Opinion issued July 24, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-17-00594-CV

PACIFIC ENERGY & MINING COMPANY, Appellant

V.

FIDELITY EXPLORATION & PRODUCTION COMPANY AND NORMAN OIL & GAS, LLC, Appellees

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On Appeal from the 151st District Court
Harris County, Texas
Trial Court Case No. 2016-09257

MEMORANDUM OPINION

Appellant Pacific Energy and Mining Company ("Pacific") appeals the trial court's order granting summary judgment in favor of appellees Fidelity Exploration & Production Company ("Fidelity") and Norman Oil & Gas, LLC ("Norman") in

this case arising out of a transaction for the sale of oil and gas assets ("assets" or "properties") in Utah. In three issues, Pacific contends that the trial court erred in (1) granting summary judgment to Fidelity; (2) granting summary judgment to Norman and sustaining Norman's objections to Pacific's summary judgment evidence; and (3) awarding Fidelity and Norman their attorney's fees and expenses. We modify the trial court's judgment and affirm as modified.

Background

In 2015, Fidelity, an oil and gas operator, decided to sell certain of its assets located in Utah. In August 2015, Pacific submitted a successful bid to purchase the assets from Fidelity. Fidelity and Pacific negotiated an Asset Purchase Agreement ("APA").

Pursuant to the APA, Pacific was to purchase the assets from Fidelity for $11.5 million and, contemporaneously with execution of the APA, pay Fidelity an earnest money deposit equal to ten percent of the $11.5 million purchase price ($1,150,000.00). Pacific did not have the necessary funds to purchase the Fidelity assets or pay the deposit and sought temporary financing for the acquisition. Through a mutual contact, Pacific approached Don Roger Norman to request a loan to finance the transaction. Mr. Norman discussed the request for a loan with his son, Roger William Norman. Unwilling to loan the money, the Normans agreed to fund

the entire purchase price on condition that Norman would own 100% of the assets acquired pursuant to the APA.

The APA could be assigned but only with Fidelity's consent. Prior to execution of the APA, Pacific asked Fidelity to consent to Pacific's assignment of the APA to Norman. Fidelity agreed to the assignment but only if Pacific agreed to remain subject to the obligations of the APA. Pacific agreed. By letter dated September 24, 2015, Pacific advised Norman: "Upon execution of the APA by the parties, Pacific Energy & Mining Company assigns all its rights, title, and interest as the buyer in the APA to Norman Oil & Gas, LLC." Pacific and Fidelity then executed the APA the same day. Norman sent the deposit required under the APA to Fidelity on September 25, 2015.

During this same time, Pacific and Norman executed a Memorandum of Understanding ("MOU") to outline the terms and conditions for the acquisition of the Fidelity assets under the APA. The MOU stated:

> The following is an outline of the terms and conditions for the acquisition of Fidelity Exploration and Production Company ("Fidelity") assets in the State of Utah, under that certain Asset Purchase Agreement ("APA") dated September 25, 2015 between Fidelity and Pacific. This Memorandum is an expression of interest to enter into an operating agreement and shall not be binding on either party.
>
> 1. Norman Oil & Gas, LLC ("Norman") will fund 100% of the acquisition price as outlined in the APA.
>
> 2. All assets under the APA will be assigned from Pacific to Norman.

3. Norman will own 100% of the assets acquired pursuant to the APA.

4. Pacific and Norman shall enter into an operating agreement in which Pacific shall be the operator for Norman.

5. Norman shall grant a 30% net profits interest to Pacific after all normal operating expenses for the asset.

6. Distributions shall be made as agreed by Roger Norman after required reserves are set aside in Norman.

7. Point of contact between Norman and the field operations of Pacific shall be Tariq Ahmad and/or Jim Gibbons.

8. The existing pipeline agreement between Fidelity and Pacific shall be extended by another 10 years beyond the existing term of the agreement.

By letter dated October 4, 2015, in which it referenced the "non-binding memorandum of understanding dated September 25, 2015," Pacific informed Norman that it had completed its due diligence pursuant to the APA. If further requested that Norman complete any remaining due diligence and "enter into a mutually acceptable operating agreement pursuant to the non-binding agreement referenced above[.]"

On October 21, 2015, Norman sued Fidelity and Pacific alleging that it had not been provided with the information necessary for the completion of its due diligence. Norman sought a declaration that it was entitled to the information about, and access to, the Fidelity properties, and to purchase the properties under the APA.

Before Fidelity became obligated to close on the APA, the APA obligated the buyer to satisfy a number of conditions and other covenants set out in Section 6 on or prior to the "Outside Date" of November 6, 2015. The APA authorized Fidelity to terminate the APA if the conditions and covenants were not met. On November 9, 2015, Fidelity terminated the APA.

Fidelity and Norman subsequently settled Norman's lawsuit and entered into a new asset purchase agreement ("Norman APA"). The Norman APA, however, did not close, either.

On February 12, 2016, Pacific filed the underlying suit against Fidelity and Norman. Fidelity and Norman answered the suit, and Fidelity counterclaimed for its attorney's fees.

On January 8, 2017, Pacific filed its second amended petition alleging breach of contract, civil conspiracy, and commercial bribery against Fidelity and Norman, and breach of fiduciary duty of loyalty and disclosure and tortious interference against Norman. Pacific also sought a declaratory judgment that it was entitled to purchase the properties under the APA, Fidelity was obligated to convey the properties to Pacific upon closing, and that no other party other than Pacific had a right to purchase the properties.

