Opinion issued July 29, 2021

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00474-CV

B. GREGG PRICE, P.C. AND B. GREGG PRICE, Appellants
V.

SERIES 1 – VIRAGE MASTER, LP, Appellee

On Appeal from the 215th District Court
Harris County, Texas
Trial Court Case No. 2019-74357

MEMORANDUM OPINION

Appellants, B. Gregg Price, P.C. ("Law Firm") and B. Gregg Price ("Price"), challenge the trial court's summary judgment in favor of appellee, Series 1–Virage Master, LP ("Virage"), in Virage's suit against the Law Firm for breach of a promissory note and against Price for breach of a guaranty. In four issues, the Law

Firm and Price contend that the trial court erred in granting summary judgment, in striking their summary-judgment response, and in denying their motion for new trial.

We affirm.

Background

In its petition, Virage alleged that it is in the business of providing business-development and litigation funding to attorneys and law firms. The Law Firm is a firm located in Sulphur Springs, Texas, and Price is its sole owner and principal. On July 21, 2015, Virage and the Law Firm executed "Business Expense Note Number 946" (the "Note"), pursuant to which Virage loaned the Law Firm $3,250,647.05. In exchange, under the terms of the Note, the Law Firm agreed to remit certain portions of the proceeds from its cases to Virage and to provide quarterly updates on the status of its cases. Along with the Note, Virage and Price executed a guaranty agreement (the "Guaranty"), pursuant to which Price guaranteed the Law Firm's obligations under the Note.

Subsequently, the Law Firm failed or refused to repay the loan in accordance with the terms of the Note. Virage alleged that the Law Firm had settled cases on behalf of its clients and had either retained the entirety of the proceeds or had failed to remit the portion owed to Virage. In addition, the Law Firm had ceased, after October 2018, to provide any quarterly status updates on its cases to Virage. Accordingly, Virage notified the Law Firm and Price of the default and of its

acceleration of the maturity of the Note. After the Law Firm failed to pay, and Price failed to cure the default, Price sued the Law Firm for breach of the Note and sued Price for breach of the Guaranty. Virage alleged that the Law Firm entered into the Note, that it breached the Note by defaulting on its terms, and that such breach damaged Virage. Virage asserted that, as of the date of suit, October 9, 2019, the entire principal balance of the loan, i.e., $3,250,647.05, remained outstanding. Virage asserted that Price breached the Guaranty by failing to cure the default.

The Law Firm and Price filed an answer, generally denying the allegations. In a verified plea, Price asserted that he was not liable in the capacity in which he was sued on the Guaranty because his signature was not on the Guaranty.

Virage filed a motion for summary judgment, arguing that it was entitled to judgment as a matter of law on its claims against the Law Firm and Price because there were no genuine issues of material fact. Virage asserted that its evidence established that the Law Firm executed the Note; that Price executed the Guaranty; that Virage provided the loan as agreed; that the Law Firm failed to repay the loan as agreed; that, after demand and the Law Firm failed or refused to pay, Virage accelerated the maturity of the Note; that Price, who had unconditionally guaranteed payment of the Note, failed, after notice, to cure the default; and that Virage suffered damages in the amount of $3,250,647.05, plus interest and fees.

To its summary-judgment motion, Virage appended the affidavit of its Managing Director, Martin Shellist. In his affidavit, Shellist testified as follows:

> 5. On or about July 21, 2015, the [Law Firm] executed a promissory note for the principal sum of $3,250,647.05 pursuant to a "LitCap Business Expense Note, Note No. 946" (the "[Note]"). Under the terms of the [Note], the [Law Firm] agreed to use the loan proceeds for the limited purpose of funding the prosecution of the [Law Firm's] ongoing litigation cases. (See [Note], §1.1; Ex. B). The [Law Firm] agreed to repay the [Note] using attorney's fees generated by its cases. *Id*. at §2.3.
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> 6. [Price] personally guaranteed the [Law Firm's] obligations under the [Note].
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> 7. Pursuant to Section 3.2(b) of the [Note], the [Law Firm] was required to provide Virage with quarterly "case status" updates. Despite Virage's repeated requests, however, the [Law Firm] has refused to provide any case updates since July 1, 2019. The [Law Firm's] refusal to provide these quarterly case status updates constitutes an "Event of Default" under §4.1 of the [Note].
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> 8. Additionally, the [Law Firm] has received settlements and/or favorable judgments in other cases that, under the [Note], trigger the [Law Firm's] obligation to pay a portion of the settlement or judgment (an amount equal to at least 50% of its earned attorney's fees and 100% of reimbursed expenses in those cases) to Virage. On or about July 1, 2019, the [Law Firm] admitted through email correspondence that it received a "Recovery" in over 40 "Litigation Matters" for which it failed to remit any payment to Virage. The [Law Firm], however, has repeatedly refused to make these required payments, thereby constituting another Event of Default under the [Note].
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> 9. On February 13, 2020, and as permitted by the [Note], Virage issued a Notice of Acceleration to the [Law Firm] declaring the balance of the [Note] and all accrued interest to be immediately due and payable. . . . The Notice of Acceleration also demanded that [Price], as guarantor, satisfy the balance. To date, Defendants have refused to pay the [Note].

10. As of March 12, 2020, the balance of the loan is $3,250,647.05 in principal and $2,788,590.20 in accrued interest, for a total of $6,039,237.25.

