Affirmed; Opinion Filed April 16, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00326-CV

RUSSELL RAMSLAND, JR., DINERO ENERGY CORPORATION, AND DINERO OPERATING COMPANY, Appellants
V.
WFW FAMILY, LP, ADRIENNE SUZANNE WYNN BEAUCHAMP CHARITABLE REMAINDER UNITRUST, CLAUDE FORREST WYNN, FORREST JACOB WYNN, AND TAYLOR MAYS WYNN, Appellees

On Appeal from the 95th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-14-09459

MEMORANDUM OPINION

Before Justices Lang, Fillmore, and Schenck
Opinion by Justice Lang

This case involves a dispute among family members over funds paid respecting interests in oil and gas properties. Appellees (collectively, "the Wynns")[1] filed this lawsuit against appellants (collectively, "Dinero" or "the Dinero Parties").[2] Dinero asserted multiple counterclaims against the Wynns. Subsequently, all of the Wynns' claims were nonsuited and both sides filed competing motions for summary judgment respecting certain counterclaims of Dinero.

[1] Appellees are the following entities and individuals: WFW Family, LP ("WFW"); Adrienne Suzanne Wynn Beauchamp Charitable Remainder Unitrust ("the Unitrust"); Claude Forrest Wynn; Forrest Jacob Wynn; and Taylor Mays Wynn. In this Court, the Unitrust has filed a brief separate from the collective brief of the remaining appellees.

[2] Appellants are as follows: Russell Ramsland, Jr., Dinero Energy Corporation ("Dinero Energy"), and Dinero Operating Company ("Dinero Operating").

The trial court granted summary judgment in favor of the Wynns as to those counterclaims and denied Dinero's summary judgment motion.

On appeal, Dinero asserts five issues. Specifically, Dinero contends the trial court erred by granting summary judgment in favor of the Wynns because (1) any of Dinero's counterclaims that were "potentially time-barred" were "revived" pursuant to section 16.069 of the Texas Civil Practice and Remedies Code, *see* TEX. CIV. PRAC. & REM. CODE ANN. § 16.069 (West 2015), and (2) the summary judgment evidence conclusively proved Dinero's counterclaims for breach of contract and quantum meruit. Additionally, Dinero asserts (1) it was entitled to attorney's fees pursuant to civil practice and remedies code section 38.001, *see id*. § 38.001, and (2) the trial court's award of attorney's fees to the Wynns was improper. We decide against Dinero on its five issues. The trial court's judgment is affirmed.

I. FACTUAL AND PROCEDURAL CONTEXT

Beginning in the 1940s, J.C. Barnes owned and operated the J.C. Barnes Oil Company with his son, J.C. Barnes, Jr., and his two sons-in-law, Russell Ramsland, Sr. and W.F. Wynn, a/k/a "Sleepy" Wynn. Sleepy was married to Barnes' daughter Shirley and they had two children, Claude Forrest Wynn and Adrienne Suzanne Wynn Beauchamp. Forrest Jacob Wynn and Taylor Mays Wynn are Claude's children. WFW is a family limited partnership established by Sleepy and Shirley during their lifetimes. Further, the Unitrust was established by Sleepy and Shirley to provide for the care of Beauchamp after their deaths and came into existence in 2008 upon the death of Sleepy.[3]

Russell Ramsland, Jr. ("Ramsland") is the son of Russell Ramsland, Sr. and Barnes' daughter Jane. Ramsland and his family control Dinero Operating and Dinero Energy. Among the

[3] Shirley Wynn died in 2006.

oil and gas properties operated by Dinero Operating are certain wells formerly operated by the J.C. Barnes Oil Company, including those on the "Parker B Lease" in Ector County, Texas.

After Barnes' death in 1975, members of the Wynn and Ramsland families inherited multiple oil and gas properties, including (1) royalty and working interests in the wells on the Parker B Lease and (2) royalty interests on the production of two oil and gas wells in Beckham County, Oklahoma (the "Oklahoma wells"). The operator responsible for calculating and making the royalty interest payments respecting the Oklahoma wells was Chesapeake Operating, Inc.

This case was filed by the Wynns on August 28, 2014. In their original petition, the Wynns asserted in part (1) in February 2003, Sleepy, Shirley, and WFW each executed documents titled "Assignment of Oil and Gas Leases" ("the Assignments") that conveyed to Dinero Energy all of their working interests in the Parker B Lease; (2) however, the "first purchaser"[4] as to the Parker B wells, Holly Frontier Corporation, continued to send the working interest revenues to Sleepy, Shirley, and WFW; (3) because Sleepy, Shirley, and WFW "continued to own their overriding royalty interests in the Parker B," "it was ordinary and usual for the Wynns to continue receiving revenue checks from Holly Frontier on the Parker B, even after the Assignments"; (4) Dinero Operating "eventually" discovered the "mistake" respecting the working interest revenues and "asked the Wynns for a full refund, going all the way back to the date of the Assignments"; (5) "Plaintiffs did not cause the improper payments, did not know of the improper payments, and are not at fault for this conduct"; (6) "[r]ather, Defendants are at fault for failing to inform the purchaser of the minerals that it [sic] should receive payment for them"; (7) "to the extent Defendants ever had a right to the funds in dispute, Defendants have foregone and waived those rights as a matter of law"; (8) "Plaintiffs seek declaration from this Court that they do not owe any

[4] According to the Unitrust's brief in this Court, a "first purchaser" is "the party who first purchases production from an oil and gas well, and makes payments to the various interest owners." *See also* 16 TEX. ADMIN. CODE § 3.34(a)(4) (Westlaw, current through April 2018) (defining "first purchaser" in context of natural gas regulation as "[t]he first purchaser of natural gas produced from a well").

money to Defendants"; (9) alternatively, "[i]f Plaintiffs owe Defendants anything for the payments received for the Parker B working interests," "Plaintiffs seek declaration from this Court that they only owe working interest revenue received from the Parker B since April 25, 2012," pursuant to the applicable two-year statute of limitations; and (10) "Plaintiffs are entitled to recover reasonable costs and necessary attorney's fees that are equitable and just under Texas Civil Practice & Remedies Code section 37.009 because this is a suit for declaratory relief."

