Opinion issued February 13, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-01114-CV

CARTO PROPERTIES, LLC, JEN MARIE RAU, INDIVIDUALLY, KEY MAPS, INC., AND THE JEN MARIE RAU LIFE INSURANCE TRUST, Appellants/Cross-Appellees,

V.

BRIAR CAPITAL, L.P., Appellee/Cross-Appellant

On Appeal from the 11th District Court
Harris County, Texas
Trial Court Case No. 2015-09664

MEMORANDUM OPINION[1]

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[1] This Court originally issued an opinion in this case on June 13, 2017. On August 7, 2017, during the rehearing period, this Court was notified that appellant/cross-appellee, Jen Marie Rau, had filed a bankruptcy petition on June 5, 2017. *See* TEX. R. APP. P. 8.2. Because issuance of our prior opinion and judgment occurred during the pendency of the automatic stay provided by 11 U.S.C. § 362(a)

Appellants/cross-appellees, Carto Properties, LLC, Jen Marie Rau, individually ("Rau"), Key Maps, Inc., and the Jen Marie Rau Life Insurance Trust (the "Trust") (collectively, "Carto"), challenge the trial court's rendition of summary judgment in favor of appellee/cross-appellant, Briar Capital, L.P. ("Briar"), in Carto's suit against Briar for wrongful foreclosure, breach of contract, tortious interference with contract, and fraud. In three issues, Carto contends that the trial court erred in granting Briar summary judgment. In its sole cross-point, Briar contends that the trial court erred in denying its request for attorney's fees.

We affirm in part and reverse and render in part.

Background

In its second amended petition, Carto alleged that in 2013, it purchased commercial real property located at 1411 and 1413 West Alabama Street in Houston. To finance its purchase, Carto obtained a loan from Briar in the amount of $1,050,000. In conjunction with the parties' loan agreement, Carto executed a

(2012), our prior opinion and judgment are void. *See Howell v. Thompson*, 839 S.W.2d 92, 92 (Tex. 1992). Accordingly, we withdraw our opinion and judgment of June 13, 2017. *See id.* On October 20, 2017, the United States Bankruptcy Court of the Southern District of Texas dismissed Rau's bankruptcy petition, lifting the automatic stay. *See* 11 U.S.C. § 362(c)(2)(B). Appellee/cross-appellant, Briar Capital, L.P., has moved to reinstate the appeal and for reissuance of our prior opinion and judgment. *See* TEX. R. APP. P. 8.3. Accordingly, we grant the motion to reinstate the appeal and issue this new opinion and judgment. *See Howell*, 839 S.W.2d at 92.

promissory note, secured by a deed of trust naming Briar as the beneficiary (collectively, the "loan documents"). Rau, Key Maps, and the Trust (the "guarantors") each executed a guaranty agreement, guaranteeing Carto's repayment of the loan and any attorney's fees and collection costs.

In July 2014, after Carto had become delinquent on its loan payments, it received from Briar a notice of default and acceleration. Carto, in an effort to stop Briar's "threatened" foreclosure against the property and to protect its equity, entered into a forbearance agreement with Briar. Pursuant to the agreement, Carto promised to list the property for sale with a licensed broker no later than September 1, 2014. And Briar promised to refrain from exercising its enforcement remedies, i.e., foreclosure, as set forth in the loan documents, until November 1, 2014.

In September 2014, Briar again threatened to foreclose on the property after Carto had not complied with the terms of the forbearance agreement requiring that it list the property for sale with a broker. The parties then entered into a second forbearance agreement, in which Carto promised to deliver to Briar, on or before October 3, 2014, a contract executed by Carto to sell the property to a new buyer for an amount at least equal to the outstanding loan balance and with a closing date of no later than December 31, 2014. Carto also promised to deposit $40,000 into a loan-payment-reserve account to cover the interim payments. In exchange, Briar agreed to refrain from exercising its enforcement remedies until December 31, 2014.

Carto further alleged that after it had not complied with the terms of the second forbearance agreement, Briar, on December 14, 2014, sent it a notice of intent to foreclose on the property at a January 6, 2015 trustee's sale. However, in late December, Carto, through "telephone conversations and emails" with Briar, had "worked out deals in which the foreclosure would be postponed" to allow Carto more time to sell the property. The Menil Foundation (the "Foundation") had agreed to a cash purchase of the property for $1,590,000 and to a closing date, in either January or early February 2015, and Briar had "agreed verbally and in writing to hold off" on the January 6, 2015 foreclosure sale. On December 31, 2014, Briar, through its representative, John Kerkhoff, sent to Carto's representative, Jeff Williams, an email specifying a loan payoff amount, as of January 9, 2015, of $1,229,734.90 and "serv[ing] to further the belief on [Carto's] part" that Briar was not planning to foreclose on January 6, 2015. Although Briar had also "promised to send" to Carto "a third forbearance agreement prior to the scheduled January 6, 2015 foreclosure sale," Carto did not receive it. And, on January 6, 2015, Briar sold the property at a foreclosure sale.

In its claim for wrongful foreclosure, Carto specifically alleged that Briar "never re-noticed [Carto] for a February 3, 2015 mortgage foreclosure sale after it canceled the January 6, 2015 mortgage foreclosure sale."[2] In its claim for breach of

[2] It is undisputed that Briar sold the property on January 6, 2015.

contract, Carto alleged that Briar had breached "its agreement" to forbear from exercising its enforcement remedies by moving forward and selling the property at the foreclosure sale. Carto further alleged that Briar had breached its duty of good faith and fair dealing.

In its claim for tortious interference with an existing or prospective contract, Carto alleged that Briar had intentionally interfered with its sales contract with the Foundation. Carto had negotiated the final terms of the sale prior to the scheduled foreclosure sale; the Foundation was "ready, willing, and able to purchase the property" for $1,590,000 in cash; the actual market value of the property was $1,850,000; and Carto, under the terms of its sale, was to receive at least $370,000, for a portion of its equity in the property. Moreover, Briar was aware of the pending sale and its terms, including that the sale was to close in January or February 2015. Nevertheless, Briar interfered with Carto's sale of the property to the Foundation by selling the property at a foreclosure sale on January 6, 2015.

In its fraud claim, Carto alleged that Briar had agreed, "verbally and in writing," to "hold off" on the January 6, 2015 foreclosure sale. It "promised to send" Carto a third forbearance agreement and, in a December 31, 2014 email to Carto, specified an amount to pay off the loan on January 9, 2015. According to Carto, the "only possible interpretation" of the email is that Briar intended to cancel the January 6, 2015 foreclosure sale. However, Briar had no intention of delaying the

foreclosure sale, but, in fact, intended to purchase the property at the sale and then sell it directly to the Foundation for an additional profit. And, Briar, by not disclosing that it intended to move forward with the foreclosure sale as scheduled, "intended to divert" Carto's attention away from protecting its interests through seeking injunctive relief to prevent the sale. Thus, according to Carto, Briar either knew that its representations were false or made its representations recklessly, without any knowledge of their truth. Further, Briar intended that Carto act in reliance on its representations, which Carto did to its detriment.

