Opinion issued September 2, 2021

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00233-CV

TIMOTHY JAMES MCMAHAN AND KAREN MCMAHAN, Appellants
V.
JOE ALFRED IZEN, JR., Appellee

On Appeal from County Civil Court at Law No. 1
Harris County, Texas
Trial Court Case No. 1115867

MEMORANDUM OPINION

Pro se appellants Timothy James McMahan and Karen McMahan, who are husband and wife, appeal a summary judgment rendered against them in favor of Joe Alfred Izen, Jr., awarding Izen damages and attorney's fees. The McMahans raise six issues on appeal. In their first four issues, they contend that the trial court erred in granting summary judgment in favor of Izen. In their fifth issue, the

McMahans assert that they were denied due process during the hearing on the summary judgment. In their sixth issue, the McMahans contend that the evidence does not support the trial court's award of attorney's fees.

We affirm.

Background

It is not in dispute that Izen, an attorney, represented the McMahans relating to litigation between them and the Internal Revenue Service (IRS). Nor is it in dispute that the McMahans made payments to Izen, totaling $7,997, for his legal services. The dispute centers on whether the McMahans still owe Izen an additional $26,864.60 in legal fees.

On August 21, 2018, Izen filed a suit on a sworn account against the McMahans, seeking to recover $26,864.60 in legal fees, which he claimed the McMahans still owed him for representing them in the IRS litigation. Izen sued Timothy, individually, and in Timothy's capacity as trustee for the Texas Land Patent Company and as trustee for the TJM Trust No. 1. Izen sued Karen only in her individual capacity. Izen alleged that he had represented the McMahans from June 2012 until September 2014 in two suits with the IRS. Although he did not have a written contract with the McMahans, Izen asserted that the McMahans had agreed to pay him $300 per hour for his legal services on an open account. Izen acknowledged that the McMahans had made payments to him, totaling $7,997, but

he asserted that they still owed him $26,864.60 for legal services he had provided to them on the open account. Izen also sought attorney's fees and costs for prosecuting the suit to collect his unpaid fees.

Izen supported his first amended petition with his unsworn declaration, prepared pursuant to section 132.001 of the Civil Practices and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE § 132.001(a) (providing that "an unsworn declaration may be used in lieu of a written sworn declaration, verification, certification, oath, or affidavit required by statute or required by a rule, order, or requirement adopted as provided by law"). Attached to Izen's declaration as "Exhibit A" were two billing records, which itemized the legal services that he had performed for the McMahans in the IRS litigation. The records included a description of the services he had performed, the amount of time he had spent on each described task, the date of the service, and the corresponding legal fee for each task. Expenses and costs incurred by Izen in representing the McMahans were also listed. The billing records (1) reflected the total amount of the Izen's fees and expenses he incurred, (2) listed the payments already made by the McMahans to him, (3) subtracted these payments from the total amount of fees, and (4) showed the balance due. Attached to the declaration as "Exhibit B" was a demand letter sent by Izen to the McMahans requesting payment of the outstanding balance.

In his declaration, Izen stated that he was licensed to practice in Texas in 1977 and had practiced law in Harris County, Texas since then. He further attested:

> 3. I have read and reviewed all of the entries in the billing for my legal services performed for the McMahan defendants which is attached hereto and marked as Exhibit A. In my opinion a reasonable rate for hourly services of an attorney performing [the] same or similar legal work in the two legal matters and cases reflected by the attached billing, Exhibit A, and the two cases described in the Petition I have filed is $300.00 per hour.
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> 4. I specifically reviewed all of the entries in the billing and all the legal work reflected in such billing was performed by me and was necessary to protect and advance the legal interests and rights of the McMahan Defendants who were my clients in the legal matters and cases described in the First Amended Petition and the legal billing, Exhibit A.
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> 5. Furthermore, I have checked my own financial records and have confirmed that the McMahan Defendants were entitled to $7,997.00 credit for payments they made for my legal services and/or reimbursements they owed to me for advancement of legal costs and legal expenses during the term of my representation. My financial records and billings reflect that the McMahan Defendants have been provided all just offsets and credits to which they are entitled and that they received credit for all payments they have made.
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> 6. The McMahan Defendants owe the balance due as set out in the Exhibit A for legal services that I expended.

Izen averred that all the facts stated in the declaration were "true and correct within [his] own personal knowledge," and he certified that his statements were "true and correct under penalty of perjury."

The record reflects that Izen had difficulty serving the McMahans with the lawsuit. More than one year after filing suit, Izen obtained an order permitting him to serve the McMahans by substituted service.

On November 19, 2019, the McMahans filed their pro se answer to Izen's first amended petition. In addition to a general denial, the McMahans emphasized that they had no written contract with Izen, and they specifically denied that they had agreed that Izen would provide legal services to them on an open account. At the end of the answer, Timothy McMahan signed the following statement,

> I affirm the foregoing answer in good faith to the best of my ability and comprehension of the statute, rules, and facts, and any errors of statute, rules, facts or law that I made by accident, I meant no harm and I will immediately correct all errors that are brought to my attention. I believe that all of the foregoing is true and complete to the best of my ability.

Timothy's signature was acknowledged by a notary public. Beneath Timothy's signature, Karen McMahan stated, "Timothy James McMahan is my husband, and that I am under his coverture, and that I have totally relied upon his actions in this matter." Karen signed the statement, and her signature was also acknowledged by a notary public. The McMahans' answer included special

exceptions[1] to Izen's first amended petition and a motion to dismiss the suit under Texas Rule of Civil Procedure 91a.

