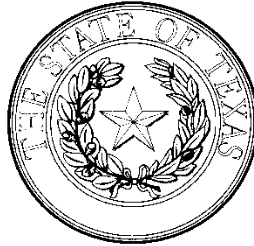
Opinion issued November 2, 2021



In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00283-CV

ELIE S. HADDAD AND MARA L. WILSON, Appellants

V.

JP MORGAN CHASE BANK, N.A., Appellee

On Appeal from the 269th District Court
Harris County, Texas
Trial Court Case No. 2018-00018

MEMORANDUM OPINION

Appellants Elie Haddad and Mara Wilson challenge the trial court's summary judgment in favor of JP Morgan Chase Bank, N.A. The bank sued appellants and their company, M&E Endeavours LLC, for breach of contract relating to a

commercial loan and two guaranty agreements. Appellants contend that the trial court erred in granting summary judgment for the bank and in awarding attorney's fees. We affirm the trial court's judgment.

BACKGROUND

M&E Endeavours took out a business loan from appellee JP Morgan Chase Bank for a principal amount of $250,000 on September 18, 2012. On that day, both appellants, Elie Haddad and Mara Wilson, signed a business loan agreement and promissory note as members of M&E Endeavours. Haddad and Wilson also each signed a commercial guaranty agreement in their personal capacities. The guaranty agreements provided that Haddad and Wilson guaranteed to pay Chase Bank the indebtedness of M&E Endeavours, including all current and future indebtedness. Each guaranty agreement also provided that the agreement was a "guaranty of payment and not of collection," and so Chase Bank was "not required to attempt to collect first from [M&E Endeavours], any collateral, or any other person."

A little more than a year later, on October 7, 2013, M&E Endeavours took out another business loan from Chase Bank, this time for $1 million. Haddad and Wilson again signed a business loan agreement and promissory note as members of M&E Endeavours. They did not sign a guaranty agreement on that day. Haddad claims that, before he signed the note, a Chase Bank loan officer told him that if M&E Endeavours was unable to repay the loan, the bank would first seek to collect from

M&E Endeavours' inventory, then its receivables, and then from Haddad and Wilson personally only if the first two collection efforts did not satisfy the loan. Haddad and Wilson both said they would not have signed the promissory note if not for the loan officer's representation about the order of collection.

M&E Endeavours did not repay the $1 million promissory note in full, and Chase Bank, without first trying to collect from M&E Endeavours' inventory or receivables, sued M&E Endeavours for breach of contract and Haddad and Wilson personally for breach of their guaranty agreements. Chase Bank also sought attorney's fees. Both Haddad and Wilson asserted the affirmative defenses of fraudulent inducement and failure to mitigate; Haddad also filed a counterclaim for fraudulent inducement.

Chase Bank moved for traditional summary judgment on its breach-of-contract and breach-of-guaranty-agreement claims, asserting there was no genuine issue of material fact as to the defendants' liability under the promissory note and guaranty agreements. Chase Bank also moved for traditional summary judgment on Haddad's and Wilson's affirmative defenses and Haddad's counterclaim. Chase Bank asserted that the fraudulent-inducement claims failed as a matter of law because the parol evidence rule barred Haddad and Wilson from admitting any evidence of the Chase Bank loan officer's representation about the order of collection, and even if the evidence were admissible, Haddad and Wilson could not

have justifiably relied on that representation because it was contradicted by the terms of the promissory note. In response, Haddad produced his own deposition testimony stating that a Chase Bank loan officer falsely represented the order of collection and that he would not have signed the $1 million promissory note without that representation; Wilson provided her own affidavit stating the same facts and claims. Chase Bank moved, in the alternative, for a no-evidence summary judgment on Haddad's and Wilson's counterclaim and defenses. The trial court granted Chase Bank's summary-judgment motion and awarded attorney's fees, and now Haddad and Wilson appeal.

STANDARD OF REVIEW

We review a trial court's summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). If a trial court grants summary judgment without specifying the grounds, we will uphold its judgment if any of the theories advanced in the motion are meritorious. *Beverick v. Koch Power, Inc.*, 186 S.W.3d 145, 148 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

In a traditional motion for summary judgment, the movant has the burden to establish that no genuine issue of material fact exists and it is entitled to judgment as a matter of law. *See* TEX. R. CIV. P. 166a(c); *KPMG Peat Marwick v. Harrison Cty. Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). When a plaintiff moves for summary judgment on its own claim, it must conclusively prove all essential

elements of its cause of action. *Rhône–Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999). When a plaintiff moves for summary judgment on an opposing party's claim, the plaintiff must conclusively negate at least one element of the claim. *See Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995). Proof is conclusive if reasonable people could not differ in their conclusions. *Helix Energy Sols. Grp. v. Gold*, 522 S.W.3d 427, 431 (Tex. 2017).

