**Opinion issued September 24, 2020**

**In The**

# Court of Appeals

**For The**

# First District of Texas

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**NO. 01-19-00477-CV**

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**Z AUTO PLACE, LLC A/K/A AND D/B/A AUTO PLACE AND Z AUTO PLACE SPRING, Appellant**

**V.**

**CARS.COM, LLC, Appellee**

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**On Appeal from County Court at Law No. 4**
**Harris County, Texas**
**Trial Court Case No. 2017-1926**

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## MEMORANDUM OPINION

Appellant, Z Auto Place, LLC a/k/a and d/b/a Auto Place and Z Auto Place Spring ("Z Auto Place"), appeals the trial court's order granting summary judgment in favor of appellee, Cars.com, LLC. In its first and second issues, Z Auto Place

contends that the trial court erred in granting summary judgment on Cars.com's suit on a sworn account because Z Auto Place filed a verified denial and supporting affidavit, and it presented evidence creating a reasonable inference that Z Auto Place cancelled its relationship with Cars.com. In its third and fourth issues, Z Auto Place contends that the trial court erred in awarding attorney's fees to Cars.com because Chapter 38 of Texas Civil Practice and Remedies Code does not permit recovery against an LLC, and Cars.com's pre-suit demand was excessive and based on unauthorized charges. We affirm in part and reverse and render in part.

## Background

On December 1, 2016, Z Auto Place entered into an agreement with Cars.com for the purchase of an advertising package. Under the terms of the agreement, Z Auto Place agreed to pay Cars.Com $1,600 per month. The agreement had an initial term of three months. On April 25, 2017, the parties entered into a second agreement, with an initial term of twelve months, under which Z Auto Place agreed to pay Cars.com $3,933 per month.

Section 5 of the agreements states: "Agreement will revert to month to month status once Initial Term is complete. Customer must provide 30 days prior written notice to terminate once Initial Term is complete." Section 3 of the agreements states:

> 3. **Term and Termination.** Orders cannot be cancelled during their initial term. The initial term for each Order made under this Agreement

> shall be the period specified in the Order Form, or if no initial term is specified, for 12 months, and shall commence upon delivery of a Product. Thereafter, the Agreement automatically renews on a month-to-month basis until either party provides 30 days written notice of termination to the other party. Either party may immediately terminate this Agreement at any time in the event the other party commits a material breach of this Agreement and such breach is not cured by the breaching party within 30 days of its receipt of written notice of such breach. Cars.com reserves the right to discontinue any Product at any time and may suspend performance for Customer's failure to pay any invoice when due or Customer's failure to comply with the Policies. If Customer terminates any Product for convenience prior to the end of initial term for such Product, then Customer shall pay Cars.com a termination fee equal to the total number of months in the initial term minus the total number of months in the initial term for which Customer paid Cars.com for the terminated Product(s), multiplied by the monthly fee for such Product(s). **To be effective, termination must be faxed to 877-707-1947 or emailed to pendingservice@cars.com using the form provided by a Cars.com sales representative. Cars.com and Customer may agree to revoke any termination, in which case, this Agreement will remain in effect.**

On June 25, 2018, Cars.com filed suit against Z Auto Place alleging that Z Auto Place failed to pay the amounts owed under the agreements. In its amended petition, Cars.com alleged that "[o]n or about December 1, 2016, for valuable consideration, the Defendant entered into an agreement for good and/or services . . . Plaintiff has fully performed all of its obligations pursuant to aforesaid agreement, and all conditions precedent have occurred, have been met, or have been waived, but Defendant failed to pay Plaintiff in accordance with the verified account . . . Defendant did promise to pay, but though often requested to do so, the Defendant failed and refused and still fails and refuses to pay all to the Plaintiff's damages in

the amount of $16,326.44 together with interest and attorneys' fees as hereinafter alleged." Cars.com further alleged "Plaintiff has made written demand upon the Defendant for payment of said account, more than thirty (30) days prior to the filing of this Petition, and that Plaintiff would show the Court that the recovery of attorneys' fees is authorized, made and provided, under and according to the provisions of Chapter 38, Texas Civil Practice and Remedies Code, the agreement between the parties, and the principles of equity." Cars.com sought attorney's fees in the amount of $5,440.00.