On December 23, 2019, Izen filed a no-evidence motion for summary judgment and, on December 26, 2019, Izen filed a traditional motion for summary judgment. Both motions sought summary judgment against Karen, individually, and against Timothy, individually, and as trustee for the Texas Land Patent Company and as trustee for the TJM Trust No. 1.

In the traditional motion for summary judgment, Izen asserted that he was entitled to summary judgment "on his cause of action based on sworn account." Pointing to the documents supporting his first amended petition—which included his section 132.001 declaration and the billing records itemizing the unpaid legal fees—Izen asserted that he had met the requirements of Rule of Civil Procedure 185 to prove the sworn account. He claimed that the McMahans owed him $26,864.60 "after [the McMahans] have received and been accorded all offsets and credits to which [they] were entitled including the $7,997.00 previously paid by [them]." He asserted, "Pursuant to Texas Rule of Civil Procedure Rule 185 governing filing of suits on sworn account and presentation of a cause of action and claims based on sworn account, [the McMahans] have not properly denied any portion of [Izen's]

[1] The record does not show that the McMahans obtained a ruling on their special exceptions.

sworn account." Izen also asserted that he was entitled to summary judgment because the McMahans had breached the contract they had with him.

In addition to $26,864.60 in damages for the unpaid legal fees, Izen asserted that, because his suit was based on a sworn account and was for legal services rendered to the McMahans, Civil Practice and Remedies Code section 38.001 entitled him to recover his reasonable and necessary attorney's fees of $47,157.93 for prosecuting this suit. As evidence supporting his attorney's fees, Izen offered his declaration and billing records, itemizing the legal work he had performed in prosecuting this suit.

The motions for summary judgment were set for a hearing on January 14, 2019. The McMahans did not file a response to the motions, and the trial court granted Izen's no-evidence and traditional motions for summary judgment on that day.

On January 31, 2020, the McMahans filed a document entitled "Objection to Judgment on No-Evidence Summary Judgment." The McMahans complained that they had not received proper notice of the hearing on Izen's no-evidence motion for summary judgment. They asked the trial court to vacate the order granting the no-evidence motion for summary judgment. In support of the objection, the McMahans each filed affidavits entitled "Declaration of Voluntary Pre-Trial Discovery by Affidavit." In the affidavits, they addressed the merits of Izen's claims. They stated

that they had not entered into an agreement with Izen for him to provide legal services to them on an open account. They stated that, instead, they had agreed to pay Izen a flat fee of $8,000 to perform the legal services. They attached documents to their affidavits, including receipts from Izen indicating that they had paid him $8,000.

The trial court conducted a hearing on the McMahans' objection to the motion for summary judgment on February 4, 2020. Following the hearing, the trial court granted the McMahans' objection and set aside both the traditional and no-evidence summary judgments. The trial court ordered that the hearings for both motions for summary judgment "be reset by the parties." Izen then reset the hearing on his motions for summary judgment for February 19, 2020.

On February 11, 2020, the McMahans filed a no-evidence motion for summary judgment. They also set their motion for summary judgment to be heard on February 19, 2020. Izen objected to the setting because the motion had not been on file for 21 days before the hearing, as required by Rule of Civil Procedure 166a(c). Izen also filed a response in opposition to the McMahans' motion for summary judgment.

On February 18, 2020, Izen filed a response to the McMahans' still-pending motion to dismiss under Rule 91a, which had been filed as part of the McMahans' answer. In the response, Izen pointed out that Rule 91a permitted the trial court to

award the "prevailing party on the [Rule 91a] motion all costs and reasonable and necessary attorney fees." TEX. R. CIV. P. 91a.7. Izen sought to recover his attorney's fees of $4,681.60 "[for] responding to and opposing" the McMahans' Rule 91a motion. Izen supported the attorney's fees request with his declaration, which was attached to his response.

On February 19, 2020, the trial court conducted a hearing during which it heard arguments regarding Izen's traditional motion for summary judgment. At the end of the hearing, the trial court verbally granted the motion. The following day, the trial court signed an order granting Izen's traditional motion for summary judgment and awarding $26,864.60 to Izen against Karen, individually, and against Timothy, individually, and as trustee of the Texas Land Patent Company and as trustee of the TJM Trust No. 1. The order stated that the $26,864.60 was "for the unpaid balance that [the McMahans] owed Plaintiff Izen for the legal services [he] performed" for them in the IRS litigation. The trial court also awarded Izen attorney's fees of $47,157.93 "for the legal services Plaintiff Izen performed in this case," and attorney's fees of $4,681.60 "as the prevailing party" with respect to the McMahans' Rule 91a motion to dismiss. Although the order did not specifically deny the Rule 91a motion to dismiss or the McMahans' motion for summary judgment, the order stated that "all relief not specifically granted" was denied. The

order also stated that it was "a final judgment disposing of all parties and all claims and causes of action."