Virage also appended a copy of the Note and Guaranty, which reflect that Virage agreed to provide the Law Firm with litigation funding in the amount of $3,250,647.05. And, in exchange, the Law Firm agreed to provide payment and status reports to Virage as follows, in pertinent part:

> **2.1 Payment of Principal and Interest**. . . . Borrower agrees to make payment(s) under this Note as follows: Within ten calendar days following the end of the month in which any Recovery(ies) is received by Borrower, Borrower will pay to Holder, in accordance with Section 2.3 [Treatment of Funds], Borrower's interest in such amounts until Holder has received payments of such Recovery(ies) such that the principal and interest due under this Note has been paid in full.
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> . . . .
>
> **3.2 Additional Covenants.** Borrower and Attorney hereby represent, warrant and covenant that, so long as this Note remains unpaid or any other obligation is due and payable to Holder under this Note, Borrower and Attorney shall comply with the following:
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> > . . . .
> >
> > (b) Status Reports. Borrower or Attorney shall notify Holder and LitCap of the status of each Litigation Matter by providing to Holder a status report quarterly on or before the last day of the month following the end of each calendar quarter . . . . Each quarterly update will describe the current status of each Litigation Matter, the minimum amount in controversy in respect thereof, the anticipated date of any Recovery Event in connection therewith and any material developments arising after the date of the last quarterly update report. . . .

The Note provides that a failure to pay as agreed or to provide status reports constituted a default and allowed Virage to accelerate the maturity of the Note without notice or demand.

The Guaranty reflects that Price, "As Attorney," unconditionally guaranteed the Borrower Law Firm's payment obligations under the Note, as follows:

> IN CONSIDERATION OF HOLDER ENTERING INTO THIS NOTE, **ATTORNEY HEREBY UNCONDITIONALLY AGREES TO GUARANTEE THE PAYMENT OBLIGATIONS OF BORROWER UNDER THIS NOTE**, AS DEFINED IN ARTICLE 2 OF THIS AGREEMENT, AND AGREES TO PAY HOLDER PROMPTLY WHEN DUE THE FULL AMOUNT OF ALL INDEBTEDNESS DUE TO HOLDER FROM BORROWER AS AND WHEN SUCH IS DUE AND PAYABLE, AND HEREBY WAIVES PRESENTMENT, NOTICE OF DISHONOR OR PROTEST. **THIS IS A GUARANTY OF PAYMENT AND NOT OF COLLECTION**, AND IN CASE BORROWER FAILS TO PAY ANY INDEBTEDNESS WHEN DUE, ATTORNEY AGREES TO MAKE SUCH PAYMENT OR TO CAUSE SUCH PAYMENT TO BE MADE PUNCTUALLY AS AND WHEN THE SAME SHALL BECOME DUE AND PAYABLE ON THE MATURITY DATE, WHETHER SUCH MATURITY DATE OCCURS BY ACCELERATION OR OTHERWISE . . . .

(Emphasis added.)

Virage also presented a copy of its February 13, 2020 Notice of Acceleration to the Law Firm and Price, declaring the outstanding "principal ($3,250,647.05) and the accrued interest ($2,734,976.79) under the Note to be immediately due and payable to Virage." And, Virage appended the affidavit of its counsel, Ashish Mahendru, in support of its request for attorney's fees.

It is undisputed that Virage's summary-judgment motion was set for a hearing on April 2, 2020 and that the Law Firm and Price received notice of the hearing.

On April 1, 2020, the day before the hearing, the Law Firm and Price filed a summary-judgment response. They asserted that the electronic signatures on the Note and Guaranty were "not the signatures of the maker, B. Gregg Price, P.C. [the Law Firm] or Mr. Price" and thus that "the Note and Guaranty cannot be enforced against the Defendants." They asserted that, "[f]or an electronic signature to be binding, there must be a showing of an intent by the parties to be bound by the Uniform Electronic Signature Act Tex. Bus. Com. Code §322.005(b)." And, there was "no evidence presented . . . that the parties intended for this Act to apply." In addition, the Guaranty lacked the signature of Price in his individual capacity.

Virage moved to strike the Law Firm and Price's summary-judgment response as late-filed. Virage also argued that the Law Firm failed to file a verified denial, and thus could not argue that its signature did not appear on the Note, and that "[t]here is no requirement that parties explicitly agree that electronic signatures will be valid—that fact is determined from the context."

On April 2, 2020, the trial court signed an order striking the Law Firm and Price's summary-judgment response and granting summary judgment for Virage, awarding it $6,039,237.25 in principal and interest. The Law Firm and Price filed a motion for new trial, discussed below, which the trial court denied.

Summary Judgment

In their first and second issues, the Law Firm and Price argue that the trial court erred in granting summary judgment because Virage failed to conclusively establish its right to judgment on its claims and the trial court erred in striking the Law Firm and Price's summary-judgment response. The Law Firm and Price assert that they did not receive adequate notice of the submission of the motion.

Standard of Review and Overarching Legal Principles

We review a trial court's summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). 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. *Id*. 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 is 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 that 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). A plaintiff moving for summary judgment on its own claim, as here, must conclusively prove

all essential elements of its cause of action. *Rhône–Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999). A plaintiff seeking a summary judgment awarding damages on its claim must conclusively establish its damages. *McRay v. Dow Golub Remels & Beverly, LLP*, 554 S.W.3d 702, 705 (Tex. App.—Houston [1st Dist.] 2018, no pet.). A matter is conclusively established if reasonable people could not differ as to the conclusion to be drawn from the evidence. *See City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005).

Only after the movant meets its burden does the burden shift to the non-movant to present evidence raising a genuine issue of material fact precluding summary judgment. *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995); *see also McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 342 (Tex. 1993) ("[S]ummary judgments must stand or fall on their own merits, and the non-movant's failure to except or respond cannot supply by default the . . . summary judgment proof necessary to establish the movant's right."). Evidence raises a genuine issue 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). A non-movant who fails to present a response is limited on appeal to arguing the legal sufficiency of the grounds presented by the movant. *McConnell*, 858 S.W.2d at 343.

Analysis

We first consider whether Virage, as movant, met its burden to establish its right to judgment. *See* TEX. R. CIV. P. 166a(c); *Siegler*, 899 S.W.2d at 197 (only after movant meets its burden does burden shift to non-movant to present evidence raising genuine issue of material fact).