Briar answered, generally denying Carto's allegations and asserting various affirmative defenses and a counterclaim for attorney's fees and costs. Briar also filed a summary-judgment motion, arguing that it was entitled to judgment as a matter of law on Carto's claims because they are based on "unsigned and alleged oral promises, agreements, or modification[s] to signed and written loan documents." Briar asserted that Carto had previously admitted that it had failed to repay the loan in accordance with its terms and comply with the first and second forbearance agreements by not listing or selling the property and by not depositing the agreed upon sums into the loan-payment-reserve account.

Briar further asserted that on December 31, 2014, Carto sent to Briar an email, requesting that it "work up a loan payoff for Friday, January 9th." Briar answered with the payoff amount and noted a required forbearance fee of $25,000. On January

4, 2015, two days before the scheduled foreclosure sale, Carto sent to Briar an email, asking whether a third "forbearance agreement [would] be ready [on] Monday," January 5, 2015. Briar answered that it would; however, Carto, on January 5, did not execute a new forbearance agreement or pay the forbearance fee. Thus, Briar, having no reason to pass on the trustee's sale and in accordance with its rights under the loan documents, sold the property at the January 6, 2015 foreclosure sale as noticed.

In regard to Carto's claim of tortious interference with contract, Briar argued that it was entitled to judgment as a matter of law, based on its affirmative defense of justification, because Carto was admittedly in default on the loan, Briar had a legal and contractual right, pursuant to the loan documents, to foreclose on the property, notwithstanding the pendency of any sale of the property by Carto. In regard to Carto's fraud claim, Briar argued that it was entitled to judgment as a matter of law because Carto was barred from relying on any representations that Briar had agreed, either orally or in unsigned documents, to waive its enforcement rights or extend the loan as the express, unambiguous terms of the loan documents prohibit such modifications.

In regard to its claim against Carto and the guarantors for attorney's fees, Briar argued that it was entitled to judgment as a matter of law because the terms of the loan documents expressly provide for the recovery of its reasonable attorney's fees

in any lawsuit requiring it to enforce or preserve its rights under the loan documents. Briar sought attorney's fees in the amount of $61,121.50 for trial, $30,000.00 for appeal, $20,000.00 for a petition for review to the Texas Supreme Court, and $17,500.00 if a petition for review were granted.

Briar attached to its summary-judgment motion a copy of Carto's petition; the loan documents, including the loan agreement, note, deed of trust, and an "Acknowledgement of Final Agreement, No Oral Agreements, [and] Waiver of Jury Trial"; the guaranty agreements; the first and second forbearance agreements; Briar's notices to Carto of default and foreclosure; the trustee's deed; and numerous emails. Briar also attached excerpts of the depositions of representatives of the Foundation, John Trahan and Taylor Cooksey; the affidavits of its representative, John Kerkhoff, and its attorney, Seth A. Miller; and its attorney's fees invoices.

In its summary-judgment response, Carto argued that a material fact issue precluded summary judgment on its claim of tortious interference with an existing or prospective contract because, although there was not a signed agreement in place between Carto and the Foundation, the parties had agreed to the final terms of the sale of the property. Carto asserted that Briar was aware of the details of the agreement; the Foundation was "ready, willing, and able to purchase the property" for $1,590,000 in cash funds; the sale was to close in January or early February 2015;

and Briar intentionally interfered with Carto's sale of the property by selling the property at the foreclosure sale on January 6, 2015.

Carto argued that a material fact issue precluded summary judgment on its fraud claim because Briar, by agreeing to make available to Carto a third forbearance agreement and giving Briar a January 9, 2015 payoff quote, had "effectively cancelled the January 6, 2015 mortgage foreclosure sale." Carto further argued that Briar was not entitled to summary judgment on its claim for attorney's fees because Carto's claims were not based on the loan documents themselves. Carto attached to its response a copy of its second amended petition; excerpts of the deposition of Trahan; and the affidavits of Rau, Williams, and Carto's attorney, Albert J. Holly.

In its reply, Briar argued that it was entitled to judgment as a matter of law on Carto's claims because the loan documents expressly require that any changes to the rights and responsibilities thereunder be made by a written agreement signed by the parties. And it was undisputed that the parties had not executed a third forbearance agreement.

Briar explained that although it had given Carto a payoff amount effective January 9 2015, it did so only in response to the December 31, 2014 email request by Carto's representative, Williams, that Briar "work up a payoff quote for next Friday, January 9th." Briar emphasized that it did not unilaterally offer a payoff amount for that date. On January 4, 2015, Williams sent to Briar an email asking

whether a forbearance agreement would "be ready Monday." And Briar's representative, Kerkhoff, responded, "Yes, I [will] have it for you tomorrow morning." Briar asserted that its summary-judgment evidence shows that although Carto had asked it to reduce its forbearance fee from $25,000 to $15,000, Briar had refused. And, the parties never signed an agreement to modify the foreclosure rights under the loan documents or an agreement to cancel the foreclosure sale.

The trial court, without specifying the grounds, granted Briar summary judgment and dismissed all of Carto's claims. The trial court also denied Briar's request for its attorney's fees, but it taxed the court costs against Carto.

Standard of Review

We review a trial court's summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005); *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). In conducting our review, we take as true all evidence favorable to the non-movant, and we indulge every reasonable inference and resolve any doubts in the non-movant's favor. *Valence Operating*, 164 S.W.3d at 661; *Knott*, 128 S.W.3d at 215. If a trial court grants summary judgment without specifying the grounds for granting the motion, we must uphold the trial court's judgment if any of the asserted grounds are meritorious. *Beverick v. Koch Power, Inc.*, 186 S.W.3d 145, 148 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

To prevail on a matter-of-law summary-judgment motion, the movant must establish that no genuine issue of material fact exists and the trial court should grant judgment as a matter of law. *See* TEX. R. CIV. P. 166a(c); *KPMG Peat Marwick v. Harrison Cty. Hous. Fin. Corp*., 988 S.W.2d 746, 748 (Tex. 1999). When a plaintiff moves for summary judgment on its own claim, it must conclusively prove all essential elements of its cause of action. *Rhone–Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999). When a defendant moves for a matter-of-law summary judgment, it must either: (1) disprove at least one essential element of the plaintiff's cause of action or (2) plead and conclusively establish each essential element of an affirmative defense, thereby defeating the plaintiff's cause of action. *See Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995); *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995); *Lujan v. Navistar Fin. Corp*., 433 S.W.3d 699, 704 (Tex. App.—Houston [1st Dist.] 2014, no pet.). Once the movant meets its burden, the burden shifts to the non-movant to raise a genuine issue of material fact precluding summary judgment. *See Siegler*, 899 S.W.2d at 197; *Transcon. Ins. Co. v. Briggs Equip. Trust*, 321 S.W.3d 685, 691 (Tex. App.—Houston [14th Dist.] 2010, no pet.). The evidence raises a genuine issue of fact if reasonable and fair-minded factfinders could differ in their conclusions in light of all of the summary-judgment evidence. *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007).

Summary Judgment

In its first issue, Carto generally challenges the trial court's rendition of summary judgment in favor of Briar. In its second issue, Carto argues that the trial court erred in granting Briar summary judgment on Carto's fraud claim because material fact issues exist regarding Carto's duty to disclose its intent to foreclose on the property. Carto specifically argues that Briar, "[b]y disclosing the acceptable January 9 payoff amount" and "promising delivery of a third forbearance agreement," conveyed a false impression that it intended to cancel the January 6, 2015 foreclosure sale. In its third issue, Carto argues that the trial court erred in granting Briar summary judgment on Carto's claim for tortious interference with a prospective contract because Briar's summary-judgment motion did not address its claim.