Raising six issues, the McMahans now appeal the traditional summary judgment rendered in Izen's favor.[2]

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[2] In their briefing, the McMahans include arguments asserting that Timothy is not liable in his capacity as trustee of the Texas Land Patent Company and the TJM Trust No. 1. However, as Izen points out in his brief, the McMahans' notice of appeal did not perfect the appeal in Timothy's capacity as trustee. The notice of appeal states, "Timothy James McMahan and Karen McMahan, desire to appeal from the Summary Judgment signed by the Court on February 20, 2020." Timothy and Karen each signed the pro se notice of appeal in their individual capacity, indicating that the appeal was perfected for Timothy only in his individual capacity and not in his capacity as trustee. Because he did not perfect this appeal in his representative capacity, the only appellants before this Court are Timothy and Karen in their individual capacities. *See Elizondo v. Tex. Natural Res. Conservation Comm'n*, 974 S.W.2d 928, 931 (Tex. App.—Austin 1998, no pet.) (holding that because appellant did not perfect appeal in representative capacity, appellant was only before court in individual capacity). Thus, we do not consider Timothy's arguments challenging his liability in his capacity as trustee. We note that an individual acting in an official or representative capacity, such as a trustee, is, in law, a distinctly separate individual from the same person acting as an individual. *See Crowder v. Ann L. Crowder Est. Tr.*, No. 01-06-00606-CV, 2007 WL 2874818, at *2 (Tex. App.—Houston [1st Dist.] Oct. 4, 2007, no pet.) (mem. op.). Rule of Civil Procedure 7 allows a person to represent himself pro se only to litigate rights on his own behalf, not to litigate rights in a representative capacity. *See* TEX. R. CIV. P. 7 (providing that "[a]ny party to a suit may appear and prosecute or defend his rights therein, either in person or by an attorney of the court"); *In re Guetersloh*, 326 S.W.3d 737, 739–40 (Tex. App.—Amarillo 2010, orig. proceeding) (holding that trustee may not appear pro se in representative capacity as trustee of trust). If he had desired to appeal the judgment against him in his capacity as trustee, then it would have been necessary for an attorney to represent Timothy in that capacity on appeal. *See Lorie Bernice Sharpe Tr. v. Phung*, 622 S.W.3d 929, 929–30 (Tex. App.—Austin 2021, no pet.).

Summary Judgment

In their second issue, the McMahans contend that the trial court erred when it granted summary judgment in Izen's favor. They assert that Izen did not offer sufficient evidence to meet his burden of proof to establish that he was entitled to summary judgment based on a sworn account and that there were issues of material fact precluding summary judgment.[3]

A. Standard of Review

We review de novo the trial court's ruling on a motion for summary judgment. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). 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 Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). A party moving for traditional summary judgment has the burden to prove that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *SeaBright Ins. Co. v. Lopez*, 465 S.W.3d 637, 641 (Tex. 2015).

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[3] The McMahans' first issue contends that Izen did not offer sufficient evidence to prove that he was entitled to summary judgment based on breach of contract. Because, as discussed below, we determine that Izen was entitled to summary judgment based on a sworn account, we need not address the McMahans' first issue. *See* TEX. R. APP. P. 47.1 ("The court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal.").

When, as here, the plaintiff moves for summary judgment, he must conclusively prove all elements of his cause of action as a matter of law. *Rhône–Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999); *FP Stores, Inc. v. Tramontina US, Inc.*, 513 S.W.3d 684, 690 (Tex. App.—Houston [1st Dist.] 2016, pet. denied). A matter is conclusively established if reasonable minds could not differ about the conclusion to be drawn from the facts in the record. *See City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005).

If a movant meets his burden of establishing each element of the claim on which he seeks summary judgment, the burden then shifts to the nonmovant to disprove or raise a genuine issue of material fact as to at least one of those elements. *See Amedisys, Inc. v. Kingwood Home Health Care, LLC*, 437 S.W.3d 507, 511 (Tex. 2014). Evidence raises a genuine issue of fact if reasonable jurors could differ in their conclusions considering all the summary-judgment evidence. *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007).

B. Applicable Legal Principles

The elements of a claim for suit on an open account are (1) transactions between parties, (2) creating a creditor-debtor relationship through the general course of dealing, (3) with the account still being open, and (4) with the expectation of further dealings. *Kaldis v. Crest Fin.*, 463 S.W.3d 588, 592 (Tex. App.—Houston [1st Dist.] 2015, no pet.). In his first amended petition, Izen alleged that he provided

legal services to the McMahans based on an open account and that the McMahans still owed him a balance on the account. He sought to establish his claim by pleading a sworn account.

"A suit on a sworn account is not an independent cause of action; it is a procedural rule with regard to evidence necessary to establish a prima facie right of recovery of certain types of contractual claims." *Miller v. Maplewood Square Council of Co-Owners*, No. 01–18–00914–CV, 2020 WL 3422290, at *3 (Tex. App.—Houston [1st Dist.] June 23, 2020, pet. denied) (mem. op.). Rule of Civil Procedure 185 governs suits based on a sworn account. *See* TEX. R. CIV. P. 185. It provides that "when an action is founded on an open account on which a systematic record has been kept and is supported by an affidavit, the account shall be taken as prima facie evidence of the claim, unless the party resisting the claim files a written denial under oath." *Panditi v. Apostle*, 180 S.W .3d 924, 926 (Tex. App.—Dallas 2006, no pet.).

Rule 185 defines an open account to include "any claim for a liquidated money demand based upon written contract or . . . for personal service rendered, or labor done or labor or materials furnished" TEX. R. CIV. P. 185. The affidavit supporting the claim must be "to the effect that such claim is, within the knowledge of affiant, just and true, that it is due, and that all just and lawful offsets, payments and credits have been allowed." *Id.*; *see Panditi*, 180 S.W.3d at 926 (stating

requirements for sworn-account petition and accompanying affidavit). If a plaintiff satisfies Rule 185's requirements, the sworn account is received as prima facie evidence of the debt. TEX. R. CIV. P. 185; *see Panditi*, 180 S.W.3d at 926.

The defendant resisting the suit on a sworn account must also comply with the requirements of Rule 185, "or he will not be permitted to dispute the receipt of the services or the correctness of the charges." *Panditi*, 180 S.W.3d at 927. Rule 185 requires the defendant to "comply with the rules of pleading" and "timely file a written denial, under oath," or else the defendant "shall not be permitted to deny the claim, or any item therein." TEX. R. CIV. P. 185; *see Panditi*, 180 S.W.3d at 927 (recognizing that Rule 185 requires sworn denial to be written and verified by affidavit).