Additionally, the Wynns stated in their original petition (1) in 2006, Dinero Operating, Ramsland, and others (the "Dinero Group") "initiated" a lawsuit in Oklahoma against Chesapeake Operating, Inc. (the "Chesapeake Lawsuit"); (2) in that lawsuit, "Dinero Operating purported to represent and act on behalf of Shirley's Estate, Wynn Management Trust, Taylor Wynn and Forrest Wynn (collectively, the 'Wynn Group'), all without their consent or authority"; (3) "when the Dinero Group finally settled its claims against Chesapeake, including the claims belonging to the Wynn Group, the Dinero Group pocketed the Wynn Group's share of the settlement proceeds and kept that money for themselves, all without ever reporting or accounting to the Wynn Group"; and (4) "[a]ccordingly, the Wynn Group sues [Ramsland] and Dinero Operating for Texas common law fraud and statutory fraud" and "for money had and received, seeking both actual and exemplary damages."

On September 30, 2014, Dinero filed a general denial answer and asserted counterclaims for money had and received, quantum meruit, "breach of contract—the assignments," and "breach of contract—the joint operating agreements." As to those counterclaims, Dinero contended in part (1) "[o]n or about July 2013, Counter Plaintiffs discovered the Wynns' receipt and retention of the Parker B Lease working interest revenues and presented their claims to the Counter Defendants"; (2) "[t]he Wynns received approximately $852,152.46 of revenues owned by the Counter Plaintiffs for the period of February 2003 to the present"; (3) "[t]hroughout the relevant period, Counter

Plaintiffs paid all lease operating expenses attributable to the working interests in the Parker B Lease formerly owned by the Wynns"; and (4) "Sleepy Wynn and Shirley Wynn, individually prior [to] their deaths and through their respective estates and the Wynns as beneficiaries after their deaths, and WFW materially breached the Assignments by receiving and retaining Parker B Lease working interest revenues attributable to the interest owned by the Counter Plaintiffs." Further, as to its counterclaim for "breach of contract—the joint operating agreements," Dinero asserted (1) Sleepy, Shirley, and WFW were parties to a "joint operating agreement (the 'JOA') governing operations relating to the Parker B Lease and wells" that "provides that each party is liable for its proportionate share of the costs of developing and operating . . . all of the lands covered by and leased pursuant to the Parker B Lease"; (2) the JOA "does not provide that a party's obligations under the JOA terminate following an assignment of that party's interest"; (3) "[a]s the recipients of inherited interests from Sleepy Wynn and Shirley Wynn, the Wynns remain liable for the operating expenses incurred on the Parker B Lease by Counter Plaintiffs and took such interest subject to the outstanding joint interest billing obligations"; (4) "[a]fter receipt of the inherited interests, the Wynns became directly liable for the joint interest billing obligations as they accrued"; and (5) "[t]he non-payment of the joint interest billing obligations by Sleepy Wynn, Shirley Wynn, WFW and the Wynns resulted in a material breach of the JOA." Additionally, Dinero requested recovery of its attorney's fees pursuant to sections 37.001 and 38.001 of the civil practice & remedies code. *See* CIV. PRAC. & REM. §§ 37.001, 38.001.

The Wynns filed a general denial answer to Dinero's counterclaims and asserted several affirmative defenses, including that Dinero's counterclaims are barred by limitations. Further, the Wynns filed an amended petition in which they abandoned their fraud claims, added a claim for conversion, otherwise restated their allegations and claims from their original petition, and asserted in part, "Dinero Operating has no authority or legal basis for now using [the Chesapeake Lawsuit

settlement proceeds] as some form of offset for the Parker B Lease money in dispute in this lawsuit."

In November 2015, the Wynns filed traditional and no-evidence motions for summary judgment as to all of Dinero's counterclaims "except for its potentially valid cause of action for money had and received with respect to overpayments received after April 25, 2012." In their motions, the Wynns stated in part,

> On April 25, 2014, Dinero filed suit against Plaintiffs in the 162nd District Court of Dallas County alleging the exact same claims it now makes as counterclaims in this lawsuit. The case was abated pending mediation, and the parties were unable to reach an agreement. On August 28, 2014, Plaintiffs filed this suit for declaratory judgment because Dinero refused to accept the fact that it was only entitled, at best, to two years of overpayments.

The Wynns contended they were entitled to summary judgment on Dinero's counterclaims, other than money had and received for the preceding two years, because (1) the claims are barred by limitations, (2) there is a lack of privity as to the breach of contract counterclaims, and (3) there is no evidence of the essential elements of quantum meruit. Among the attachments to the Wynns' motions for summary judgment were (1) copies of the Assignments,[5] (2) excerpts from a deposition of Ramsland in which he testified the Assignments were effective, and (3) excerpts from a deposition of James Dewey, the designated representative of Dinero Operating and Dinero Energy, in which he testified the JOA does not apply to royalty interest owners.