On October 16, 2018, Z Auto Place filed its answer that included a general denial and several affirmative defenses. Z Auto Place alleged, among other things, that "Defendant's failure, if any, to comply with the underlying agreement was excused by a previous and material breach of the same agreement," and "to the extent that Plaintiff did make a demand under Chapter 38.001 of the Tex. Civ. Prac. and Rem. Code, any such demand was excessive. As such, Plaintiff is not entitled to a recovery of attorney's fees."

On April 4, 2019, Cars.com filed a motion for summary judgment, in which it asserted, "**SUIT ON CONTRACT.** This is a suit and motion for summary judgment based upon a contract." Cars.com argued that "Defendant does not deny execution of the contract" and its answer "is insufficient in law to constitute a defense to Plaintiff's cause of action and Plaintiff is therefore entitled to Judgment

as a matter of law." To its motion, Cars.com attached the affidavit of its representative, Justin Camisa, attesting that Z Auto Place breached its contract by failing to make payments when due, and that Z Auto Place owed Cars.com $16,326.44 under the terms of the contract. To his affidavit, Camisa attached copies of the December 2016 and April 2017 agreements, a statement of account reflecting Z Auto Place's payment history, and the invoices sent to Z Auto Place from March 2017 to June 2017. Cars.com further asserted "Plaintiff is entitled to attorneys' fees pursuant to Chapter 38, of the Texas Civil Practice and Remedies Code." It attached the affidavit of its attorney, Andrew Totz, in support of its request for $5,440.00 in attorney's fees.

On April 22, 2019, Z Auto Place filed its first amended verified answer asserting the same general denial and affirmative defenses as in its original answer. The amended answer included the affidavit of Wajdi "Joe" Zeidan, Z Auto Place's owner.

On the same day, Z Auto Place filed its response in opposition to Cars.com's summary judgment motion. Z Auto Place argued that (1) it filed a verified denial with its amended answer in response to Cars.com's suit on a sworn account; (2) it did not agree to the monthly charge in excess of $5,000, it demanded that Cars.com terminate the contract, and a Cars.com representative assured Z Auto Place that the account would be closed and the bill adjusted accordingly; and (3) Cars.com's pre-

suit demand was excessive and it was therefore not entitled to recover attorney's fees under section 38.001 of the Texas Civil Practice and Remedies Code. To its response, Z Auto Place attached Wajdi Zeidan's affidavit stating that Z Auto Place did not authorize Cars.com to charge the sum alleged in its petition, Cars.com did not calculate the account correctly, Cars.com mispresented that it would only charge $1,600 per month on a three-month basis, Z Auto Place canceled its account with Cars.com after it received invoices that it never agreed to, Z Auto Place's account was charged without authorization, and Z Auto Place did not receive the results promised by Cars.com. It also attached the affidavits of Zouheir Zeidan and Teresa Poonsuwan as well as its verified amended answer. In his affidavit, Zouheir attested that after Cars.com charged Z Auto Place for two advertising packages that Cars.com had offered to Z Auto Place on a trial basis and risk-free, he spoke with Mo Mohammad at Cars.com who assured him that he would adjust the invoice and take care of it. In her attorney affidavit, Poonsuwan stated that the fees sought by Cars.com were not reasonable and necessary because the only two hearings in the case—on motions for default judgment and new trial—were unopposed or agreed to, no depositions had been taken, and Z Auto Place paid Cars.com its attorney's fees in connection with the default judgment.

On April 26, 2019, the trial court granted summary judgment to Cars.com, awarding $16,326.44 in damages and $5,440.00 in attorney's fees.

On May 21, 2019, Z Auto Place filed a motion for new trial and to set aside final judgment. Cars.com filed a response on May 31, 2019. The trial court denied the motion on June 5, 2019. This appeal followed.