If the plaintiff meets its burden, the burden then shifts to the nonmovant to raise a fact issue on at least one element of the plaintiff's claim or each element of an affirmative defense. *Lunsford Consulting Grp., Inc. v. Crescent Real Estate Funding VIII, L.P.*, 77 S.W.3d 473, 475 (Tex. App.—Houston [1st Dist.] 2002, no pet.). Evidence raises a genuine issue of fact if reasonable 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) (per curiam). To determine if the nonmovant has raised a fact issue, we review the evidence in the light most favorable to the nonmovant, crediting favorable evidence if reasonable jurors could do so, and disregarding contrary evidence unless reasonable jurors could not. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). We indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002).

A plaintiff may move for a no-evidence summary judgment "on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial." TEX. R. CIV. P. 166a(i). A court may not grant a no-evidence summary judgment if the nonmovant brings forth "more than a scintilla of probative evidence to raise a genuine issue of material fact." *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003) "More than a scintilla of evidence exists when the evidence rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Id.*

DISCUSSION

On appeal, Haddad and Wilson raise points of error relating to their fraudulent-inducement defenses and counterclaim, Wilson's failure-to-mitigate defense, the trial court's grounds for summary judgment, and the award of attorney's fees. They did not challenge Chase Bank's breach-of-contract claims, instead arguing their affirmative defenses should have defeated summary judgment.

To be entitled to summary judgment on its breach-of-contract claims, Chase Bank was required to establish, as a matter of law: (1) valid contracts with M&E Endeavours, Haddad, and Wilson; (2) Chase Bank's performance or tender of performance; (3) M&E Endeavours', Haddad's, and Wilson's breach of their respective contracts; and (4) damages as a result of each breach. *See Prime Prods., Inc. v. S.S.I. Plastics, Inc.*, 97 S.W.3d 631, 636 (Tex. App.—Houston [1st Dist.]

2002, pet. denied). Haddad and Wilson have not disputed any of these elements, and so Chase Bank has shown that it is entitled to traditional summary judgment on its breach-of-contract claims, unless Haddad and Wilson established an affirmative defense. *See Lunsford Consulting Grp.*, 77 S.W.3d at 475.

A. Fraudulent inducement

Haddad's first, second, and third issues and Wilson's first issue essentially raise the same question: did the trial court err in granting summary judgment on their fraudulent-inducement affirmative defenses and counterclaim?

1. Applicable Law

A contract is subject to avoidance if it was fraudulently induced. *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 331 (Tex. 2011). Fraudulent inducement may be asserted as an independent cause of action or as an affirmative defense—the elements are the same. *Compare Wilmot v. Bouknight*, 466 S.W.3d 219, 227 (Tex. App.—Houston [1st Dist.] 2015, pet. denied) (stating elements where plaintiff sued employer for fraudulent inducement of employment contract), *with Fortitude Energy, LLC v. Sooner Pipe LLC*, 564 S.W.3d 167, 181 (Tex. App.—Houston [1st Dist.] 2018, no pet.) (stating same elements where defendant raised fraudulent inducement as an affirmative defense). Fraudulent inducement is a type of fraud relating specifically to a contract and requires the claimant to establish the elements of fraud "as they relate to an agreement between

the parties." *Haase v. Glazner*, 62 S.W.3d 795, 798–99 (Tex. 2001). Fraudulent inducement, then, shares the "same basic elements" as a claim for fraud: (1) a material misrepresentation; (2) made with knowledge of its falsity or asserted without knowledge of its truth; (3) made with the intention that it should be acted on by the other party; (4) on which the other party relied; and (5) that caused injury. *Anderson v. Durant*, 550 S.W.3d 605, 614 (Tex. 2018).