In its response to the Wynns' motions for summary judgment, Dinero contended in part (1) "by failing to pay the Parker B lease working interest revenues to Dinero Energy that each

[5] Each of the Assignments stated in part,

> [Assignor] does hereby bargain, sell, assign, transfer and convey unto Dinero Energy Corporation . . . all of our right, title and interest as it pertains to leasehold working interest in and to any part of the following described lands in Ector County, State of Texas:
>
> North 240 acres of the E/2 and N/2 SW/4 of Section 40, Block 45, Township 1 South, T & P Ry. Co. Survey
>
> including, but not limited to, all oil and gas leases, farmout agreements, joint operating and working interests agreements, rights-of-way and salt water disposal agreements covering said lands, including all of Assignor's interest in and to all personal property located thereon and used in connection therewith, in the county above described, whether actually or properly described herein or not.

Plaintiff received after the assignments, each Plaintiff breached the obligation of the assignor in the Assignment to 'bargain, sell, transfer and convey' 'all personal property' located on the Parker B lease to Dinero Energy"; (2) "in the event Plaintiffs are allowed to keep these working interest revenues, then as a matter of law they have breached the [JOA] to pay the production costs"; and (3) summary judgment on Dinero's counterclaims based on limitations "must be denied pursuant to Tex. Civ. Prac. & Rem. Code §16.069," which permits otherwise time-barred claims when the opposing party has sought "affirmative relief" and the time-barred claim "arises out of the same transaction or occurrence that is the basis of an action." Further, Dinero filed a traditional motion for summary judgment on its counterclaims in which it asserted essentially the same arguments. The attachments to Dinero's motion for summary judgment included, *inter alia*, a copy of the JOA.[6]

Subsequently, the Wynns nonsuited all their claims against Dinero, "subject to Dinero's admission that the Chesapeake Settlement funds are being held by Dinero as an offset and will be accounted for dependent on the outcome of the remaining claims." Following a hearing, the trial court signed an order granting the Wynns' motions for summary judgment on all of Dinero's counterclaims except money had and received after August 28, 2012, and denying Dinero's summary judgment motion. Then, the parties stipulated as to liability and damages respecting Dinero's money had and received claim for the two-year period from August 28, 2012, to August 28, 2014, and the trial court signed a judgment awarding Dinero that amount, subject to the stipulation described above respecting the proceeds from the Chesapeake Lawsuit. Additionally, the trial court awarded WFW attorney's fees pursuant to Texas Rule of Civil Procedure 167. *See*

[6] The JOA states in part (1) "the parties to this agreement are owners of oil and gas leases covering and, if so indicated, unleased mineral interests in the tracts of land described in Exhibit A," i.e. the Parker B Lease; (2) "[u]nless changed by other provisions, all costs and liabilities incurred in operations under this contract shall be borne and paid, and all equipment and material acquired in operations on the Unit Area shall be owned, by the parties as their interests are given in Exhibit A"; (3) every "sale, encumbrance, transfer, or other disposition" of any party's "oil and gas leasehold interests" covered by the JOA "shall be made expressly subject to this agreement"; and (4) the JOA "shall be binding upon the parties and upon their heirs, successors, representatives, and assigns."

TEX. R. CIV. P. 167 (allowing for award of certain litigation costs if settlement offer is rejected and subsequent judgment is significantly less favorable than offer to settle). This appeal timely followed.

II. TRIAL COURT'S SUMMARY JUDGMENT

A. Standard of Review

We review a trial court's grant of summary judgment de novo. *Pinkus v. Hartford Cas. Ins. Co.*, 487 S.W.3d 616, 621 (Tex. App.—Dallas 2015, pet. denied) (citing *SeaBright Ins. Co. v. Lopez*, 465 S.W.3d 637, 641 (Tex. 2015)). 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) (no-evidence motion for summary judgment); *Nixon v. Mr. Prop. Mgmt. Co., Inc.*, 690 S.W.2d 546, 548 (Tex. 1985) (traditional motion for summary judgment). With respect to a traditional motion for summary judgment, the movant has the burden to prove that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *SeaBright*, 465 S.W.3d at 641; *see also Friendswood Dev. Co. v. McDade & Co.*, 926 S.W.2d 280, 282 (Tex. 1996) ("To obtain summary judgment based on an affirmative defense, the defendant must conclusively establish all elements of the affirmative defense."). 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. TEX. R. CIV. P. 166a(i); *Gish*, 286 S.W.3d at 310. No-evidence summary judgment is improper when the nonmovant's evidence amounts to "more than a scintilla of probative evidence to raise a genuine issue of material fact." *Boerjan v. Rodriguez*, 436 S.W.3d 307, 312 (Tex. 2014).

In reviewing both a traditional and no-evidence summary judgment, we consider the evidence in the light most favorable to the nonmovant. *See SeaBright*, 465 S.W.3d at 641; *Smith v. O'Donnell*, 288 S.W.3d 417, 424 (Tex. 2009); *Nixon*, 690 S.W.2d at 548–49. 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. *SeaBright*, 465 S.W.3d at 641; *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009); *Gish*, 286 S.W.3d at 310. If, as in this case, the trial court's order does not specify the grounds on which the summary judgment was granted, we must affirm if any of the grounds specified in the motion are meritorious. *See Provident Life & Acc. Ins. Co. v. Knott*, 128 S.W.3d 211, 216 (Tex. 2003). Also, when, as here, 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, determine all questions presented, and render the judgment the trial court should have rendered. *SeaBright*, 465 S.W.3d at 641–42.

B. "Revival" of Time-Barred Claims Pursuant to Section 16.069

1. Applicable Law

A statute of limitations is an affirmative defense. *See* TEX. R. CIV. P. 94. "A defendant moving for summary judgment on the affirmative defense of limitations has the burden to conclusively establish that defense." *Semple v. Vincent*, No. 05-15-01571-CV, 2017 WL 2871426, at *3 (Tex. App.—Dallas July 5, 2017, no pet.) (mem. op.) (citing *KPMG Peat Marwick v. Harrison Cty. Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999)).