On January 23, 2017, Fidelity moved for traditional summary judgment on Pacific's claims against it. On February 7, 2017, Pacific filed its summary judgment

response and, on February 9, 2017, Fidelity filed a reply to Pacific's response. On February 21, 2017, the trial court granted Fidelity's motion.

On March 20, 2017, Fidelity moved for summary judgment on its counterclaim for attorney's fees. On April 11, 2017, the trial court granted the motion and awarded Fidelity a portion of the requested fees.

On March 28, 2017, Norman moved for traditional summary judgment on Pacific's claims against it. On April 17, 2017, Pacific filed its response to Norman's summary judgment motion. On the same day, Pacific filed a third amended petition. On April 21, 2017, Norman filed a reply and objections to Pacific's summary judgment evidence. On April 26, 2017, the trial court granted Norman's motion for summary judgment and sustained Norman's objections to Pacific's summary judgment evidence.

Pacific filed motions for new trial or, in the alternative, to reconsider Fidelity and Norman's motions for summary judgment. The trial court denied these motions. This timely appeal followed.

Standards of Review

We review a trial court's decision to grant a motion for summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). In our review, we take the non-movant's competent evidence as true, indulge every reasonable inference in favor of the non-movant, and resolve all doubts in favor of

the non-movant. *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 846 (Tex. 2005). 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 is meritorious. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000).

Under the traditional summary judgment standard, the movant has the burden to show 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); *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). A defendant moving for traditional summary judgment must either negate at least one element of the plaintiff's cause of action or plead and conclusively establish each essential element of an affirmative defense. *See IHS Cedars Treatment Ctr. of DeSoto, Tex., Inc. v. Mason*, 143 S.W.3d 794, 798 (Tex. 2004); *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995). If the movant meets its burden as set out above, the burden then shifts to the non-movant to raise a genuine issue of material fact precluding summary judgment. *Centeq Realty*, 899 S.W.2d at 197. 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. *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007). Summary judgment must

be decided on the live pleadings on file at the time of the hearing and before judgment. TEX. R. CIV. P. 166a(c).

We review a trial court's rulings concerning the admission or exclusion of summary judgment evidence for an abuse of discretion. *See Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998). A trial court abuses its discretion when it rules without regard to any guiding rules or principles, and a reviewing court must uphold the trial court's ruling if there is any legitimate basis for that ruling. *See id.*

Summary Judgment in Favor of Fidelity

In its first issue, Pacific contends that the trial court erred in granting traditional summary judgment in favor of Fidelity on Pacific's claims for breach of the APA, civil conspiracy, commercial bribery, and declaratory judgment.

A. Breach of Contract and Declaratory Judgment Claims

In its second amended petition—the live pleading on file at the time of summary judgment—Pacific alleged that Fidelity had breached the terms of the APA by refusing to cooperate with Pacific to close the APA. Pacific also sought a declaration that it was entitled to performance under the APA.

It its summary judgment motion, Fidelity argued that Pacific's breach of the APA and declaratory judgment claims failed as a matter of law because the summary judgment evidence established that Pacific had assigned all of its rights in the APA

to Norman. In support of its argument, Fidelity attached as summary judgment evidence a copy of the APA and a September 25, 2015 letter from Pacific to Norman which stated, in relevant part: "This is to confirm that pursuant to section 14.9 of the [APA], [Pacific] has requested and obtained consent from [Fidelity]. Upon execution of the APA by the parties, [Pacific] assigns all its right, title and interest as the buyer in the APA to [Norman]." Pacific and Fidelity executed the APA on September 24, 2015. Fidelity argued in its motion that the assignment of "all of [Pacific's] right, title and interest" in the APA gave Norman, as of September 24, 2015, Pacific's rights in the APA, including the right to close the APA. Thus, it argued, Pacific had no right to claim that Fidelity breached the APA by refusing to close.

In its summary judgment response, Pacific argued that its claim for breach of the APA did not fail because the assignment was partial and, thus, Pacific retained some interest in the APA. In particular, Pacific argued that Fidelity's consent to the assignment was conditioned on Pacific retaining "its obligations, including indemnity obligations under [the APA]" and, therefore, Pacific retained some portion of its contractual relationship with Fidelity. Pacific did not attach any evidence to its response.

In its summary judgment reply, Fidelity argued that the assignment was not partial—rather, it unambiguously assigned "all" of Pacific's rights in the APA to

Norman, and Pacific no longer had any rights in the APA to assert at the time of the alleged breach. It further argued that its requirement that Pacific, as assignor, retain its obligations under the APA was merely the "embodiment of well settled Texas law that 'a party who assigns its contractual rights and duties to a third party remains liable unless expressly or impliedly released by the other party in the contract.'"

On appeal, Pacific presents several grounds in support of its argument that the trial court erred in granting summary judgment on its claims for breach of the APA and declaratory judgment. We address each ground below.

1. Pacific's Assignment to Norman

Pacific argues, as it did in the trial court, that although Pacific assigned its right, title, and interest in the APA to Norman, the assignment was only partial because Pacific remained obligated under the APA. Therefore, it reasons, Pacific retained some portion of its contractual relationship with Fidelity.