Generally, the "clear and express" terms of a contract cannot be varied by evidence of extrinsic agreements. *Town N. Nat'l Bank v. Broaddus*, 569 S.W.2d 489, 491 (Tex. 1978). This rule, called the parol evidence rule, provides that the written terms of a contract cannot be contradicted by evidence of an earlier, inconsistent agreement. *Baroid Equip., Inc. v. Odeco Drilling, Inc.*, 184 S.W.3d 1, 13 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). "Evidence violating the parol evidence rule has no legal effect and 'merely constitutes proof of facts that are immaterial and inoperative.'" *Id.* (quoting *Piper, Stiles & Ladd v. Fid. and Deposit Co.*, 435 S.W.2d 934, 940 (Tex. App.—Houston [1st Dist.] 1968, writ ref'd n.r.e.)). The parol evidence rule serves to avoid uncertainty and confusion regarding written agreements and to ensure written agreements "are not, as a result of asserted contradictory oral agreements, reduced to mere 'scraps of paper.'" *Wagner v. Morris*, 658 S.W.2d 230, 232 (Tex. App.—Houston [1st Dist.] 1983, no writ)

(quoting *Howeth v. Davenport*, 311 S.W.2d 480, 482 (Tex. App.—San Antonio 1958, writ ref'd n.r.e.)).

However, a narrow exception to the parol evidence rule exists: in some cases, contradictory extrinsic evidence may be admissible to prove fraudulent inducement. *Broaddus*, 569 S.W.2d at 494. To establish this exception, there must be (1) a "showing of some type of trickery, artifice, or device" by the payee of the note; and (2) a showing that the payee represented to the maker of the note that he would not be liable on the note. *Id.* When both of those elements are satisfied, then the extrinsic evidence is admissible to prove a claim for fraudulent inducement of a promissory note or guaranty agreement. *Id.*; *see also Simpson v. MBank Dall., N.A.*, 724 S.W.2d 102, 108 (Tex. App.—Dallas 1987, writ ref'd n.r.e.) (applying the *Broaddus* rule to guaranty agreements).

2. Analysis

Haddad and Wilson have not challenged that Chase Bank proved the elements of its breach-of-contract claim on summary judgment. To defeat Chase Bank's summary-judgment motion with the affirmative defense of fraudulent inducement, Haddad and Wilson were therefore required to raise a fact issue as to each element of the affirmative defense. *See Lunsford Consulting Grp.*, 77 S.W.3d at 475. To defeat Chase Bank's summary-judgment motion on Haddad's counterclaim of

fraudulent inducement, Haddad was required to raise a genuine issue of material fact as to his counterclaim. *See id.*

In its traditional summary-judgment motion, Chase Bank argued that Haddad's and Wilson's fraudulent-inducement claims failed as a matter of law because Haddad and Wilson could not prove Chase Bank's loan officer made a misrepresentation, and any evidence they might have offered to show a misrepresentation relating to the contract was barred by the parol evidence rule. Chase Bank further argued that Haddad and Wilson did not present evidence to show "artifice, trickery, or device" as required by *Broaddus* to establish an exception to the parol evidence rule. Haddad and Wilson argued in response that the *Broaddus* rule did not apply in this case because the nature of the misrepresentation was different, and even if the *Broaddus* rule did apply, they presented sufficient evidence to show "artifice, trickery, or device" and establish an exception to the parol evidence rule. Ultimately, then, this dispute turns on whether the *Broaddus* rule applies to this case, and, if it does, whether Haddad and Wilson have presented evidence of "artifice, trickery, or device" sufficient to establish an exception to the parol evidence rule, which would allow them to present extrinsic evidence relating to the terms of the contract.

The Court in *Broaddus* established a general rule that before extrinsic evidence is permissible to show fraudulent inducement of a promissory note, there

must be some showing of "trickery, artifice, or device" by the payee in addition to a representation to the maker that he would not be liable on the note. *Broaddus*, 569 S.W.2d at 494. A "mere representation" by a payee to the maker that the maker will not be liable on the promissory note is not sufficient to establish an exception to the parol evidence rule. *Id.* at 492. In *Broaddus*, a bank—the payee under a promissory note—sued two of the three makers of the promissory note to collect on the note. *Id.* at 490. The two makers raised the affirmative defense of fraudulent inducement and provided affidavits alleging that the bank's officer told them they would not be held liable on the note. *Id.* at 494. The Supreme Court, in analyzing earlier cases concerning fraudulent inducement of promissory notes, determined that, "when there is only a representation to a maker, or surety, by the payee that he will not be liable," parol evidence is inadmissible to contradict the "clear and express" terms of the note, but "where something more than just a representation is involved," parol evidence may be admissible. *Id.* at 491.