Section 16.069 of the civil practice and remedies code states as follows:

> (a) If a counterclaim or cross claim arises out of the same transaction or occurrence that is the basis of an action, a party to the action may file the counterclaim or cross claim even though as a separate action it would be barred by limitations on the date the party's answer is required.

> (b) The counterclaim or cross claim must be filed not later than the 30th day after the date on which the party's answer is required.

CIV. PRAC. & REM. § 16.069. Section 16.069 is intended to prevent a party from waiting until an opponent's valid claim, arising out of the same transaction or occurrence, is time-barred before asserting its own claim. *Holman St. Baptist Church v. Jefferson*, 317 S.W.3d 540, 545 (Tex. App.—Houston [14th Dist.] 2010, pet. denied); *Wells v. Dotson*, 261 S.W.3d 275, 281 (Tex. App.—Tyler 2008, no pet.). "Courts have interpreted section 16.069 as permitting a party's otherwise time-barred counterclaims or cross claims only when the opposing party has sought 'affirmative relief,' rather than just a declaration on a dispute between the parties." *Holman St. Baptist Church*, 317 S.W.3d at 545.

For a counterclaim to arise out of the "same transaction or occurrence" as the original claim, there must be a "logical relationship" between the claims. *Smith v. Ferguson*, 160 S.W.3d 115, 120 (Tex. App.—Dallas 2005, pet. denied). The essential facts on which the counterclaim is based must be significantly and logically relevant to both claims. *Id.*; *accord Wells*, 261 S.W.3d at 281. Under this test, a transaction is flexible, comprehending a series of many occurrences logically related to one another. *Wells*, 261 S.W.3d at 281.

2. Application of Law to Facts

In its first issue, Dinero contends "[b]ecause [section 16.069] applies to each of Dinero's counterclaims and revives any potentially time barred claims, the trial court erred in granting summary judgment in the Wynns' favor on their limitations defense."[7] According to Dinero, (1) "it is undisputed that the Wynns, as Plaintiffs, sought affirmative relief in their petition" and (2) "from the face of the pleadings it is clear that the facts which are the subject of the Wynns' claims arise

[7] Dinero contends that as a result of the applicability of section 16.069, it is entitled to recover damages dating back to February 2003 on its counterclaims, including its counterclaim for money had and received. In light of our conclusion below that section 16.069 did not revive Dinero's counterclaims, we do not address Dinero's contention as to how that section would operate in this case.

from the same transactions which are the subject of Dinero's counterclaims—the same essential facts are significantly and logically relevant to both sides' claims in the case." Specifically, as to "affirmative relief," Dinero asserts (1) "[t]he Wynns ask for actual and punitive damages against Dinero for fraud, conversion and money had and received"; (2) "[i]n turn, the Wynns are attempting to use these alleged damages as an offset to the amounts they owe Dinero for the working interest revenues they received and kept"; (3) the Wynns' pleadings "sought an award of attorneys' fees in the declaratory judgment context which this Court has interpreted to be a request for affirmative relief for the purpose of applying section 16.069" (citing *ECC Parkway Joint Venture v. Baldwin*, 765 S.W.2d 504, 513–14 (Tex. App.—Dallas 1989, writ denied)); and (4) "[t]he Wynns' request for a declaratory judgment in their petition goes well beyond seeking only a declaration with respect to limitations."

Additionally, in its reply brief in this Court, Dinero asserts in part,

> Specifically, the parties' respective interests in the Parker B wells and lease . . . and [the Oklahoma wells] are all from a common source of title—J.C. Barnes. For decades the parties participated in the oil and gas business together including the [Parker B lease] and [the Oklahoma wells]. The amount received in connection with the Chesapeake Lawsuit were held as offsets against the amounts of money owed by [the Wynns] to the Dinero Parties for their receipt of the working interest revenues in the Parker B Lease from and after February 3, 2003 owned by the Dinero Parties. [The Wynns'] claims of conversion and money had and received all relate to this transaction. Correspondingly, the Dinero Parties' claims all relate to the monies owned by [the Wynns] on the Parker B. These transactions are all logically related to each other thereby satisfying the Section 16.069 transaction or occurrence requirement.

(citations to record omitted). Further, Dinero asserts in its reply brief that the language of the Wynns' pleadings (1) "seek[s] a declaration from the trial court on comparative causation," (2) "may also be interpreted to be defensive claims of waiver and estoppel," and (3) "seeks a declaration that they have the right of setoff which is also an affirmative claim."

The Wynns respond "[t]he summary judgment evidence conclusively establishes that the Dinero Parties' claims are barred by limitations and that the claims were not revived by [the

Wynns'] suit." Specifically, the Unitrust asserts in part (1) "[the Wynns'] only claim for damages in this lawsuit was based on the completely unrelated settlement of the Chesapeake dispute in Oklahoma"; (2) "[a]ppellants' time-barred claims on the other hand, relate to payments derived from wells on the Parker B Lease"; and (3) "[t]he claims pertain to different mineral interests in different states," "involve distinct legal issues," and "are clearly not part of the 'same transaction or occurrence." Further, the Wynns contend their declaratory judgment claim and request for attorney's fees did not trigger the revival of time-barred claims pursuant to section 16.069. In support of their arguments, the Wynns cite *Ball v. SBC Communications, Inc.*, No. 04-02-00702-CV, 2003 WL 21467219 (Tex. App.—San Antonio June 25, 2003, pet. denied) (mem. op.).

