Affirmed and Opinion Filed August 24, 2017

In The

Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-01249-CV

JAMES C. MORRIS, Appellant
V.
BRANCH BANKING AND TRUST COMPANY, Appellee

On Appeal from the 68th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-11-12220

MEMORANDUM OPINION

Before Justices Bridges, Lang-Miers, and Schenck
Opinion by Justice Bridges

James C. Morris appeals the trial court's judgment in favor of Branch Banking and Trust on BB&T's claims based on two promissory notes. In eleven issues, Morris argues the trial court erred in (1) granting summary judgment on one promissory note when bank records showed the note was paid in full and its balance was $0.00; (2) granting partial summary judgment for $110,000 on a second promissory note; (3) granting partial summary judgment because *D'Oench Duhme* and 12 U.S.C. § 1823(e) do not bar a borrower's defenses that no asset actually existed; (4) granting summary judgment because the note documents are not negotiable instruments, and BB&T's *D'Oench Duhme*, 12 U.S.C. § 1823(e), and federal holder-in-due-course arguments therefore fail; (5) applying federal holder-in-due-course doctrine to state law affirmative defenses and payment; (6) granting summary judgment because Morris' forgery and payment

defenses were not barred by BB&T's *D'Oench Duhme*, 12 U.S.C. § 1823(e), and federal holder-in-due-course arguments; (7) granting summary judgment because Morris "did not ratify the forgeries"; (8) granting summary judgment on Morris' defenses and counterclaims because they were based on the same documents BB&T seeks to enforce; and (9) admitting plaintiff's exhibit 27, which concerns a $390,000 advance on the second note. Morris also challenges the legal and factual sufficiency of the evidence to show he received a $390,000 advance. Finally, because the trial court erred in entering judgment in favor of BB&T, Morris argues, the award of attorney's fees and costs should be reversed. We affirm the trial court's judgment.

In 2006, Morris began banking with Colonial Bank. Morris owned a trucking company, and he bought and sold trucks and heavy equipment. On March 15, 2006, Morris signed a promissory note for $1,500,000 (Note 1) payable to Colonial. On July 27, 2006, Morris signed a second note for $500,000 (Note 2) payable to Colonial in connection with a line of credit Morris intended to use to purchase equipment. Both notes were secured by certain commercial property. On July 11, 2007, Morris signed (1) an amended promissory note regarding Note 1 by which the original principal amount was reduced to $1,498,218.28, and the maturity of the note was extended until July 11, 2012 and (2) a Loan Modification, Renewal, and Extension agreement regarding Note 2.

In July 2009, Morris sent BB&T a letter discussing combining Note 1 and Note 2 into a "single structured loan with a lower interest rate and an extended maturity date." Morris expressed his concerns that Colonial was "in great stress," and Morris knew his loans were in jeopardy when Colonial "was put under cease-and-desist orders from the federal government several months" before. Also in July 2009, Morris submitted to Colonial a personal financial statement listing $1,893,759 as "Real Estate Mortgages Payable." Morris later testified that he

"did not" make payments on either note after July 2009. In August 2009, Colonial failed, and BB&T purchased Colonial's assets from the Federal Deposit Insurance Corporation (FDIC).

In May 2011, BB&T filed its original petition alleging Morris defaulted on Note 1 and Note 2 and seeking $2,169,991.70 in damages. Morris filed a general denial. In his amended answer in January 2012, Morris denied that the notes attached to BB&T's petition were "the operative instruments on which [he] purportedly [was] liable," denied execution of "one or more of the Notes," asserted BB&T lacked standing to bring suit on the notes absent proof it was the lawful owner and holder of the notes, and claimed BB&T had "engaged in unlawful or inequitable conduct which constitutes a legal or equitable bar to any relief."

In July 2012, Morris filed an answer to BB&T's first amended petition in which he restated the arguments made in his January 2012 answer and additionally made the following arguments: (1) the "operative Notes and instruments" were not true and correct copies of original instruments; (2) Morris denied "execution of the operative Notes and instruments"; (3) the operative Notes and instruments contained forgeries or alterations; (4) Morris denied "the genuineness of the endorsement or assignment of one or more of the Notes"; (5) Morris denied consideration was given or received for the notes; (6) all sums actually funded and owing on the notes were repaid; (7) Morris paid $224,475.08 to Colonial on or about July 11, 2008, in full payment of any amounts owed to Colonial on any alleged indebtedness on the $1,500,000 note; (8) the doctrine of unclean hands barred the relief sought by BB&T; (9) BB&T did not take the notes in good faith and was not, therefore, a holder in due course of the notes; and (10) in the alternative, if Morris would otherwise be liable on the notes, Morris was fraudulently induced to execute the notes and did so in reliance upon Colonial's false promises that it would extend credit to fund Morris' ongoing business, and the material breach of these promises caused Morris damages "far in excess" of the amounts claimed by BB&T.

