Opinion issued August 11, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00610-CV

NILESH BAVISHI AND DIPTI BAVISHI, Appellants

V.

STERLING AIR CONDITIONING, INC. D/B/A AIRTRON, INC., A/K/A AIRTRON HEATING & AIR CONDITIONING, Appellee

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On Appeal from the 268th District Court
Fort Bend County, Texas
Trial Court Case No. 09-DCV-174880

MEMORANDUM OPINION

Sterling Air Conditioning, Inc. *d/b/a* Airtron, Inc., *a/k/a* Airtron Heating & Air Conditioning ("Airtron") sued Nilesh and Dipti Bavishi ("Bavishi") on a sworn

account and asserted alternative claims for breach of contract and quantum meruit arising out of Bavishi's failure to pay Airtron for air conditioning work that Airtron had completed at Bavishi's new house. The trial court rendered summary judgment in favor of Airtron. In four issues, Bavishi contends that the trial court erroneously rendered summary judgment because (1) Airtron failed to allege that all lawful offsets had been applied to the account; (2) Airtron did not conclusively establish that it fully performed under the contract and that Bavishi breached the contract; (3) Airtron failed to prove that Bavishi accepted Airtron's services; and (4) Airtron's summary judgment affidavit contained conclusory statements.

We affirm.

Background

Bavishi began construction on a new house in 2006. In June 2008, Transtar Builders, Inc. ("Transtar"), the general contractor on the project, terminated its relationship with G.K. Mechanical, Inc., the original air conditioning subcontractor. Transtar hired Airtron as air conditioning subcontractor to complete the project in place of G.K. Mechanical, and it executed a contract with Airtron for a "total turnkey price" of $42,954. Transtar's contract with Airtron listed nine distinct items under "Scope of Work Included," including: installing condensers, programmable thermostats, a zone control board, fresh-air intake controllers, and supply and return grills; connecting the vent hoods; adding supply drops to a

second floor bathroom; modifying "return air on the first floor plus additional return on [second] floor landing"; obtaining a permit from the City of Sugar Land; and supplying "miscellaneous material and labor." Under the "Notes" section, the contract provided that: "Condition of existing coils, furnaces, and ductwork is unknown and is not warranted through Airtron. Any repairs or additional services to complete start-up will be extra." The contract similarly stated that the "condition of zone dampers is unknown, replacement of existing equipment (if needed) is extra." This contract did not include a provision specifically obligating Airtron to correct any problems created by previous subcontractors.

In March 2009, Bavishi terminated his relationship with Transtar and himself assumed the role of general contractor. At the time Bavishi fired Transtar, Airtron had not yet completed its work for Transtar, although it had installed some materials at Bavishi's house, including grills, registers, and fan covers.

On May 12, 2009, Bavishi and Airtron executed a contract governing Airtron's remaining work on the project. This contract provided that Airtron would install thermostats and a total of seven condensers for a price of $32,215. The contract also included the following statement:

> This Contract has been modified to show what remaining work is to be completed, as per the original agreement. Based upon previous conversations, the remaining [w]ork left is 1) Completing the trim, both outside and inside the house. 2) Setting the condensers on Builder supplied pad. 3) Starting up systems and installing all thermostats to appropriate locations.

As with Airtron's contract with Transtar, Airtron's contract with Bavishi did not include a provision requiring Airtron either to correct any problems with the air conditioning system created by previous subcontractors or to complete all necessary work to make the system operational.

On June 2, 2009, Airtron issued an invoice to Bavishi in the amount of $32,215.50 for "HVAC final—finish trim & set units." During the course of Airtron's work at Bavishi's property, Airtron employees discovered a problem in the copper line that fed coolant to the condensers. The copper line had been installed by another company, but, at Bavishi's request, Airtron repaired a leak in the line. Airtron invoiced Bavishi an additional $150 for parts and labor.

Beginning in June 2009, after Airtron had installed the contracted-for condensers and thermostats, Bavishi and Airtron disputed both the quality of Airtron's work and the scope of its responsibilities under the contract. Specifically, the parties disputed whether the contract obligated Airtron to correct all problems with the air conditioning system that were created by the subcontractors who had worked on the project prior to Airtron. After the parties were unable to achieve a resolution of this dispute, Airtron ceased working on the project on July 1, 2009.

