rata interest in the Collateral so acquired and shall remain obligated to pay its pro rata portion of all attorneys' fees and other expenses incurred by [ANBOT] in connection with the enforcement of the Loan Documents and preservation of the Collateral.

Under the Participation Agreement, ANBOT contractually agreed to provide Benchmark notice of the occurrence of any "Event of Default." Paragraph 3(a) of the Participation Agreement states:

> [ANBOT] shall promptly (within 24 hours) notify [Benchmark] of the occurrence of any Event of Default (as defined in the [July 19, 2006 Amended and Restated] Loan Agreement). [ANBOT] shall promptly notify [Benchmark] as soon as practicable after actual knowledge thereof is acquired by an officer of [ANBOT] primarily responsible for [ANBOT]'s credit relationship with [Metro Cinema]. [ANBOT] will promptly notify [Benchmark] of any material action of enforcement taken with respect to repayment of the Loan by [Metro Cinema] or any guarantor.

Paragraph 1(a)(1) of the Participation Agreement provides, "The loan [made by ANBOT to Metro Cinema] is a construction loan . . . and as such, [Metro Cinema] may obtain advances from time to time. . . . [ANBOT] shall give prompt notice by e-mail of each advance requested by [Metro Cinema]. . . ." Paragraph 7(b) of the Participation Agreement states, "All notices required or permitted to be given hereunder shall be in writing or by e-mail . . . ." On September 19, 2006 and October 19, 2006, ANBOT advanced funds to cover Metro Cinema's interest-only payments due under the Loan. The record contains numerous acknowledgments by ANBOT that it did not provide Benchmark written or e-mail notice within twenty-four hours of these Events of Default by Metro Cinema. Summary judgment evidence established verbal notices of these Metro Cinema defaults were provided by ANBOT to Benchmark. Benchmark acknowledges the trial court found that verbal, as opposed to written, notice was not a material breach of the Participation Agreement. *See Hernandez v. Gulf Grp. Lloyds*, 875 S.W.2d 691, 693 (Tex. 1994) (factor in determining materiality of breach is extent to which non-breaching party will be deprived of benefit it reasonably could have anticipated had the breach not occurred; the "less the non-breaching party is deprived of the expected benefit, the less material the breach"). On this record, it was not shown Benchmark was deprived of a benefit of the Participation

Agreement by not receiving written notice of Metro Cinema's September 19, 2006 and October 19, 2006 interest payment defaults within twenty-four hours.

However, Benchmark contends that multiple additional breaches by ANBOT "cumulatively" amounted to a material breach that would discharge or excuse Benchmark's performance under the Participation Agreement. *See Mustang Pipeline Co., Inc. v. Driver Pipeline Co., Inc.*, 134 S.W.3d 195, 196 (Tex. 2004) (per curiam) (it is fundamental principle of contract law that when one party to a contract commits a material breach of that contract, the other party is discharged or excused from further performance). Therefore, we consider whether a genuine issue of material fact exists with regard to other claimed breaches by ANBOT of the Participation Agreement.

Benchmark asserted ANBOT breached Paragraph 5(e) of the Participation Agreement stating that "to [ANBOT's] knowledge, a Monetary Event of Default under the Loan does not exist as of the date of the [Participation Agreement]." As discussed above with regard to Benchmark's fraudulent inducement claim, the summary judgment evidence establishes ANBOT advanced funds to cover Metro Cinema's August 19, 2006 interest-only payment obligation prior to execution of the Participation Agreement and Metro Cinema's failure to make that interest-only payment constituted an "Event of Default" under the Loan Agreement.

Also relevant to Benchmark's assertions of breaches of the Participation Agreement by ANBOT, Brewer attested Benchmark was not notified of ANBOT's foreclosure of the Collateral securing the Loan,[11] ANBOT's assignment of the leasehold securing the Loan, enforcement actions taken by ANBOT as a result of Metro Cinema's defaults under the Loan Documents (including the July 23, 2007 notice of default sent on behalf of ANBOT to Metro Cinema and a

[11] Paragraph 3(a) of the Participation Agreement provides, in part, that "[ANBOT] shall promptly (within 24 hours) notify [Benchmark] of the occurrence of any Event of Default (as defined in the Loan Agreement)."