In February 2013, BB&T filed its third amended petition again alleging Morris executed Note 1 and Note 2 and defaulted on both. In addition, BB&T alleged Note 1 was extended by a July 11, 2007 amended promissory note by which the original principal amount was reduced to $1,498,218.28, and the maturity of the note was extended until July 11, 2012. Along with the Note 1 amendment, the decrease in the principal amount and its extension were evidenced by a note renewal, modification, extension and decrease agreement executed by Morris and Colonial on July 11, 2007. Similarly, BB&T alleged the maturity date of Note 2 was extended to September 15, 2008 by a loan modification, renewal, and extension agreement dated July 11, 2007 (Note 2 renewal). On September 15, 2008, the maturity date of Note 2 was again extended to September 15, 2009 by an extension of real estate note and lien (Note 2 extension). Copies of all these documents were attached to the petition.

The petition further alleged that BB&T was successor-in-interest to Colonial by an acquisition of assets from the FDIC as receiver for Colonial. In August 2009, Colonial was declared insolvent and, effective August 14, 2009, the FDIC sold, assigned, and transferred to BB&T all of Colonial's rights, title, and interests in Note 1 and Note 2, as further evidenced by allonges affixed to the notes. The petition alleged, to the extent Morris contested the authenticity of "some, but not all, of the loan documents at issue," Morris had "ratified any unauthorized signatures by continuing to utilize the credit facilities referenced herein." The petition expressed BB&T's understanding that Morris asserted the affirmative defenses of lack of consideration, payment, unclean hands, and fraud in answer to BB&T's suit on Note 1 and Note 2. BB&T argued it was not subject to Morris' affirmative defenses because it was afforded the status of a federal holder in due course. BB&T acknowledged Morris' claims that BB&T did not qualify as a holder in due course because BB&T had notice the notes were overdue or in default, the notes had been fraudulently altered, or BB&T did not take the notes in good faith and for value.

BB&T asserted that "successors to the FDIC need not meet such technical state law requirements to be conferred with holder in due course status under the federal doctrine." BB&T further argued Morris' affirmative defenses were also barred by the *D'Oench Duhme* doctrine and 12 U.S.C.A. § 1823(e), "both of which shelter the FDIC and its assignees from defenses based on undocumented agreements between a borrower and a depository institution." *See D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942).

In February 2013, BB&T filed traditional and no-evidence motions for summary judgment. Relevant to both motions, BB&T again set out the facts of Morris' execution of Note 1 and Note 2, Morris' default under the terms of Note 1 and Note 2, and BB&T's acquisition of Note 1 and Note 2 from the FDIC. In its traditional motion for summary judgment, BB&T argued it was a federal holder in due course, and Morris was therefore barred from asserting personal defenses to liability. BB&T also argued that Morris' defenses were barred under the *D'Oench, Duhme* doctrine.

As to the $224,475.08 Morris' answer claimed was full and final payment of all amounts he owed, BB&T agreed Morris did make such a payment on July 11, 2008; however, BB&T argued the payment only served to reduce the principal balance under Note 1 to $1,394,161.22, which is where it remains today. BB&T attached to the motion its loan history showing a Note 1 loan balance of $1,498,218.28 on July 11, 2007, the day Morris signed an amended promissory note regarding Note 1 by which the principal was reduced to that amount. The history also showed Morris' $224,475.08 "regular payment" on July 11, 2008, reducing the principal to $1,394,161.22.

In its no-evidence motion, BB&T separately addressed Morris' affirmative defenses of failure of consideration, payment, unclean hands, fraud in the inducement, prior material breach, estoppel, waiver, and accord and satisfaction and his counterclaims of fraud, negligence,

negligent misrepresentation, breach of contract, breach of fiduciary duty, and breach of the duty of good faith and fair dealing. As to every affirmative defense and counterclaim, BB&T set forth the law applicable to each and argued Morris produced no evidence of each.