Bavishi subsequently refused to pay Airtron in accordance with the two invoices Airtron had issued. Airtron then sued Bavishi on a sworn account and

asserted claims for breach of contract and quantum meruit. Airtron attached the affidavit of William Nylan, Airtron's Operations Manager, to its original petition in support of the sworn account. Nylan averred that he had personal knowledge of the contents of the affidavit and control over the records of the account. He stated:

> According to [Airtron's] books and records, pursuant to request by [Bavishi], [Airtron] sold, delivered, and installed for [Bavishi] certain labor, materials and supplies on account to one or more real properties, on which account a systematic record has been kept. A true and correct copy of the invoice(s) for said materials, labor, and supplies so provided . . . is (are) attached hereto as Exhibit "A-1" and incorporated herein for all purposes.
>
> According to [Airtron's] books and records, this claim is just and true and the amount due and unpaid by [Bavishi] to [Airtron] after allowing for all just and lawful offsets, payments, and credits is [$32,365.]

Airtron attached the contract and the two invoices to Bavishi to its original petition. Airtron also alleged that it had completed its obligations under the May 2009 contract and that Bavishi had breached the contract by failing to pay the invoiced amounts. In its quantum meruit claim, Airtron asserted that it was entitled to the reasonable value of materials and supplies that it had sold and delivered to Bavishi while Transtar was still the general contractor on the project and before Airtron entered into its own contract with Bavishi.

Bavishi answered by filing an unsworn general denial.

Airtron moved for summary judgment on each of its own claims. As summary judgment evidence, Airtron attached an affidavit by William Nylan; its

contract with Bavishi; the two unpaid invoices to Bavishi; an unpaid invoice for $2,972.80 to Transtar for work performed by Airtron for Transtar prior to Bavishi's assuming the role of general contractor; and Bavishi's interrogatory answers, in which Bavishi acknowledged the contract he had made with Airtron and admitted that he owed Airtron $21,742.

Nylan averred that at the time Bavishi fired Transtar as the general contractor Transtar owed Airtron $2,972.80 for materials, including "grills, registers, and fan covers," that Airtron had installed at Bavishi's property pursuant to its contract with Transtar. Airtron argued that it was entitled to recover those funds under quantum meruit. Nylan further averred that Airtron "sold, delivered, and installed for [Bavishi] certain labor, materials and supplies on account" and that Airtron "provided and/or installed said air conditioning labor, materials and supplies pursuant to the terms of [the May 2009 contract between Airtron and Bavishi]." According to Nylan, Airtron's records indicated that, "after allowing for all just and lawful offsets, payments, and credits," Bavishi owed it $32,365 on its suit on a sworn account or, alternatively, for breach of contract.

In his interrogatory answers, Bavishi claimed that he was entitled to $10,473 in offsets because, after Airtron left the project, he had to hire additional air conditioning subcontractors to "complete the work" and make the air conditioning

system operational.[1] Airtron argued that Bavishi was not entitled to any of the claimed offsets because the subsequent subcontractors corrected deficiencies in the work of subcontractors that Transtar had hired prior to contracting with Airtron. These subcontractors did not correct deficiencies in the work that Airtron had completed pursuant to its contract with Bavishi. Because Airtron was not contractually obligated under either its original contract with Transtar or its subsequent contract with Bavishi to correct the work of the prior subcontractors, it argued that Bavishi was not entitled to any offsets.

In response to Airtron's summary judgment motion, Bavishi argued that the summary judgment evidence reflected that "[Airtron] did not finish the job, that [Bavishi] had to expend considerable sums after [Airtron] left [the job] to correct and complete the work [Airtron] had contracted to do, and that [Bavishi was] entitled to significant offsets to the amount of [Airtron's] claim." Bavishi argued that Airtron's original contract with Transtar was for a "turnkey job," that Airtron's contract with Bavishi noted that "the work in the original contract was incomplete and that the new contract was a modification of the previous one," and that the "turnkey" contract between Airtron and Bavishi required Airtron "to recognize the previous problems with the [air conditioning] system and make it operational," and

[1] Bavishi argued that he was entitled to the claimed offsets solely in his interrogatory answers and in his summary judgment response. He did not raise this argument in a verified denial of Airtron's sworn account.

this was not done. Bavishi argued that he was entitled to over $10,000 in offsets expended "to correct the inadequacies of Airtron's work."