Fidelity asserts that Pacific conflates its rights under the APA with its obligations. An assignment is the transfer of some rights or interest from one person to another. *See Concierge Nursing Ctrs., Inc. v. Antex Roofing, Inc.*, 433 S.W.3d 37, 45 (Tex. App.—Houston [1st Dist.] 2013, pet. denied); *Brown v. Mesa Distribs., Inc.*, 414 S.W.3d 279, 285 (Tex. App.—Houston [1st Dist.] 2013, no pet.) ("An assignment is a manifestation by the owner of a right of his intention to transfer such right to the assignee."). Unless qualified, the assignment is a transfer of one *whole*

interest. *See Concierge Nursing Ctrs.*, 433 S.W.3d at 45. Following an unqualified assignment, the assignor loses all rights to enforce the contract. *See Mobil Oil Corp. v. Tex. Commerce Bank-Airline*, 813 S.W.2d 607, 609 (Tex. App.—Houston [1st Dist.] 1991, no writ). Any right to performance by the assignor is extinguished. *See id.* Although the right to performance is extinguished, the assignor's obligations remain. *See NextEra Retail of Tex., LP v. Inv'rs Warranty of Am., Inc.*, 418 S.W.3d 222, 226 (Tex. App.—Houston [1st Dist.] 2013, pet. denied).

Here, Pacific assigned all right, title and interest in the APA to Norman: "Upon execution of the APA by the parties, [Pacific] assigns all its right, title and interest as the buyer in the APA to [Norman]." Pacific and Fidelity executed the APA on September 24, 2015. Fidelity's requirement for its consent to assignment—that Pacific, as assignor, not be relieved of its obligations under the APA—merely reflects well-settled Texas law that "a party who assigns its contractual rights and duties to a third party remains liable unless expressly or impliedly released by the other party in the contract." *Seagull Energy E&P, Inc. v. Eland Energy, Inc.*, 207 S.W.3d 342, 347 (Tex. 2006). Moreover, the APA specifically provides that any assignment of Pacific's rights "shall not relieve Buyer of any of its obligations . . .

herein." Pacific assigned all of its right to the APA to Norman. That it retained its obligations does not change this conclusion.[1]

2. Judicial Admission, Estoppel, and Third-Party Beneficiary Theories

Pacific presents additional grounds in support of its argument that the trial court erred in granting summary judgment on its breach of contract claim. It contends that (1) Fidelity "judicially admitted that the assignment did not occur" and therefore was not entitled to summary judgment on the ground that the assignment did occur; (2) Fidelity acknowledged Pacific's contractual relationship even after the assignment and, thus, should be estopped from taking a contrary position; and (3) even if there was a complete assignment, Pacific maintained its standing to sue Fidelity for breach of contract because it was an intended third-party beneficiary.

Pacific, however, failed to present its judicial admission, estoppel, and third-party beneficiary arguments to the trial court. *See D.R. Horton-Tex., Ltd. v. Markel Int'l Ins. Co.*, 300 SW.3d 740, 743 (Tex. 2009); *Frazer v. Tex. Farm Bureau Mut. Ins. Co.*, 4 S.W.3d 819, 824–25 (Tex. App.—Houston [1st Dist.] 1999, no pet.) ("A non-movant must expressly present to the trial court any reason that would

[1] Because the assignment was not partial, Pacific's assertion that its "admission that a partial assignment occurred would at most amount to a conflicting admission precluding summary judgment" is equally unavailing. Further, Pacific's allegation that only a partial assignment occurred does not constitute summary judgment evidence. *See Nicholson v. Mem'l Hosp. Sys.*, 722 S.W.2d 746, 749 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

defeat the movant's right to summary judgment in its response to the motion for summary judgment."). "Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal." TEX. R. CIV. P. 166a(c). A non-movant waives as a basis for precluding summary judgment any argument that it did not present to the trial court in its written response. *State Bd. of Ins. v. Westland Film Indus.*, 705 S.W.2d 695, 696 (Tex. 1986) (stating that "appellate court is not authorized to reverse a trial court's judgment in the absence of properly assigned error"). Having failed to present these arguments to the trial court, Pacific has waived them.[2]

B. Civil Conspiracy and Commercial Bribery Claims

In its second amended petition, Pacific alleged that "Norman, while occupying a fiduciary relationship to Pacific, deliberately proceeded to renege on its agreement to finalize the terms of their joint venture on the Properties." Predicated on that breach by Norman of its alleged fiduciary duties arising under the joint venture, Pacific pleaded claims of civil conspiracy and commercial bribery against Fidelity.

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[2] Pacific also contends that Fidelity's argument that it did not breach the APA because Pacific engaged in a prior material breach is unavailing because Fidelity did not plead the affirmative defense of prior material breach. Fidelity's argument, however, is relevant only if we find that Pacific's assignment to Norman was partial or otherwise invalid. Having concluded that Pacific transferred all of its rights in the APA and therefore could not maintain a suit to enforce the assignment rights, we need not consider Pacific's argument.

In its summary judgment motion, Fidelity argued that it was entitled to summary judgment on Pacific's conspiracy and commercial bribery claims because Norman did not owe fiduciary duties to Pacific under the MOU. Specifically, it argued that the MOU (1) was not a binding contract and did not create any fiduciary duties running from Norman to Pacific and (2) did not create a joint venture. Thus, Fidelity argued, it could not have conspired to breach any fiduciary duty owed by Norman. Fidelity further asserted that absent any fiduciary obligations owed by Norman to Pacific, Pacific's commercial bribery claim—an element of which is that a "fiduciary" commit an offense[3]—also failed as a matter of law.

In its summary judgment response, Pacific argued that "Pacific and Norman established a joint venture under Nevada law" as evidenced by the MOU and the parties' conduct, thereby giving rise to fiduciary duties. Thus, Pacific argued, because Pacific and Norman were fiduciaries, Fidelity was not entitled to judgment as a matter of law on Pacific's conspiracy and commercial bribery claims.