In *Ball*, SBC Communications, Inc. ("SBC") purchased a life insurance policy on an employee, Adrian Ball. *Id*. at *1. Adrian died in 1991 and the company collected the proceeds of the policy. *Id*. On July 11, 2002, Adrian's heir, Arnold T. Ball ("Ball"), filed a petition in Harris County, Texas, seeking a pre-suit deposition of SBC on matters pertaining to the insurance policy. *Id*. Ball subsequently non-suited SBC in that case. *Id*. Also, Ball filed a similar suit in Bexar County, Texas on July 29, 2002, in which an order of non-suit was entered on August 21, 2002. *Id*.

On July 29, 2002, SBC filed a lawsuit against Ball seeking a declaratory judgment on several alternative grounds, including that, to the extent Ball had any claim based on SBC's alleged lack of insurable interest in the life of Adrian, the claim was barred by the applicable statute of limitations, release, waiver, consent, ratification, estoppel, quasi-estoppel, and unclean hands. *Id*. Also, SBC alleged a claim for attorney's fees. *Id*. Ball answered that lawsuit and alleged counterclaims for unjust enrichment and constructive trust. *Id*. SBC filed a traditional motion for summary judgment on the ground that Ball's claims for unjust enrichment and constructive trust were barred by the applicable statute of limitations. *Id*. Shortly thereafter, SBC amended its

petition, maintaining its declaratory judgment action and dropping its claim for attorney's fees. *Id*. Subsequently, the trial court granted summary judgment in favor of SBC based on the statute of limitations. *Id*. at *2.

On appeal, Ball contended (1) his counterclaims arose from the same transaction or occurrence made the basis of SBC's claims, i.e., SBC's receipt of proceeds from the life insurance policy taken out on Adrian, and (2) accordingly, because the plain language of section 16.069 makes no exception for declaratory judgment actions based upon limitations, that section revived his claims even if they were otherwise barred by limitations. *Id*. at *3. SBC argued (1) section 16.069 "is not designed to revive claims by a defendant where the plaintiff has filed suit seeking a declaratory judgment that such claims are barred by limitations as a matter of law" and (2) "when section 16.069 is interpreted according to set principles of statutory construction, it is clear that Ball's interpretation cannot stand." *Id*. at *2–3.

The court of appeals reasoned in part (1) the purpose of section 16.069 is to prevent a plaintiff from postponing the filing of a claim until an adversary's valid claim is barred by limitations" and (2) "the record does not reflect that SBC sought to postpone its lawsuit so that Ball's claim or claims would be barred by limitations." *Id*. at *3. Further, that court stated "the particular construction advocated by Ball would be unjust and unreasonable" because "the result would be that a litigant would never be able to seek a declaratory judgment based on limitations because a defendant could always use section 16.069 to defeat such a suit." *Id*. at *4. Additionally, the court of appeals distinguished cases relied upon by Ball, including *EEC Parkway*, stating, "We do not consider these cases dispositive as none of them involve a declaratory judgment action based upon limitations." *Id*. at *5. The court of appeals concluded, "We hold that section 16.069 of the Texas Civil Practice and Remedies Code does not revive or save claims brought by a party

as counterclaims in a suit for declaratory judgment which alleges that such claims are absolutely barred by limitations as a matter of law." *Id*. at *6.

ECC Parkway involved a dispute arising from the sale of real property. *See* 765 S.W.2d at 505. The purchaser ("ECC") filed a lawsuit against the seller ("Baldwin") for fraud, negligent misrepresentation, and violation of the Texas Deceptive Trade Practices Act for failing to disclose the existence of a height restriction on the property. *Id*. Baldwin (1) counterclaimed that ECC's DTPA action was groundless and brought in bad faith or for purposes of harassment and (2) asserted a third-party claim against the broker ("Duvall-Giles") for contribution and indemnity. *Id*. at 508. Then, Duvall-Giles filed a cross-action against ECC for a declaration that ECC's claims were meritless and for attorney's fees. *Id*. In response, ECC filed a counterclaim against Duvall-Giles asserting causes of action similar to those it had already asserted against Baldwin. *Id*. at 513. Although that counterclaim was outside the applicable limitations period, ECC contended that counterclaim was timely under section 16.069. *Id*. Duvall-Giles moved to strike ECC's counterclaim as barred by limitations, which motion the trial court denied. *Id*.

On appeal to this Court, Duvall-Giles argued section 16.069 does not apply because its claim against ECC was "not for affirmative relief but only for attorney's fees and that only contingently, based upon the outcome of Baldwin's claim against ECC." *Id*. This Court stated, "Claims for attorney's fees are generally contingent on the claimant's prevailing. A claim for attorney's fees is a claim for affirmative relief." *Id*. at 514. Additionally, this Court stated "the purpose of section 16.069 is to preclude a claimant from waiting to file his claim until after his would-be adversary's own claim against him is barred by limitations" and "we see no reason why that purpose is not served by allowing ECC's counterclaim instead of disallowing it." *Id*. at 513. This Court concluded the trial court did not err by denying Duvall-Giles' motion to strike ECC's counterclaim. *Id*. at 514.