lawsuit filed by ANBOT against Metro Cinema and Baldridge),[12] and defaults by Metro Cinema under the Loan Documents (including defaults resulting from liens and lawsuits filed against Metro Cinema).[13] Brewer attested Benchmark did not consent to assignment of the servicing of the Loan to a third party[14] or waiver by ANBOT of any payment default by Metro Cinema or the forgiveness by ANBOT of Metro Cinema's and Baldridge's indebtedness.[15] The record also contains the testimony of Michael H. Bartlett, a group president of ANBOT, that ANBOT was not having success obtaining financial statements from Metro Cinema and Baldridge and that their failure to provide financial statements was a technical violation of the Loan. Brewer also attested Benchmark was not provided information in ANBOT's possession concerning the continued creditworthiness of Metro Cinema and Baldridge.[16] The record contains evidence ANBOT elected to operate the cinema, which has a bearing on whether this Loan was administered in the same manner as other extensions of credit in which ANBOT had not sold a participating interest.[17]

We conclude that on this record, there are genuine issues of material fact as to whether ANBOT breached the Participation Agreement and whether the alleged breaches are material. *See Examination Mgmt. Servs., Inc. v. Kersh Risk Mgmt., Inc.*, 367 S.W.3d 835, 844 (Tex. App.—Dallas 2012, no pet.) (whether breach of contract is material is ordinarily question of fact

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[12] Paragraph 3(a) of the Participation Agreement provides, in part, that " [ANTOT] will promptly notify [Benchmark] of any material action of enforcement taken with respect to repayment of the Loan by [Metro Cinema] or [Baldridge]."

[13] Paragraph 3(a) of the Participation Agreement provides, in part, that "[ANBOT] shall promptly (within 24 hours) notify [Benchmark] of the occurrence of any Event of Default (as defined in the Loan Agreement)."

[14] Paragraph 4(c) of the Participation Agreement provides, in part, that "[ANBOT shall not transfer the servicing of the Loan to a third party other than [Benchmark] without the prior written consent of [Benchmark]."

[15] Paragraph 3(d) of the Participation Agreement provides, in part, that ". . . without [Benchmark's] consent, [ANBOT] shall not . . . waive any payment default set forth in the Loan Agreement . . . or forgive any principal or interest under the Loan."

[16] Paragraph 3(a) of the Participation Agreement provides, in part, that "[ANBOT] agrees to provide [Benchmark] the following credit related . . . information regarding [Metro Cinema] to the extent in the possession of [ANBOT]: [c]urrent financial statements of [Metro Cinema], as well as of . . . guarantors . . . under the Loan" and "any information and/or documents in possession of [ANBOT] bearing on the continued creditworthiness of [Metro Cinema]."

[17] Paragraph 3(b) of the Participation Agreement imposes an obligation upon ANBOT to "administer the Loan in the same manner as it administers similar extensions of credit in which it has not sold any participating interest."

based on several factors); *Henry v. Masson*, 333 S.W.3d 825, 835 (Tex. App.—Houston [1st Dist.] 2010, no pet.) ("The materiality of a breach—the question of whether a party's breach of a contract will render the contract unenforceable—generally presents a dispute for resolution by the trier of fact."); *Levine v. Steve Scharn Custom Homes, Inc.*, 448 S.W.3d 637, 654 (Tex. App.—Houston [1st Dist.] 2014, pet. denied). We conclude the trial court erred by granting summary judgment in favor of ANBOT on Benchmark's breach of contract claim.

Conclusion

We conclude there exist genuine issues of material fact with regard to Benchmark's fraudulent inducement and breach of contract claims, and the trial court erred by granting summary judgment in ANBOT's favor on those claims. We resolve Benchmark's sixth issue in its favor.

ANBOT's Costs, Disbursements, and Attorney's Fees

By counterclaim, ANBOT alleges Benchmark breached the Participation Agreement by failing to reimburse ANBOT for expenses deemed by ANBOT to be necessary to preserve the Collateral. ANBOT sought to recover costs, disbursements, and attorney's fees pursuant to the Participation Agreement and chapters 37 and 38 of the Texas Civil Practice and Remedies Code. With regard to a contractual right to recovery of costs, disbursements, and attorney's fees, paragraph 7(g) of the Participation Agreement provides:

> In the event an action or claim is brought for breach of the terms and conditions of this Agreement, the non-breaching party shall be entitled to recover from the breaching party its costs and disbursements therein, including attorney's fees.