**Standard 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). When a plaintiff moves for summary judgment on its own claim, it must prove that it is entitled to judgment as a matter of law on each element of its cause of action. *Castillo Info. Tech. Servs., LLC v. Dyonyx*, L.P., 554 S.W.3d 41, 45 (Tex. App.—Houston [1st Dist.] 2017, no

pet.). The nonmovant has no burden to respond to a motion for summary judgment unless the movant conclusively establishes each element of its cause of action as a matter of law. *Rhone–Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 222–23 (Tex. 1999). 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, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995). The evidence raises a genuine issue of fact if reasonable and fair-minded jurors could differ in their conclusions in light of all of the summary judgment evidence. *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007).

**Propriety of Summary Judgment**

In its first issue, Z Auto Place contends that the trial court erred in granting summary judgment on Cars.com's suit on a sworn account. Citing Texas Rule of Civil Procedure 185, Z Auto Place argues that it filed a verified denial and supporting affidavit disputing the correctness of the account and, therefore, Cars.com was required to present further proof of its claim.[1]

Cars.com contends that it sued Z Auto Place for breach of contract and not on a sworn account. In its amended petition, Cars.com alleged that "[o]n or about

[1] Rule 185 is not a rule of substantive law; rather, "it is a rule of procedure regarding the evidence necessary to establish a prima facie right of recovery" on certain types of contractual account claims. *Rizk v. Fin. Guardian Ins. Agency, Inc.*, 584 S.W.2d 860, 862 (Tex. 1979); *Williams v. Unifund CCR Partners Assignee of Citibank*, 264 S.W.3d 231, 234 (Tex. App.—Houston [1st Dist.] 2008, no pet.).

December 1, 2016, for valuable consideration, the Defendant entered into an agreement for good and/or services . . . Plaintiff has fully performed all of its obligations pursuant to aforesaid agreement, and all conditions precedent have occurred, have been met, or have been waived, but Defendant failed to pay Plaintiff in accordance with the verified account . . . Defendant did promise to pay, but though often requested to do so, the Defendant failed and refused and still fails and refuses to pay all to the Plaintiff's damages in the amount of $16,326.44 together with interest and attorneys' fees as hereinafter alleged."

Cars.com asserts that it also moved for summary judgment on its breach of contract claim and not on a sworn account. In its motion, Cars.com stated: "**SUIT ON CONTRACT.** This is a suit and motion for summary judgment based upon a contract." It attached the affidavit of its representative, Justin Camisa, attesting that Z Auto Place breached its contract by failing to make payments when due, and that Z Auto Place owed Cars.com $16,326.44 under the terms of the contract. To his affidavit, Camisa attached copies of the December 2016 and April 2017 agreements, a statement of account reflecting Z Auto Place's payment history, and the invoices sent to Z Auto Place from March 2017 to June 2017.

Cars.com did not allege in its amended petition, its summary judgment motion, or at any other time, that this is a suit on a sworn account under Rule 185. *See Kaldis v. Crest Fin.*, 463 S.W.3d 588, 597 (Tex. App.—Houston [1st Dist.]

2015, no pet.) (rejecting defendant's argument that plaintiff failed to comply with Rule 185's requirements where plaintiff "did not allege in its petition, in the trial court, or in its appellate brief that this is a suit on a sworn account under Rule 185 . . . nor did the trial court base its judgment on Rule 185"). In its answer, Z Auto Place asserted, among other things, that "Defendant's failure, if any, to comply with the underlying agreement was excused by a previous and material breach of the same agreement." This claim of prior material breach of an "agreement" is, at the very least, evidence for the proposition that Z Auto Place was aware that Cars.com had pleaded a cause of action for breach of contract. Further, if Z Auto Place was unsure of the nature of the claim against it, it could have filed special exceptions to compel Cars.com to clarify its pleading, but it did not do so. *See* TEX. R. CIV. P. 91; *Baylor Univ. v. Sonnichsen*, 221 S.W.3d 632, 635 (Tex. 2007) ("The purpose of a special exception is to compel the clarification of the opposing party's pleading if it is not sufficiently specific or fails to plead a cause of action."). In the absence of special exceptions, courts construe the pleadings liberally in favor of the pleader. *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 897 (Tex. 2000). We overrule Z Auto Place's first issue.