As summary judgment evidence, Bavishi attached his own affidavit, Airtron's contract with Transtar, and a series of e-mails between Bavishi and Nylan discussing the problems with the air conditioning system. Bavishi averred that Airtron's contract with Transtar was "for a 'turnkey price' for Airtron to complete any necessary work so that the air conditioning would be in working order." He further stated that the May 2009 contract covered not just the installation of condensers and thermostats, but also covered the completion of "any air conditioning work to make the system operational." Bavishi averred:

> Airtron did not do the work it contracted to do. From June 14 through July 1, 2009, I sent Airtron a series of lengthy emails explaining the problems with the system and the corrective action that was necessary. These are attached as Exhibit C. As the email of June 30 at 7:24 P.M. indicates, Airtron had the responsibility to correct any problems with the air conditioning system that existed when Airtron started the job, regardless of how or by whom those problems arose. Airtron did not take any corrective action and left the job about July 1 (without obtaining a final inspection as required for an occupancy permit from the City of Sugar Land). Airtron has performed no work since.

Bavishi then averred that he had spent over $10,000 since Airtron left the project to make the air conditioning system operational, and "[a]ll of [those] expenses were for work that Airtron had contracted to do but did not."

Without specifying the basis for its ruling, the trial court rendered summary judgment in favor of Airtron and awarded it a total of $35,337.80 in damages, $4,496.12 in pre-judgment interest, $6,250 in attorney's fees, and $12,250 in conditional post-trial and appellate attorney's fees. After the trial court denied Bavishi's motion for new trial, this appeal followed.

Standard of Review

We review de novo the trial court's ruling on a summary judgment motion. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). To prevail on a traditional summary judgment motion, the movant must establish that no genuine issues of material fact exist and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Little v. Tex. Dep't of Criminal Justice*, 148 S.W.3d 374, 381 (Tex. 2004). A party moving for summary judgment on its own claims must conclusively prove all essential elements of the claim. *See Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999); TEX. R. CIV. P. 166a(a) ("A party seeking to recover upon a claim . . . may, at any time after the adverse party has appeared or answered, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof."). A matter is conclusively established if reasonable people could not differ as to the conclusion to be drawn from the evidence. *See City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005).

If the movant meets its burden, the burden then shifts to the nonmovant to raise a genuine issue of material fact precluding summary judgment. *See Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995). The evidence raises a genuine issue of fact if reasonable and fair-minded jurors could differ in their conclusions in light of all of the summary judgment evidence. *See Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007) (per curiam). To determine if the nonmovant has raised a fact issue, we review the evidence in the light most favorable to the nonmovant, crediting favorable evidence if reasonable jurors could do so, and disregarding contrary evidence unless reasonable jurors could not. *See Fielding*, 289 S.W.3d at 848 (citing *City of Keller*, 168 S.W.3d at 827). We indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *See Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002) (citing *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997)).

When, as here, the trial court's summary judgment does not state the basis for the court's decision, we must uphold the judgment if any of the theories advanced in the motion are meritorious. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 216 (Tex. 2003).

Suit on a Sworn Account

In his first issue, Bavishi contends that the trial court erroneously rendered summary judgment in favor of Airtron on its sworn account because Airtron failed to allege that all lawful offsets, payments, and credits had been applied.

Texas Rule of Civil Procedure 185 applies to "any claim for a liquidated money demand . . . [for] labor done or labor or materials furnished . . . ." TEX. R. CIV. P. 185. This rule is not a rule of substantive law; rather, "it is a rule of procedure regarding the evidence necessary to establish a prima facie right of recovery" on certain types of contractual account claims. *See Rizk v. Fin. Guardian Ins. Agency, Inc.*, 584 S.W.2d 860, 862 (Tex. 1979); *Smith v. CDI Rental Equipment, Ltd.*, 310 S.W.3d 559, 566 (Tex. App.—Tyler 2010, no pet.); *Panditi v. Apostle*, 180 S.W.3d 924, 926 (Tex. App.—Dallas 2006, no pet.).