In the case before us, the record shows (1) the Wynns' claims for actual and punitive damages against Dinero for fraud, conversion, and money had and received pertained to proceeds from the Chesapeake Lawsuit, (2) Dinero's counterclaims pertained to working interest revenues respecting the Parker B Lease, and (3) nowhere in their pleadings did the Wynns request an "offset" of any kind. Dinero cites no authority, and we have found none, to support its position that the logical relationship test as to those claims and counterclaims is satisfied by a "common source of title" respecting the wells involved or by Dinero's contention during this lawsuit that it was entitled to an "offset" respecting the various amounts allegedly owed. Rather, "[t]he essential facts on which the counterclaim is based must be significantly and logically relevant to both claims." *Smith*, 160 S.W.3d at 120; *see also Wells*, 261 S.W.3d at 281. The record shows the factual basis of Dinero's counterclaim is the misdirected working interest payments on the Parker B Lease that began in 2003. That basis is not significantly or logically relevant to the Wynns' claim that Dinero wrongfully retained proceeds from the Chesapeake Lawsuit. Accordingly, on this record, we conclude the evidence conclusively established Dinero's counterclaims do not "arise out of the same transaction or occurrence" that is the basis of the Wynns' claims for fraud, conversion, and money had and received. *See Smith*, 160 S.W.3d at 120 (concluding ex-wife's untimely counterclaim respecting 1988 agreement by ex-husband to pay back taxes on property received by ex-wife in divorce did not arise out of "same transaction or occurrence" as ex-husband's claims based on ex-wife's alleged breach of 1986 divorce settlement agreement).

Further, we disagree with Dinero's position that the Wynns' declaratory judgment claim triggered section 16.069. The Wynns' pleadings specifically stated they "seek declaration from this Court that they do not owe any money to Defendants" or, alternatively, "[i]f Plaintiffs owe Defendants anything for the payments received for the Parker B working interests," "Plaintiffs seek declaration from this Court that they only owe working interest revenue received from the

Parker B since April 25, 2012," pursuant to the applicable two-year statute of limitations. The language of those pleadings does not show the Wynns sought declaratory relief in addition to the declaration respecting limitations, but rather that they requested declarations in the alternative. Additionally, Dinero contends in its reply brief that "this Court should not entertain the Appellees' apparent invitation to overrule the [*ECC Parkway*] panel's decision." However, *ECC Parkway* is distinguishable. Unlike the case before us, *ECC Parkway* involved a declaratory judgment action based on the merits of the claims in question. *See ECC Parkway*, 765 S.W.2d at 508; *see also Ball*, 2003 WL 21467219, at *5 (distinguishing *ECC Parkway*). By contrast, the case before us involves a declaratory judgment action based on limitations. *See Ball*, 2003 WL 21467219, at *1–2. Also, as in *Ball*, the record shows this is not a case in which the Wynns sought to postpone their lawsuit until Dinero's claims were barred by limitations. *See id*. at *3. On this record, without disturbing *ECC Parkway*, we conclude section 16.069 did not revive Dinero's counterclaims in this case. *See Ball*, 2003 WL 21467219, at *6 (concluding "section 16.069 of the Texas Civil Practice and Remedies Code does not revive or save claims brought by a party as counterclaims in a suit for declaratory judgment which alleges that such claims are absolutely barred by limitations as a matter of law").

We decide against Dinero on its first issue.

C. Dinero's Breach of Contract Counterclaims

1. Applicable Law

"An assignment is a manifestation by the owner of a right of his intention to transfer such right to the assignee." *Pape Equip. Co. v. I.C.S., Inc.*, 737 S.W.2d 397, 399 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.). Further, "[a]n assignment is a contract between the assignor and assignee, and operates by way of agreement or contract." *Johnson v. Structured Asset Servs., LLC*, 148 S.W.3d 711, 721 (Tex. App.—Dallas 2004, no pet.).

"In construing a written contract, the primary concern of the court is to ascertain the true intentions of the parties as expressed in the instrument." *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003). To determine the intent of the parties, we examine the entire writing and strive to harmonize and give effect to all provisions in the contract, so that no provision is rendered meaningless. *In re Serv. Corp. Int'l*, 355 S.W.3d 655, 661 (Tex. 2011). In doing so, we give contract terms "their plain and ordinary meaning unless the instrument indicates the parties intended a different meaning." *Reeder v. Wood Cty. Energy, LLC*, 395 S.W.3d 789, 794–95 (Tex. 2012). "No single provision taken alone will be given controlling effect; rather, all the provisions must be considered with reference to the whole instrument." *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). "[W]e may neither rewrite the parties' contract nor add to its language." *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 162 (Tex. 2003). If, after applying the rules of construction, we can give the contract a definite or certain legal meaning, we construe it as a matter of law. *See Frost Nat'l Bank v. L & F Distribs., Ltd.*, 165 S.W.3d 310, 312 (Tex. 2005); *Hackberry Creek Country Club, Inc. v. Hackberry Creek Home Owners Ass'n*, 205 S.W.3d 46, 56 (Tex. App.—Dallas 2006, pet. denied).

The elements of a breach of contract claim are (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages to the plaintiff resulting from that breach. *Woodhaven Partners, Ltd. v. Shamoun & Norman, L.L.P.*, 422 S.W.3d 821, 837 (Tex. App.—Dallas 2014, no pet.). Generally, a four-year statute of limitations applies to actions for breach of contract. *Exxon Corp. v. Emerald Oil & Gas Co., L.C.*, 348 S.W.3d 194, 203 (Tex. 2011); *see also* CIV. PRAC. & REM. § 16.051.

2. Application of Law to Facts

In its second and third issues, Dinero asserts "even if section 16.069 does not apply, Dinero is still entitled to recover four years of breach of contract damages, plus attorney's fees" based on

its counterclaims for "breach of contract—the assignments" and "breach of contract—the joint operating agreements." First, as to the Assignments, Dinero contends (1) the Wynns "have each breached the Assignments by their conduct in keeping the Parker B Lease oil and gas working interest payments mistakenly sent to them by the first purchaser" and (2) "[w]hen, as here, the contractual obligation is continuing and the breach is recurring, the four year limitations for contract causes of action begins at the end of each breach." Specifically, according to Dinero,

> Here, the obligation imposed by the Assignments was to "transfer and convey" the personal property in the form of the revenue from the sale of hydrocarbons from the Parker B wells to the Dinero Parties whenever received after February 3, 2003, since they no longer had title to or any right to retain that personal property. Because of the continuing obligations under the Assignments, each time a check was received for those proceeds and not tendered to the Dinero Parties, a new cause of action for breach of contract arose.