"To place the plaintiff's sworn account claim at issue, the defendant must file a 'special verified denial of the account' in accordance with Texas Rule of Civil Procedure 93." *Bavishi v. Sterling Air Conditioning, Inc.*, No. 01–10–00610–CV, 2011 WL 3525417, at *6 (Tex. App.—Houston [1st Dist.] Aug. 11, 2011, no pet.) (mem. op.). Rule 93 provides that, unless the truth of such matters appear of record, a pleading must be verified by affidavit if it contains "[a] denial of an account which is the foundation of the plaintiff's action." *See* TEX. R. CIV. P. 93(10). "A valid verification must be based on personal knowledge." *Miller*, 2020 WL 3422290, at *2 (citing *Mekeel v. U.S. Bank Nat'l Ass'n*, 355 S.W.3d 349, 355 (Tex. App.—El

Paso 2011, pet. dism'd)). "Any qualifying verbiage, such as a statement that the affidavit is 'based on the best of one's personal knowledge,' renders the affidavit legally invalid." *Id.* "[The] sworn denial must be included in the defendant's answer; a sworn denial in a response to a summary judgment motion does not satisfy Rule 185." *Bavishi*, 2011 WL 3525417, at *6.

If the defendant fails to file a verified denial to the sworn account, the sworn account is received as prima facie evidence of the debt, and the plaintiff, as summary judgment movant, is entitled to summary judgment on the pleadings. *Id.*; *Nguyen v. Short, How, Frels & Heitz, P.C.*, 108 S.W.3d 558, 562 (Tex. App.—Dallas 2003, pet. denied); *see Livingston Ford Mercury, Inc. v. Haley*, 997 S.W.2d 425, 430 (Tex. App.—Beaumont 1999, no pet.) (holding that, when plaintiff files proper sworn account petition, but defendant does not comply with Rule 185, petition will support summary judgment and "additional proof of the accuracy of the account is unnecessary"); *see also Pascual Madrigal P.L.L.C. v. Com. IT Solutions Inc.*, No. 04–13–00742–CV, 2014 WL 4230174, at *2 n.1 (Tex. App.—San Antonio Aug. 27, 2014, no pet.) (mem. op.) (explaining that Rule 185 is an exception to general rule that pleadings are not evidence). "In other words, a defendant's noncompliance with [R]ule 185 conclusively establishes that there is no defense to the suit on the sworn account." *Nguyen*, 108 S.W.3d at 562; *see Whiteside v. Ford Motor Credit Corp.*, 220 S.W.3d 191, 194 (Tex. App.—Dallas 2007, no pet.) ("When the defendant fails

to file a sworn denial and the trial court enters summary judgment on a sworn account, appellate review is limited because the defendant will not be allowed to dispute the plaintiff's claim."). "If, however, the plaintiff's suit on a sworn account was not properly pleaded pursuant to Rule 185, the defendant is not required to file a sworn denial." *Bavishi*, 2011 WL 3525417, at *6 (citing *Panditi*, 180 S.W.3d at 927).

C. Analysis

Here, Izen's first amended petition complied with Rule 185. Izen attached billing records, as Exhibit A, to his declaration, which was appended to his petition. The records listed the date and type of legal services he provided to the McMahans, the amount of time he spent on each task, the total number of hours that he spent on the legal services, the fee amount for each task, and the total fees for all professional services rendered. Expenses and costs incurred by Izen in representing the McMahans were also listed. The billing records reflected the offsets and credits the McMahans received for paying a portion of the legal fees.

As stated above, Izen attested as follows in his declaration:

> 3. I have read and reviewed all of the entries in the billing for my legal services performed for the McMahan defendants which is attached hereto and marked as Exhibit A. In my opinion a reasonable rate for hourly services of an attorney performing [the] same or similar legal work in the two legal matters and cases reflected by the attached billing, Exhibit A, and the two cases described in the Petition I have filed is $300.00 per hour.

> 4. I specifically reviewed all of the entries in the billing and all the legal work reflected in such billing was performed by me and was necessary to protect and advance the legal interests and rights of the McMahan Defendants who were my clients in the legal matters and cases described in the First Amended Petition and the legal billing, Exhibit A.
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> 5. Furthermore, I have checked my own financial records and have confirmed that the McMahan Defendants were entitled to $7,997.00 credit for payments they made for my legal services and/or reimbursements they owed to me for advancement of legal costs and legal expenses during the term of my representation. My financial records and billings reflect that the McMahan Defendants have been provided all just offsets and credits to which they are entitled and that they received credit for all payments they have made.
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> 6. The McMahan Defendants owe the balance due as set out in the Exhibit A for legal services that I expended. [4]

Izen averred that all the facts stated in the declaration were "true and correct within [his] own personal knowledge," and he certified that his statements were "true and correct under penalty of perjury."

The McMahans assert that Izen did not meet the requirements of Rule 185 because he relied on his declaration to prove the sworn account rather than an affidavit "taken before some officer authorized to administer oaths." TEX. R. CIV. P. 185. The McMahans, however, fail to recognize that section 132.001 of the Civil

[4] Izen attached a demand letter to his declaration as Exhibit B. The McMahans point out that invoices at the end of the demand letter show a different outstanding balance than appears in Exhibit A. However, in proving his sworn account, Izen expressly relied on the amounts shown in Exhibit A as constituting the past due balance on the account.