General Challenge

In regard to its first issue, Carto generally asserts that the "trial court erred in granting summary judgment in favor of the defendants." The trial court granted Briar summary judgment on "all claims" by Carto, which include wrongful foreclosure, breach of contract, tortious interference with existing and prospective contract, and fraud. In its brief, however, Carto does not challenge the summary judgment rendered on its claims for wrongful foreclosure, breach of contract, and tortious interference with an *existing* contract. Carto concedes that "Briar is not

liable for breach of contract because the parties did not execute a third forbearance agreement (which includes Carto's claim for wrongful foreclosure)." Carto also concedes that "Briar is not liable for tortious interference with [an existing] contract" because Carto and the Foundation "had not executed an enforceable contract for the sale of the property."

Because Carto does not challenge the trial court's summary judgment on these claims, we affirm the summary judgment rendered in favor of Briar on Carto's claims for wrongful foreclosure, breach of contract, and tortious interference with existing contract. *See* TEX. R. CIV. P. 166a(c); *Plotkin v. Joekel*, 304 S.W.3d 455, 467 (Tex. App.—Houston [1st Dist.] 2009, pet. denied); *Tricon Tool & Supply, Inc. v. Thumann*, 226 S.W.3d 494, 500 (Tex. App.—Houston [1st Dist.] 2006, pet. denied).

Tortious Interference with Prospective Contract

In regard to its third issue, Carto, in its first amended petition, which was its live pleading at the time that Briar filed its summary-judgment motion, had asserted a claim for tortious interference with an *existing* contract.[3] However, subsequent to the filing of Briar's motion, but prior to the trial court's summary-judgment ruling, Carto filed its second amended petition containing a new claim, i.e., tortious interference with a *prospective* contract. Carto asserts that Briar's summary-

[3] Carto conceded that it did not have an existing contract with the Foundation.

judgment motion did not address this new claim. And, thus, the trial court erred in granting Briar summary judgment and dismissing all of Carto's claims and causes of action.

Generally, "[a] plaintiff's timely filed amended pleading supersedes all previous pleadings and becomes the controlling petition in the case." *Elliott v. Methodist Hosp*., 54 S.W.3d 789, 793 (Tex. App.—Houston [1st Dist.] 2001, pet. denied); *see also* TEX. R. CIV. P. 63, 65. A plaintiff timely files an amended pleading if it does so seven days before trial. TEX. R. CIV. P. 63; *see also Sosa v. Cent. Power & Light*, 909 S.W.2d 893, 895 (Tex. 1995) (explaining, under rule 63, leave not required for plaintiff to amend if amended petition filed "seven days or more before the date of trial" (internal quotations omitted)). For purposes of rule 63, "[a] summary judgment proceeding is a trial." *Goswami v. Metro. Sav. & Loan Ass'n*, 751 S.W.2d 487, 490 (Tex. 1988); *Wheeler v. Yettie Kersting Mem'l Hosp*., 761 S.W.2d 785, 787 (Tex. App.—Houston [1st Dist.] 1988, writ denied).

Carto filed its second amended petition on September 9, 2015, and the record shows that the trial court signed its order granting summary judgment twelve days later on September 21, 2015. Thus, Carto timely filed its second amended petition. *See Sosa*, 909 S.W.2d at 895 (second amended petition timely filed "exactly one week before a scheduled summary judgment hearing"). We conclude that Carto's second amended petition was its live pleading at the time the trial court

rendered summary judgment on its claims. *See Sosa*, 909 S.W.2d at 895; *Elliott*, 54 S.W.3d at 793.

Once a plaintiff has timely amended its petition to add new claims, the defendant is not entitled to a summary judgment on the plaintiff's entire case, unless the defendant amends or supplements its summary-judgment motion to address the newly added claims. *See Rotating Servs. Indus., Inc. v. Harris*, 245 S.W.3d 476, 487 (Tex. App.—Houston [1st Dist.] 2007, pet. denied); *see also Sosa*, 909 S.W.2d at 895 (when amended petition timely filed, trial court must base its decision on amended pleading, not any superseded petition); *Johnson v. Rollen*, 818 S.W.2d 180, 183 (Tex. App.—Houston [1st Dist.] 1991, no writ) ("A summary judgment may not be granted . . . on a cause of action not addressed in the summary judgment proceeding.").

Although a trial court errs in granting summary judgment on a ground or claim not addressed in a summary-judgment motion, such error is rendered harmless if "the omitted cause of action is precluded as a matter of law by other grounds raised in the case." *G & H Towing Co. v. Magee*, 347 S.W.3d 293, 297–98 (Tex. 2011). Similarly, we may affirm the summary judgment if (1) the amended or supplemental petition essentially reiterates previously pleaded causes of action, (2) a ground asserted in the summary-judgment motion conclusively negates a common element of the newly and previously pleaded claims, or (3) the original motion is broad

enough to encompass the newly asserted claims. *Coterill-Jenkins v. Texas Med. Ass'n Health Care Liability Claim Trust*, 383 S.W.3d 581, 592 (Tex. App.—Houston [14th Dist.] 2012, pet. denied).

Briar, in its summary-judgment motion, argued that it was entitled, as a matter of law, to judgment on Carto's claim of tortious interference because Briar had conclusively established its affirmative defense of justification. Briar asserts on appeal that its justification defense applies equally to a claim of tortious interference with a prospective contract. Thus, its summary-judgment motion was broad enough to encompass the newly asserted claims. *See id.*

"[J]ustification is an affirmative defense to tortious interference with prospective business relations as well as to tortious interference with an existing contract."[4] *Prudential Ins. Co. of Am. v. Fin. Review Servs., Inc*., 29 S.W.3d 74, 78 (Tex. 2000) ("[A] defendant may negate liability on the ground that its conduct was

[4] To establish a cause of action for tortious interference with prospective business relationships, a plaintiff must show that (1) there was a reasonable probability that the parties would have entered into a business relationship; (2) the defendant committed an independently tortious or unlawful act that prevented the relationship from occurring; (3) the defendant either acted with a conscious desire to prevent the relationship from occurring or knew the interference was certain or substantially certain to occur as a result of the conduct; and (4) the plaintiff suffered actual harm or damages as a result of the defendant's interference. *Silver Lion, Inc. v. Dolphin St., Inc*., No. 01-07-00370-CV, 2010 WL 2025749, at *5 (Tex. App.—Houston [1st Dist.] May 20, 2010, pet. denied) (mem. op.) (citing *Richardson-Eagle, Inc. v. William M. Mercer, Inc*., 213 S.W.3d 469, 475 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) (citing *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 713 (Tex. 2001)).