In its second issue, Z Auto Place contends that the trial court erred in granting summary judgment to Cars.com because Z Auto Place presented evidence creating a reasonable inference as to whether it cancelled its relationship with Cars.com.

To prevail on a breach of contract claim, a plaintiff is required to establish (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages sustained as a result of the breach. *Fortitude Energy, LLC v. Sooner Pipe LLC*, 564 S.W.3d 167, 180 (Tex. App.—Houston [1st Dist.] 2018, no pet.). Here, the summary judgment evidence showed that Z Auto Place entered into agreements with Cars.com in December 2016 and April 2017. Under the December 2016 agreement, Z Auto Place was required to pay Cars.com $1,600 per month for an initial period of three months. Under the April 2017 agreement, Z Auto Place was required to pay Cars.com $3,933 per month for an initial period of twelve months. The agreements state: "Agreement will revert to month to month status once Initial Term is complete. Customer must provide 30 days prior written notice to terminate once Initial Term is complete." Section 3 of both agreements states, in bold type: "**To be effective, termination must be faxed to 877-707-1947 or emailed to pendingservice@cars.com using the form provided by a Cars.com sales representative. Cars.com and Customer may agree to revoke any termination, in which case, this Agreement will remain in effect.**" The evidence further shows that Cars.com provided Z Auto Place with the contracted-for product, Z Auto Place did not pay the amounts owed under the agreements between March 2017 and June 2017, and Cars.com sustained damages in the amount of $16,326.44.

Z Auto Place argues that a fact issue exists regarding the validity of the agreements because it presented evidence creating a reasonable inference that it cancelled its relationship with Cars.com. In support of its argument, it points to Zouheir's affidavit stating that Z Auto Place was dissatisfied with the results of the advertising packages it purchased from Cars.com, he spoke with a Cars.com representative about terminating the contracts, and the representative assured him that the account would be closed and the bill adjusted accordingly. There is no evidence, however, that Z Auto Place terminated the December 2016 and April 2017 agreements in writing and that it sent its termination form to Cars.com by fax or email, as required by the terms of the contract. Because the evidence fails to raise a fact issue regarding the validity of the agreements, the trial court did not err in granting summary judgment to Cars.com on its breach of contract claim. We overrule Z Auto Place's second issue.

**Award of Attorney's Fees**

In its third issue, Z Auto Place contends that the trial court erred in awarding attorney's fees under Chapter 38 of the Texas Civil Practice and Remedies Code because the statute only allows recovery against an individual or corporation, not an LLC.

Section 38.001 provides: "A person may recover reasonable attorney's fees from an individual or corporation . . . if that claim is for . . . an oral or written

contract." TEX. CIV. PRAC. & REM. CODE § 38.001(8). This Court has determined that section 38.001 "does not authorize the recovery of attorney's fees in a breach of contract action against an LLC [limited liability company]." *TEC Olmos, LLC v. ConocoPhillips Co.*, 555 S.W.3d 176, 188 (Tex. App.—Houston [1st Dist.] 2018, pet. denied) ("Under the plain language of section 38.001, a trial court cannot order limited liability partnerships (L.L.P.), limited liability companies (L.L.C.), or limited partnerships (L.P.) to pay attorneys' fees.") (quoting *Varel Int'l Indus., L.P. v. PetroDrillbits Int'l, Inc.*, No. 05-14-01556-CV, 2016 WL 4535779, at *7 (Tex. App.—Dallas Aug. 30, 2016, pet. denied) (mem. op.)); *see also Alta Mesa Holdings, L.P. v. Ives*, 488 S.W.3d 438, 455 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (holding section 38.001 does not authorize recovery of attorney's fees in breach of contract action against limited liability company). Z Auto Place is not an individual or a corporation; it is a limited liability company. Thus, Cars.com may not recover attorney's fees under section 38.001 against Z Auto Place, a limited liability company, as a matter of law. *See Vast Constr., LLC v. CTC Contractors, LLC*, 526 S.W.3d 709, 728 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (noting availability of attorney's fees under particular statute is question of law for court).