On appeal, Pacific contends that the trial court erred in granting summary judgment in favor of Fidelity on Pacific's conspiracy and commercial bribery claims because "Fidelity failed to disprove the existence of a partnership between Norman and Pacific Energy which would give rise to certain fiduciary duties, including the duty of loyalty." A review of the record, however, reveals that Pacific did not plead

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[3] *See* TEX. PENAL CODE ANN. § 32.43(a)-(c) (West 2016).

partnership—rather, it pleaded only joint venture. Summary judgment must be decided on the live pleadings on file at the time of the hearing and before judgment. TEX. R. CIV. P. 166a(c). Because Pacific only pleaded joint venture as the basis for the fiduciary duty allegedly breached by Norman, Fidelity was not required to negate the existence of an unpled theory of partnership. *See SmithKline Beecham Corp. v. Doe*, 903 S.W.2d 347, 355 (Tex. 1995) (quoting *Cook v. Brundidge, Fountain, Elliott & Churchill*, 533 S.W.2d 751, 759 (Tex. 1976)) ("A defendant need not, however, show that the plaintiff cannot succeed on any theory conceivable in order to obtain summary judgment; he is only 'required to meet the plaintiff's case as pleaded.'"); *Cullins v. Foster*, 171 S.W.3d 521, 528–29 (Tex. App.—Houston [14th Dist.] 2005, pet. denied); *Gillespie v. Scherr*, 987 S.W.2d 129, 133–34 (Tex. App.—Houston [14th Dist.] 1998, pet denied).

Moreover, Pacific's subsequent addition of the partnership theory in its third amended petition—filed after the trial court granted summary judgment in favor of Fidelity—is also unavailing. *See Hussong v. Schwan's Sales Enters., Inc.*, 896 S.W.2d 320, 323 (Tex. App.—Houston [1st Dist.] 1995, no writ) ("[A] trial court can only consider pleadings and proof on file at the time of the hearing, or filed after the hearing and before judgment with the permission of the court."). A trial court does not err in granting summary judgment when the nonmovant amends the pleading to add a new theory after the trial court grants the motion. *See Automaker,*

Inc. v. C.C.R.T. Co., 976 S.W.2d 744, 745–46 (Tex. App.—Houston [1st Dist.] 1998, no pet.). Here, the trial court granted Fidelity's summary judgment motion on February 21, 2017. Pacific filed its third amended petition on April 17, 2017, nearly two months after Fidelity's motion was granted. Because Pacific did not allege partnership at any time prior to summary judgment, Fidelity had no burden to disprove the existence of a partnership.[4]

The trial court properly granted summary judgment to Fidelity on Pacific's claims for breach of contract, declaratory judgment, conspiracy, and commercial bribery. We overrule Pacific's first issue.

Summary Judgment in Favor of Norman

In its second issue, Pacific argues that the trial court erred by granting summary judgment in favor of Norman on its claims for breach of contract, breach of fiduciary duty, and commercial bribery. It also contends that the trial court abused its discretion when it sustained Norman's objections to Pacific's summary judgment evidence.

A. Summary Judgment Evidence

To its summary judgment response, Pacific attached the declarations of Dana Frank Green, Pacific's President, James A. "Jim" Gibbons, and Tariq I. Ahmad.

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[4] We note that Pacific does not challenge the grant of summary judgment on its joint venture theory, its only pled theory.

Norman objected to each of the following statements in the declarations on the grounds that the statements attempted to (1) contradict the terms of the MOU and, therefore, violated the parol evidence rule, and (2) state a legal conclusion without evidence of the necessary elements of a partnership.

Green Declaration

¶ 17 "Roger Williams and I discussed the partnership between Pacific and Norman, including the 70/30 split."

¶ 17 "We also discussed why it was so important for the partnership to have Pacific as the operator for the Properties . . . ."

Gibbons Declaration

¶ 11 "On that call, Don Roger rejected the 50/50 offer and counteroffered a deal in which the Normans would fund the acquisition but the resulting partnership would be 70/30 with Pacific having the lesser interest in the business."

¶ 12 "Ahmad accepted Don Roger's offer on the phone. After Pacific agreed to be partners with the Normans . . . ."

Ahmad Declaration

¶ 13 "On that call, Don Roger rejected the 50/50 offer and counteroffered a deal in which the Normans would fund the acquisition but the resulting partnership would be 70/30 with Pacific having the lesser interest in the business."

¶ 16 "I shook hands with Don Roger. At this meeting I, on behalf of Pacific, agreed that the Normans would handle all the accounting for the partnership. We were partners."

¶ 17 "On September 22, 2015, I formed a new Utah company that I intended would be the special purpose entity through with [sic] the Pacific-Normans partnership would operate: . . . ."

¶ 18 "I drafted the initial draft of the MOU, which I intended to use to notify Fidelity who Pacific would be partnering with in connection with the APA, and included Dead Horse as the company through which the Norman-Pacific partnership would operate the Properties."

¶ 21 "On this call, I informed Fidelity that Pacific had partnered and secured arrangements for the deposit with the Normans."

¶ 22 "On or about September 24, 2015, relying on the representations of the Normans, including that Pacific and the Normans were partners, I, on behalf of Pacific, assigned Pacific's interest in the APA to Norman."