privileged or justified."); *Calvillo v. Gonzalez*, 922 S.W.2d 928, 929 (Tex. 1996). A justification defense is based on either the exercise of (1) one's own legal rights; or (2) a good faith claim to a colorable legal right, even though the claim ultimately proves to be mistaken. *Tex. Beef Cattle Co. v. Green*, 921 S.W.2d 203, 211 (Tex. 1996). "Generally, justification is established as a matter of law when the acts the plaintiff complains of as tortious interference are merely the defendant's exercise of its own contractual rights." *Prudential Ins. Co. of Am.*, 29 S.W.3d at 81; *see ACS Investors, Inc. v. McLaughlin*, 943 S.W.2d 426, 431 (Tex. 1997). "Enforcing or complying with one's own valid contract does not constitute unjustifiable interference with another's contract." *Gulf Liquids New River Project, LLC v. Gulsby Eng'g, Inc*., 356 S.W.3d 54, 77 (Tex. App.—Houston [1st Dist.] 2011, no pet.); *see Friendswood Dev. Co. v. McDade Co*., 926 S.W.2d 280, 283 (Tex. 1996) (defendant conclusively established justification defense based on unambiguous terms of contract); *see also Maynard v. Caballero*, 752 S.W.2d 719, 721 (Tex. App.—El Paso 1988, writ denied) ("An action to protect one's contractual right is also ordinarily justification for interference with another's contract."). Thus, if a trial court determines, as a matter of law, that a defendant had a legal right to interfere with a prospective contract, then the defendant has conclusively established its justification defense and summary judgment is proper. *Tex. Beef*, 921 S.W.2d at

211; *see also Calvillo*, 922 S.W.2d at 929 (applying *Texas Beef's* construction of justification defense to claim for tortious interference with prospective contract).

Briar, in its summary-judgment motion, asserted that, notwithstanding the existence of any existing or prospective contract to sell the property that Carto may have had, Briar had "the legal and contractual right to foreclose on the [p]roperty pursuant to the [l]oan [d]ocuments." Section 22(a)(iii) of the deed of trust expressly provides Briar, as beneficiary, in the event of a default on the loan agreement by Carto, a right to foreclose on its lien and sell the property at public auction. And Carto concedes that it was in default on the loan and the two forbearance agreements. Thus, Briar, in foreclosing on the property on January 6, 2015, was merely exercising its contractual rights. *See Prudential Ins. Co. of Am.*, 29 S.W.3d at 8.

Because the summary-judgment evidence establishes that the act of which Carto complains was merely Briar's exercise of its own contractual rights, Briar has established its justification defense as a matter of law. *See Prudential Ins. Co. of Am.*, 29 S.W.3d at 81; *see also Friendswood Dev. Co.*, 926 S.W.2d at 283 (justification established as matter of law if acts of which plaintiff complains merely defendant's exercise of own contractual rights); *Gulf Liquids New River Project, LLC*, 356 S.W.3d at 77 (enforcement of one's own valid contract not unjustifiable interference with another's contract).

Carto further asserts that Briar acted intentionally to interfere with its prospective contract with the Foundation. However, "[g]ood faith is not a relevant factor in determining justification if the defendant act[ed] to assert a legal right." *Calvillo*, 922 S.W.2d at 929 (defendant's motivation behind assertion of legal right not relevant).

We conclude that Briar conclusively established its affirmative defense of justification. *See Tex. Beef*, 921 S.W.2d at 211; *see also Calvillo*, 922 S.W.2d at 929. Accordingly, we hold that the trial court did not err in granting Briar summary judgment on Carto's claim for tortious interference with a prospective contract.

We overrule Carto's third issue.

Fraud

In regard to its second issue, Carto asserts that Briar's statements "promising delivery of a third forbearance agreement" and "disclosing a January 9 payoff amount" constituted partial disclosures conveying a false impression, which obligated Briar to "make a full disclosure," i.e., to state that it intended to move forward with the January 6, 2015 foreclosure sale.

Briar argues that Carto waived this issue because it did not plead a claim for fraud by non-disclosure or raise it in its summary-judgment response. Briar further asserts that even had Carto properly raised this issue, Briar established that it had no duty to inform Carto that the "properly noticed foreclosure would occur as

scheduled." We need not resolve whether Carto's fraud claim in his petition encompasses a claim for fraud by non-disclosure because, even were we to so conclude, Briar conclusively disproved an element common to both claims, that of justifiable reliance.[5] *See Cathey*, 900 S.W.2d at 341.

"It is well-settled that a party asserting a cause of action for fraud must prove that it 'actually and justifiably relied' on the alleged misrepresentation." *Atl. Lloyds Ins. Co. v. Butler*, 137 S.W.3d 199, 225 (Tex. App.—Houston [1st Dist.] 2004, pet. denied); *see also Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co*., 51 S.W.3d 573, 577 (Tex. 2001). Likewise, reliance is a necessary element of a claim of fraud by

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[5] "Fraud by non-disclosure is simply a subcategory of fraud because, where a party has a duty to disclose, the non-disclosure may be as misleading as a positive misrepresentation of facts." *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 181 (Tex. 1997). To recover on a fraud claim, a plaintiff must establish that: (1) the defendant made a material representation; (2) the representation was false; (3) the defendant, when it made the representation, knew it was false, or made it recklessly without any knowledge of the truth and as a positive assertion; (4) the defendant made the representation with the intent that the plaintiff should act on it; (5) the plaintiff actually and justifiably relied on the representation; and (6) the plaintiff suffered injury. *Aquaplex, Inc. v. Rancho La Valencia, Inc*., 297 S.W.3d 768, 774 (Tex. 2009); *Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co*., 51 S.W.3d 573, 577 (Tex. 2001); *Ginn v. NCI Bldg. Sys., Inc*., 472 S.W.3d 802, 835 (Tex. App.—Houston [1st Dist.] 2015, no pet.). To recover on an claim for fraud by nondisclosure, a plaintiff must establish that (1) the defendant failed to disclose facts to the plaintiff that the defendant had a duty to disclose; (2) the facts were material; (3) the defendant knew that the plaintiff was ignorant of the facts and did not have an equal opportunity to discover the truth; (4) the defendant was deliberately silent and failed to disclose the facts with the intent to induce the plaintiff to take some action; (5) the plaintiff justifiably relied on the omission; and (6) the plaintiff suffered injury as a result. *See Horizon Shipbuilding, Inc. v. Blyn II Holding, LLC*, 324 S.W.3d 840, 850 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

nondisclosure. *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 181 (Tex. 1997) (reliance is element of fraud and likewise element of fraud by nondisclosure); *Blankinship v. Brown*, 399 S.W.3d 303, 308 (Tex. App.—Dallas 2013, pet. denied) (plaintiffs bringing claim of fraud by non-disclosure must establish reliance on defendant's misrepresentations or nondisclosures). Further, such reliance must be justifiable. *BP Am. Prod. Co. v. Zaffirini*, 419 S.W.3d 485, 506 (Tex. App.—San Antonio 2013, pet. denied) ("[J]ustifiable reliance is also an essential element of fraud by nondisclosure."); *see also Simulis, L.L.C. v. Gen. Elec. Capital Corp*., 439 S.W.3d 571, 578 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

The issue of justifiable reliance is generally a question of fact. *Prize Energy Res., L.P. v. Cliff Hoskins, Inc*., 345 S.W.3d 537, 584 (Tex. App.—San Antonio 2011, no pet.); *1001 McKinney Ltd. v. Credit Suisse First Bos. Mortg. Capital*, 192 S.W.3d 20, 30 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). However, the "issue of justifiable reliance may become a question of law when the undisputed or conclusively proven facts demonstrate circumstances under which reliance cannot be justified—such as when the party had actual knowledge of the representation's falsity or the representation directly contradicts the express terms of a written agreement." *Samson Lone Star Ltd. P'ship v. Hooks*, 497 S.W.3d 1, 16 n.4 (Tex. App.—Houston [1st Dist.] 2016, pet. denied); *see Logsdon v. Logsdon*, No. 02-16-00063-CV, 2017 WL 632905, at *3 (Tex. App.—Fort Worth Feb. 16, 2017, no pet.)