In support of that position, Dinero cites *F.D. Stella Products Co. v. Scott*, 875 S.W.2d 462, 466 (Tex. App.—Austin 1994, no writ.). In *F.D. Stella*, the court of appeals stated (1) "Texas law is settled that in any circumstance where a contract requires fixed, periodic payments, the statute of limitations for a breach-of-contract claim will bar only those payments due more than four years before the filing of suit," and (2) "[t]he issue in the present case is whether a lease also gives a new cause of action each time a rent payment is missed." *Id.* at 465–66. However, unlike *F.D. Stella*, the case before us does not involve a contract that "requires fixed, periodic payments." *See id.* at 465. Further, the provisions of the Assignments do not support the "continuing obligations" described by Dinero that allegedly gave rise to "recurring" breaches. Rather, each of the Assignments, on its face, describes a single transfer of the assignor's working interests effectuated and completed in 2003. No other obligations are described in the Assignments.[8] On this record, we conclude there is no evidence of a breach of the Assignments within four years of the filing of

[8] Additionally, in its reply brief in this Court, Dinero asserts the Wynns "failed to negate the discovery rule." However, "we do not consider arguments raised for the first time in a reply brief." *RES-TX Blvd., L.L.C. v. Blvd. Builders/CITTA Townhomes, LP*, No. 05-12-01450-CV, 2014 WL 1483578, at *4 n.3 (Tex. App.—Dallas Apr. 15, 2014, no pet.) (mem. op.); *see Dallas Cty. v. Gonzales*, 183 S.W.3d 94, 104 (Tex. App.—Dallas 2006, pet. denied) ("A reply brief may not be used to raise new issues.").

this lawsuit. *See Reeder*, 395 S.W.3d at 794–95; *J.M. Davidson, Inc.*, 128 S.W.3d at 229; *Am. Mfrs. Mut. Ins. Co.*, 124 S.W.3d at 162.

Second, Dinero contends (1) "the Wynns are each admittedly the 'heirs, successors, representatives and/or assigns' of Sleepy and Shirley Wynn; therefore the [JOA] is binding on each of them"; (2) in the event the Wynns are allowed to keep the working interest revenues, "then they have breached the Operating Agreement to pay the production costs as a matter of law"; and (3) "each month a payment was not made created a new cause of action."

The Wynns respond in part (1) they "were not responsible for bearing the costs charged to a working interest owner because *they no longer owned a working interest* after the Assignments were executed" (emphasis original); (2) "[i]t is undisputed that the JOA applies only to working interest owners and not to royalty or overriding royalty interest owners"; and (3) Dinero has "not pointed to any evidence that [the Wynns] were bound by the JOA after the Assignments."

As described above, the record shows (1) each of the Assignments transferred the assignor's working interests to Dinero Energy in 2003; (2) Ramsland testified in his deposition that the Assignments were effective, and (3) Dewey testified the JOA does not apply to royalty interest owners. Dinero cites no provision of the JOA, and we have found none, that describes continuing obligations respecting a party that transfers its working interest. On this record, we conclude there is no evidence of a breach of the JOA by the Wynns in the four years preceding the filing of this lawsuit. *See Woodhaven Partners*, 422 S.W.3d at 837 (elements of breach of contract claim include "existence of a valid contract").

We decide against Dinero on its second and third issues.

D. Quantum Meruit

1. Applicable Law

Quantum meruit is an equitable remedy "based upon the promise implied by law to pay for beneficial services rendered and knowingly accepted." *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 740 (Tex. 2005) (quoting *Vortt Exploration Co., Inc. v. Chevron U.S.A., Inc.*, 787 S.W.2d 942, 944 (Tex. 1990)). Generally, a party may recover under quantum meruit only where there is no express contract covering the services or materials furnished. *Vortt*, 787 S.W.2d at 944. "To recover under quantum meruit, a claimant must prove that: (1) valuable services were rendered or materials furnished, (2) to the person sought to be charged, (3) which services or materials were accepted, used and enjoyed by that person, (4) under such circumstances as reasonably notified the person sought to be charged that the plaintiff, in performing such services, was expecting to be paid by him." *Fulgham v. Fischer*, 349 S.W.3d 153, 159 (Tex. App.—Dallas 2011, no pet.) (citing *Vortt*, 787 S.W.2d at 944). The measure of damages for a quantum meruit claim is the reasonable value of the work or services performed. *Lamajak, Inc. v. Frazin*, 230 S.W.3d 786, 796 (Tex. App.—Dallas 2007, no pet.). The statute of limitations for an action based on quantum meruit is four years. *See Pepi Corp. v. Galliford*, 254 S.W.3d 457, 461 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).

2. Application of Law to Facts

In its fourth issue, Dinero contends that in the alternative to its breach of contract counterclaims, it was entitled to recover the working interest revenue payments in quantum meruit. According to Dinero, "the Wynns, as recipients of Parker B Lease working interest revenues, knowingly accepted the following services and materials from Dinero Operating with the expectation of being paid: all workover expenses, all production expenses, all supervision

expenses, and all bookkeeping, accounting and monthly reporting expenses." Further, Dinero asserts (1) "[w]ithout the expenditure of those costs no working interest revenues would have been generated"; (2) "[e]ach month that services were rendered or materials furnished, a new cause of action arose for the payment of those services and materials"; and (3) "a joint interest billing statement was provided monthly for these costs," but "[n]one were ever paid."