The Court found the "element of trickery or deception" was involved in each of the cases where parol evidence had been found admissible. *Id.* at 493. In support of this notion, the Court discussed *Berry v. Abilene Savings Association*, where the plaintiff seeking to establish fraudulent inducement of a promissory note claimed that a bank executive intended to loan money to the executive's neighbor but could not because of certain restrictions and technicalities; the neighbor—the plaintiff's

employer—asked the plaintiff to take out the loan instead and give him the money, and the bank officer, participating in this scheme, represented to the plaintiff that he would not be liable on the note. *Id.* (discussing *Berry v. Abilene Sav. Ass'n*, 513 S.W.2d 872 (Tex. App.—Eastland 1974, writ ref'd n.r.e.)). The Court also discussed *Viracola v. Dallas International Bank*, where the president of a corporation negotiating its sale to another company took out a loan from the bank, and the bank, to ensure the bank would be paid in full from the proceeds of the sale, asked the president to co-sign the loan in his individual capacity and pledge his stock in the corporation, assuring the president that he would not be liable personally and the bank would return his stock if the sale was not finalized. *Id.* (discussing *Viracola v. Dall. Int'l Bank*, 508 S.W.2d 472 (Tex. App.—Waco 1974, writ ref'd n.r.e.)). The sale did fall through, the bank did return the stock, but the bank sued the president personally on the note anyway. *Id.* (discussing *Viracola*). In each of those cases, the Court found, there was not only a representation that the maker would not be liable on the note, but also some kind of scheme or "some type of trickery, artifice, or device employed by the payee in addition to the showing that the payee represented to the maker he would not be liable on such note." *Id.* at 494. Notably, in each of those cases, someone other than the maker of the promissory note suggested that the maker take out the loan in the first place. *See id.* at 493.

Having discussed other cases in which "artifice, trickery, or device" had been found, the Court in *Broaddus* then turned to the case before it. The two makers of the promissory note offered affidavits claiming that the payee had told them they would not be liable, but because they presented no evidence of "trickery, artifice, or device," the Court found their affidavits were insufficient to establish an exception to the parol evidence rule. *See id.* at 494. Because the makers' only evidence in response to a summary-judgment motion was inadmissible in light of the parol evidence rule, the Court found the two makers did not meet their burden to establish a genuine issue of material fact, and so the trial court properly granted summary judgment in favor of the bank. *Id.*

Haddad and Wilson both claim that the *Broaddus* rule does not apply because the misrepresentation in this case was not that Haddad and Wilson would not be liable on the promissory notes, unlike the misrepresentation in *Broaddus*, but that Chase Bank would seek collection from M&E Endeavours first, before seeking collection from Haddad and Wilson personally. In support of this claim, Haddad compares this case to *Wagner v. Morris*, where this court stressed the "narrow" holding of *Broaddus* and found that *Broaddus* did not apply to the facts of that case. *See Wagner*, 658 S.W.2d at 232. In *Wagner*, the appellants brought fraud and DTPA claims against their homebuilder, asserting that the homebuilder misrepresented the interest rate on the promissory note the appellants assumed to purchase their home

from the homebuilder. *Id.* at 231. The court found that *Broaddus* was inapplicable not because of the nature of the misrepresentation—in that case, the interest rate on the promissory note, but because of what the plaintiffs were seeking to use the evidence to establish:

> The instant case, however, is not controlled by the parol evidence rule because the appellants are not seeking to change or contradict the terms of the note in question. It is significant that the promissory note involved is not owed to the [homebuilder], but to an Austin savings and loan association which was never a party to this suit. The appellants are not trying to avoid their obligation to pay the promissory note by proving the existence of some oral agreement relieving them of that responsibility.

Id. at 232. The nature of the misrepresentation was not the determinative factor in establishing an exception to the parol evidence rule in *Wagner*; the fact that the plaintiffs were not trying to use the evidence to contradict the terms of the promissory note or avoid their obligation under it was.