(mem. op.); *see, e.g.*, *Simulis, L.L.C.*, 439 S.W.3d at 577 (reliance on "vague, indefinite promise" of future business not justifiable as matter of law); *JSC Neftegas–Impex v. Citibank, N.A.*, 365 S.W.3d 387, 407–09 (Tex. App.—Houston [1st Dist.] 2011, pet. denied) (reliance on representation not justified, as matter of law, where plaintiff had actual knowledge of representation's falsity); *DeClaire v. G & B McIntosh Family Ltd. P'ship*, 260 S.W.3d 34, 47 (Tex. App.—Houston [1st Dist.] 2008, no pet.) ("[R]eliance upon an oral representation that is directly contradicted by the express, unambiguous terms of a written agreement between the parties is not justified as a matter of law."); *Atl. Lloyds Ins. Co. v. Butler*, 137 S.W.3d 199, 226–27 (Tex. App.—Houston [1st Dist.] 2004, pet. denied) (affirming summary judgment as to fraud claim where no genuine issue of material fact as to whether reliance justifiable).

This Court has previously examined the issue of justifiable reliance in a lending relationship. *See Bluebonnet Savings Bank, F.S.B. v. Grayridge Apartment Homes, Inc.*, 907 S.W.2d 904, 907–10 (Tex. App.—Houston [1st Dist.] 1995, writ denied). There, a borrower obtained a loan from a lender to finance the purchase of a commercial property. *Id.* at 907. After the borrower defaulted on the note and the lender foreclosed its deed of trust on the property, the borrower sued the lender for fraud and misrepresentation. *Id.* The borrower asserted that the lender's agent had orally agreed to accept partial payments on the loan, even though the agent knew, or

should have known, that the lender's loan committee would refuse the deal and foreclose. *Id*. Moreover, the borrower admitted that the parties had never executed a written agreement to restructure the loan. *Id*. We held that, as a matter of law, the borrower had failed to prove that it had justifiably relied on the oral statements of the lender's agent. *Id.* at 909.

We further noted, in *Bluebonnet Savings Bank*, that the "existence of a written contract makes it harder for a party to show reliance on subsequent oral representations" because the contract "itself is notice of binding duties, and when it requires that amendments be in writing, that is additional notice not to rely on oral representations." *Id.* at 908. And we emphasized that the lender had sent threats of foreclosure to the borrower. *Id*. at 909. We concluded that even though the borrower "thought he had an oral deal that precluded foreclosure," his reliance was simply not justifiable. *Id.* at 910. We explained that "[w]hat [the borrower] actually had was a signed written contract that 'contained ample cautionary language which would preclude exclusive reliance by a reasonable businessperson on verbal statements contradicting the written agreement.'" *Id.* (quoting *Airborne Freight Corp., Inc. v. C.R. Lee Enter., Inc*., 847 S.W.2d 289, 295, 298 (Tex. App.—El Paso 1992, writ denied) ("The terms of the written contract simply belie any reliance on [the defendant's] verbal assurance.")).

Similarly, the Fourteenth Court of Appeals, relying in part on *Bluebonnet Savings*, has also examined the issue of justifiable reliance in a lending relationship. *See Beal Bank, S.S.B. v. Schleider*, 124 S.W.3d 640, 645–52 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). There, a borrower sued a lender for fraud, alleging that the lender had orally agreed to extend the time to pay a loan, despite language in the note requiring that any modification of the loan terms be in writing. *Id.* at 645–46. The borrower asserted that he had expected to receive papers from the lender, but had received none. *Id.* at 644. Although he did not "follow up" with the lender, "in his mind" the oral agreement was "still on the table." *Id.* at 645. And he acknowledged that the terms of a final modification agreement were never reached. *Id.* After the lender sent the borrower a demand letter, the borrower sued the lender for fraud and misrepresentation. *Id.* at 646. In rejecting the borrower's claims, the appellate court concluded that the borrower's alleged reliance on the oral representations by the lender was, as a matter of law, not justifiable. *Id*. at 652.

Here, Briar, in its summary-judgment motion, argued that it was entitled to judgment as a matter of law on Carto's fraud claim because it conclusively disproved an essential element, that of justifiable reliance. *See Cathey*, 900 S.W.2d at 341. Briar further argued that Carto's reliance on the alleged misrepresentations by Briar, i.e., that it had agreed, either orally or in an unsigned writing, to waive enforcement of its foreclosure remedy, was not justifiable because such representations

contradicted the express, unambiguous terms of the loan documents, which granted Briar a right to foreclose on the property in the event of a default by Carto. And Carto concedes that it was in default on the loan and the first and second forbearance agreements.

As its summary-judgment evidence, Briar pointed to the parties' loan agreement, which "bars any modification that is not contained in an instrument signed by the party to be charged with such modification." Specifically, section 12.4 provides:

> No provision of this Loan Agreement or of any of the other Loan Documents shall be changed, altered, modified, waived, discharged, terminated, or released, except by an instrument in writing signed by the party against whom enforcement of the change, alteration, modification, waiver, discharge, termination, or release is sought.

The parties' "Acknowledgment of Final Agreement, No Oral Agreements, and Waiver of Jury Trial," executed in conjunction with the loan agreement, provides, in pertinent part:

> THE WRITTEN LOAN REPRESENTS THE FINAL AGREEMENT BETWEEN THE PARTIES AND MAY NOT BE CONTRADICTED BY EVIDENCE OF PRIOR, CONTEMPORANEOUS, OR *SUBSEQUENT* ORAL AGREEMENTS OF THE PARTIES.

(Emphasis added.) Further, the deed of trust provides, in pertinent part, as follows:

> The Deed of Trust and the Loan Documents . . . may not be modified, amended, *waived*, *extended*, changed, *discharged* or terminated orally . . . but *only by an agreement in writing, signed by the party against whom enforcement* of any modification, amendment, waiver, extension, change, discharge or termination is sought.

(Emphasis added.)

It is undisputed that Briar sent Carto notices of default and foreclosure. And the parties did not execute a third forbearance agreement, or any other written agreement, to modify, amend, waive, or extend Briar's right to enforce the loan documents through foreclosure proceedings. The complained-of representations, that Briar had agreed, either orally or in an unsigned writing, to modify or waive enforcement of its rights, directly contradicts the express, unambiguous terms of the loan documents. Thus, Carto's reliance on such representations was, as a matter of law, not justifiable. *See Bluebonnet Savings Bank, F.S.B.*, 907 S.W.2d at 908–10; *see also Beal Bank, S.S.B.*, 124 S.W.3d at 647.