Attached to the summary judgment motions was the affidavit of David Twiss, a current senior vice president for BB&T and former senior vice president for Colonial from March 2002 until August 2009. Twiss stated the duties of his position at BB&T included oversight over the entire portfolio of assets received from Colonial. At Colonial, Twiss presided over Colonial's loan committee. Twiss was familiar with Colonial's record-keeping practices both generally and as to Morris' loans and had first-hand knowledge of the transactions, activities, documents, and instruments regarding and evidencing the loans.

Twiss' affidavit recounted the history of the loans as follows: on March 15, 2006, Morris executed Note 1 in the original amount of $1,500,000; July 11, 2007, Morrison and Colonial agreed to decrease the amount of Note 1 to $1,498,218.28 and extend its maturity date to July 11, 2012; this agreement was evidenced by a note renewal, modification, extension, and decrease agreement and an amended and restated promissory note both signed by Morris on July 11, 2007; on July 27, 2006, Morris executed Note 2 in the amount of $500,000; and Note 2's maturity date was extended by the July 11, 2007 Note 2 renewal and the September 15, 2008 Note 2 extension. Twiss described BB&T's acquisition of Colonial's assets from the FDIC, including Note 1 and Note 2, and its maintenance and control over Colonial's records. Twiss stated BB&T is the owner and holder of Note 1 and Note 2, the Note 1 renewal, the Note 1 amendment, the Note 2 renewal, and the Note 2 extension. Twiss stated Morris had defaulted on Note 1 by failing to pay, as evidenced by attached record showing the transaction history for Note 1. Twiss stated Morris' last payment on Note 1 was the July 11, 2008 payment of $224,475.08, leaving a balance of $1,394,161.22. As to Note 2, Twiss stated Morris drew advances totaling $500,000 on Note 2

between July 18, 2008 and November 10, 2008. Again, Morris failed to pay when Note 2 matured on September 15, 2009. Twiss stated he was a custodian of records for Colonial relating to Morris and his loans, and the documents attached were kept by Colonial in the regular course of business. Further, he was a custodian of records for BB&T with respect to Morris, and the records attached were kept by BB&T in the regular course of business. Finally, Twiss stated the records attached were true and correct copies.

In his response to BB&T's summary judgment motions, Morris reasserted his claim that "certain of the loan instruments" were forgeries and altered documents. Morris argued BB&T was not entitled to assert the application of the federal holder in due course doctrine or D'Oench Duhme because it failed to produce Colonial's loan committee minutes in discovery, and fact issues existed as to whether BB&T was the owner and holder of Note 1 and Note 2, the amounts owed under the notes, whether Morris ratified the forged documents on which BB&T relied, and the viability of Morris' affirmative defenses and counterclaims. Morris acknowledged BB&T's no-evidence motion but characterized BB&T's argument as a claim that his "affirmative defenses and counterclaims are barred by the federal superpower defenses." In a single paragraph, Morris argued BB&T's no-evidence motion should be denied because BB&T refused to produce Colonial's loan committee minutes, and this denied him probative evidence necessary to establish his claims and defenses. In addition, Morris argued there were "genuine issues of material fact with respect to his affirmative claims and defenses." Morris argued that, because he had "proffered evidence in support of his claims and defenses, summary judgment for BB&T [was] not appropriate." Other than this general assertion, Morris did not address the arguments made in BB&T's no-evidence motion.

Attached to Morris' response, among other things, was his affidavit in which he stated he "did not sign and/or initial page 1 of the Amended and Restated Promissory Note asserted by

BB&T"; he did not, "in connection with the Loan Modification, Renewal and Extension Agreement, receive $500,000.00 from Colonial Bank"; and he "performed and fulfilled [his] obligations according to the terms of the Loan Documents and [his] agreements with Colonial Bank, and [his] agreement with BB&T, or [he] was excused from performance by the prior material breach of said agreements by Colonial Bank and/or BB&T."

On June 2, 2013, the trial court signed an order granting BB&T partial summary judgment and awarding $1,806,368 on Note 1, and $110,000 on Note 2. Without specifying the ground or grounds upon which it was based, the order adjudicated and denied Morris' affirmative defenses of failure of consideration, payment, unclean hands, fraud in the inducement, prior material breach, estoppel, waiver, accord and satisfaction and novation and ordered that Morris take nothing on his counterclaims of fraud, negligence, negligent misrepresentation, breach of contract, breach of fiduciary duty, and breach of the duty of good faith and fair dealing. The order did not dispose of Morris' claims based on the purported forgery of loan documents associated with Note 2 and set BB&T's claims for the alleged unpaid portion of Note 2, violations of the environmental certificate, and attorney's fees, as well as Morris' affirmative defenses relating to the alleged forgery of documents associated with Note 2 for trial.