In this case, unlike *Wagner*, Haddad and Wilson have tried to introduce evidence to contradict the terms of the promissory note and guaranty agreement and avoid their personal obligation under those contracts; thus, the reasons why *Broaddus* did not apply in *Wagner* are not present here. We find Haddad's and Wilson's argument that the *Broaddus* rule does not apply in this case unavailing. The *Broaddus* rule applies to this case, and to establish an exception to the parol evidence rule to allow extrinsic evidence that contradicts the contract terms, Haddad

and Wilson needed to show "trickery, artifice, or device," in addition to a misrepresentation. *See Broaddus*, 569 S.W.2d at 494.

Haddad and Wilson argue that, even if the *Broaddus* rule applies, they have provided evidence of "trickery, artifice, or device" necessary to establish an exception to the parol evidence rule. The Court in *Broaddus*, while discussing cases in which trickery sufficient to overcome the parol evidence rule was found, described trickery as a kind of scheme beyond just the terms of the promissory note that indicated the note was a sham. *See id.* at 493. While Haddad and Wilson claim Chase Bank misrepresented the order of collection, they provided no evidence of any kind of outside scheme that would suggest the commercial loan to M&E Endeavours was anything other than what it purported to be—a commercial loan to a business. Haddad and Wilson claim that the loan officer's misrepresentation was evidence of trickery, but that claim ignores the holding in *Broaddus*: evidence of a misrepresentation alone is insufficient to overcome the parol evidence rule. *See id.* at 494.

Like the two promissory note makers in *Broaddus*, Haddad and Wilson have provided their own testimony as evidence of a misrepresentation to establish a defense of fraudulent inducement in response to the bank's motion for summary judgment to collect on a promissory note. *See id.* at 490–91. Like the two note makers in *Broaddus*, Haddad and Wilson seek to avoid liability on the promissory

note by claiming the bank made intentional misrepresentations to induce them to sign the note. *See id.* Like the two note makers in *Broaddus*, Haddad and Wilson have provided no evidence of "trickery, artifice, or device" sufficient to overcome the parol evidence rule, *see id.* at 494, and so, like the Court in *Broaddus*, we must find that the parol evidence rule bars their extrinsic evidence to contradict the terms of the contract. *See id.*

Because the *Broaddus* rule applies to this case but Haddad and Wilson did not present evidence of "trickery, artifice, or device" sufficient to overcome the parol evidence rule, they have not offered any evidence that raised a genuine issue of material fact with respect to their claims of fraudulent inducement. In response to Chase Bank's summary-judgment motion, Haddad and Wilson were required to present evidence raising a genuine issue of material fact on each element of their affirmative defense of fraudulent inducement, *see Lunsford Consulting Grp.*, 77 S.W.3d at 475, which they have failed to do, and Haddad was required to present evidence raising a genuine issue of material fact with respect to his counterclaim of fraudulent inducement, *see id.*, which he has failed to do. Therefore, the trial court did not err in granting summary judgment in favor of Chase Bank.

Even assuming Haddad's and Wilson's allegations are true and that a Chase Bank loan officer told them the bank would seek to collect from M&E Endeavours' inventory and receivables first before collecting from Haddad and Wilson

personally, as a reasonable factfinder could, *see Mann Frankfort Stein & Lipp Advisors*, 289 S.W.3d at 848, their fraudulent-inducement claims could not succeed as a matter of law because they cannot show they justifiably relied on that representation. "[A] party to a written contract cannot justifiably rely on oral misrepresentations regarding the contract's unambiguous terms." *Nat'l Prop. Holdings, L.P. v. Westergren*, 453 S.W.3d 419, 424 (Tex. 2015) (per curiam). The additional terms of the promissory note provide:

> The Guaranty is an absolute guaranty of payment and performance and not of collection. Therefore, Lender may insist that Guarantor pay immediately, and Lender is not required, and Guarantor hereby waives any requirement or obligation on the part of Lender, to sue or otherwise attempt to collect first from [M&E Endeavours], the Collateral, or any other person liable for the Indebtedness.