Benchmark generally denied ANBOT's claims asserted by counterclaim and moved for a traditional summary judgment, challenging ANBOT's right to attorney's fees under section 7(g) of the Participation Agreement. In its final judgment, the trial court ordered that "ANBOT is not entitled to recovery of its costs, disbursements, or attorneys' fees under paragraph 7(g) of the

Participation Agreement." In a single cross-issue on appeal, ANBOT contends the trial court erred by granting summary judgment in favor of Benchmark on ANBOT's counterclaims for recovery of costs, disbursements, and attorney's fees.

ANBOT contends Benchmark has waived its challenge to ANBOT's claim for costs, disbursements, and attorney's fees by failing to assert an "avoidance defense" under rule of civil procedure 94. ANBOT also contends Benchmark failed to preserve an objection to ANBOT's claim for recovery of costs, disbursements, and attorney's fees by failing to specially except to that claim under rule of civil procedure 90.

We are unpersuaded by ANBOT's contention concerning application of rule of civil procedure 94. Rule of civil procedure 94 requires affirmative pleading of certain specified defenses and of "any other matter constituting an avoidance or affirmative defense." TEX. R. CIV. P. 94. Here, Benchmark denied liability for ANBOT's counterclaims, including a claim for attorney's fees and other expenses, and moved for summary judgment on ANBOT's claim of entitlement to costs, disbursements, and attorney's fees under section 7(g) of the Participation Agreement, clearly placing the issue of ANBOT's entitlement to recovery of costs, disbursements, and attorney's fees in issue. We are equally unpersuaded by ANBOT's assertion that, pursuant to rule of civil procedure 90, Benchmark waived an objection to ANBOT's counterclaim for recovery of costs, disbursements, and attorney's fees by failing to file a special exception to such pleading, thereby precluding a summary judgment on that claim. Rule of civil procedure 90 provides:

> Every defect, omission or fault in a pleading either of form or of substance, which is not specifically pointed out by exception in writing and brought to the attention of the judge in the trial court before the instruction or charge to the jury or, in a non-jury case, before the judgment is signed, shall be deemed to have been waived by the party seeking reversal on such account; provided that this rule shall not apply as to any party against whom default judgment is rendered.

TEX. R. CIV. P. 90. Benchmark does not assert a defect in ANBOT's pleading; Benchmark simply asserts ANBOT is not entitled to recovery of costs, disbursements, and attorney's fees under its pleaded theory due to ANBOT's breach of the Participation Agreement. Moreover, Benchmark is not seeking reversal of the trial court's summary judgment on ANBOT's claim for attorney's fees. Therefore, the provision of rule of civil procedure 90 deeming waiver of a pleading defect by a party seeking reversal of a judgment is inapplicable. Further, ANBOT's reliance on *Hudspeth v. Hudspeth*, 756 S.W.2d 29, 34 (Tex. App.—San Antonio 1988, writ denied), which is clearly distinguishable from the case at bar, is not persuasive. In *Hudspeth*, appellants alleged the trial court erred in awarding attorney's fees to appellees on their counterclaim for declaratory judgment. *Id.* However, in *Hudspeth*, appellants waived any error by failing to specially except to an action for declaratory judgment as a counterclaim, under the then-applicable declaratory judgments act, until after judgment was signed. *Id.*; *see also Narisi v. Legend Diversified Invs.*, 715 S.W.2d 49, 52 (Tex. App.—Dallas 1986, writ ref'd n.r.e.) (Narisi waived alleged error in award of attorney's fees by failing to except or otherwise raise the issue of whether a declaratory judgment action may be brought as a counterclaim under the then-applicable declaratory judgment act until after judgment was signed). Here, unlike the issue presented in *Hudspeth*, Benchmark is not claiming a defect in ANBOT's pleading.