Cars.com argues that the trial court properly awarded attorney's fees because Cars.com pleaded for and requested attorney's fees based on the agreement between the parties in addition to section 38.001. In its first amended petition, Cars.com

alleged, "Plaintiff would show the Court that the recovery of attorneys' fees is authorized, made and provided, under and according to the provisions of Chapter 38, Texas Civil Practice and Remedies Code, the agreement between the parties, and the principles of equity." Section 2 of the agreements, entitled "Fees," states, in relevant part, "Customer agrees to pay all of Cars.com's costs, including attorney's fees, incurred in collecting overdue amounts." However, Cars.com moved for summary judgment on its claim for attorney's fees solely on the basis of section 38.001. In its summary judgment motion, Cars.com asserted, "Plaintiff is entitled to attorneys' fees pursuant to Chapter 38, of the Texas Civil Practice and Remedies Code." In the affidavit attached to its motion, counsel for Cars.com stated, "Pursuant to 38.003 and 38.004 Civil Practice and Remedies Code, reasonable, usual and customary fees in this cause are $5,440.00 with additional fees of $3,000.00 in event of appeal." Because Cars.com did not move to recover attorney's fees based on the parties' agreement, the trial court could not have awarded attorney's fees to Cars.com on that basis. *See Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 204 (Tex. 2002) ("A court cannot grant summary judgment on grounds that were not presented."); *Stiles v. Resolution Tr. Corp*., 867 S.W.2d 24, 26 (Tex. 1993) ("[A] summary judgment cannot be affirmed on grounds not expressly set out in the motion or response.").

Cars.com argues that Z Auto Place waived its right to object to Cars.com's request for attorney's fees under Chapter 38. This is so, it reasons, because Z Auto Place did not argue in its summary judgment response that Cars.com could not recover attorney's fees under Chapter 38 because Z Auto Place is an LLC. A motion for summary judgment must stand or fall on the grounds it specifically and expressly sets forth. *See McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 339 (Tex. 1993) (quoting *Westbrook Const. Co. v. Fid. Bank of Dallas*, 813 S.W.2d 752, 754–55 (Tex. App.—Fort Worth 1991, writ denied). A movant bears the burden of establishing its right to summary judgment as a matter of law on the grounds set forth in his motion, regardless of whether the nonmovant files a response to the summary judgment motion. *See City of Hou. v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979); *see also Rutherford v. Whataburger, Inc.*, 601 S.W.2d 441, 443 (Tex. Civ. App. 1980, writ ref'd n.r.e.) (concluding trial court erred in granting summary judgment denying recovery of attorney's fees under statutory provision because appellee's summary judgment motion did not contain specific ground relating to recovery of attorney's fees under statute). As the summary judgment movant, Cars.com had the burden to prove that it was entitled to recover attorney's fees as a matter of law. Because Cars.com was not entitled to recover attorney's fees from Z Auto Place under section 38.001, the trial court erred in

granting summary judgment on this claim as a matter of law. We sustain Z Auto Place's third issue.[2]

## Conclusion

We reverse the portion of the trial court's judgment awarding Cars.com $5,440.00 in attorney's fees and render judgment that Cars.com take nothing on its claim for attorney's fees. We affirm the remainder of the trial court's judgment with respect to Cars.com's breach of contract claim against Z Auto Place.

Russell Lloyd
Justice

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

[2] In light of our conclusion, we do not reach Z Auto Place's fourth issue asserting that the trial court erred in awarding attorney fees against it because Cars.com's pre-suit demand was excessive and based on unauthorized charges.