Carto, in its summary-judgment response, argued that material fact issues precluded summary judgment because its evidence establishes that Briar, by affirmatively providing the January 9, 2015 payoff amount and representing that the third forbearance agreement would be ready the next morning, had "effectively cancel[ed] the January 6, 2015 mortgage foreclosure sale." And in support of its argument, Carto directed the trial court to certain emails and the affidavits of Rau and Williams.

Carto's summary-judgment evidence reflects that on December 31, 2014, Carto sent to Briar an email, requesting that Briar "work up a payoff quote for next Friday, January 9th." As requested by Carto, Briar responded with a payoff quote

for January 9, 2015. And Carto responded with a request that the $25,000 forbearance fee be reduced to $15,000, which Briar declined. On January 4, 2015, Carto sent to Briar an email, asking whether a forbearance agreement would "be ready Monday." And Briar, responded, "Yes, I [will] have it for you tomorrow morning." Carto does not assert that Briar, after representing that a third forbearance agreement would be available, failed or refused to make it available. Carto simply asserts that it "did not receive it." *See Beal Bank, S.S.B.*, 124 S.W.3d at 645 (borrower did not "follow up" with lender).

More important, nothing in Briar's emails reflects a promise to pass on the January 6, 2015 foreclosure sale without the execution of a third forbearance agreement. *See Bluebonnet Sav. Bank, F.S.B.*, 907 S.W.2d at 909. We conclude that the summary-judgment evidence does not raise a genuine issue of material fact as to whether Carto justifiably relied on any alleged representations by Briar.

Carto further asserts that although Briar "may have had the contractual right to foreclose on the property," it was not entitled to "exercise that right by . . . breaching the informal fiduciary duty it owed to Carto." Carto did not raise, in either its second amended petition or response to Briar's summary-judgment motion, a claim of breach of fiduciary duty. Rather, Carto waited until its motion for new trial, filed after the trial court had granted summary judgment and dismissed Carto's claims to raise its claim that Briar had breached its "informal fiduciary

duties." This was not sufficient to preserve the issue for appellate review. *See Unifund CCR Partners v. Weaver*, 262 S.W.3d 796, 797–98 (Tex. 2008) (argument first raised by non-movant in post-judgment filing did not preserve argument for appeal); *Kelley–Coppedge, Inc. v. Highlands Ins. Co*., 980 S.W.2d 462, 467 (Tex. 1998) (party waived reliance on argument it asserted for first time in motion for new trial); *see also* TEX. R. APP. P. 33.1.

We conclude that Briar conclusively disproved an essential element of Carto's fraud claim, that of justifiable reliance. *See Cathey*, 900 S.W.2d at 341. Accordingly, we hold that the trial court did not err in granting Briar summary judgment on Carto's fraud claim.

We overrule Carto's second issue.

Attorney's Fees

In its sole issue, Briar argues that the trial court erred in denying its request for attorney's fees because the loan documents expressly provide that it is entitled to recover its attorney's fees incurred in enforcing them. Briar asserts that Carto's claims, which are based on Carto's allegations that Briar extended or waived its right to foreclose on the property, required Briar to defend and enforce its rights under the loan documents and guaranty agreements. Further, the guaranty agreements required that the guarantors pay Briar's reasonable attorney's fees incurred in enforcing it rights. Briar asserts that it is "entitled to recover its attorney's fees

incurred in this action from each of the Carto parties [Carto and the guarantors] jointly and severally."

Whether a party is entitled to an award of attorney's fees is a question of law that we review de novo. *Holland v. Wal–Mart Stores, Inc*., 1 S.W.3d 91, 94 (Tex. 1999). Generally, a trial court may award attorney's fees only when authorized by statute or by the parties' contract. *MBM Fin. Corp. v. Woodlands Operating Co*., 292 S.W.3d 660, 669 (Tex. 2009); *www.urban.inc. v. Drummond*, 508 S.W.3d 657, 666 (Tex. App.—Houston [1st Dist.] 2016, no pet.). "Parties are generally free to contract for attorney's fees as they see fit." *Venture Cotton Co-op. v. Freeman*, 435 S.W.3d 222, 231 (Tex. 2014). "Our primary concern when we construe a written contract is to ascertain the parties' true intent as expressed in the contract." *Epps v. Fowler*, 351 S.W.3d 862, 865 (Tex. 2011). Usually, the intent of the parties can be discerned from the instrument itself. *ExxonMobil Corp. v. Valence Operating Co*., 174 S.W.3d 303, 312 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). Unless the contract itself shows them to be used in a technical or different sense, we give words and phrases their ordinary and generally accepted meaning, reading them in context and in light of the rules of grammar and common usage. *Valence Operating Co.*, 164 S.W.3d at 662; *Drummond*, 508 S.W.3d at 666. We consider the entire writing and attempt to harmonize and give effect to all the provisions of the contract

by analyzing the provisions with reference to the whole agreement. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003).

A guarantor's liability is measured by the principal's liability unless a more extensive or more limited liability is expressly provided for in the guaranty. *W. BankDowntown v. Carline*, 757 S .W.2d 111, 113 (Tex. App.—Houston [1st Dist.] 1988, writ denied). To determine the extent of the guarantor's liability, we look to the language of the guaranty agreement. *Id*. If the guaranty agreement is so worded that it can be given a certain or definite legal meaning or interpretation, it is not ambiguous, and we construe it as a matter of law. *Id*. at 114. If uncertainty exists as to the meaning of the guaranty contract, and if two reasonable interpretations may be made, we apply the construction most favorable to the guarantor. *Coker v. Coker*, 650 S.W.2d 391, 394 & n.1 (Tex. 1983) ("[A] guarantor is entitled to have his agreement strictly construed so that it is limited to his undertakings, and it will not be extended by construction or implication.").

Briar, in its summary-judgment motion, argued that it is entitled to its attorney's fees in defending against Carto's claims because the loan documents expressly entitle Briar to recover its attorney's fees and costs incurred to enforce the loan documents after a default by Carto. Briar pointed to the loan agreement, which provides, in pertinent part, that Briar is entitled to reimbursement for its reasonable attorney's fees incurred in connection with any action or claim against it by Carto:

> [Carto] shall promptly pay upon request all actual and reasonable costs and expenses incurred by [Briar], including *actual and reasonable attorney's fees* . . . in connection with: . . . any action, proceeding, litigation, or claim instituted or asserted by or against [Briar] . . . wherein it becomes necessary in the opinion of [Briar] to protect [Briar's] interests in the Mortgaged Property . . . or to defend or uphold the Lien of the Mortgage . . . .

(Emphasis added.) Briar also pointed to the promissory note, which provides, in pertinent part, that it is entitled to its reasonable attorney's fees in any suit to enforce the note:

> If any owner and/or holder of this Note retains an attorney in connection with any Event of Default . . . or to collect, enforce or defend this Note or any other Loan Document in any lawsuit . . . , then [Carto] agrees to pay to each such owner and/or holder . . . all costs and expenses incurred by such holder in trying to collect this Note or in any such suit or proceeding, including, without limitation, *reasonable attorneys' fees* and expenses . . . .

(Emphasis added.)