At trial in April 2015, Morris testified he did not sign an extension of real estate note and lien regarding Note 2 on September 15, 2008. Morris testified the document showed a signature of "James C. Morris," and he always signed documents "J.C. Morris." Morris had an expert review the signature, and an expert concluded the signature "doesn't look like" Morris' signature.

Morris testified he did not get a $390,000 advance on Note 2. Counsel for BB&T showed Morris a Colonial Bank "Loan Debit Memorandum" showing a $390,000 advance on

November 10, 2008, but Morris said he did not make such a draw. Counsel asked if Morris remembered his deposition testimony in which Morris stated he could not tell "one way or another" if he received $390,000 from the bank in November 2008. In response to further questioning, Morris testified, "I did not receive $390,000."

The next day, BB&T's senior vice president, David Hendricks, was asked if he could identify Exhibit 27, the "Loan Debit Memorandum," as a business record of Colonial Bank. Hendricks testified that BB&T's Exhibit 27 was a "teller's transfer receipt, when money is moved from one account to another," dated November 10, 2008 showing a $390,000 transfer to customer "James C. Morris." Exhibit 27 also contained a BB&T document dated May 3, 2013 showing a "general ledger" document of Colonial dated November 10, 2008. Hendricks testified BB&T took the records of Colonial and incorporated them into BB&T's records, BB&T relied on Colonial's records in the course of BB&T's business, and BB&T evaluated and confirmed the accuracy of the records received from Colonial. Specifically, BB&T reviewed and confirmed the records pertaining to Morris upon receipt and "rel[ied] on that information as its own" and incorporated that information into its own accounting records. Morris' counsel objected that Exhibit 27 did not qualify as a business record. Hendricks testified Exhibit 27 was "what was in the loan file," and he could not recall whether he had seen the originals, but there would not be "an original in the file because it would be like a deposit slip type of thing that's run through the bank's records that wouldn't come back." The trial court admitted Exhibit 27.

The jury subsequently found Colonial and Morris agreed to enter into an extension of real estate loan and lien agreement on September 15, 2008, $390,000 was advanced by Colonial to Morris on or about November 10, 2008, Morris failed to comply with the extension agreement, and BB&T was the owner of the Note 2 extension. The jury awarded $540,699.10 to compensate BB&T for its damages resulting from the failure to comply with the September 15,

2008 Note 2 extension agreement and attorney's fees for BB&T's pursuit of its claims regarding Note 1, its claims for $110,000 and Morris' failure to comply with Note 2 and the Note 2 renewal, its claims related to Morris' bankruptcy proceedings, and its claims for the remaining balance of Note 2 and Morris' failure to comply with the September 15, 2008 Note 2 extension agreement.

On October 5, 2015, the trial court entered judgment (1) incorporating the June 21, 2013 partial summary judgment awarding BB&T $1,806,368 as of May 20, 2013 plus post-judgment interest on BB&T's claims under Note 1 and $110,000 as of September 15, 2008 plus post-judgment interest on BB&T's claims under Note 2; (2) awarding BB&T $540,699.10 for the remaining portion of Note 2 as evidenced by the September 15, 2008 Note 2 extension agreement plus post-judgment interest; and (3) awarding attorney's fees of $155,000 through trial plus additional fees in the event of appeal. This appeal followed.

Morris filed a post-trial motion for judgment notwithstanding the verdict in which he argued the evidence was insufficient to establish he received the $390,000 advance, BB&T failed to controvert his evidence regarding forgery, and there was no evidence to show Colonial's "contractual rights" were assigned to BB&T. For the first time, Morris argued Colonial's accounting records showed Note 1 was completely paid off on August 10, 2007. Citing an exhibit attached to BB&T's motion for summary judgment, Morris noted the record showed a transaction code of "PYMT. FULL," the transaction description was "Pay Off," and the transaction amount was $1,498,218.28. Morris argued that, because these entries were the last entries, the time period selected for the report was through May 31, 2010, and the report was dated June 3, 2010, the record showed the loan was paid off and BB&T suffered no damages. As a result, Morris argued, Twiss' affidavit testimony regarding post-August 2007 accounting and loan balances consisted of unsupported conclusions. Regarding Note 2, Morris argued

Colonial's records were missing a page and failed to identify Morris as the borrower, and Twiss' affidavit testimony concerning Note 2 also consisted of unsupported conclusions. Also for the first time, Morris' motion argued both Note 1 and Note 2 were not negotiable instruments because they were for "such lesser amounts as may be advanced" and were "governed by and payable in accordance with, the terms and provisions of the Loan Agreement." The trial court entered judgment in favor of BB&T, and this appeal followed.