The trial court could have properly sustained Norman's objections to the above statements because the statements presuppose that a partnership had already formed. "Mere legal conclusions cannot give rise to an issue of a disputed fact such as the existence of a partnership." *Murphy v. McDermott Inc.*, 807 S.W.2d 606, 613 (Tex. App.—Houston [14th Dist.] 1991, writ denied) (concluding summary judgment evidence that third-party referred to plaintiff as his partner did not create partnership); *see also Torres v. Kelley*, No. 13-04-313-CV, 2007 WL 528849, at *3 (Tex. App.—Corpus Christi Feb. 22, 2007, no pet.) (mem. op.) (finding conclusory statements by parties and witnesses about existence of partnership did not constitute evidence of partnership); *Ben Fitzgerald Realty Co. v. Muller*, 846 S.W.2d 110, 121 (Tex. App.—Tyler 1993, writ denied) (finding mere legal conclusions by lay witness did not prove existence of partnership). The trial court did not abuse its discretion in sustaining Norman's objections to Pacific's summary judgment evidence.

B. Breach of Contract Claim

In its summary judgment motion, Norman contended that Pacific could not prevail on its breach of contract claim because the basis for its claim, i.e. the MOU, was not a valid and enforceable contract but, rather, an agreement to agree. In support of its contention, Norman argued that the MOU was unsigned and specifically stated that it was "an expression of interest" that "shall not be binding on either party."

In its third amended petition—which was filed after Norman filed its summary judgment motion but before judgment was rendered, *see* TEX. R. CIV. P. 166a(c)—Pacific nonsuited its claims for civil conspiracy, tortious interference, and declaratory relief, and it added allegations of a partnership between Pacific and Norman. In its summary judgment response filed the same day, Pacific argued that a genuine issue of material fact existed as to whether it had formed a partnership or joint venture with Norman.

In its summary judgment reply, Norman contended that Pacific's additional allegations in its third amended petition did not alter the fact that no genuine issue of material fact existed regarding the formation or intent to form a joint venture or partnership with Pacific. It contended that it was entitled to judgment as a matter of law on Pacific's breach of contract claim.

On appeal, Pacific asserts that Norman's summary judgment argument focused on the fact that the MOU was not an enforceable agreement but that "the basis of Pacific's breach of contract claim against Norman was a breach of the oral partnership agreement, not the MOU." It then argues that "[b]ecause Norman did not address the breach of the oral partnership agreement claim, the trial court abused its discretion when it granted summary judgment on this breach of contract claim."

Initially, we note that Norman's summary judgment motion could only address the issue as to whether the MOU was an enforceable agreement because Pacific had not yet filed its third amended petition in which it asserted, for the first time, that a partnership existed. And, contrary to Pacific's contention, Norman addressed Pacific's breach of contract claim premised upon an alleged partnership in its reply brief. There, it argued that the summary judgment evidence proved as a matter of law that no partnership existed between Pacific and Norman.

Under Business Organizations Code section 152.052(a), the factors indicating that persons have created a partnership include the persons':

> (1) receipt or right to receive a share of profits of the business;
>
> (2) expression of an intent to be partners in the business;
>
> (3) participation or right to participate in control of the business;
>
> (4) agreement to share or sharing:
>
> (A) losses of the business; or

(B) liability for claims by third parties against the business; and

(5) agreement to contribute or contributing money or property to the business.

TEX. BUS. ORGS. CODE ANN. § 152.052 (West 2012).[5] While a court must consider all of the factors, conclusive evidence of only one factor is insufficient to prove the existence of a partnership. *See Ingram v. Deere*, 288 S.W.3d 886, 898 (Tex. 2009).

1. Share of Profits

The MOU provided that Pacific and Norman would enter into an operating agreement in which Pacific would be the operator for Norman, and Norman would grant a 30% net profits interest[6] to Pacific after all normal operating expenses for the asset. Norman's counsel testified that "at the time the Normans made the deposit on the 24th, they insisted that they be the buyer through this assignment and they would control the transaction, and Pacific Energy would be involved eventually, if the transaction closed, as an operator." Thus, Pacific would be paid for its work as an operator with a 30% net profit interest.

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[5] An agreement to share losses by the owners of a business is not necessary to create a partnership. *Knowles v. Wright*, 288 S.W.3d 136, 147 (Tex. App.—Houston [1st Dist.] 2009, pet. denied).

[6] "A net profit interest is a share of gross production from a property measured by net profits from the operation of the property." *T-Vestco Litt-Vada v. Lu-Cal One Oil Co.*, 651 S.W.2d 284, 291 (Tex. Civ. App.—Austin 1983, writ ref'd n.r.e.) (citation omitted).

Norman contends that the net profits interest was to be payment to Pacific for its services as operator, in the event that Norman acquired the Fidelity properties, and if it entered into an operating agreement with Pacific. We agree. While it is true that the "receipt or right to receive a share of profits of the business" may be indicative of the existence of a partnership, "a share of profits paid as wages or other compensation to an employee or independent contractor is not indicative of a partnership interest in the business." *Ingram*, 288 S.W.3d at 898 (internal quotations omitted).

2. Intent to Be Partners

With regard to the second factor, the Texas Supreme Court has stated that "there must be evidence that both parties expressed their intent to be partners." *Id.* at 900.

Norman contends that there is no evidence that the Normans expressed an intent to be partners with Pacific. Pacific argues that that the MOU itself evidenced an expression of intent to be partners. Specifically, Pacific relies on the statement in the MOU that the memorandum is "an expression of interest to enter into an operating agreement." This statement is not evidence of an intent to be partners in the business. *See Rankin v, Naftalis*, 557 S.W.2d 940, 946 (Tex. 1977) (stating evidence of joint operating arrangement to develop potential oil and gas producing property will not support finding of intent to form broader relationship, such as

partnership or joint venture). Pacific also argues that the declarations demonstrate that Norman expressed "an intent to be partners in the business, including discussions on the partnership's structure and Norman's acquiescence to the partnership." With regard to the remaining references in Pacific's declarations to "partner" and "partnership," the court in *Ingram* held that such colloquial references are legally insufficient expressions of intent; rather, the focus should be on statements to third parties or holding the other party out as partner. 288 S.W.3d at 900. Pacific has not pointed to any statement by the Normans to a third party that the Normans considered themselves to be in a partnership with Pacific.