Practices and Remedies Code permits a party to use an unsworn declaration in lieu of an affidavit "required by statute or required by a rule, order, or requirement adopted as provided by law." TEX. CIV. PRAC. & REM. CODE § 132.001(a). Section 132.001 defines when an unsworn declaration cannot be used. The statute provides that it "does not apply to a lien required to be filed with a county clerk, an instrument concerning real or personal property required to be filed with a county clerk, or an oath of office or an oath required to be taken before a specified official other than a notary public." *Id.* § 132.001(b). But section 132.001 does not exclude its application to an affidavit required by Rule 185. *See id.*

We have previously recognized that "[t]he inclusion of the phrase 'under penalty of perjury' is the key to allowing an unsworn declaration to replace an affidavit." *Dominguez v. State*, 441 S.W.3d 652, 658 (Tex. App.—Houston [1st Dist.] 2014, no pet.); *see Tex. Dep't of Pub. Safety v. Caruana*, 363 S.W.3d 558, 564 (Tex. 2012) (emphasizing that statements in unsworn declaration are "subscribed" as true under penalty of perjury and thus "[t]he verity of a declaration is . . . assured by the criminal penalties for perjury"). Here, Izen met the statutory requirement, stating in his unsworn declaration that he his statements were "true and correct under penalty of perjury."

The McMahans also contend that Izen has not satisfied Rule 185's requirement that his claim was "just and true." TEX. R. CIV. P. 185. A sworn account

must be supported by an affidavit "*to the effect* that such claim is, within the knowledge of [the] affiant, just and true . . . ." *Id.* (emphasis added.) Here, Izen's claim was described in his declaration and in the billing records appended to and referenced in the declaration. Izen attested that the statements in the declaration were "true and correct." He further attested that his hourly rate was "a reasonable rate for hourly services of an attorney performing same or similar legal work." He also attested that "the legal work reflected in [his] billing [records]" was "necessary to protect and advance the legal interests and rights of the McMahan Defendants" in their litigation with the IRS. Thus, Izen's statement in the declaration was "to the effect" that his claim for his unpaid legal fees was not only true but was just. *See id.*

The McMahans further complain that Izen cannot recover the unpaid legal fees because they did not have a written contract with him. However, Rule 185 permits recovery based on a sworn account for an action that is "founded on an open account," defining an open account to include "any claim for a liquidated money demand based upon written contract *or* . . . for personal service rendered, or labor done or labor or materials furnished" *Id.* (emphasis added); *see also Willie v. Donovan & Watkins, Inc.*, No. 01–00–01039–CV, 2002 WL 537682, at *2 (Tex. App.—Houston [1st Dist.] Apr. 11, 2002, no pet.) (not designated for publication) (explaining that "the procedure outlined under Rule 185 refers to a variety of account claims, not just claims on written contracts" and that "[n]umerous cases exist where

an action on a sworn account was not based on a written contract") (citing *Wuagneux Builders, Inc. v. Candlewood Builders, Inc.*, 651 S.W.2d 919 (Tex. App—Fort Worth 1983, no pet.) (affirming recovery on sworn account for oral contract to build retaining wall)).

The McMahans further complain that Izen did not offer "any proof of systematic billing." As mentioned, Rule 185 permits recovery for an action founded on an open account "on which a systematic record has been kept." TEX. R. CIV. P. 185. Here, Izen offered billing records, detailing all the legal services and dates of those services he provided to the McMahans in representing them in the IRS litigation. "Texas appellate courts have found sufficient compliance with Rule 185 when the plaintiff's pleadings included statements or invoices." *Clifton v. Am. Express Centurion Bank*, No. 09–06–283CV, 2007 WL 2493517, at *2 n.4 (Tex. App.—Beaumont Sept. 6, 2007, no pet.) (mem. op.) (citing *Panditi*, 180 S.W.3d at 927 (billing statements); *Powers v. Adams*, 2 S.W.3d 496, 499 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (itemized monthly statements of legal services reflecting offsets, payments, and credits); *Enernational Corp. v. Exploitation Eng'rs, Inc.*, 705 S.W.2d 749, 750–51 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.). (dated invoices appearing to show dates when services were rendered)). Here, the billings records offered by Izen were sufficient to show a systematic record was kept for the account.

We conclude that Izen's first amended petition, section 132.001 declaration, and attached billing records met the requirements of Rule 185 and established Izen's prima facie right of recovery of the $26,864.60 in unpaid legal fees supported in those documents. *See* TEX. R. CIV. P. 185; *Nguyen*, 108 S.W.3d at 562 (stating requirements for sworn account petition and supporting affidavit). Thus, the McMahans were required to file a verified denial of the account in compliance with Rule 185 and Rule 93(10). *See* TEX. R. CIV. P. 185; *Bavishi*, 2011 WL 3525417, at *7; *see also Requipco, Inc. v. Am–Tex Tank & Equip., Inc*., 738 S.W.2d 299, 302 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.) (recognizing that, "if the defendant fails to file a written denial under oath and in the form required by Rules 185 and 93(10), he may not dispute the receipt of the items or services or the correctness of the amount charged either in whole or in part"). In his motion for summary judgment, Izen asserted that summary judgment should be granted because the McMahans had "not properly denied any portion of [Izen's] sworn account" pursuant to the requirements of Rule 185. We agree.

The McMahans' answer, containing the verified denial, does not satisfy the requirements of Rules 185 and 93(10). Timothy attested in a "jurat" found at the end of the answer that he certified that the answer was made "to the best of [his] ability and comprehension" and he that he "believe[d] that all the foregoing is true and complete to the best of my ability." Karen attested only "that Timothy James

McMahan is my husband, and that I am under his coverture, and that I have totally relied upon his actions in this matter."