In his first issue, Morris argues the trial court erred in granting summary judgment in favor of BB&T on Note 1 because Colonial's records state that he made payment in full and that the balance owed on the loan was "0.00" when Colonial failed. In a related argument, Morris asserts he overpaid Note 1.

The issues determined on a motion for partial summary judgment are final, even though the judgment is interlocutory. *Trevino & Assocs. Mech., L.P. v. Frost Nat. Bank*, 400 S.W.3d 139, 144 (Tex. App.—Dallas 2013); *Martin v. First Republic Bank, Fort Worth, N.S.*, 799 S.W.2d 482, 488 (Tex. App.—Fort Worth 1990, writ denied); *Linder v. Valero Transmission Co.*, 736 S.W.2d 807, 810 (Tex. App.—Corpus Christi 1987, writ ref'd n.r.e.) (clear purpose of former version of Texas Rule of Civil Procedure 166a(e) is to make issues determined in motion for summary judgment final). After an interlocutory, partial summary judgment is granted, the issues it decides cannot be litigated further in the trial court, unless the trial court sets the partial summary judgment aside or the summary judgment is reversed on appeal. *Trevino*, 400 S.W.3d at 144; *Martin*, 799 S.W.2d at 488–89; *Linder*, 736 S.W.2d at 810 (issues decided cannot be further litigated unless interlocutory summary judgment set aside by trial court or reversed on appeal). Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal. TEX. R. CIV. P. 166a(c); *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 675 (Tex. 1979) (party precluded from

urging on appeal issue not expressly presented to trial court in written motion or in written answer or response to motion).

Morris argued Note 1 was paid in full for the first time in a motion for judgment notwithstanding the verdict filed after the underlying partial summary judgment and jury trial. For the first time on appeal, Morris argues Note 1 was actually overpaid. Morris did not raise either of these issues in his summary judgment response. We cannot reverse a summary judgment based on arguments not expressly presented to the trial court by written motion or other response to the summary judgment motion. TEX. R. CIV. P. 166a(c); *City of Houston*, 589 S.W.2d at 678. We overrule Morris' first issue.

In his second issue, Morris argues the trial court erred in granting partial summary judgment for $110,000 of the $500,000 BB&T claimed it was owed on Note 2 because his affidavit stated $500,000 was not advanced. In its motion for summary judgment, BB&T relied on Twiss' affidavit to show Note 2 carried, as of February 13, 2013, an outstanding balance of $499,597.82[1] plus accrued and unpaid interest of $111,493.58. BB&T also presented the loan history of Note 2 showing a balance of $499,597.82 remained on Note 2. BB&T argued Colonial's July 17, 2009 response to Morris' request to restructure Note 1 and Note 2 stated Note 2 had an outstanding principal balance of $499,597.82, and Morris did not dispute this amount. BB&T submitted Morris' deposition testimony in which, when asked whether advances on Note 2 were made as shown on bank records, Morris responded he could not tell whether he did or did not make the draws shown on the records.

Morris' affidavit stated he did not, "in connection with the Loan Modification, Renewal and Extension Agreement [signed on September 15, 2008], receive $500,000.00 from Colonial

[1] The record is unclear why the outstanding balance of Note 2 was $402.18 less than the stated $500,000 amount of Note 2. Morris does not complain of this discrepancy; therefore, we do not further address this issue.

Bank." Morris did not claim he did not receive $500,000 on Note 2 after that date. Twiss' affidavit established that Morris drew advances totaling $500,000 on Note 2 between July 18, 2008 and November 10, 2008. Colonial's records showed Note 2 had an outstanding principal balance of $499,597.82 plus unpaid interest. Morris denied receiving a $390,000 draw on Note 2, and the trial court denied summary judgment as to the $390,000 draw and submitted to the jury the issue whether Morris drew $390,000 on Note 2.

However, Morris did not raise a fact issue as to the remaining $110,000. Morris admitted executing the $500,000 Note 2 in July 2006 and renewing and extending Note 2 in July 2007, resulting in a maturity date of September 15, 2008. Morris denied drawing on Note 2 in 2006 and 2007 but testified he "received funds in 2008" on Note 2. Morris testified the funds he received in 2008 were paid pursuant to the promissory note signed in July 2007. Morris testified that "as of July 2008, [he] owed no money" on Note 2. Morris did not "recall" whether he borrowed any additional funds between July 2008 and September 2008. The partial summary judgment awarded BB&T $110,000 on Note 2 "as of September 15, 2008." We conclude the trial court did not err by granting summary judgment on Note 2 for $110,000. *See Martin*, 799 S.W.2d at 485. We overrule Morris' second issue.