Briar further pointed to the following provisions of the guaranty agreements, which each provide, in pertinent part, that Briar is entitled to recover from the guarantor its reasonable attorney's fees incurred in enforcing the loan documents:

> Guarantor hereby unconditionally and irrevocably guarantees to Lender the punctual payment and performance when due . . . the Guaranteed Obligations (as hereafter defined) in accordance with the terms of the Loan Documents (as hereafter defined).
>
> The term "Guaranteed Obligations" as used herein shall mean, and this Guaranty shall apply to, any and all indebtedness, obligations, liabilities, covenants, agreements, representations and warranties of every kind and character of Borrower to Lender, under, pertaining to or in connection with [the loan] . . . whether due or owing or to become

> due and owing, howsoever created or arising or evidenced, whether joint or several, or joint and several, whether absolute or contingent, and all renewals, extensions, and rearrangements of such indebtedness, obligations or liabilities, including any and all amounts owing or which may hereafter become owing thereon or in connection therewith, including, without limitation, any and all amounts of principal, interest, *attorney's fees*, costs of collection and other amounts owing hereunder.
>
> . . . .
>
> Guarantor[] shall pay on demand all *reasonable attorneys' fees* and other costs and expenses incurred by [Briar] in the enforcement of or preservation of [Briar's] rights under this Guaranty . . . .

(Emphasis added.)

Thus, the loan agreement reflects that the parties intended that Carto pay Briar its reasonable attorney's fees incurred "in connection with" "any action, proceeding, litigation, or claim instituted or asserted by or against" Briar, wherein, "in the opinion of [Briar,]" it became necessary "to protect [its] interests in the [property] . . . or to defend or uphold [its lien]." *See Epps*, 351 S.W.3d at 865 (primary concern is to ascertain parties' intent); *Dorsett*, 164 S.W.3d at 662 (giving words and phrases their ordinary and generally accepted meaning); *Drummond*, 508 S.W.3d at 666. The promissory note reflects that the parties intended that if Briar "retain[ed] an attorney in connection with any Event of Default . . . or to collect, enforce or defend th[e] Note or any other Loan Document in any lawsuit," then Carto would pay to Briar "all costs and expenses incurred . . . in trying to collect [the note] or in any such suit or proceeding, including, without limitation, reasonable attorneys' fees and expenses."

Further, the guaranty agreements reflect that the parties intended that each guarantor "unconditionally and irrevocably guarantee[] to [Briar] the punctual payment and performance . . . of the Guaranteed Obligations," which include "any and all" liabilities of Carto to Briar, "pertaining to or in connection with [the loan]," including "attorney's fees." *See Carline*, 757 S.W.2d at 113. And the guarantors agreed to "pay on demand *all reasonable attorneys' fees* and other costs and expenses incurred by [Briar] in the enforcement of or preservation of [Briar's] rights under [the] Guaranty." *See id*. (emphasis added).

In the instant suit, Carto filed a claim against Briar, alleging that it had tortiously interfered with Carto's prospective contract with the Foundation by foreclosing on the property. This claim required Briar to defend its right to foreclose, as provided in the loan documents. In its fraud claim against Briar, Carto asserted that Briar had made representations agreeing, either orally or in an unsigned writing, to modify or waive enforcement of its rights under the loan documents. This claim required Briar to establish that such alleged representations contradicted the terms of the loan documents, which granted Briar a right to foreclose on the property in the event of a default by Carto. Because Carto's claims required Briar to "enforce or defend" its rights under the loan documents, Briar is entitled to its reasonable attorney's fees incurred in defending against the suit. Further, the guaranty

agreements expressly entitle Briar to recover its reasonable attorney's fees from Rau, Key Maps, and the Trust, as guarantors.

The loan agreement, promissory note, and guaranty agreements each require Briar to establish that the amount of its attorney's fees was "reasonable." For purposes of summary judgment, an attorney's affidavit can sufficiently establish the reasonableness of attorney's fees, which is ordinarily a fact question. *Gaughan v. Nat'l Cutting Horse Ass'n*, 351 S.W.3d 408, 423 (Tex. App.—Fort Worth 2011, pet. denied). Generally, summary judgment is proper if the affidavit filed by the movant's attorney "sets forth his qualifications, his opinion regarding reasonable attorney's fees, and the basis for his opinion." *Basin Credit Consultants, Inc. v. Obregon*, 2 S.W.3d 372, 373 (Tex. App.—San Antonio 1999, pet. denied).

Briar, in its summary-judgment motion, asserted that in defending against the instant suit, it incurred $61,121.50 in attorney's fees at trial. Briar presented the invoices of its attorneys, detailing the work performed. Briar also presented the affidavit of its attorney, Miller, who set forth his experience and testified in extensive detail regarding the facts supporting the reasonableness and necessity of the attorney's fees incurred by Briar. *See Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997). Miller further opined that Briar would incur an additional $30,000 in attorney's fees in the event of an appeal to the court of appeals,

$20,000 in the event of a petition to the Texas Supreme Court, and $17,500 if such petition for review were granted.

Briar's summary-judgment evidence establishes that it is entitled to its attorney's fees. *See id.* Thus, the burden shifted to Carto to raise a genuine issue of material fact precluding summary judgment. *See Siegler*, 899 S.W.2d at 197; *Transcon. Ins. Co.*, 321 S.W.3d at 691; *see also* TEX. R. CIV. P. 166a(c).

In its summary-judgment response, Carto asserted that a material fact issue precluded summary judgment in favor of Briar on its attorney's fees. Carto directed the trial court to the affidavit of its attorney, Albert J. Holly, who testified that Briar is not entitled to its attorney's fees because its defense against the instant suit is "not based on an interpretation or defense of the loan documents." Rather, its defense is "based on evidence of fraud in the mortgage foreclosure process and resulting tortious interference with . . . [a] prospective contract." Holly further opined, without reference to underlying facts, that Briar's attorney's fees were "unreasonable, unnecessary and were not incurred in good faith."

As discussed above, Carto's claims indeed required Briar to defend and enforce its right to foreclose under the loan documents. In regard to the

reasonableness of its attorney's fees, Briar asserts that Holly's affidavit is conclusory and constitutes no evidence to raise a fact issue.[6]

"A legal conclusion in an affidavit is insufficient to raise an issue of fact in response to a motion for summary judgment." *Mercer v. Daoran Corp*., 676 S.W.2d 580, 583 (Tex. 1984). "A conclusory statement is one that does not provide the underlying facts to support the conclusion." *Dolcefino v. Randolph*, 19 S.W.3d 906, 930 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). An affidavit by non-movant's counsel that simply criticizes the fees sought by the movant as unreasonable without setting forth the factual basis for the opinion is not sufficient to defeat summary judgment. *See Obregon*, 2 S.W.3d at 373; *see also* TEX. R. CIV. P. 166a(f); *see, e.g.*, *Houston v. Houston*, No. 13-02-00142-CV, 2004 WL 351850, *5 (Tex. App.—Corpus Christi Feb. 26, 2004, no pet.) (mem. op.) (not designated for publication) (non-movant's attorney's affidavit did not state movant's attorney's hourly fee unreasonable, nor identify unnecessary billable time).