Reliance on the loan officer's misrepresentation was not justified because the promissory note clearly states that Chase Bank was not required to attempt to collect from M&E Endeavours first before seeking payment from Haddad and Wilson, as guarantors. In an arms-length transaction, each party must exercise ordinary care to protect his own interests. *Westergren*, 453 S.W.3d at 425 (citing *Thigpen v. Locke*, 363 S.W.2d 247, 251 (Tex. 1962)). "[F]ailure to exercise reasonable diligence is not excused by mere confidence in the honesty and integrity of the other party." *Id.* (citing *Thigpen*, 363 S.W.2d at 251). Even when a party fails to exercise reasonable diligence, he is "charged with knowledge of all facts that would have been discovered by a reasonably prudent person similarly situated." *Thigpen*, 363 S.W.2d

at 251. The Chase Bank loan officer's misrepresentation about the order of collection was contradicted by the terms of the promissory note, and so Haddad and Wilson could not have justifiably relied on that misrepresentation. *See Westergren*, 453 S.W.3d at 424. Therefore, the trial court did not err in granting summary judgment in favor of Chase Bank.

Chase Bank also moved, in the alternative, for a no-evidence summary judgment on Haddad's fraudulent-inducement counterclaim and Haddad's and Wilson's fraudulent-inducement affirmative defense. To defeat Chase Bank's no-evidence summary-judgment motion, Haddad and Wilson were required to produce "more than a scintilla of probative evidence to raise a genuine issue of material fact." *See King Ranch*, 118 S.W.3d at 751. For the reasons explained above, in light of the parol evidence rule, we find that Haddad and Wilson effectively provided no evidence in support of their claim, and so the trial court did not err in granting summary judgment in favor of Chase Bank, even under a different summary-judgment standard.

Haddad's first, second, and third points of error and Wilson's first point of error are overruled.

B. Failure to Mitigate

In her second point of error, Wilson claims the trial court erred in granting summary judgment on her affirmative defense of failure to mitigate damages. She

argued in response to Chase Bank's motion for summary judgment that (1) Chase Bank never tried to mitigate its damages by collecting from M&E Endeavours' inventory and receivables first, despite the Chase Bank loan officer's representation that the bank would; and (2) the $1 million promissory note did not expressly waive her defense of failure to mitigate as a guarantor. She also argues that the parol evidence rule should not bar admission of evidence of the Chase Bank loan officer's misrepresentation.

1. Applicable Law

The failure to mitigate damages is an affirmative defense. *Zimmerman Truck Lines, Inc. v. Pastran*, 587 S.W.3d 847, 862 (Tex. App.—El Paso 2019, no pet.). A party to a contract has a duty to mitigate damages if it can do so "at a trifling expense or with reasonable exertions." *Great Am. Ins. Co. v. N. Austin Mun. Util. Dist. No. 1*, 908 S.W.2d 415, 426 (Tex. 1995). The party raising the defense must prove lack of diligence and the amount by which the failure to mitigate increased the amount of damages. *Kartsotis v. Bloch*, 503 S.W.3d 506, 522 (Tex. App.—Dallas 2016, pet. denied).

2. Analysis

Wilson has not presented any summary-judgment evidence to raise a fact issue on this affirmative defense. Again, for a nonmovant to avoid summary judgment based on an affirmative defense, the nonmovant must raise a genuine issue of

material fact on each element of the affirmative defense. *See Lunsford Consulting Grp.*, 77 S.W.3d at 475.

In responding to Chase Bank's summary-judgment motion, she argued only that Chase Bank did not try to mitigate its damages by collecting from M&E Endeavours' inventory and receivables first and that she had not waived the defense because there was no provision in the $1 million promissory note waiving a defense of failure to mitigate. She has presented no evidence to establish that Chase Bank had a duty to mitigate, to show Chase Bank's lack of diligence, or to establish the amount by which the failure to mitigate increased the amount of damages. *See Great Am. Ins.*, 908 S.W.2d at 426; *Kartsotis*, 503 S.W.3d at 522.

Further, her claim that there was not a waiver provision in the $1 million promissory note is contradicted by the note itself. The additional terms of the $1 million promissory note provide:

> The Guaranty is an absolute guaranty of payment and performance and not of collection. Therefore, Lender may insist that Guarantor pay immediately, and Lender is not required, and Guarantor hereby waives any requirement or obligation on the part of Lender, to sue or otherwise attempt to collect first from [M&E Endeavours], the Collateral, or any other person liable for the Indebtedness.

Similarly, the guaranty agreement provides:

> This Guaranty is a guaranty of payment and not of collection. Therefore, the Lender can insist that the Guarantor pay immediately, and the Lender is not required to attempt to collect first from [M&E Endeavours], any collateral, or any other person liable for the indebtedness.