Rule 185 provides that "when an action is founded on an open account on which a systematic record has been kept and is supported by an affidavit, the account shall be taken as prima facie evidence of the claim, unless the party resisting the claim files a written denial under oath." *Panditi*, 180 S.W.3d at 926; *see* TEX. R. CIV. P. 185. To establish a prima facie case in a suit on a sworn account, the plaintiff must strictly comply with the requirements of Rule 185. *Nguyen v. Short, How, Frels & Heitz, P.C.*, 108 S.W.3d 558, 562 (Tex. App.—Dallas 2003, pet. denied). The plaintiff's petition "must contain a systematic

itemized statement of the services rendered, reveal offsets made to the account, and be supported by an affidavit stating the claim is within the affiant's knowledge and that it is 'just and true.'" *Id.*; *see also Panditi*, 180 S.W.3d at 926 (stating requirements for sworn account petition and accompanying affidavit). If there is a deficiency in the plaintiff's sworn account, the account will not constitute prima facie evidence of the debt. *Panditi*, 180 S.W.3d at 927; *Nguyen*, 108 S.W.3d at 562.

The defendant resisting the sworn account must also strictly comply with the requirements of Rule 185, "or he will not be permitted to dispute the receipt of the services or the correctness of the charges." *See Panditi*, 180 S.W.3d at 927; *see also Vance v. Holloway*, 689 S.W.2d 403, 404 (Tex. 1985) (per curiam) ("Holloway failed to file a sworn denial and he has, therefore, waived his right to dispute the amount and ownership of the account."). Rule 185 requires the defendant to "comply with the rules of pleading" and "timely file a written denial, under oath," or else the defendant "shall not be permitted to deny the claim, or any item therein." TEX. R. CIV. P. 185; *Panditi*, 180 S.W.3d at 927 (noting that Rule 185 requires sworn denial to be written and verified by affidavit). To place the plaintiff's sworn account claim at issue, the defendant must file a "special verified denial of the account" in accordance with Texas Rule of Civil Procedure 93. *See Huddleston v. Case Power & Equip. Co.*, 748 S.W.2d 102, 103 (Tex. App.—Dallas

1988, no writ); *see also* TEX. R. CIV. P. 93(10) ("A pleading setting up any of the following matters, unless the truth of such matters appear of record, shall be verified by affidavit[:] A denial of an account which is the foundation of the plaintiff's action . . . ."). This sworn denial must be included in the defendant's answer; a sworn denial in a response to a summary judgment motion does not satisfy Rule 185. *See Cooper v. Scott Irrigation Constr., Inc.*, 838 S.W.2d 743, 746 (Tex. App.—El Paso 1992, no writ); *see also Rush v. Montgomery Ward*, 757 S.W.2d 521, 523 (Tex. App.—Houston [14th Dist.] 1988, writ denied) ("Only in the affidavit accompanying his response to Ward's motion for summary judgment did appellant dispute the correctness and fairness of the charges, and demand additional proof of his liability. Because the combined effect of Texas Rule of Civil Procedure 185 and Texas Rule of Civil Procedure 93(10) required appellant to raise those claims in his answer, we hold that appellant raised his assertions too late.").

If the defendant fails to file a verified denial to the sworn account, the sworn account is received as prima facie evidence of the debt, and the plaintiff, as summary judgment movant, is entitled to summary judgment on the pleadings. *Nguyen*, 108 S.W.3d at 562; *see Livingston Ford Mercury, Inc. v. Haley*, 997 S.W.2d 425, 430 (Tex. App.—Beaumont 1999, no pet.) (holding that when plaintiff files proper sworn account petition but defendant does not comply with