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[6] Although Briar did not raise this point in the trial court, substantive defects in an opposing party's summary-judgment evidence are not waived and may be raised for the first time on appeal. *See McMahan v. Greenwood*, 108 S.W.3d 467, 498 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) ("[O]bjections relating to substantive defects (such as lack of relevancy, conclusory) can be raised for the first time on appeal and are not waived by the failure to obtain a ruling from the trial court."). Substantive defects, such as affidavits comprised of conclusory statements, leave the evidence legally insufficient. *Hou–Tex, Inc. v. Landmark Graphics*, 26 S.W.3d 103, 112 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

Here, Holly's affidavit, in which he asserts that the attorney's fees sought by Briar were "unreasonable, unnecessary and . . . not incurred in good faith," without setting forth any factual bases, is not sufficient to defeat summary judgment. *See Obregon*, 2 S.W.3d at 373; *see also* TEX. R. CIV. P. 166a(f). And Carto did not present any other summary-judgment evidence regarding Briar's attorney's fees.[7]

We conclude that the summary-judgment evidence conclusively establishes that Briar is entitled to recover its attorney's fees. Accordingly, we hold that the trial court erred in not granting Briar summary judgment on its counterclaim for attorney's fees.

In regard to Briar's argument, in its summary-judgment motion and on appeal, that it is entitled to recover its attorney's fees from "each of the Carto parties [Carto, Rau, Key Maps, and the Trust] jointly and severally," Briar points to the terms of the guaranty agreement. The guaranty agreement provides: "If this guaranty is

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[7] Carto, in its brief, asserts that Briar failed to segregate its recoverable attorney's fees from its claims in which attorney's fees are not recoverable. "A failure to segregate attorney's fees in a case containing multiple causes of action, only some of which entitle the recovery of attorney's fees, can result in the recovery of zero attorney's fees." *Green Intern. v. Solis*, 951 S.W.2d 384, 389 (Tex. 1997). However, unless a party objects to a failure to segregate, error, if any, is waived. *Id.* Here, Carto did not object in the trial court that Briar failed to segregate its attorney's fees. Thus, error, if any, is waived. *See id.*; *see also Red Rock Props. 2005, Ltd. v. Chase Home Fin., L.L.C.*, No. 14-08-00352-CV, 2009 WL 1795037, at *7 (Tex. App.—Houston [14th Dist.] June 25, 2009, no pet.) (mem. op.) (failure to object to failure to segregate attorney's fees prior to trial court's ruling on summary-judgment motion waived error).

signed by more than one person or entity, then all of the obligations of Guarantors arising hereunder *shall be jointly and severally binding on each of the undersigned* . . . and the term 'Guarantor' shall mean all such persons and entities and *each of them individually and separately*." (Emphasis added.)

Carto asserts that the loan documents "do not create joint and several liability among Carto, as the primary obligor, and Rau, Key, and the Trust, as guarantors." Rather, the "obligations owed by Rau, Key, and the Trust" are "derivative, and triggered only upon Carto's failure to pay." Thus, Briar "cannot seek payment from any of the guarantors until Carto has failed to pay." Further, "[w]ere the contractual scheme actually joint and several, Briar would be able to seek payment from any of the guarantors in the first instance" and "any one of the obligors may be held liable."

The law recognizes two distinct types of guaranty: (1) a conditional guaranty, i.e., guaranty of collection, and (2) an unconditional guaranty, i.e., a guaranty of payment. *Cox v. Lerman*, 949 S.W.2d 527, 530 (Tex. App.—Houston [14th Dist.] 1997, no pet.). A guaranty of collection is an undertaking of a guarantor to pay if the debt cannot first be collected from the primary obligor by the use of reasonable diligence. *Id*. By contrast, a guaranty of payment requires no condition precedent to its enforcement against the guarantor other than a default by the principal debtor. *Id*. A guarantor of payment is primarily liable and waives any requirement that the holder of the note take action against the maker as a condition precedent to his

liability on the guaranty. *Hopkins v. First Nat'l Bank at Brownsville*, 551 S.W.2d 343, 345 (Tex. 1977). "A guarantor of payment is thus akin to a co-maker in that the holder of the note can enforce it against either party." *Cox*, 949 S.W.2d at 530 (lender may bring action against guarantor of payment without joining principal debtor).

Here, the guaranty agreement provides that it constitutes "a continuing guaranty of payment and performance and not a guaranty of collection" and an "absolute, irrevocable and unconditional guaranty of payment and performance." It also provides that the "Guarantor shall be liable for the payment and performance of the Guaranteed Obligations as a primary obligor" and "it shall not be necessary for [Briar], in order to enforce such payment or performance by Guarantor, first to institute suit or pursue or exhaust any rights or remedies against Borrower [Carto]." Thus, Rau, Key, and the Trust, as guarantors of payment, are liable for the payment and performance of the Guaranteed Obligations as primary obligors. *See Hopkins*, 551 S.W.2d at 345 ("guarantor of payment" primarily liable and waives any requirement holder of note first take action against maker as condition precedent to liability on guaranty); *Cox*, 949 S.W.2d at 530 (guaranty of payment requires no condition precedent to enforcement against guarantor other than default by principal debtor); *see also Chahadeh v. Jacinto Med. Grp., P.A.*, 519 S.W.3d 242, 246–47 (Tex. App.—Houston [1st Dist.] 2017, no pet.).

Carto essentially argues that because each guarantor executed a separate copy of the guaranty agreement, this "create[d] several joint obligations" and "not a single joint and several obligation." The guaranty agreement provides, however, that a "suit may be brought or demand may be made against all parties who have signed *this Guaranty or any other guaranty covering all or any part of the Guaranteed Obligations, or against any one or more of them, separately or together*, without impairing the right of [Briar] against any party hereto." (Emphasis added.) Also, "neither [Briar's] rights or remedies nor Guarantor's obligations under the terms of th[e] Guaranty shall be released, diminished, impaired, reduced or affected by, and the liability of Guarantor under th[e] Guaranty shall be absolute and unconditional irrespective of . . . any complete or partial release of any one or more of [the other] guarantors, or any release of [the] Borrower [Carto]." Thus, any party who signed a guaranty agreement covering the Guaranteed Obligations, in whole or in part, is subject to demand or suit. Further, that such guarantors, "separately or together," share liability for the performance of the Guaranteed Obligations, even were Briar to partially or fully release any of the guarantors or even the borrower, Carto, itself, illustrates that the guarantors share primary liability and their obligations are jointly and severally binding. *See Hopkins*, 551 S.W.2d at 345; *Cox*, 949 S.W.2d at 530; *see also Chahadeh*, 519 S.W.3d at 246–47.

We sustain Briar's sole issue.

Conclusion

We affirm the portion of the trial court's summary judgment rendered in favor of Briar on all claims by Carto. We reverse the portion of the trial court's summary judgment denying Briar its attorney's fees, and we render judgment that Briar recover from Carto, jointly and severally with Rau, Key Maps, and the Trust, the sum of $61,121.50 for attorney's fees at trial, $30,000.00 for attorney's fees on appeal, $20,000.00 in the event of an unsuccessful petition by Carto for review in the Texas Supreme Court, and $17,500.00 in the event of an unsuccessful appeal by Carto in the Texas Supreme Court.

Terry Jennings
Justice

Panel consists of Justices Jennings, Brown, and Lloyd.