The promissory note and the guaranty agreement clearly provide that Chase Bank, the lender, was not required to collect from M&E Endeavours before seeking payment from Haddad and Wilson, the guarantors. As discussed above, Wilson has not established an exception to the parol evidence rule, and so she could not introduce evidence of any representations to the contrary by the Chase Bank loan officer.

We conclude that Wilson has not met her burden to raise a genuine issue of material fact on each element of the affirmative defense of failure to mitigate. The trial court did not err in granting summary judgment in favor of Chase Bank.

Wilson's second point of error is overruled.

C. Basis for Summary Judgment

In their next point of error, Haddad and Wilson argue the trial court erred by granting summary judgment on grounds not raised in Chase Bank's motion for summary judgment. Haddad and Wilson asserted in their affirmative defenses that the 2013 $1 million promissory note had been fraudulently induced, but, according to them, Chase Bank argued on summary judgment that Haddad and Wilson had no evidence to show the 2012 *guaranty agreement* had been fraudulently induced.

1. Applicable Law

When a party moves for summary judgment, he must expressly state in the motion the specific grounds upon which relief is sought, and summary judgment

may only be granted on those grounds. *G & H Towing Co. v. Magee*, 347 S.W.3d 293, 297 (Tex. 2011) (per curiam) (citing TEX. R. CIV. P. 166a(c)). "Grounds may be stated concisely, without detail and argument[,] [b]ut they must at least be listed in the motion." *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 340 (Tex. 1993). The motion itself must state the specific grounds upon which judgment is sought so as to define the issues and to put the non-moving party on notice with adequate information to oppose the motion. *Inwood Forest Cmty. Improvement Ass'n v. R.J.S. Dev. Co., Inc.*, 630 S.W.2d 751, 753 (Tex. App.—Houston [1st Dist.] 1982, no writ).

2. Analysis

Chase Bank sought summary judgment on its breach-of-contract claims for M&E Endeavours' $1 million promissory note and Haddad's and Wilson's guaranty agreements. Chase Bank introduced evidence of each element of its claim, and Haddad and Wilson have not disputed the contracts existed and were breached. Chase Bank, in the absence of any affirmative defenses, was entitled to summary judgment on those grounds.

Haddad and Wilson did, however, seek to avoid summary judgment by raising the affirmative defense of fraudulent inducement regarding the $1 million promissory note. In seeking summary judgment on its breach-of-contract claims, Chase Bank also sought to negate elements of Haddad's and Wilson's fraudulent-

inducement affirmative defenses. Haddad and Wilson claim Chase Bank did not move for summary judgment on their affirmative defense of fraudulent inducement regarding the 2013 $1 million promissory note, but only on the affirmative defense of fraudulent inducement regarding the 2012 guaranty agreement—an affirmative defense they did not raise.

We find this claim unavailing. Chase Bank argued in its motion that the fraudulent-inducement defenses and counterclaim must fail "because extrinsic evidence is not permissible in this promissory note/guaranty case." Chase Bank went on to explain the parol evidence rule, which bars extrinsic evidence "in cases involving promissory notes and guaranties." The summary-judgment motion emphasized the terms of the guaranty agreements to stress Haddad's and Wilson's liability under the agreements and to show the parties' intent that the agreements were a complete integration and no outside representations had been made, but the motion also cited Wilson's and Haddad's deposition testimony regarding the circumstances under which they signed the $1 million promissory note, when the misrepresentation was made. In one paragraph, Chase Bank did misstate Haddad's and Wilson's claim: "Haddad and Wilson now allege that they were fraudulently induced to sign the commercial guaranties based on alleged representations" by Chase Bank's loan officer. However, the motion clearly explained why Haddad's and Wilson's fraudulent-inducement affirmative defenses should fail as a matter of

law relating to any of their written contracts, regardless of which document they claimed was fraudulently induced. Both Haddad and Wilson responded to Chase Bank's summary-judgment motion explaining why they believed their fraudulent-inducement defense should defeat the motion, and only Haddad pointed out Chase Bank's misstatement of their claim. Further, Chase Bank corrected the misstatement in its reply: "Faced with the fact that the written agreements obligate Haddad and Wilson to Chase [Bank] for the full amounts owed by M&E [Endeavours], Haddad and Wilson instead argue that they were fraudulently induced into executing the 2013 contract," meaning the $1 million promissory note signed in 2013. The motion sufficiently defined the issues to put the non-moving parties on notice with adequate information to oppose the motion. *See Inwood Forest Cmty. Improvement Ass'n*, 630 S.W.2d at 753. The trial court did not err in granting summary judgment in favor of Chase Bank.