In *Miller*, a case involving a suit on a sworn account, we emphasized that "a sworn denial must be based on personal knowledge." 2020 WL 3422290, at *6. We determined that the defendant's "affidavit, in which he swore that the alleged facts in his amended answer were 'true and correct to the best of his knowledge,' [was] insufficient to comply with the personal knowledge requirement" and did not satisfy the requirements of Rule 185. *See id.* We held that, "[b]ecause [the defendant] did not file a sworn written denial sufficient to satisfy Rule 185, [the plaintiff was] entitled to summary judgment on its suit for sworn account as a matter of law." *Id.*

Following our holding in *Miller*, we likewise hold that the McMahans' sworn denial in their answer was insufficient to comply with the personal knowledge requirement and thus did not satisfy the requirements of Rule 185. *See id.*; *see also Sundance Res., Inc. v. Dialog Wireline Servs., L.L.C.*, No. 06–08–00137–CV, 2009 WL 928276, at *3 (Tex. App.—Texarkana Apr. 8, 2009, no pet.) (mem. op.) (holding that defendant's answer did not meet requirements of Rules 185 and 93 because affidavit verifying answer did not state it was based on affiant's personal knowledge but stated only that his statements were "true and correct"). As in *Miller*, we hold that, because the McMahans did not file a sworn denial that satisfied Rule 185, Izen was entitled to summary judgment on his suit on sworn account as a matter

of law. *See Miller*, 2020 WL 3422290, at *6. Thus, the trial court did not err in rendering summary judgment in Izen's favor based on the sworn account. *See id.*

We overrule the McMahans' second issue.

D. Unpreserved Issues

In their third issue, the McMahans argue that the trial court erred by granting summary judgment in Izen's favor because his claims are barred by the statute of limitations. In his fourth issue, the McMahans assert that the trial court erred in granting summary judgment because the open-account agreement on which Izen based his claim violated the statute of frauds, specifically the statutory provision requiring a writing for "an agreement which is not to be performed within one year of making the agreement." *See* TEX. BUS. & COM. CODE § 26.01(b)(6).

The statute of limitations and the statute of frauds are both affirmative defenses, which, if not pleaded, are waived. *See* TEX. R. CIV. P. 94 (listing statute of limitations and statute of frauds as affirmative defense and requiring defendant to plead "any . . . matter constituting an avoidance or affirmative defense"). The McMahans did not plead statute of limitations or statute of frauds as an affirmative defense in their answer. Nor did they raise either of these affirmative defenses in their response to Izen's traditional motion for summary judgment. The McMahans claim on appeal that these defenses were raised in their affidavits filed in response to Izen's motion for summary judgment. But a review of the affidavits show that

neither limitations nor the statute of frauds is discussed. Therefore, the McMahans did not preserve these two issues for our review. *See* TEX. R. CIV. P. 166a(c) ("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."); *Miller*, 2020 WL 3422290, at *3 (holding issues asserting summary judgment should be reversed based on statute of limitations and statute of frauds were not preserved because arguments not raised in response to motion for summary judgment); *see also Travis v. City of Mesquite*, 830 S.W.2d 94, 100 (Tex. 1992) ("In an appeal from a summary judgment, issues to be reviewed by the appellate court must have been actually presented to and considered by the trial court.").

We overrule the McMahans' third and fourth issues.

E. Due Process

In their fifth issue, the McMahans assert that the trial court erred "by denying the McMahans their due process rights by granting summary judgment before the McMahans could present their defense/evidence and by permitting ex parte communications." We agree with the McMahans that both the Texas Constitution's due course of law provision and the United States Constitution's due process clause require that a party be given an opportunity to be heard at a meaningful time and in a meaningful manner. *See Perry v. Del Rio*, 67 S.W.3d 85, 92 (Tex. 2001) (recognizing that Texas Constitution's "due course of law provision at a minimum

requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner"); *Univ. of Tex. Med. Sch. at Hous. v. Than*, 901 S.W.2d 926, 930 (Tex. 1995) ("Due process at a minimum requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner.").

Here, after the trial court set aside the summary judgment in Izen's favor on February 4, 2020—and ordered the parties to reset the hearing on the motion—Izen reset the hearing for February 19, 2020. The McMahans and Izen appeared at the February 19 hearing, and the trial court swore them in. During the hearing, Izen argued the merits of his motion. The McMahans made numerous objections to Izen's arguments before the trial court granted the motion. On appeal, the McMahans contend that they were denied due process and due course of law because the trial court permitted Izen to testify at the hearing but did not afford them the same opportunity to be heard before granting Izen's motion.

"[T]he Texas Rules of Civil Procedure expressly prohibit the introduction of oral testimony at a summary judgment hearing." *Zavala v. Franco*, No. 08–20–00163–CV, 2021 WL 1526531, at *7 (Tex. App.—El Paso Apr. 19, 2021, pet. filed); *see also Martin v. Martin, Martin & Richards, Inc.*, 989 S.W.2d 357, 359 (Tex. 1998) (recognizing that "oral testimony cannot be adduced in support of or opposition to a motion for summary judgment"). Rule 166a(c) states that "[n]o oral testimony shall be received at the [summary judgment] hearing." TEX. R. CIV. P.

166a(c). Accordingly, the trial court could not have considered either Izen's or the McMahans' oral statements at the summary-judgment hearing as being admissible evidence to either support the motion or to rebut it. *See id.*; *see also Jones v. Vills. of Town Ctr. Owners Ass'n, Inc.*, No. 14–12–00306–CV, 2013 WL 2456873, at *5 (Tex. App.—Houston [14th Dist.] June 6, 2013, pet. denied) (mem. op.) (observing that, because Rule 166a(c) prohibits admission of oral testimony at a summary judgment hearing, it would be error for trial court to grant or deny summary judgment based on oral testimony).