A. Breach-of-Contract Claims

Generally, to be entitled to a summary judgment on its breach-of-contract claims against the Law Firm on the Note and against Price on the Guaranty, Virage was required to establish: (1) valid contracts with the Law Firm and Price, (2) Virage's performance, (3) the Law Firm's and Price's breaches 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). To be entitled to summary judgment as to the amount of its damages, Virage was required to conclusively establish its damages. *See McRay*, 554 S.W.3d at 705.

1. *The Note*

With respect to Virage's claim against the Law Firm for breach of the Note, Virage was required to establish: (1) the existence of the note in question; (2) that Virage is the holder of the note; (3) that the Law Firm is the maker of the note; and

(4) a certain balance is due and owing on the note. *See Dorsett v. Hispanic Hous. & Educ. Corp*., 389 S.W.3d 609, 613 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

Virage attached to its summary-judgment motion the affidavits of Shellist and Mahendru and a copy of the Note. In his affidavit, Shellist testified that the facts stated were true and correct and within his personal knowledge. He referenced the attached Note and testified that:

> 5. On or about July 21, 2015, the [Law Firm] executed a promissory note for the principal sum of $3,250,647.05 pursuant to a "LitCap Business Expense Note, Note No. 946" (the "[Note]"). Under the terms of the [Note], the [Law Firm] agreed to use the loan proceeds for the limited purpose of funding the prosecution of the [Law Firm's] ongoing litigation cases. (See [Note], §1.1; Ex. B). The [Law Firm] agreed to repay the [Note] using attorney's fees generated by its cases. *Id*. at §2.3.

The attached Note, dated July 21, 2015, identifies Virage as the "Holder" and the Law Office as the "Borrower." The Note states that Virage agreed to loan the Law Firm the principal sum of $3,250,647.05 at a rate of 21.5% annual interest. In exchange, the Law Firm agreed to remit certain portions of the proceeds from its cases to Virage and to provide quarterly updates on the status of its cases. The Note reflects that Shellist, as "Authorized Person for Holder," executed the Note on behalf of Virage, "as Holder." And, Price, as "equity partner with ability to bind Borrower," executed the Note on behalf of "Law Office of B. Gregg Price," as "Borrower." Mahendru testified that the attached copy of the Note was a "true and correct cop[y]" of the promissory note.

Thus, Virage established the validity of the Note. *See Prime Prods.*, 97 S.W.3d at 636 It presented evidence establishing the existence of the Note, that Virage is the holder of the Note, and that the Law Firm is the maker of the Note. *See Dorsett*, 389 S.W.3d at 613; *see, e.g.*, *McShaffry v. Amegy Bank Nat'l Ass'n*, 332 S.W.3d 493, 496 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (holding affidavit of bank vice president established existence and ownership of promissory note).

The Note also states that the "borrowings represented by this Note were deposited into operating account of Borrower at [Bank and account number]." Thus, Virage established its performance under the Note. *See Prime Prods.*, 97 S.W.3d at 636. Shellist further testified in his affidavit:

> 7. Pursuant to Section 3.2(b) of the [Note], the [Law Firm] was required to provide Virage with quarterly "case status" updates. Despite Virage's repeated requests, however, the [Law Firm] has refused to provide any case updates since July 1, 2019. The [Law Firm's] refusal to provide these quarterly case status updates constitutes an "Event of Default" under §4.1 of the [Note].
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> 8. Additionally, the [Law Firm] has received settlements and/or favorable judgments in other cases that, under the [Note], trigger the [Law Firm's] obligation to pay a portion of the settlement or judgment (an amount equal to at least 50% of its earned attorney's fees and 100% of reimbursed expenses in those cases) to Virage. On or about July 1, 2019, the [Law Firm] admitted through email correspondence that it received a "Recovery" in over 40 "Litigation Matters" for which it failed to remit any payment to Virage. The [Law Firm], however, has repeatedly refused to make these required payments, thereby constituting another Event of Default under the [Note].
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> 9. On February 13, 2020, and as permitted by the [Note], Virage issued a Notice of Acceleration to the [Law Firm] declaring the

> balance of the [Note] and all accrued interest to be immediately due and payable. . . . The Notice of Acceleration also demanded that [Price], as guarantor, satisfy the balance. To date, Defendants have refused to pay the [Note].

And, Shellist testified that, as of March 12, 2020, there remained outstanding $3,250,647.05 in principal and $2,788,590.20 in accrued interest, for a total of $6,039,237.25. Thus, Virage also established the Law Firm's breach of the Note, that damages resulted from the breach, and the amount of the damages, or the balance due and owing. *See McShaffry*, 332 S.W.3d at 496; *see also McRay*, 554 S.W.3d at 705; *Dorsett*, 389 S.W.3d at 613; *Prime Prods.*, 97 S.W.3d at 636.

We conclude that Virage's summary judgment evidence establishes its right to judgment against the Law Firm on the Note. *See Siegler*, 899 S.W.2d at 197. Accordingly, the burden shifted to the Law Firm to present evidence raising a genuine issue of material fact precluding summary judgment. *See id.* As discussed below, because the trial court struck the Law Firm's summary-judgment response, there is no evidence presented to raise a fact issue. Thus, the Law Firm is limited on appeal to challenging the legal sufficiency of the grounds presented by Virage. *McConnell*, 858 S.W.2d at 343.