Rule 185, the petition will support summary judgment and "additional proof of the accuracy of the account is unnecessary"). "In other words, a defendant's noncompliance with rule 185 conclusively establishes that there is no defense to the suit on the sworn account." *Nguyen*, 108 S.W.3d at 562; *see Whiteside v. Ford Motor Credit Corp.*, 220 S.W.3d 191, 194 (Tex. App.—Dallas 2007, no pet.) ("When the defendant fails to file a sworn denial and the trial court enters summary judgment on a sworn account, appellate review is limited because the defendant will not be allowed to dispute the plaintiff's claim."). If, however, the plaintiff's suit on a sworn account was not properly pleaded pursuant to Rule 185, the defendant is not required to file a sworn denial. *Panditi*, 180 S.W.3d at 927. In this circumstance, a general denial is sufficient to controvert the account. *Tex. Dep't of Corrs. v. Sisters of St. Francis of St. Jude Hosp.*, 753 S.W.2d 523, 524 (Tex. App.—Houston [1st Dist.] 1988, no writ).

Here, Bavishi contends that his general denial and sworn affidavit attached to his response to Airtron's summary judgment motion, which alleges that several offsets should be applied to the account, raises a fact issue because Airtron did not allege that all offsets, payments, and credits had been applied to the account, and, therefore, Airtron did not properly plead a sworn account in compliance with Rule 185. The record, however, reflects otherwise.

In its original petition, Airtron alleged that it "sold and delivered to [Bavishi] certain heating and air conditioning labor, materials and supplies specified in the Account." Airtron attached its contract with Bavishi and two unpaid invoices totaling $32,365 to its original petition. Airtron also attached the affidavit of William Nylan. Nylan averred that he had personal knowledge of the account and stated:

> According to [Airtron's] books and records, pursuant to request by [Bavishi], [Airtron] sold, delivered, and installed for [Bavishi] certain labor, materials and supplies on account to one or more real properties, on which account a systematic record has been kept. A true and correct copy of the invoice(s) for said materials, labor, and supplies so provided . . . is (are) attached hereto as Exhibit "A-1" and incorporated herein for all purposes.
>
> According to [Airtron's] books and records, this claim is just and true and the amount due and unpaid by [Bavishi] to [Airtron] *after allowing for all just and lawful offsets, payments, and credits* is [$32,365].

(Emphasis added.)

Airtron's petition, affidavit, and supporting invoices contain all of the information required by Rule 185. *See* TEX. R. CIV. P. 185; *Nguyen*, 108 S.W.3d at 562 (stating requirements for sworn account petition and supporting affidavit). Thus, to dispute Airtron's implied assertion that Bavishi was not entitled to any offsets, Bavishi was required to file a verified denial of the account in compliance with Rule 185 and Rule 93(10). *See Panditi*, 180 S.W.3d at 927. It is undisputed that Bavishi filed only an unsworn general denial and did not argue that he was

entitled to offsets until his response to Airtron's summary judgment motion. Because Bavishi did not file a verified denial, "he was precluded from denying 'the claim or any item therein.'" *See id.* (quoting TEX. R. CIV. P. 185); *Solano v. Syndicated Office Sys.*, 225 S.W.3d 64, 67 (Tex. App.—El Paso 2005) ("The failure to follow Rule 185 precludes the defendant from raising a fact issue and from disputing the receipt of the items or services rendered or the correctness of the claim. The defendant may not deny the claim or raise an issue that he did not owe the account or that it was wrongfully charged to him.").

We conclude that because Airtron properly stated that all lawful offsets had been applied to Bavishi's account and Bavishi did not file a verified denial challenging this assertion, Airtron's petition and supporting affidavit constituted prima facie evidence of the sworn account which Bavishi waived the right to dispute, entitling Airtron to summary judgment on its pleadings. We therefore hold that the trial court correctly rendered summary judgment in favor of Airtron on its sworn account.

We overrule Bavishi's first issue.[2]

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[2] Because we hold that the trial court properly rendered summary judgment on Airtron's sworn account, we do not address Bavishi's second issue—whether the trial court erred in rendering summary judgment on Airtron's breach of contract claim. In his fourth issue, Bavishi contends that Nylan's summary judgment affidavit included conclusory statements supporting Airtron's breach of contract and quantum meruit claims. Although we address whether Nylan's statements relating to Airtron's quantum meruit claim are conclusory, we do not address

Quantum Meruit

In his third issue, Bavishi contends that the trial court erroneously rendered summary judgment in favor of Airtron on its quantum meruit claim because it failed to establish that Bavishi accepted Airtron's services.