In his third issue, Morris argues the trial court erred in granting partial summary judgment because *D'Oench Duhme* and 12 U.S.C § 1823(e) do not bar a borrower's defenses that no asset actually existed based on (1) accounting records indicating there is no amount owed or that are incomplete and (2) forgery. In his sixth issue, Morris makes the related arguments that the trial court erred in granting partial summary judgment because *D'Oench Duhme*, 12 U.S.C § 1823(e), and federal holder-in-due-course arguments do not bar Morris' "forgery and payment" defenses. In both issues, Morris argues the summary judgment evidence raised a fact issue on his defenses of forgery, of the loan being paid in full, and of his denial that he received a

$500,000 advance as part of the Note 2 modification, renewal, and extension agreement. We have already determined Morris did not raise a fact issue to preclude summary judgment in favor of BB&T on its claims regarding Note 1, and summary judgment was proper on $110,000 of Note 2. Further, the record shows the forgery claim and the issue of whether Martin received a $390,000 advance on Note 2 were determined by the jury, not summary judgment. We overrule Morris' third and sixth issues.

In his fourth, fifth, seventh, and eighth issues, Morris argues the trial court erred in granting summary judgment because the note documents are not negotiable instruments, BB&T is not a "holder," and the *D'Oench Duhme* and federal holder-in-due-course arguments made by BB&T fail; federal holder-in-due-course doctrine does not apply to state law affirmative defenses and payment; "Morris did not ratify the forgeries"; and Morris' defenses and counterclaims were based on the same documents BB&T sought to enforce, and the *D'Oench Duhme* doctrine was therefore inapplicable.

BB&T moved for summary judgment on both traditional and no evidence grounds and the trial court granted summary judgment without specifying the grounds upon which it relied. When a party moves for summary judgment on multiple grounds and the trial court's summary judgment order does not specify the ground or grounds upon which it was based, the appealing party must negate all possible grounds upon which the order could have been based. *See Star–Telegram, Inc. v. Doe*, 915 S.W.2d 471, 473 (Tex. 1995); *Jarvis v. Rocanville Corporation*, 298 S.W.3d 305, 313 (Tex. App.—Dallas 2009, pet. denied). This can be accomplished by asserting a separate issue challenging each possible ground. *Jarvis*, 298 S.W.3d at 313. Alternatively, a party can raise an issue which broadly asserts that the trial court erred by granting summary judgment and within that issue provide argument negating all possible grounds upon which summary judgment could have been granted. *See Star–Telegram*, 915 S.W.2d at 473; *Jarvis*,

298 S.W.3d at 313. This is sometimes referred to as a *Malooly* issue. *See e.g., Rangel v. Progressive Cty. Mut. Ins. Co.*, 333 S.W.3d 265, 269–70 (Tex. App.—El Paso 2010, pet. denied). It is not sufficient to merely raise a general issue as the appellant must also support the issue with argument and authorities challenging each ground. *Rangel*, 333 S.W.3d at 270, citing *Cruikshank v. Consumer Direct Mortg., Inc.*, 138 S.W.3d 497, 502–03 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) (a general *Malooly* issue statement only preserves a complaint if the ground challenged on appeal is supported by argument). If the appellant fails to challenge each ground on which summary judgment could have been granted, we must uphold the summary judgment on the unchallenged ground. *Star–Telegram, Inc.*, 915 S.W.2d at 473; *Jarvis*, 298 S.W.3d at 313.

Here, Morris' arguments regarding his defenses and counterclaims focus on *D'Oench Duhme*, 12 U.S.C § 1823(e), and federal holder-in-due-course doctrines. BB&T's no-evidence motion for summary judgment asserted nineteen grounds to which Morris did not respond either in opposition to the motion for summary judgment or on appeal.[2] Morris has not addressed these