On appeal, the Law Firm does not dispute that Virage performed as agreed under the Note and loaned the Law Firm $3,250,647.05; that the Law Firm did not repay the loan as agreed in the Note; that Virage suffered damages as a result of the breach; or the amount of Virage's damages. *See Prime Prods.*, 97 S.W.3d at 636;

see also McRay, 554 S.W.3d at 705. The Law Firm argues, rather, that Virage's summary-judgment evidence is legally insufficient because it does not establish the validity of the Note. *See Prime Prods.*, 97 S.W.3d at 636. That is, the Law Firm argues that Virage failed to establish (a.) the existence of the Note; (b.) that Virage is the holder of the Note; and (c.) that the Law Firm is the maker of the Note. *See Dorsett*, 389 S.W.3d at 613.

a. Existence of the Note

The Law Firm asserts that Virage's summary-judgment evidence is legally insufficient to establish the existence of the Note because Virage "did not attach" the Note directly to Shellist's affidavit, because Shellist did not swear that the copy of the Note attached to the motion was "true and correct," and because Mahendru did not explain the basis of his personal knowledge in his affidavit.

A party must present its summary-judgment evidence in a form that would be admissible at trial. *See* TEX. R. CIV. P. 166a(f); *Smiley Dental-Bear Creek, P.L.L.C. v. SMS Fin. LA, L.L.C.*, No. 01-18-00983-CV, 2020 WL 4758472, at *3 (Tex. App.—Houston [1st Dist.] Aug. 18, 2020, no pet.) (mem. op.). Texas law divides defects in summary judgment affidavits into two categories: (1) defects in substance and (2) defects in form. *Coward v. H.E.B., Inc.*, No. 01-13-00773-CV, 2014 WL 3512800, at *2 (Tex. App.—Houston [1st Dist.] July 15, 2014, no pet.) (mem. op.).

Defects in substance render the evidence legally insufficient. *Stewart v. Sanmina Tex. L.P.*, 156 S.W.3d 198, 207 (Tex. App.—Dallas 2005, no pet.). Such defects include objections that statements in an affidavit are irrelevant or conclusory. *UT Health Sci. Ctr.–Hous. v. Carver*, No. 01-16-01010-CV, 2018 WL 1473897, at *5 (Tex. App.—Houston [1st Dist.] Mar. 27, 2018, no pet.) (mem. op.); *see, e.g.*, *McMahan v. Greenwood*, 108 S.W.3d 467, 498 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (relevance); *Green v. Indus. Specialty Contractors, Inc*., 1 S.W.3d 126, 130 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (conclusory). "Substantive defects are never waived" and may be raised for the first time on appeal because incompetent evidence "cannot be considered under any circumstances." *See Mathis v. Bocell*, 982 S.W.2d 52, 60 (Tex. App.—Houston [1st Dist.] 1998, no pet.).

Defects in form do not render the evidence legally insufficient. *See Youngstown Sheet & Tube Co., v. Penn*, 363 S.W.2d 230, 234 (Tex. 1962); *Wilson v. Gen. Motors Acceptance Corp*., 897 S.W.2d 818, 822 (Tex. App.—Houston [1st Dist.] 1994, no writ) ("An unchallenged defect can support an affirmance of a summary judgment."). Rather, the evidence is competent but inadmissible. *Mathis*, 982 S.W.2d at 60. Such defects include, for instance, "objections to hearsay, lack of foundation, lack of personal knowledge, sham affidavit, statement of an interested witness that is not clear, positive direct, or free from contradiction, best evidence, self-serving statements, and unsubstantiated opinions." *UT Health Sci. Ctr.–Hous*.,

2018 WL 1473897, at *5 (citing examples); *see also Smiley Dental-Bear Creek, P.L.L.C.*, 2020 WL 4758472, at *3. Objections to such defects must be presented to the trial court, and the complaining party must obtain a ruling on its objection. TEX. R. CIV. P. 166a(f) ("Defects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend."). The failure to obtain a ruling on an objection to a defect in form waives the objection. *Smiley Dental-Bear Creek*, 2020 WL 4758472, at *3; *Thibodeau v. Dodeka, LLC*, 436 S.W.3d 23, 27 (Tex. App.—Waco 2014, pet. denied) (concluding that objection that affidavit not based on personal knowledge constituted objection to form that required objection to summary-judgment evidence at or before time trial court made summary-judgment ruling to preserve matter for appeal); *see also Brown v. Brown*, 145 S.W.3d 745, 751 (Tex. App.—Dallas 2004, pet. denied) (noting that opposing party must be given opportunity to amend affidavit).

Here, the Law Firm's complaints constitute defects of form that do not render the evidence legally insufficient and required an objection in the trial court. It is undisputed that the Law Firm did not raise any of these points in the trial court. Thus, they are waived. *See Smiley Dental-Bear Creek*, 2020 WL 4758472, at *3.

With respect to the Law Firm's complaint that Shellist did not attach the Note directly to his affidavit, Rule 166a requires that certified or sworn copies of all

records or papers referred to in a supporting or opposing affidavit be attached to the affidavit or served therewith. TEX. R. CIV. P. 166a(f). However, the Rule also states that "[d]efects in the *form of affidavits or attachments* will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend." *Id.* (emphasis added). In *Youngstown Steel*, the non-movant complained that the operating agreement at issue, although in the record, was not attached directly to the affidavit at issue. 363 S.W.2d at 234. The supreme court held that the complaint was a purely formal deficiency and because the non-movant did not raise the deficiency in the trial court, it could not be raised on appeal. *Id*. Here, the Note is attached to Virage's summary-judgment motion immediately after Shellist's affidavit. Because the Law Firm asserts a defect of form, and not a substantive defect, such does not render the evidence legally insufficient and required an objection in the trial court to preserve the matter for appeal. *See id.*; *Smiley Dental-Bear Creek*, 2020 WL 4758472, at *3. Because the Law Firm did not raise this point in the trial court, the issue is waived.