Quantum meruit is an equitable theory of recovery based on an implied agreement to pay for benefits received and knowingly accepted. *Heldenfels Bros., Inc. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992); *Tricon Tool & Supply, Inc. v. Thumann*, 226 S.W.3d 494, 502 (Tex. App.—Houston [1st Dist.] 2006, pet. denied). A party can recover in quantum meruit when non-payment for the services rendered would result in an unjust enrichment to the party benefited by the work. *Speck v. First Evangelical Lutheran Church of Houston*, 235 S.W.3d 811, 815 (Tex. App.—Houston [1st Dist.] 2007, no pet.). To recover in quantum meruit, the plaintiff must establish that: (1) valuable services and/or materials were furnished, (2) to the party sought to be charged, (3) which were accepted by the party sought to be charged, and (4) under such circumstances as reasonably notified the recipient that the plaintiff, in performing, expected to be paid by the recipient. *Heldenfels Bros.*, 832 S.W.2d at 41 (citing *Vortt Exploration Co. v. Chevron U.S.A., Inc.*, 787 S.W.2d 942, 944 (Tex. 1990)). The plaintiff must also demonstrate that its efforts "were undertaken *for* the person sought to be charged;

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whether his statements relating to Airtron's breach of contract claim are conclusory.

it is not enough to merely show that [its] efforts benefitted the defendant." *Hester v. Friedkin Cos.*, 132 S.W.3d 100, 106 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) (emphasis in original).

Bavishi contends that he raised a fact issue regarding whether he accepted Airtron's services, and he points to his summary judgment affidavit and the attached series of e-mails between Nylan and himself discussing the problems with the air conditioning system as evidence that Airtron did not satisfy its responsibility to correct all problems that arose involving the air conditioning system. Airtron argues that its quantum meruit claim was limited to recovery for the reasonable value of materials that it provided to Bavishi under its agreement with Transtar before Airtron contracted directly with Bavishi, including the installation of "grills, registers, and fan covers," and that by not objecting to the installation of these particular materials or claiming that Airtron's installation of these materials was faulty Bavishi accepted the materials. We agree with Airtron.

Airtron's contract with Transtar obligated it to install, among other things, "steel supply grills and aluminum fixed bar return grills." In his summary judgment affidavit, Nylan averred that Airtron installed materials, "including grills, registers, and fan covers," pursuant to its contract with Transtar and that Transtar did not pay Airtron for these materials. After Bavishi fired Transtar and took over the project as general contractor, he signed a new contract with Airtron, which

specified the remaining work to be completed and materials to be installed. This contract did not mention items such as grills, registers, and fan covers. Furthermore, although Bavishi subsequently informed Airtron of the numerous alleged problems with the air conditioning system, he never complained that the materials installed under the Transtar contract, and specified in Airtron's quantum meruit claim, were unsatisfactory. There is also no evidence that any of the subsequent air conditioning subcontractors hired by Bavishi after Airtron left the project were required to fix problems concerning these specific materials.

We conclude that, under these facts, the summary judgment evidence establishes that Bavishi accepted the materials installed pursuant to Airtron's contract with Transtar and at issue in Airtron's quantum meruit claim. *See also RC Mgmt., Inc. v. Tex. Waste Sys., Inc.*, No. 04-02-00488-CV, 2003 WL 1712535, at *4 (Tex. App.—San Antonio Apr. 2, 2003, no pet.) (mem. op.) ("[T]he evidence reflects that RCM did not refuse delivery of the larger containers or contact TWS to, at the very least, complain of the larger containers."). We therefore hold that the trial court correctly rendered summary judgment in favor of Airtron on its quantum meruit claim.

We overrule Bavishi's third issue.