[2] BB&T's no-evidence motion for summary judgment argued the notes are afforded a presumption of consideration, and Morris presented no evidence the notes were not supported by consideration and no evidence to establish the elements of his claim the notes were not supported by consideration due to some unfulfilled promise by Colonial to extend credit to fund Morris' ongoing business ventures; to satisfy his defense that he paid $224,475.08 in full payment of Note 1, Morris was required to show the nature of his alleged payment, his items of payment, and the amounts of the credits he claimed, yet Morris presented no evidence of any of those three elements regarding either Note 1 or Note 2; Morris presented no evidence of the elements of accord and satisfaction; to the extent Morris claimed he had an agreement with Colonial whereby Colonial would accept payment of an amount less than the amount owed under the notes as full and final payment, Morris presented no evidence of such an agreement that would satisfy the elements of 12 U.S.C. § 1823(e); Morris' unclean hands defense was not applicable to BB&T's claims and Morris presented no evidence to show the BB&T engaged in unlawful or inequitable conduct or was guilty of bad faith; to the extent Morris' unclean hands defense was based on his allegation that Colonial falsely promised to extend additional credit, Morris presented no evidence of such an agreement that would satisfy the elements of 12 U.S.C. § 1823(e); as to Morris' fraud defense and counterclaim, Morris produced no evidence of the elements of fraud; to the extent Morris argued he was induced to sign the notes based upon a false promise of future funding or was induced to default by Colonial's promise to delay or abate Morris' payments, Morris presented no evidence Colonial actually made such a promise or made it with no intention of performing and with the intent to deceive; Morris also presented no evidence of a promise that would satisfy the elements of 12 U.S.C. § 1823(e); Morris' breach of contract defense and counterclaim presented no evidence supporting the existence of a valid, binding, and enforceable agreement other than the notes themselves, no evidence BB&T breached any specific contractual duty which was a proximate cause of his damages, and no evidence that Morris himself performed under any contract on which he based his breach of contract defense or counterclaim; Morris presented no evidence to support his defense of estoppel: he presented no evidence that BB&T made a false representation to, or concealed material facts from, Morris with actual or constructive knowledge of those facts and with the intent that Morris act on that false representation of concealment; as to Morris' defense of promissory estoppel, Morris presented no evidence that BB&T agreed to extend or modify his obligations under the notes via a written agreement compliant with the statute of frauds or that a written agreement that would satisfy the requirements of the statute of frauds existed; as to waiver, Morris presented no evidence BB&T knowingly and intentionally relinquished its right to enforce the notes or declare a default; as to Morris' claim that BB&T ratified the prior acts of Colonial by its reliance on, and assertion of, fraudulent, forged, or materially altered documents as the basis for its claims, Morris presented no evidence to show that BB&T had knowledge that any document in relation to the notes was fraudulent or forged or that BB&T approved of any such fraud or forgery; as to negligence, Morris presented no evidence BB&T owed Morris any legal duty in connection with the loan transactions, no evidence of proximate cause, and no evidence Morris was damaged by BB&T's alleged conduct; no evidence showed BB&T made any actionable

no-evidence grounds, either in the trial court or on appeal. Accordingly, we conclude we must uphold the trial court's partial summary judgment on these unchallenged grounds. *Star–Telegram, Inc.*, 915 S.W.2d at 473; *Jarvis*, 298 S.W.3d at 313. We overrule Morris' fourth, fifth, seventh, and eighth issues.

In his ninth issue, Morris argues the trial court erred in admitting Exhibit 27, documents regarding the $390,000 advance, because Hendricks, the witness who proved up Exhibit 27, had not seen the originals, and the documents do not qualify as business records. The decision whether to admit evidence rests within the discretion of the trial court. *E.I. du Pont de Nemours and Co., Inc. v. Robinson*, 923 S.W.2d 549, 558 (Tex. 1995); *Sierad v. Barnett*, 164 S.W.3d 471, 481 (Tex. App.—Dallas 2005, no pet.). The test for abuse of discretion is whether the trial court acted without reference to any guiding rules or principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985). An appellate court must uphold the trial court's evidentiary ruling if there is any legitimate basis for the ruling. *Id.* Hendricks was a senior vice president of BB&T. A witness' position may show how the witness learned or knew of the facts to which they testify. *Cockrell v. Republic Mortg. Ins. Co.*, 817 S.W.2d 106, 111 (Tex. App.—Dallas 1991, no pet.). Hendricks testified that Exhibit 27 showed a transfer of $390,000 to Morris on November 10, 2008, the exhibit was in the loan file, and an original was not kept because it was "like a deposit slip."