In addition, the Law Firm's complaint that Shellist, who referenced specific portions of the attached Note in his affidavit, incorporated and discussed the pertinent language in the Note, and attested that the facts were "true and correct and within his personal knowledge," but did not state that the attached Note was a true and correct copy, constitutes a defect of form. A *complete absence* of authentication

is a defect of substance that may be raised for the first time on appeal. *See Mackey v. Great Lakes Invs., Inc*., 255 S.W.3d 243, 252 (Tex. App.—San Antonio 2008, pet. denied) ("Unauthenticated or unsworn documents, or documents not supported by any affidavit, are not entitled to consideration as summary judgment evidence."); *Blanche v. First Nationwide Mortg. Corp*., 74 S.W.3d 444, 451 (Tex. App.—Dallas 2002, no pet.) (holding proponent made no attempt to authenticate vast majority of their evidence, which was neither identified nor referenced in affidavit). However, a defect in the form of the authentication of a document, i.e., a defect in an affidavit attempting to authenticate the attached document, is waived in the absence of an objection and ruling in the trial court. *In re Longoria*, 470 S.W.3d 616, 630 (Tex. App.—Houston [14th Dist.] 2015, orig. proceeding [mand. denied]).

Because the Law Firm did not raise this objection in the trial court, the complaint is waived. *See Landry's Seafood Rests., Inc. v. Waterfront Cafe, Inc*., 49 S.W.3d 544, 551 (Tex. App.—Austin 2001, pet. dism'd) (holding that failure of summary-judgment affidavit to state that facts in attached document were true and correct constituted defect of form that was waived when party failed to object); *see also Hicks v. Humble Oil & Ref. Co*., 970 S.W.2d 90, 93 (Tex. App.—Houston [14th Dist.] 1998, pet. denied) (holding that complaint that exhibits were not properly authenticated constituted defect of form that required objection and ruling).

Finally, the Law Firm's complaint that Mahendru did not explain the basis of his personal knowledge also constitutes a defect of form. An affidavit that fails to disclose that the affidavit has personal knowledge of the facts or that shows "*no basis* for personal knowledge is legally insufficient" and constitutes a defect of substance that may be raised for first time on appeal. *Kerlin v. Arias*, 274 S.W.3d 666, 668 (Tex. 2008) (emphasis added) (holding affidavit legally insufficient because "nothing in the affidavit affirmatively show[ed] how [affiant] could possibly have personal knowledge about events occurring in the 1840s"); *see Wa. DC Party Shuttle, LLC v. IGuideTours, LLC*, 406 S.W.3d 723, 733 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (noting that affidavit that fails to disclose that affiant has personal knowledge of facts asserted suffers from substantive defect). However, a complaint that an affidavit fails to reveal the basis for the affiant's asserted personal knowledge constitutes a defect of form that must be preserved by objection and ruling in trial court. *Wa. DC Party Shuttle*, 406 S.W.3d at 736.

Here, Mahendru testified that he is Virage's counsel, that the facts stated therein were "true and correct and within [his] personal knowledge," and that the attached copies of the Note and Notice of Acceleration were "true and correct" copies. Mahendru's testimony that he is Virage's counsel, that he has personal knowledge of the facts, and that the attached Note is a true and correct copy is legally sufficient. *See In re E.I. DuPont de Nemours & Co*., 136 S.W.3d 218, 224 (Tex.

2004) (holding that affiant who swore that his statements were based on his "personal knowledge of the facts stated in the affidavit" satisfied personal knowledge requirement); *see, e.g.*, *Mackey*, 255 S.W.3d at 252 (holding that counsel's affidavit stating that attached exhibits were true and correct copies was sufficient); *St. Paul Cos. v. Chevron U.S.A., Inc*., 798 S.W.2d 4, 6 (Tex. App.—Houston [1st Dist.] 1990, writ dism'd by agr.) (holding that affidavit of regional counsel was sufficient to authenticate contract). "It is not necessary to separately authenticate documentary evidence or to use 'magic words' so long as the affiant has verified the accuracy of the documents." *Mackey*, 255 S.W.3d at 252.

The Law Firm's complaint that Mahendru did not expound on the basis for his asserted personal knowledge is an alleged defect of form that the Law Firm did not preserve. *See* TEX. R. CIV. P. 166a(f) ("Defects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend."); *Smiley Dental-Bear Creek*, 2020 WL 4758472, at *3; *Wa. DC Party Shuttle*, 406 S.W.3d at 736. We conclude that Virage's summary-judgment evidence establishing the existence of the Note is legally sufficient. *See Dorsett*, 389 S.W.3d at 613.

b. Holder of the Note

The Law Firm asserts that Virage's summary-judgment evidence is legally insufficient to establish that Virage is the holder of the Note because "Shellist did

not testify that Virage was the owner of the Note" and "[n]o other evidence in the record establishes that Virage is the owner and holder of the note."

Generally, a payee establishes ownership of a note when it attests in an affidavit that it is the owner of the note, attaches a sworn copy of the note, the note shows on its face that it was issued to the payee, and there is no summary-judgment proof showing that the note has ever been pledged, assigned, transferred, or conveyed. *See Zarges v. Bevan*, 652 S.W.2d 368, 369 (Tex. 1983); *Sandhu v. Pinglia Invs. of Tex., L.L.C.*, No. 14-08-00184-CV, 2009 WL 1795032, at *4 (Tex. App.—Houston [14th Dist.] June 25, 2009, pet. denied) (mem. op.); *Affiliated Cap. Corp. v. Musemeche*, 804 S.W.2d 216, 218 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

Here, the attached Note shows on its face that it was issued to Virage, as the "Holder" of the Note, and that the Note is signed by Shellist for Virage, as "Holder." Shellist attests in his affidavit that Virage loaned the Law Firm the sum at issue and that the sum was, at the time of suit, still owed to Virage. *See Musemeche*, 804 S.W.2d at 218 (holding affidavit testimony that sworn copy of note, showing on its face that it was issued to lender, along with affidavit testimony that lender was "still trying to collect" was sufficient). And, nothing in the summary-judgment record suggests that the Note was ever pledged, assigned, transferred, or conveyed. *See id*. We conclude that Virage's summary-judgment evidence is legally sufficient to

establish its status as owner and holder of the Note. *See id.*; *see also Calbert v. Assoc. Asset Mgmt., LLC*, 2010 WL 2305862, at *3 (Tex. App.—Houston [1st Dist.] June 10, 2010, no pet.) (mem. op.) (holding summary-judgment evidence sufficient to establish lender as holder of note).

c. Maker of the Note

The Law Firm asserts that the evidence is legally insufficient to establish that it is the maker of the Note because the Note does not bear its signature.