Conclusory Statements in Summary Judgment Affidavit

Finally, in his fourth issue, Bavishi contends that the trial court erroneously rendered summary judgment based on Nylan's summary judgment affidavit, which contained legally and factually conclusory statements.[3]

Affidavits containing conclusory statements unsupported by facts are not competent summary judgment evidence. *Prime Prods., Inc. v. S.S.I. Plastics, Inc.*, 97 S.W.3d 631, 637 (Tex. App.—Houston [1st Dist.] 2002, pet. denied) (quoting *Aldridge v. De Los Santos*, 878 S.W.2d 288, 296 (Tex. App.—Corpus Christi 1994, writ dism'd w.o.j.)); *Rizkallah v. Conner*, 952 S.W.2d 580, 587 (Tex. App.—Houston [1st Dist.] 1997, no pet.) ("A conclusory statement is one that does not provide the underlying facts to support the conclusion."). An affidavit must be factual—mere conclusions of the affiant lack probative value. *Prime Prods.*, 97 S.W.3d at 637; *see also Ryland Group, Inc. v. Hood*, 924 S.W.2d 120, 122 (Tex. 1996) ("[Conclusory affidavits are neither] credible nor susceptible to being readily controverted."). A conclusory statement "may set forth an unsupported

[3] On appeal, Airtron contends that Bavishi's objections to Nylan's affidavit constitute objections to the form of the affidavit, and, thus, Bavishi failed to preserve this complaint for appellate review because he did not object to Nylan's affidavit in the trial court. An assertion that a summary judgment affidavit is conclusory is an objection relating to a substantive defect, and, thus, an appellant may raise this argument for the first time on appeal and without obtaining a ruling from the trial court. *McMahan v. Greenwood*, 108 S.W.3d 467, 498 (Tex. App.—Houston [14th Dist.] 2003, pet. denied); *see Brown v. Brown*, 145 S.W.3d 745, 751 (Tex. App.—Dallas 2004, pet. denied). Because Bavishi objects to the substance of Nylan's affidavit, he may raise this contention for the first time on appeal.

legal conclusion or an unsupported factual conclusion." *Choctaw Props., L.L.C. v. Aledo Indep. Sch. Dist.*, 127 S.W.3d 235, 242 (Tex. App.—Waco 2003, no pet.).

Bavishi contends that Nylan's statement in his affidavit that "[a]t the time that Transtar was fired from the job, Transtar owed [Airtron] moneys for work done by [Airtron] for Transtar at said residence" is conclusory because it is "not supported by any facts" and "Airtron attached no summary judgment proof." We disagree.

In addition to the above statement, Nylan's summary judgment affidavit also included the following paragraph:

> Additionally, pursuant to [Airtron's] books and records, Transtar owes [Airtron] for work at the subject residence, which included grills, registers, and fan covers, a copy of which unpaid invoice is attached hereto as Exhibit "A-4," and incorporated herein for all purposes. According to [Airtron's] books and records, this claim is just and true and the amount due and unpaid by Transtar to [Airtron] after allowing for all just and lawful offsets, payments, and credits is [$2,972.80].

Airtron also attached the invoice issued to Transtar, dated May 14, 2009, which reflects an unpaid balance of $2,972.80, to Nylan's affidavit.

We conclude that, contrary to Bavishi's assertion, Airtron presented factual support for the objected-to statement demonstrating the amount that Transtar owed to Airtron. *See Rivera v. White*, 234 S.W.3d 802, 808 (Tex. App.—Texarkana 2007, no pet.) ("Although all of White's statements concerning the vehicle damage and medical care are to some degree conclusory, each furnishes some factual

information that could have been rebutted."); *Choctaw Props.*, 127 S.W.3d at 242 ("Thus, his 'conclusory' statements that he spoke with an agent of the Defendants have factual support in the affidavit."). Nylan's statement is supported by facts and, thus, is not conclusory. We therefore hold that the trial court properly considered this evidence when rendering summary judgment in favor of Airtron.

We overrule Bavishi's fourth issue.

Conclusion

We affirm the judgment of the trial court.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Higley, and Matthews.[4]

[4] The Honorable Sylvia Matthews, Judge of the 281st District Court of Harris County, Texas, participating by assignment. *See* TEX. GOV'T CODE ANN. § 74.003(h) (Vernon 2005).