3. Right of Control

Control of the business is one of the most important factors in determining whether a partnership has been formed. *See id*. at 896. "The right to control a business is the right to make executive decisions." *Id*. at 901.

Under the MOU, Norman was to own 100% of the assets acquired pursuant to the APA. Norman's counsel testified that Norman would control the transaction. As sole owner of the assets, Norman would have the exclusive right to make decisions about developing the oil and gas interests; Pacific as the prospective operator, would not have that right but, rather, only the rights granted to it under an operating agreement. *See Hysaw v. Dawkins*, 483 S.W.3d 1, 9 (Tex. 2016). Pacific also acknowledged that Norman would handle all of the accounting for the business.

See Ingram, 288 S.W.3d at 901–02 (noting importance of controlling books and finances for business as key fact in determining right to control). There is no evidence reflecting a mutual right to control the business.

4. Sharing of Losses

In its summary judgment response, Pacific argued that had the transaction reached the operating phase, "presumably Norman would absorb losses stemming from the Properties and Pacific would absorb losses stemming from the pipeline that served the Properties." Pacific's contention about a presumptive agreement is not evidence of an agreement to share losses. Moreover, the MOU makes no mention of loss sharing.

5. Contribution to the Business

In its summary judgment response, Pacific argued that "both Norman and Pacific contributed to the partnership: Norman provided the initial cash deposit and Pacific provided the APA (rights to purchase the Properties)." However, even if Pacific's assignment of its rights under the APA raised a fact issue as to the existence of "an agreement to contribute . . . money or property to the business," evidence of only one factor is insufficient to prove the existence of a partnership. *See Ingram*, 288 S.W.3d at 898.

Under the totality-of-the-circumstances test prescribed by *Ingram*, the record establishes as a matter of law the lack of the existence of a partnership between

Pacific and Norman. *See id.* The trial court did not err in granting summary judgment in favor of Norman on Pacific's breach of contract claim.

C. Breach of Fiduciary Duty and Commercial Bribery Claims

Pacific argues that "[b]ecause a partnership existed, Norman owed [Pacific] fiduciary duties as a matter of law—thus, summary judgment on [Pacific's] breach of fiduciary duty and commercial bribery claims was improper." *See* TEX. PENAL CODE ANN. § 32.43(a)–(c) (West 2016) (explaining when person who is fiduciary commits offense); *Ins. Co. of N. Am. v. Morris*, 981 S.W.2d 667, 674 (Tex. 1998) (noting fiduciary duties arise as matter of law in certain formal relationships, including partnerships). Having concluded that no partnership existed, Pacific's claims for breach of fiduciary duty and commercial bribery based on the fiduciary relationship arising from a partnership likewise fail.

The trial court properly granted summary judgment in favor of Norman on Pacific's claims for breach of fiduciary duty and commercial bribery.

We overrule Pacific's second issue.

Attorney's Fees

In its third point of error, Pacific contends that the trial court erred in awarding attorney's fees to Fidelity and Norman.

A. Attorney's Fee Award to Fidelity

Pacific argues that the trial court erred in granting attorney's fees to Fidelity because (1) Fidelity failed to segregate its fees; (2) the award of appellate attorney's fees was not conditioned on Pacific's unsuccessful appeal; and (3) there was insufficient evidence of the reasonableness of Fidelity's appellate fees.

"Generally, a party seeking attorney's fees must segregate those fees incurred in connection with a claim that allows their recovery from fees incurred in connection with claims for which no such recovery is allowed." *Hill v. Premier IMS, Inc.*, No. 01-15-00137-CV, 2016 WL 2745301, at *8 (Tex. App.—Houston [1st Dist.] May 10, 2016, no pet.) (mem. op.) (quoting *Alief Indep. Sch. Dist. v. Perry*, 440 S.W.3d 228, 245 (Tex. App.—Houston [14th Dist.] 2013, pet. denied)). "Settled law, however, holds that a party waives any error arising from possibly awarding nonrecoverable fees when the complaining party does not object to failure to segregate between legal services for which fees are properly recoverable and those for which no recovery of fees is authorized." *Haden v. David J. Sacks, P.C.*, 332 S.W.3d 503, 516 (Tex. App.—Houston [1st Dist.] 2009, pet. denied); *see also Aero Energy, Inc. v. Circle C Drilling Co.*, 699 S.W.2d 821, 823 (Tex. 1985) ("Because [the party] did not object to the failure of the trial court to segregate the attorney's fees between the claims, they have waived that point."). Pacific did not object to the lack of segregation or otherwise bring the issue to the trial court's attention prior to

its granting summary judgment. Pacific has therefore waived this issue. *See Haden*, 32 S.W.3d at 516–17; *see also Am. First Nat. Bank v. Jordan-Lewis Dev., L.P.*, No. 01-09-00990-CV, 2011 WL 2732779, at *8 (Tex. App.—Houston [1st Dist.] July 14, 2011, no pet.) (mem. op.) ("Because AFNB's objection to the failure to segregate attorney's fees was not raised before the trial court rendered judgment, AFNB has waived this objection on appeal.").

Pacific also contends that the trial court erred in awarding appellate attorney's fees to Fidelity because the fees were not conditioned on Pacific's unsuccessful appeal.