Generally, to prove that a defendant is the maker of a note, the plaintiff must present evidence indicating that the defendant's signature appears on the note or that a representative of the defendant signed the note on the defendant's behalf. *See* TEX. BUS. & COM. CODE § 3.401(a); *Suttles v. Thomas Bearden Co.*, 152 S.W.3d 607, 611 (Tex. App.—Houston [1st Dist.] 2004, no pet.).

Here, Virage's summary-judgment evidence shows that the Note bears Price's electronic signature, as "[e]quity partner with the ability to bind Borrower," and on behalf of the Law Firm, "As Borrower." The term "Borrower" is defined in the Note as the Law Firm. On appeal, the Law Firm denies that the signature on the Note is actually that of the Law Firm. However, because the Law Firm did not file a sworn denial of its execution of the Note, the Note is received as fully proved in that respect. *See* TEX. R. CIV. P. 93(7) ("Denial of the execution by himself or by his authority of any instrument in writing, upon which any pleading is founded, in whole

or in part and charged to have been executed by him or by his authority" must be raised by verified pleading or "shall be received in evidence as fully proved"); *Sandhu*, 2009 WL 1795032, at *4 ("When the defendant does not deny the genuineness of his signature on the note, he is established as the maker.").[1]

In sum, we conclude that Virage's summary-judgment evidence is legally sufficient to support the trial court's summary judgment in its favor with respect to its claim against the Law Firm for breach of the Note. *See McConnell*, 858 S.W.2d at 343.

2. *The Guaranty*

To prevail on a claim of breach of a guaranty, a lender must establish (1) the existence and ownership of the guaranty, (2) the terms of the underlying contract, (3) the occurrence of the conditions upon which liability is based, and (4) the guarantor's failure or refusal to perform the promise. *Julka v. U.S. Bank Nat'l Ass'n*, 516 S.W.3d 84, 87 (Tex. App.—Houston [1st Dist.] 2017, no pet.). The existence and ownership of a guaranty may be shown by an affidavit and attached sworn copies of the guaranty or proof that the party is the named payee. *See, e.g.*, *Chahadeh v.*

[1] The Law Firm argues that it was not required to file a verified denial because Virage did not file a copy of the Note with its original petition. However, there is "no basis for holding that it is mandatory and required that the note or the guaranty agreement be actually attached to the pleading in order to require the enforcement of Rule 93." *Pickering v. First Greenville Nat. Bank*, 479 S.W.2d 76, 78 (Tex. Civ. App.—Dallas 1972, no writ.).

Jacinto Med. Grp., P.A., 519 S.W.3d 242, 249 (Tex. App.—Houston [1st Dist.] 2017, no pet.); *Hooper v. Mercantile Bank & Trust*, 762 S.W.2d 383, 385 (Tex. App.—San Antonio 1988, no writ) (bank established guaranty by presenting guaranty and affidavit of its assistant vice-president, who stated that he had personal knowledge of attached true and correct copy of guaranty).

Here, the Guaranty is contained in the Note, discussed above, the terms of the Note reference the Guaranty, and the Note and Guaranty were executed at the same time. Thus, we construe them together. *See Jones v. Kelley*, 614 S.W.2d 95, 98 (Tex. 1981); *Miller v. Pawnee Leasing Corp*., No. 01-18-00429-CV, 2020 WL 477214, at *8 (Tex. App.—Houston [1st Dist.] Jan. 30, 2020, no pet.) (mem. op.) (noting that separate instruments or contracts executed at the same time, for the same purpose, and in the course of the same transaction are to be considered as one instrument and are to be read and construed together).

The Note names Virage as "Holder," and the Guaranty names the Holder as payee under its terms. In his affidavit, Shellist testified that "[Price] personally guaranteed the [Law Firm's] obligations under the [Note]." Shellist testified that the facts were true and correct and within his personal knowledge. The attached Guaranty, which states that it took effect upon execution of the Note, provides that Price, "As Attorney," unconditionally guaranteed the Borrower Law Firm's obligations under the Note, as follows:

> IN CONSIDERATION OF HOLDER ENTERING INTO THIS NOTE, **ATTORNEY HEREBY UNCONDITIONALLY AGREES TO GUARANTEE THE PAYMENT OBLIGATIONS OF BORROWER UNDER THIS NOTE**, AS DEFINED IN ARTICLE 2 OF THIS AGREEMENT, AND AGREES TO PAY HOLDER PROMPTLY WHEN DUE THE FULL AMOUNT OF ALL INDEBTEDNESS DUE TO HOLDER FROM BORROWER AS AND WHEN SUCH IS DUE AND PAYABLE, AND HEREBY WAIVES PRESENTMENT, NOTICE OF DISHONOR OR PROTEST. **THIS IS A GUARANTY OF PAYMENT AND NOT OF COLLECTION**, AND IN CASE BORROWER FAILS TO PAY ANY INDEBTEDNESS WHEN DUE, ATTORNEY AGREES TO MAKE SUCH PAYMENT OR TO CAUSE SUCH PAYMENT TO BE MADE PUNCTUALLY AS AND WHEN THE SAME SHALL BECOME DUE AND PAYABLE ON THE MATURITY DATE, WHETHER SUCH MATURITY DATE OCCURS BY ACCELERATION OR OTHERWISE . . . .