ANBOT further argues Benchmark failed to establish as a matter of law that ANBOT was a "breaching party," and, therefore, not contractually entitled to recover its costs, disbursements, and attorney's fees under paragraph 7(g) of the Participation Agreement. ANBOT argues that its breach by failing to provide written or e-mail notice to Benchmark within twenty-four hours of the advances of Metro Cinema's interest-only payments "was merely technical and immaterial," and therefore, it could not have been a "breaching party" within the terms of paragraph 7(g) of the Participation Agreement. As discussed above, the record

establishes ANBOT's acknowledgment of breach of the Participation Agreement by failing to provide Benchmark written notice of Metro Cinema's default under the Loan. Paragraph 7(g) does not qualify the term "non-breaching," by excepting "technical" or "immaterial" breaches.

Throughout the record and on appeal, ANBOT makes the statement that paragraph 7(g) of the Participation Agreement is unambiguous and, therefore, the terms in that provision are given their plain, ordinary, and generally accepted meaning. *See Worldwide Asset Purchasing, L.L.C. v. Rent-A-Center East, Inc.*, 290 S.W.3d 554, 560 (Tex. App.—Dallas 2009, no pet.); *see also Epps v. Fowler*, 351 S.W.3d 862, 865–66 (Tex. 2011) (undefined terms in contract are given their plain, generally accepted meaning); *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 861 (Tex. 2000) (contract is not ambiguous if it can be given a certain or definite legal meaning or interpretation). Applying the plain language of paragraph 7(g), ANBOT cannot be considered a nonbreaching party where the record establishes ANBOT's acknowledgment of its breach of the Participation Agreement.

ANBOT further argues the "plain language" of the Participation Agreement made ANBOT the "non-breaching party" and "prevailing party," both of which entitled it to recover its costs, disbursements, and attorney's fees under the Participation Agreement. According to ANBOT, the "plain meaning" of paragraph 7(g) of the Participation Agreement "requires" that one party in a suit for breach of the terms and conditions of the Participation Agreement "will be 'the breaching party' and one party will be 'the nonbreaching party.'" However, nothing in the plain language of paragraph 7(g) precludes a determination that there can be breaches of the Participation Agreement by each party seeking recovery, thus resulting in no party qualifying as a "nonbreaching party" entitled to recovery of costs, disbursements, and attorney's fees.

ANBOT alternatively requests that, if this Court rejects its interpretation of the phrase "nonbreaching party" in paragraph 7(g), we should conclude the phrase is ambiguous, reverse

the trial court's judgment in favor of Benchmark on this issue, and remand the issue to the trial court for further proceedings. *See TST Impreso, Inc. v. Asia Pulp & Paper Trading (USA), Inc.*, No. 05-12-01551-CV, 2014 WL 348535, at *3 (Tex. App.—Dallas Jan. 30, 2014, pet. denied) (mem. op.) (this Court may consider ambiguity when raised for first time on appeal in summary judgment case). The entirety of ANBOT's argument regarding this alternative "request" consists of a citation to *Kaye/Bassman International Corp. v. Help Desk Now, Inc.*, 321 S.W.3d 806, 814 (Tex. App.—Dallas 2010, pet. denied), for the proposition that it is improper to grant a motion for summary judgment when a contract is ambiguous because the interpretation of the contract is a fact issue. But in this case, there is nothing ambiguous about the phrase "nonbreaching party," as utilized in paragraph 7(g) of the Participation Agreement. The term is used regularly in commercial contracts and applied regularly in our jurisprudence. *Cf. Hernandez v. Gulf Group Lloyds*, 875 S.W.2d 691, 693 (Tex. 1994) ("In determining the materiality of a breach, courts will consider, among other things, the extent to which the nonbreaching party will be deprived of the benefit that it could have reasonably anticipated from full performance."); *see also Greene v. Farmers Ins. Exch.*, 446 S.W.3d 761, 768 (Tex. 2014) ("to determine materiality in contexts presented by those cases we considered the extent to which the parties we referred to as nonbreaching parties—the insurers—would have been deprived of the benefit that they could have reasonably anticipated").

The record establishes ANBOT's acknowledgement that it breached the Participation Agreement by failing to provide Benchmark written notice of Metro Cinema's default under the Loan. We conclude the trial court did not err by granting summary judgment in favor of Benchmark on ANBOT's claim for contractual attorney's fees under paragraph 7(g) of the Participation Agreement.