Texas law allows an award of appellate attorney's fees, provided that the award is contingent upon the appellant's unsuccessful appeal. *Ogu v. C.I.A. Servs. Inc.*, No. 01-09-01025-CV, 2011 WL 947008, at *4 n.3 (Tex. App.—Houston [1st Dist.] Mar. 17, 2011, no pet.) (mem. op.); *Keith v. Keith*, 221 S.W.3d 156, 171 (Tex. App.—Houston [1st Dist.] 2006, no pet.). Here, the trial court ordered that (1) "Fidelity conditionally recover from Pacific an additional $30,000.00 in attorney's fees and costs, which the Court finds reasonable and necessary based on the summary judgment evidence, if Pacific files an appeal that is unsuccessful"; (2) "if Pacific files a petition for review, Fidelity conditionally recover from Pacific an additional $20,000.00 in attorney's fees and costs, which the Court finds reasonable and necessary based on the summary judgment evidence, if the petition is denied";

and (3) "if Pacific files a petition for review that is granted, Fidelity conditionally recover from Pacific (in addition to the $20,000.00 awarded in the previous item) an additional $7,500.00 in attorney's fees and costs, which the Court find reasonable and necessary based on the summary judgment evidence, if Pacific is unsuccessful." The trial court conditioned the award of appellate attorney's fees upon Pacific's unsuccessful appeal.

Pacific argues that Fidelity presented insufficient evidence of the reasonableness of its appellate fees to support the award.

An attorney's affidavit is "expert testimony that will support an award of attorney's fees in a summary judgment proceeding." *Triton 88, L.P. v. Star Elec., L.L.C.*, 411 S.W.3d 42, 64 (Tex. App.—Houston [1st Dist.] 2013, no pet.). Testimony from a party's attorney about a party's attorneys' fees is taken as true as a matter of law if the testimony "is not contradicted by any other witness and is clear, positive, direct, and free from contradiction." *Blockbuster, Inc. v. C–Span Entm't, Inc.*, 276 S.W.3d 482, 490 (Tex. App.—Dallas 2008, pet. granted, judgm't vacated w.r.m.) (citing *Ragsdale v. Progressive Voters League*, 801 S.W.2d 880, 882 (Tex. 1990)).

Here, in support of its summary judgment motion on its attorney's fees counterclaim, Fidelity submitted the testimony of its lead counsel via affidavit regarding the reasonableness of the fees sought, the experience and reasonable

hourly rates of Fidelity's counsel who worked on the case, and the reasonable and necessary amount of fees Fidelity should be awarded under the APA in the event Pacific sought appellate review and was unsuccessful. Fidelity's lead counsel based his opinions as to the reasonableness of the fees on the factors enumerated in *Arthur Andersen & Co. v. Perry Equipment Corp.*, 945 S.W.2d 812, 818 (Tex. 1997). To his affidavit, Fidelity's counsel attached the firm's invoices to further support his testimony and the basis for his opinions.

"To create a fact issue, the non-movant's attorney must file an affidavit contesting the reasonableness of the movant's attorney's fee affidavit." *Owen Elec. Supply, Inc. v. Brite Day Const., Inc.*, 821 S.W.2d 283, 288 (Tex. App.—Houston [1st Dist.] 1991, writ denied). A review of the record shows that Pacific filed no evidence contesting the reasonableness of the fees sought by Fidelity. In its brief, Pacific argues that the affidavit testimony presented by Fidelity failed to articulate the number of hours that would allegedly be incurred working on any appeal and how the expected time would be reasonable and necessary. Fidelity has not directed us to any authority requiring the reversal of an attorney's fees award due to the absence of such specific testimony. Moreover, we have previously declined to impose such a requirement. *See Keith*, 221 S.W.3d at 170; *George Pharis Chevrolet, Inc. v. Polk*, 661 S.W.2d 314, 318 (Tex. App.—Houston [1st Dist.] 1983, no writ) (holding that complained-of deficiency concerning number of hours spent and

reasonable hourly rate goes only to weight of evidence and is not of magnitude that would render it insufficient as matter of law). We further note that the trial court awarded only approximately one-third of the contingent appellate fees sought by Fidelity.[7]

We conclude the trial court did not err in awarding Fidelity its attorney's fees.

B. Attorney's Fee Award to Norman

Pacific contends that the trial court erred by awarding attorney's fees to Norman because (1) Norman did not request attorney's fees in its pleadings; (2) Norman was not a party to the APA; (3) Norman failed to segregate its fees; (4) there was insufficient evidence of the reasonableness of Norman's appellate fees; and (5) the award of appellate attorney's fees was not conditioned on Pacific's unsuccessful appeal.

Pacific contends that Norman failed to request attorney's fees in its trial pleadings and, therefore, was not entitled to an award. Norman argues that the issue of its request for attorney's fees was tried by consent because Pacific was on notice of Norman's request in its summary judgment motion but never raised the alleged

[7] Fidelity sought an award of $50,000 in attorney's fees and costs should Pacific file an unsuccessful appeal (the trial court awarded $30,000), $40,000 if Pacific filed a petition for review with the Texas Supreme Court (the trial court awarded $20,000), and an additional $10,000 if Pacific's appeal to the Texas Supreme Court was unsuccessful following the grant of Pacific's petition for review (the trial court awarded $7,500).

pleading defect in response to the motion. *See* TEX. R. CIV. P. 90 (providing that pleading defects not specifically pointed out by exception in writing and brought to trial court's attention before judgment is signed are deemed waived). Pacific responds that Norman's request for attorney's fees was not tried by consent because Pacific requested that the trial court deny Norman's summary judgment motion, including Norman's request for attorney's fees. Pacific further argues that it again objected to the award of attorney's fees to Norman in its motion for new trial, thereby preserving its objection.