"Well-settled law compels that we presume that proceedings in the trial court, as well as its judgment, are regular and correct" unless the record demonstrates otherwise. *S. Ins. Co. v. Brewster*, 249 S.W.3d 6, 13 (Tex. App.—Houston [1st Dist.] 2007, pet. denied); *see McElyea v. Parker*, 81 S.W.2d 649, 653 (Tex. 1935) ("Everything must be presumed in favor of the judgment, which is not concluded by the record."); *Casillas v. State Off. of Risk Mgmt.*, 146 S.W.3d 735, 738 (Tex. App.—El Paso 2004, no pet.) ("We presume the regularity of a judgment absent controverting matter in the record."). Here, the record contains no indication that the trial court improperly considered any testimony by Izen at the hearing as a basis to grant his motion for summary judgment or to deny any relief requested by the McMahans. And we observe that, although the trial court swore him in, Izen's statements during the hearing were presented more as legal arguments supporting

his motion for summary judgment than as testimony. Because the trial court was not permitted to consider testimony at the summary-judgment hearing, and we presume that the trial court did not improperly consider Izen's oral statements as evidence supporting the summary judgment, the record does not demonstrate that the McMahans were denied due process when they were not provided an opportunity to testify at the hearing. *See Jones*, 2013 WL 2456873, at *6 ("In any event, the record shows that the trial court did not base its ruling on any 'testimony,' but the law and the summary judgment evidence.").

To the extent that they contend that their constitutional due-process and due-course-of-law rights were violated because they did not have an opportunity to defend against Izen's summary-judgment argument, the record shows that the McMahans made objections to Izen's statements at the hearing. Moreover, Izen filed his motion for summary judgment on December 26, 2019, nearly eight weeks before the hearing, thus affording the McMahans a sufficient opportunity to respond to and defend against the motion. As mentioned, due process and due course of law require an opportunity to be heard. Here, the record shows that the McMahans were given the opportunity to defend against Izen's motion for summary judgment.[5]

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[5] In their brief, the McMahans claim that Izen did not have a motion for summary judgment pending before the trial court when the court granted summary judgment in Izen's favor. The McMahans point out that the original order granting summary judgment had been set aside. They intimate that Izen was required to re-file his motion for summary judgment after the original summary-judgment order was set

The McMahans also assert that their due-process rights were violated because Izen and the trial court engaged in *ex parte* communications at the hearing. *See United States Gov't v. Marks*, 949 S.W.2d 320, 325–27 (Tex. 1997) (observing that Texas law "looks upon *ex parte* proceedings with extreme disfavor" and recognizing that trial court's reliance on *ex parte* statements could violate individual's due-process rights). The McMahans point to a specific page in the hearing transcript, asserting that an *ex parte* communication occurred regarding attorney's fees. However, it is unclear what statement the McMahans consider to be *ex parte*. The record indicates that there was a discussion off the record, but there is no indication that the McMahans were not in the courtroom at that time or that they were excluded from the discussion. We conclude that the record does not show that the McMahans were denied due process because of an *ex parte* communication.

We overrule the McMahans' fifth issue.

F. Attorney's Fees Award

In their sixth issue, the McMahans challenge the trial court's award of $47,157.93 in attorney's fees to Izen. The McMahans assert that, because "there [was a] genuine issue of material fact concerning the existence of Mr. Izen's

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aside. We disagree. The trial court set aside the original summary-judgment order and ordered that the parties to reset the hearing on the motion. Thus, the trial court's order indicated that the parties were returned to the position they were in before the summary judgment was granted, meaning Izen's motion for summary judgment was pending at the time it was granted the second time by the trial court.

agreement with the McMahans," Izen was not entitled to recover his attorney's fees for prosecuting his claims against them in this suit. In other words, the McMahans contend that Izen did not establish a legal basis to recover his attorney's fees.

A party prevailing on a claim for suit on a sworn account may recover reasonable attorney's fees, provided the fees are properly proven. *See* TEX. CIV. PRAC. & REM. CODE § 38.001(7); *Universal MRI & Diagnostics, Inc. v. Med. Lien Mgmt. Inc.*, 497 S.W.3d 653, 663 (Tex. App.—Houston [14th Dist.] 2016, no pet.). As discussed, the trial court properly rendered summary judgment in Izen's favor on the sworn account claim. Thus, as the prevailing party on that claim, Izen was entitled to recover his attorney's fees, if proven. Because this case was decided on summary judgment, Izen was entitled to his attorney's fees only if his summary-judgment evidence conclusively established the amount of the fees. *Cossio v. Delgado*, No. 01–17–00704–CV, 2018 WL 3150421, at *3 (Tex. App.—Houston [1st Dist.] June 28, 2018, no pet.) (mem. op.) (citing *Universal MRI & Diagnostics*, 497 S.W.3d at 663).

The McMahans also assert that the $47,157.93 attorney's fees award was "arbitrary and unreasonable because the award is wholly without supporting evidence." The McMahans contend that Izen's summary-judgment evidence supporting his attorney's fees did not satisfy the proof requirements required for recovery of attorney's fees.