(Emphasis added.) The Guaranty contains a signature by Price, "As Attorney." Mahendru testified that "Exhibits B and C are true and correct copies of the Promissory Note and Notice of Acceleration." Exhibit B includes the Guaranty. Nothing in the summary-judgment record suggests that the Guaranty was ever pledged, assigned, transferred, or conveyed. *See Sandhu*, 2009 WL 1795032, at *4. Thus, Virage presented legally sufficient evidence establishing the existence and ownership of the Guaranty. *See Chahadeh*, 519 S.W.3d at 249; *Julka*, 516 S.W.3d at 87; *Hooper*, 762 S.W.2d at 385.

Virage's summary-judgment evidence also establishes the terms of the underlying contract. *See Julka*, 516 S.W.3d at 87. The evidence shows that, on July 21, 2015, Shellist, on behalf of Virage, executed the Note, discussed above. Under

the terms of the Note, Virage agreed to provide the Law Firm with over three million dollars in litigation funding. In exchange, the Law Firm agreed to repay the loan, with interest, in accordance with the schedule outlined in the Note. *See Norris v. Tex. Dev. Co*., 547 S.W.3d 656, 662 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (upholding summary judgment on breach-of-guaranty claim, in part, because record contained terms of underlying agreement).

Virage's summary-judgment evidence also establishes the occurrence of the conditions upon which liability is based and the failure or refusal to perform the promise by the guarantor, Price. *See Julka*, 516 S.W.3d at 87. Shellist testified:

> 7. Pursuant to Section 3.2(b) of the [Note], the [Law Firm] was required to provide Virage with quarterly "case status" updates. Despite Virage's repeated requests, however, the [Law Firm] has refused to provide any case updates since July 1, 2019. The [Law Firm's] refusal to provide these quarterly case status updates constitutes an "Event of Default" under §4.1 of the [Note].
>
> 8. Additionally, the [Law Firm] has received settlements and/or favorable judgments in other cases that, under the [Note], trigger the [Law Firm's] obligation to pay a portion of the settlement or judgment (an amount equal to at least 50% of its earned attorney's fees and 100% of reimbursed expenses in those cases) to Virage. On or about July 1, 2019, the [Law Firm] admitted through email correspondence that it received a "Recovery" in over 40 "Litigation Matters" for which it failed to remit any payment to Virage. The [Law Firm], however, has repeatedly refused to make these required payments, thereby constituting another Event of Default under the [Note].
>
> 9. On February 13, 2020, and as permitted by the [Note], Virage issued a Notice of Acceleration to the [Law Firm] declaring the balance of the [Note] and all accrued interest to be immediately due and payable. . . . **The Notice of Acceleration also**

> **demanded that [Price], as guarantor, satisfy the balance. To date, Defendants have refused to pay the [Note].**

(Emphasis added.) Virage also presented a copy of its February 13, 2020 notice of acceleration, notifying Price of the Law Firm's default and accelerating the balance due under the Note. Shellist testified that Price failed or refused to cure the default and that, as of March 12, 2020, the total outstanding due was $6,039,237.25.

In sum, Virage established the existence and ownership of the guaranty contract, the terms of the underlying Note, the occurrence of the conditions upon which liability is based, the failure or refusal of Price, as Guarantor, to perform the promise, and Virage's damages resulting from Price's breach. *See Julka*, 516 S.W.3d at 87; *Prime Prods.*, 97 S.W.3d at 636; *see also McRay*, 554 S.W.3d at 705.

We conclude that Virage's summary-judgment evidence established its right to judgment against Price on the Guaranty. *See Siegler*, 899 S.W.3d at 197. Accordingly, the burden shifted to the Price to present evidence raising a genuine issue of material fact precluding summary judgment. *See id.* As discussed below, because the trial court struck Price's summary-judgment response, there is no evidence presented to raise a fact issue. And, Price is limited on appeal to challenging the legal sufficiency of the grounds Virage presented. *See McConnell*, 858 S.W.2d at 343 (holding that non-movant who fails to present response is limited on appeal to arguing legal sufficiency of grounds presented by movant).

On appeal, Price does not dispute that Virage performed as agreed under the Note and loaned the Law Firm $3,250,647.05; that the Law Firm did not repay the loan as agreed in the Note; that Price did not cure the default; that Virage suffered damages as a result of the breach; or the amount of Virage's damages. *See Prime Prods.*, 97 S.W.3d at 636. Rather, Price argues that Virage's summary-judgment evidence is legally insufficient because it does not establish that he is the maker.[2] *See Dorsett*, 389 S.W.3d at 613.

Price asserts on appeal that Virage "offered no evidence that [he] signed the Guaranty." He asserts that, because the signature block does not purport to be signed by him, and is instead is signed by "law office of B Gregg Price," the evidence establishes that he "did not sign the Guaranty." He also complains that there is no evidence that he "agreed to conduct the transaction by electronic means," as required under the Texas Uniform Electronic Transactions Act. *See* TEX. BUS. & COM. CODE ch. 322 ("TUETA"). Price filed a verified denial in the trial court with respect to the authenticity of his signature on the Guaranty. *See* TEX. R. CIV. P. 93(7).

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[2] In his brief on appeal, Price also asserts, that "Virage failed to conclusively establish the existence and ownership of the [Guaranty]." However, Texas Rule of Appellate Procedure 38.1 requires a party to provide legal argument and supporting authorities demonstrating the basis for the requested relief. *See, e.g., Tesoro Petroleum Corp. v. Nabors Drilling USA, Inc.*, 106 S.W.3d 118, 128 (Tex. App.—Houston [1st Dist.] 2002, pet. denied). Price provides no argument or citation to legal authority to support his contention. Thus, we conclude that his complaint has not been briefed in compliance with Rule 38.1, and we hold that it is waived. *See* TEX. R. APP. P. 38.1.