The Wynns respond in part,

> [Dinero's quantum meruit claim] fails as a matter of law because a plaintiff may only recover for quantum meruit when the services provided are actually for the defendant, not when the defendant incidentally benefitted from the plaintiff's services. Dinero Operating cannot be said to have provided any services for the Wynn Parties, because the Wynn Parties did not own a working interest in the Parker B Lease. At most, the Wynn Parties were incidental (and accidental) beneficiaries of the work done on the lease, which does not—and cannot—give rise to a claim for quantum meruit.

In support of that argument, the Wynns cite two cases, *Truly v. Austin*, 744 S.W.2d 934 (Tex. 1988), and *Bashara v. Baptist Memorial Hospital System*, 685 S.W.2d 307, 310 (Tex. 1985).

In *Bashara*, a hospital filed a lawsuit against an injured party to obtain payment of a hospital lien. *See* 685 S.W.2d at 308. The injured party's attorney, Bashara, intervened to obtain attorney fees for creating a settlement fund from which the lien was to be paid. *Id*. The trial court awarded Bashara a quantum meruit recovery, but the court of appeals reversed. *Id*. The supreme court affirmed the court of appeals. *Id*. The supreme court stated in part,

> It is not enough to show that attorney Bashara's efforts benefited Baptist Hospital . . . . Those efforts must have been undertaken "*for* the person sought to be charged." . . . Although Baptist Hospital may well have received benefits traceable to Bashara's efforts on [the injured party's] behalf, those benefits are only incidental, and create no claim for compensation.

Id. at 310 (emphasis original) (quoting *City of Ingleside v. Stewart*, 554 S.W.2d 939, 943 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.)).

Truly involved a quantum meruit claim filed by a shopping center developer, Truly, against two joint venturers, Austin and Clark, based on services provided in the development of a shopping

center pursuant to a joint venture agreement to which all three were parties. *See* 744 S.W.2d at 936. In concluding equity did not support Truly's quantum meruit claim, the supreme court stated in part,

> [Truly] was not rendering services for the defendants, Austin and Clark. Instead, pursuant to the joint venture agreement, he performed his services for the joint venture. To recover in quantum meruit, the plaintiff must show that his efforts were undertaken for the person sought to be charged; it is not enough to merely show that his efforts benefitted the defendant.

Id. (citing *Bashara*, 685 S.W.2d at 310).

In the case before us, Dinero contends (1) "the recipient of working interest revenues is not a mere 'incidental beneficiary of services'" and (2) "a recipient of working interest revenues such as the Wynns is an *intended* beneficiary of the production services." In support of that position, Dinero cites *Southwestern Energy Production Co. v. Berry-Helfand*, 491 S.W.3d 699, 714 n.9 (Tex. 2016), for the statement "working interest payments 'bear[ ] all the costs of production.'" *Southwestern Energy* did not involve a quantum meruit claim or address any type of benefit or service in the context of quantum meruit. Further, although Dinero may have intended to benefit the working interest owners when it performed services, the record shows the Wynns no longer owned working interests in the Parker B Lease after February 2003. Dinero cites no evidence in the record, and we have found none, showing Dinero's efforts were undertaken "for" the Wynns after 2003. *See Bashara*, 685 S.W.2d at 310. On this record, we conclude the trial court did not err by granting summary judgment against Dinero on its quantum meruit claim.

We decide against Dinero on its fourth issue.

E. Attorney's Fees

In its fifth issue, Dinero contends the trial court erred by denying Dinero's request for attorney's fees and awarding WFW its attorney's fees. Specifically, Dinero asserts (1) "[b]ecause . . . Dinero should prevail on the breach of contract and/or quantum meruit counterclaims as a

matter of law, Dinero is also entitled to an award of necessary and reasonable attorneys' fees under Chapter 38 as a matter of law" and (2) "because the trial court's summary judgment with respect to limitations and Dinero's claims of breach of contract, quantum meruit and attorneys' fees claims should be reversed, thereby increasing the amount to be awarded Dinero in the ultimate final judgment," "[t]he trial court's award of attorneys' fees to WFW under Rule 167, based on the amount awarded in the erroneous judgment, must likewise be reversed since, at that juncture, the settlement offer would be insufficient to enforce a judgment for attorneys' fees against the rejecting party."

As described above, we decide against Dinero on its first four issues. Because Dinero's arguments respecting attorney's fees are all premised on this Court deciding favorably to Dinero on those issues, we decide against Dinero on its fifth issue.

III. CONCLUSION

We decide against Dinero on its five issues. The trial court's judgment is affirmed.

/Douglas S. Lang/
DOUGLAS S. LANG
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

RUSSELL RAMSLAND, JR., DINERO ENERGY CORPORATION AND DINERO OPERATING COMPANY, Appellants

No. 05-17-00326-CV V.

WFW FAMILY, LP, ADRIENNE SUZANNE WYNN BEAUCHAMP CHARITABLE REMAINDER UNITRUST, CLAUDE FORREST WYNN, FORREST JACOB WYNN, AND TAYLOR MAYS WYNN, Appellees

On Appeal from the 95th Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-14-09459.
Opinion delivered by Justice Lang, Justices Fillmore 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 appellees WFW FAMILY, LP, ADRIENNE SUZANNE WYNN BEAUCHAMP CHARITABLE REMAINDER UNITRUST, CLAUDE FORREST WYNN, FORREST JACOB WYNN, AND TAYLOR MAYS WYNN recover their costs of this appeal from appellants RUSSELL RAMSLAND, JR., DINERO ENERGY CORPORATION AND DINERO OPERATING COMPANY.

Judgment entered this 16th day of April, 2018.