To establish the reasonable and necessary amount of attorney's fees to be awarded, Texas follows the lodestar method, which is essentially a "shorthand version" of the *Arthur Andersen* factors.[6] *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 496 (Tex. 2019). "Under the lodestar method, the determination of what constitutes a reasonable attorney's fee involves two steps." *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 760 (Tex. 2012). "First, the court must determine the reasonable hours spent by counsel in the case and a reasonable hourly rate for such work." *Id.* "The court then multiplies the number of such hours by the applicable rate, the product of which is the base fee or lodestar." *Id.*

It is the fee claimant's burden to provide sufficient evidence of both the reasonable hours worked and the reasonable hourly rate. *Rohrmoos Venture*, 578 S.W.3d at 498. Sufficient evidence includes, at a minimum, evidence of (1) the particular services performed; (2) who performed those services; (3) approximately when the services were performed; (4) the reasonable amount of time required to perform the services; and (5) the reasonable hourly rate for each person performing such services. *See id.* at 502; *see also City of Laredo v. Montano*, 414 S.W.3d 731, 736 (Tex. 2013) ("In *El Apple*, we said that a lodestar calculation requires certain basic proof, including itemizing specific tasks, the time required for those tasks, and the rate charged by the person performing the work.").

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6 *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997).

To support his attorney's fees request, Izen offered his declaration and a billing record, detailing the legal services he had engaged in to prosecute his claim against the McMahans to collect his unpaid legal fees for representing them in the IRS litigation. In his declaration, Izen stated that he was licensed to practice law in Texas in 1977 and had practiced in Harris County since then. He stated that, since 1978, he had represented clients in civil and criminal tax cases in both state and federal court. Izen attested that he also had "long term experience in the fields of bankruptcy and commercial credit including collection of amounts owed under contract or open account." Izen stated that his "reasonable hourly rate" for the legal services he performed in this case to collect his unpaid legal fees was $510 per hour. In support of the reasonableness of the rate, he explained that "[i]n a recent bankruptcy case in the United States District Court for the Southern District of Texas in a bankruptcy appeal of a bankruptcy judgment involving the Bankruptcy Trustee's efforts to collect a debt, the District Court approved a reasonable hourly rate of $510.00 per hour." Izen provided the style and federal cause number for the case.

Izen attested that attached to his declaration was "a true and correct copy" of a billing record, which reflected the legal services he had performed "in this case to collect the open account owed by [the McMahans]." The billing record itemized the legal work he performed in this case and included a description of each task he had performed, the amount of time spent on each described task, and the date each task

was performed. Izen attested that "[a]ll of the billings [in the attached record] were reasonable charges for the legal work necessary for the preparation, filing, and presentation of this case." The record also provided the total amount for all the legal fees, which was $47,157.93, the amount awarded to Izen for his attorney's fees in this case.[7]

We conclude that, using the lodestar method, Izen's declaration and itemized billing record conclusively established his attorney's fees for prosecuting this suit in the trial court. *See Rohrmoos Venture*, 578 S.W.3d at 498; *El Apple I, Ltd.*, 370 S.W.3d at 760. The McMahans offered no evidence to controvert the amount of the attorney's fees established by Izen's summary-judgment evidence. Thus, the trial court did not err in awarding Izen his attorney's fees of $47,157.93.

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[7] The summary judgment also separately awarded Izen $4,681.60 in attorney's fees "as the prevailing party" on the McMahans' Rule 91a motion to dismiss. The McMahans complain that the $4,681.60 award was also included in the $47,157.93 fee award. In other words, they complain that Izen recovered the $4,681.60 fee award twice. However, a review of the record shows the McMahans' contention is not correct. Izen sought the $4,681.60 in attorney's fees in connection with the Rule 91a motion in a separate filing from his motion for summary judgment. In that filing, Izen itemized the legal services he performed defending against the Rule 91a motion, setting out the date each task was performed, the amount of time he spent on each task, and the amount of attorney's fees charged for each task. The filing showed that Izen's hourly rate was $510. The billing record setting out the $47,157.93 in attorney's fees did not include entries for the legal work related to the Rule 91a motion. In short, the record shows that the $4,681.60 in fees awarded to Izen in connection with the McMahan's Rule 91a motion were not included in the $47,157.93 fee award. The McMahans do not raise an issue regarding whether Rule 91a may serve as the legal basis for the award of $4,681.60 in attorney's fees to Izen in this case nor do they challenge the sufficiency of the evidence supporting that separate award. Therefore, we express no opinion regarding those matters.

We overrule the McMahans' sixth issue.

Rule 45 Sanctions

Finally, Izen asks this Court to provide sanctions against the McMahans pursuant to Rule of Appellate Procedure 45 because the McMahans' appeal was frivolous.

Rule 45 provides that if a court of appeals determines an appeal is frivolous, it may award a prevailing party just damages. *In re Willa Peters Hubberd Testamentary Trust*, 432 S.W.3d 358, 369 (Tex. App.—San Antonio 2014, no pet.). "Whether to grant sanctions for a frivolous appeal is a matter of discretion that this court exercises with prudence and caution and only after careful deliberation in truly egregious circumstances." *Id.*; *see Smith v. Brown*, 51 S.W.3d 376, 381 (Tex. App.—Houston [1st Dist.] 2001, pet. denied). Notably, Rule 45 does not require the Court to award just damages in every case in which an appeal is frivolous. *Woods v. Kenner*, 501 S.W.3d 185, 198 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (citing *Glassman v. Goodfriend*, 347 S.W.3d 772, 782 (Tex. App.—Houston [14th Dist.] 2011, pet. denied)).

After a review of the record and briefing filed in this Court, we deny Izen's Rule 45 request for sanctions against the McMahans.

Conclusion

We affirm the judgment of the trial court.

Richard Hightower
Justice

Panel consists of Justices Goodman, Hightower, and Rivas-Molloy.