We have reviewed Pacific's summary judgment response and there is no mention of attorney's fees or any objection to Norman's request. *See Alford v. Marino*, No. 14-04-00912-CV, 2005 WL 3310114, at *7–8 (Tex. App. Dec. 8, 2005, no pet.) (mem. op.) (concluding that defendant waived right to object to plaintiff's failure to specifically plead for attorney's fees where defendant did not object to attorney's fees award in trial court despite objection to request in post-trial brief). And while Pacific objected to the award in its motion for new trial, it did so only on the grounds that Norman could not recover attorney's fees under the APA's attorney's fee provision and that the award was not reasonable, not on the basis of a pleading defect. *See* TEX. R. CIV. P. 90.

Pacific also argues that because the APA defines "Parties" or "Party" as Fidelity and Pacific, and did not include Norman, Norman was not entitled to an award under the APA's attorney's fees provision.[8]

By letter dated September 24, 2015, Pacific assigned "all of its right, title and interest" in the APA to Norman, effective upon Pacific's and Fidelity's execution of the APA. Pacific and Fidelity executed the APA on September 24, 2015. An assignee stands in the shoes of his assignor. *See Sw. Bell Tel. Co. v. Mktg. on Hold Inc.*, 308 S.W.3d 909, 920 (Tex. 2010) (concluding that assignee of customer-assignors stepped into customers' shoes and could assert claim for injury shared by assignor and members of class); *Bosch v. Frost Nat'l Bank*, No. 01-14-00191-CV, 2015 WL 4463666, at *3 (Tex. App.–Houston [1st Dist.] July 21, 2015, no pet.) (mem. op.) ("It is well-settled that the assignee steps into the shoes of the assignor and may assert the same rights as the assignor."). As Pacific's assignee, Norman was entitled to assert all rights under the APA, including the right to be reimbursed for its fees under section 14.12.

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[8] Section 14.12 of the APA provides:

> If any Party institutes a Proceeding against any other Party relating to the provisions of this Agreement, the Party to such action or proceeding which does not prevail will reimburse the prevailing party herein (regardless of whether the prevailing Party is the plaintiff or the defendant in such action or proceeding) for the reasonable expenses of attorneys' fees and disbursements incurred by the prevailing Party.

Pacific also argues that the trial court erred in awarding attorney's fees to Norman because Norman failed to segregate its fees. Pacific did not complain that Norman failed to segregate its fees prior to the trial court granting summary judgment. Having failed to object to the lack of segregation or otherwise bring the issue to the trial court's attention prior to its granting summary judgment, Pacific has waived this issue. *See Haden*, 32 S.W.3d at 516–17; *Am. First Nat. Bank*, 2011 WL 2732779, at *8.

Pacific also contends that there was insufficient evidence of the reasonableness of Norman's appellate fees. In support of its request for attorney's fees, Norman submitted the testimony of its lead counsel via affidavit regarding the legal work conducted on behalf of Norman in the lawsuit and the attorney's fees and costs Norman incurred or would incur in connection with the litigation. The affidavit also set forth counsel's opinion regarding the reasonableness and necessity of the fees and costs sought, addressing each of the *Arthur Andersen* factors, and included the firm's invoices detailing the tasks performed, the individuals who performed them, and the amount of time spent on them. Pacific did not present any evidence challenging Norman's evidence in support if its request for attorney's fees. *See Owen Elec. Supply*, 821 S.W.2d at 288 ("To create a fact issue, the non-movant's attorney must file an affidavit contesting the reasonableness of the movant's attorney's fee affidavit.").

Lastly, Pacific argues that the trial court erred in awarding appellate fees to Norman because the award was not conditioned on Pacific's unsuccessful appeal. "[A]n unconditional award of appellate attorney's fees does not require reversal; instead, [this Court] may modify a trial court's judgment to make the award of appellate attorney's fees contingent upon the receiving party's success on appeal." *Keith*, 221 S.W.3d at 171. Although the trial court should have conditioned its order on success before the appellate court, its failure to do so does not require reversal. *Marcus v. Smith*, 313 S.W.3d 408, 418 (Tex. App.—Houston [1st Dist.] 2009, no pet.). We therefore modify the trial court's April 26, 2017 order as follows:

IT IS FURTHER ORERED that Defendant Norman Oil & Gas, LLC *conditionally* recover its reasonable attorney's fees for any appellate proceedings in this case as follows:

1. In the event of an *unsuccessful* appeal *by Pacific Energy & Mining Company* to the Court of Appeals, the amount of $60,000 for post-judgment proceedings in this Court, filing a brief in response and presenting oral argument in the Court of Appeals.

2. In the event Pacific Energy & Mining Company files a Petition for Review in the Texas Supreme Court, an additional $20,000 for responding to that Petition for Review, *if the petition is denied*.

3. In the event the Texas Supreme Court requests full briefing on the merits, an additional $40,000 for responding to Pacific Energy & Mining Company's brief, *if Pacific Energy & Mining Company is unsuccessful*.

4. In the event the Texas Supreme Court grants oral argument in this matter, an additional $30,000 for preparation and presentation of

> oral argument to that Court, *if Pacific Energy & Mining Company is unsuccessful.*[9]

As modified, we conclude that the trial court did not err in awarding Norman its attorney's fees.

We overrule Pacific's third issue.

Conclusion

We affirm the trial court's judgment as modified.

Russell Lloyd
Justice

Panel consists of Chief Justice Radack and Justices Jennings and Lloyd.

[9] The modified language is italicized.