In addition, Hendricks' testimony established Exhibit 27 was admissible as a business record. A document authored or created by a third party may be admissible as business records of a different business if: (a) the document is incorporated and kept in the course of the testifying

affirmative and false representation of existing fact to Morris that would support his negligent misrepresentation claim; Morris presented no evidence of a fiduciary relationship with the bank that would support his breach of fiduciary duty claim; Morris presented no evidence he shared a special relationship marked by shared trust or an imbalance of power necessary to support his counterclaim for breach of the duty of good faith and fair dealing; and Morris presented no evidence of fraud, malice, or gross neglect and no evidence BB&T owed Morris any extra-contractual duty necessary to support his claim for exemplary damages.

witness's business; (b) that business typically relies upon the accuracy of the contents of the document; and (c) the circumstances otherwise indicate the trustworthiness of the document. *Simien v. Unifund CCR Partners*, 321 S.W.3d 235, 240-41 (Tex. App.—Houston [1st Dist.] 2010, Hendricks testified BB&T took the records of Colonial and incorporated them into BB&T's records, BB&T relied on Colonial's records in the course of BB&T's business, and BB&T evaluated and confirmed the accuracy of the records received from Colonial. Specifically, BB&T reviewed and confirmed the records pertaining to Morris upon receipt and "rel[ied] on that information as its own" and incorporated that information into its own accounting records. We conclude, under these circumstances, the trial court did not err in admitting Exhibit 27. *See Cockrell*, 817 S.W.2d at 111. We overrule Morris' ninth issue.

In his tenth issue, Morris argues the evidence is legally and factually insufficient to establish that $390,000 was advanced to Morris on or about November 10, 2008. When a party attacks the legal sufficiency of the evidence on which the party did not have the burden of proof, the party must demonstrate that there is no evidence to support the adverse findings. *Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983); *EMC Mortg. Co. v. Jones*, 252 S.W.3d 857, 866 (Tex. App.—Dallas 2008, no pet.). In reviewing a no evidence challenge, we consider the evidence "in the light most favorable to the verdict, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not." *City of Keller v. Wilson*, 168 S.W.3d 802, 807 (Tex. 2005); *Jones*, 252 S.W.3d at 866. We are not permitted to weigh the evidence or make credibility determinations. *Jones*, 252 S.W.3d at 866. The jury's finding on an issue may be upheld on circumstantial evidence as long as it may fairly and reasonably be inferred from the facts. *Id.* If there is more than a scintilla of evidence to support the finding, the no evidence challenge fails. *Id.*

When an appellant challenges the factual sufficiency of the evidence on an issue, we consider all the evidence supporting and contradicting the finding. *Fulgham v. Fischer*, 349 S.W.3d 153, 157-58 (Tex. App.—Dallas 2011, no pet.) (citing *Plas–Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 445 (Tex. 1989)). We set aside the finding for factual insufficiency only if the finding is so contrary to the evidence as to be clearly wrong and manifestly unjust. *Id.* (citing *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986) (per curiam)). The factfinder is the sole judge of the credibility of the witnesses. *Id.* As long as the evidence falls "within the zone of reasonable disagreement," we will not substitute our judgment for that of the fact-finder. *Id.* (quoting *City of Keller*, 168 S.W.3d at 822).

Here, the trial court properly admitted Hendricks' testimony and Exhibit 27, which showed the $390,000 advance to Morris. The $390,000 advance, in addition to the $110,000 draw on Note 2, brought the balance of Note 2 to $500,000. BB&T's records showed the $390,000 advance going into Morris' account. We conclude this evidence was legally and factually sufficient to show $390,000 was advanced to Morris. *See Jones*, 252 S.W.3d at 866; *Fulgham*, 349 S.W.3d at 157-58. We overrule Morris' tenth issue.

In his eleventh issue, Morris argues the trial court's award of attorney's fees and costs to BB&T should be reversed because the trial court erred in entering judgment for BB&T. Morris requests the attorney's fees and costs be reversed "should this Court hold the trial court erred when it entered the Final Judgment." Because we conclude the trial court did not err in entering judgment in favor of BB&T, we overrule Morris' eleventh issue.

We affirm the trial court's judgment.

/David L. Bridges/
DAVID L. BRIDGES
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JAMES C. MORRIS, Appellant

No. 05-15-01249-CV V.

BRANCH BANKING AND TRUST COMPANY, Appellee

On Appeal from the 68th Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-11-12220.
Opinion delivered by Justice Bridges. Justices Lang-Miers and Schenck participating.

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

It is **ORDERED** that appellee BRANCH BANKING AND TRUST COMPANY recover its costs of this appeal from appellant JAMES C. MORRIS.

Judgment entered August 24, 2017.