This point of error is overruled.

D. Attorney's fees

In his fourth point of error, Haddad claims that the trial court erred in awarding Chase Bank attorney's fees because he raised a fact issue as to the reasonableness and necessity of the attorney's fees.

1. Applicable Law

In Texas, generally each party must pay its own attorney's fees, but fee-shifting of reasonable and necessary attorney's fees may be authorized by statute or contract. *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 483–84 (Tex. 2019). The "starting point for calculating an attorney's fee award is determining the reasonable hours worked multiplied by a reasonable hourly rate, and the fee claimant bears the burden of providing sufficient evidence on both counts." *Id.* at 498. This base calculation, when supported by sufficient evidence, is presumed to reflect the reasonable and necessary attorney's fees that can be shifted to the opposing party. *Id.* at 499. An attorney's affidavit can sufficiently establish reasonable attorney's fees on motion for summary judgment. *Am. 10-Minute Oil Change, Inc. v. Metro. Nat'l Bank-Farmers Branch*, 783 S.W.2d 598, 602 (Tex. App.—Dallas 1989, no writ). The attorney for the nonmovant may file an affidavit contesting the reasonableness of the movant's attorney's affidavit in support of attorney's fees, thus creating a fact issue. *Id.* "If an attorney's affidavit regarding fees is properly controverted by an opposing attorney, a fact issue is raised on reasonableness and summary judgment is precluded." *Sun Tec Computer, Inc. v. Recovar Grp., LLC*, No. 05-14-00257-CV, 2015 WL 5099191, at *5 (Tex. App.—Dallas Aug. 31, 2015, no pet.) (mem. op.). A proper controverting summary-judgment affidavit is made by an attorney and on personal knowledge, sets forth

facts that would be admissible in evidence, and shows the affiant's competence. *Id.* A controverting summary-judgment affidavit "that simply criticizes the fees sought by the movant as unreasonable without setting forth the factual basis for the opinion is not sufficient to defeat summary judgment." *Carto Props., LLC v. Briar Capital, L.P.*, No. 01-15-01114-CV, 2018 WL 827558, at *14 (Tex. App.—Houston [1st Dist.] Feb. 13, 2018, pet. denied) (mem. op.).

2. Analysis

Haddad has not challenged the trial court's determination that Chase Bank is entitled to attorney's fees; he has only challenged the reasonableness and necessity of the attorney's fees requested. In support of its request for attorney's fees, Chase Bank offered its attorney's affidavit, which stated her experience and qualifications, stated that lawyers and paralegals in her office had worked a total of 299.30 hours on the case at hourly rates ranging from $135 to $340, and stated that, in her opinion, the work performed and the rates charged were reasonable and necessary. She attached billing records to the affidavit. This evidence, if uncontested, would be sufficient to establish Chase Bank's reasonable attorney's fees on summary judgment. *See Rohrmoos Venture*, 578 S.W.3d at 499; *Am. 10-Minute Oil Change*, 783 S.W.2d at 602.

Haddad's attorney filed a controverting affidavit to challenge the reasonableness and necessity of the fees. He explained that Chase Bank's attorneys

billed for 24.9 hours in response to Haddad's 11 interrogatories and 14 requests for production. That amount of time, he stated, "was neither reasonable nor necessary." Haddad's attorney also stated in his affidavit that different Chase Bank attorneys "billed for performing the same tasks on multiple occasions, which again raise[d] questions regarding the reasonableness and necessity of the fees," but he did not identify specific instances in the billing records. He offered no factual basis for his opinions, and so the affidavit does no more than "simply criticize[] the fees sought as unreasonable" and is insufficient to defeat summary judgment. *See Carto Props.*, 2018 WL 827558, at *14. Because no fact issue was raised, summary judgment as to attorney's fees was proper, *see KPMG Peat Marwick*, 988 S.W.2d at 748, and the trial court did not err by awarding summary judgment for attorney's fees in favor of Chase Bank.

We overrule Haddad's fourth point of error.

CONCLUSION

We affirm the trial court's judgment.

Gordon Goodman
Justice

Panel consists of Justices Goodman, Landau, and Countiss.