ANBOT claims entitlement to recovery of attorney's fees pursuant to chapter 38 of the civil practice and remedies code. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 38.001(8) (West 2015) (person may recover attorney's fees from an individual or corporation in addition to amount of a valid claim and costs, if claim is for a written contract). However, ANBOT and Benchmark contracted in the Participation Agreement for their fee-recovery standard: "the non-breaching party shall be entitled to recover from the breaching party its costs and disbursements therein, including attorney's fees." "Parties are free to contract for a fee-recovery standard either looser or stricter than" that contained in chapter 38 of the civil practice and remedies code. *See Intercontinental Grp. P'ship v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 653 (Tex. 2009). "In such a case, 'the terms of the contract, not statute, control the outcome of the case.'" *Jesperson v. Sweetwater Ranch Apartments*, 390 S.W.3d 644, 661 (Tex. App.—Dallas 2012, no pet.) (quoting *Mohican Oil & Gas, LLC v. Scorpion Explor. & Prod., Inc.*, 337 S.W.3d 310, 321 (Tex. App.—Corpus Christi 2011, pet. denied)). We have concluded the trial court did not err by granting summary judgment in favor of Benchmark on ANBOT's claim for contractual attorney's fees under paragraph 7(g) of the Participation Agreement.

ANBOT also counterclaimed for attorney's fees under chapter 37 of the civil practice and remedies code. Section 37.009 of the civil practice and remedies code permits a court to award costs and reasonable and necessary attorney's fees as are equitable and just in a declaratory judgment proceeding. TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (West 2015). In its counterclaim, ANBOT seeks a declaratory judgment that the Participation Agreement is in full force and effect and that Benchmark is not legally excused from compliance with its terms. We have concluded above that a genuine issue of material fact exists with regard to Benchmark's breach of contract and fraudulent inducement claims, thus resulting in a genuine issue of material fact as to whether the Participation Agreement is in full force and effect or whether Benchmark

is excused from compliance with its terms. Therefore, we conclude the trial court did not err by failing to grant summary judgment in favor of ANBOT on its counterclaim for attorney's fees under chapter 37. *See SAVA gumarska in kemijska industria d.d. v. Advanced Polymer Scis., Inc.*, 128 S.W.3d 304, 324 (Tex. App.—Dallas 2004, no pet.) (award of attorney's fees under the declaratory judgment statute is within the trial court's discretion); *see also Bocquet v. Herring*, 972 S.W.2d 19, 20 (Tex. 1998); *Preston State Bank v. Willis*, 443 S.W.3d 428, 440 (Tex. App.—Dallas 2014, pet. denied) (declaratory judgments act does not require an award of attorney's fees to the prevailing party, or to any party), *cert. denied*, 136 S. Ct. 111 (2015) .

We resolve ANBOT's sole issue on appeal against it.

Conclusion

We affirm in part and deny in part the trial court's judgment sustaining ANBOT's objections to Benchmark's summary judgment evidence. We affirm the trial court's judgment denying ANBOT's claim for recovery of costs, disbursements, and attorney's fees under paragraph 7(g) of the Participation Agreement. In all other respects, we reverse the trial court's judgment. We remand this case to the trial court for further proceedings.

/Robert M. Fillmore/
ROBERT M. FILLMORE
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

BENCHMARK BANK, Appellant/Cross-Appellee

No. 05-14-00810-CV V.

AMERICAN NATIONAL BANK OF TEXAS, Appellee/Cross-Appellant

On Appeal from the 429th Judicial District Court, Collin County, Texas,
Trial Court Cause No. 429-00988-2010.
Opinion delivered by Justice Fillmore,
Justices Brown and Richter participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED** in part and **REVERSED** in part. We **AFFIRM** in part and **REVERSE** in part paragraph 1 of the trial court's judgment sustaining American National Bank of Texas's objections to Benchmark Bank's summary judgment evidence. We **AFFIRM** paragraph 9 of the trial court's judgment denying American National Bank of Texas's claim for recovery of costs, disbursements, and attorney's fees under paragraph 7(g) of the Participation Agreement. In all other respects, the trial court's judgment is **REVERSED**. We **REMAND** this cause to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment entered this 17th day of February, 2016.