The TUETA provides that "[i]f a law requires a signature, an electronic signature satisfies the law." *See* TEX. BUS. & COM. CODE § 322.007(d). It defines an "electronic signature" as any "electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record." *Id.* §322.002(8); *see also Cunningham v. Zurich Am. Ins. Co.*, 352 S.W.3d 519, 529–30 (Tex. App.—Fort Worth 2011, pet. denied) (describing "s/ followed by [a] typed name" as "unequivocally indicat[ing] a signature").

Here, as discussed above, the Note reflects Price's electronic signature, as "[e]quity partner with the ability to bind Borrower," and on behalf of the Law Firm, "As Borrower," as follows:

> **Law Office of B. Gregg Price**, **AS BORROWER**
> /s/ Electronically signed by:
> *law office of B Gregg Price*
> _____
> B. Gregg Price
> **Equity partner with ability to bind Borrower**

(Emphasis added.)

By contrast, the signature block of the Guaranty reflects that it contains an electronic signature by Price, "As Attorney," as follows:

> **B. Gregg Price**, **AS ATTORNEY**
> /s/ Electronically signed by:
> *law office of B Gregg Price*
> _____

(Emphasis added.)

We examine instruments "as a whole." *Mission Grove, L.P. v. Hall*, 503 S.W.3d 546, 554 (Tex. App.—Houston [14th Dist.] 2016, no pet.). Although Price electronically signed both the Note and Guaranty as "law office of B Gregg Price," the signature blocks make clear that he signed the Note on behalf of the Law Firm, as the Borrower, and signed the Guaranty as the individual Attorney. And, reading the Note and Guaranty together as a whole, Price is identified in the Note and Guaranty as "Attorney" and, as discussed above, the language throughout the Guaranty makes clear that Price, "As Attorney," unconditionally guaranteed the Borrower Law Firm's obligations under the Note. And, Shellist testified that "[Price] personally guaranteed the [Law Firm's] obligations under the [Note]." Price presents no authority on appeal to support his argument that his having chosen to apply the same electronic signature on both the Note and Guaranty, without more, vitiates his liability on the Guaranty.

Further, Price presents no authority to support his argument that the law requires proof of an independent agreement to conduct a transaction electronically. The TUETA provides that it "applies only to transactions between parties each of which has agreed to conduct transactions by electronic means." TEX. BUS. & COM. CODE § 332.005(b). However, "[w]hether the parties agree[d] to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct." *Id.*; *see Parks v. Seybold*, No. 05-

13-00694-CV, 2015 WL 4481768, at *5 (Tex. App.—Dallas July 23, 2015, no pet.) (mem. op.). Here, Virage's summary-judgment evidence establishes that the Law Firm, of which Price is the sole owner and principal, accepted a loan of over three million dollars from Virage, pursuant to the Note and Guaranty, which the evidence reflects were electronically executed. Thus, the evidence establishes that the Price agreed to conduct the transaction by electronic means. *See id.* § 332.005(b).

We conclude that Virage presented legally sufficient evidence establishing that Price executed the Guaranty.

In sum, we conclude that Virage established all the elements of its breach-of-contract claims against the Law Firm and Price, including the amount of its damages. *See Julka*, 516 S.W.3d at 87; *see also McRay*, 554 S.W.3d at 705. Thus, the burden shifted to the Law Firm and Price to present evidence raising a genuine issue of material fact precluding summary judgment. *See Siegler*, 899 S.W.2d at 197. The Law Firm and Price next argue on appeal that that trial court erred in striking their summary-judgment response because they were not afforded adequate notice of the hearing or submission of the summary-judgment motion.

B. Notice and Response

Due process requires that notice of the hearing or submission of a summary-judgment motion be given because the hearing or submission date determines the non-movant's deadline to file the summary-judgment response. *Martin v. Martin*,

Martin & Richards, Inc., 989 S.W.2d 357, 359 (Tex. 1998); *Tex. Integrated Conveyor Sys., Inc. v. Innovative Conveyor Concepts, Inc.*, 300 S.W.3d 348, 363 (Tex. App.—Dallas 2009, pet. denied). Texas Rule of Civil Procedure 166a(c) provides that, "[e]xcept on leave of court, with notice to opposing counsel, the motion and any supporting affidavits shall be filed and served at least twenty-one days before the time specified for hearing." TEX. R. CIV. P. 166a(c). In turn, "[e]xcept on leave of court, the adverse party, not later than seven days prior to the day of hearing may file and serve opposing affidavits or other written response." *Id.* Whether to accept and consider late summary-judgment filings lies within the trial court's sound discretion. *Carpenter v. Cimarron Hydrocarbons Corp.*, 98 S.W.3d 682, 688 (Tex. 2002); *White v. Indep. Bank, N.A.*, 794 S.W.2d 895, 900 (Tex. App.—Houston [1st Dist.] 1990, writ denied).

Here, the record reflects that Virage filed and served its motion for summary judgment on March 12, 2020, along with a notice of hearing set for April 2, 2020. Thus, the Law Firm and Price were afforded 21 days' notice of the hearing. *See* TEX. R. CIV. P. 166a(c) (providing that, except on leave of court, "motion [for summary judgment] and any supporting affidavits shall be filed and served at least twenty-one days before the time specified for hearing"). Accordingly, the Law Firm's and Price's summary-judgment response was due by March 26, 2020, or seven days prior to the April 2, 2020 hearing. *See id.* (providing that, "[e]xcept on

leave of court, the adverse party, not later than seven days prior to the day of hearing may file and serve opposing affidavits or other written response"). It is undisputed that that the Law Firm and Price did not file a response until April 1, 2020, the day before the hearing. *See id.* And, they did not file a motion for leave to file a late response. *See id.*

Also on April 1, 2020, Virage moved to strike the Law Firm and Price's response on the ground that it was untimely filed the day before the April 2, 2020 hearing and without a motion for leave to file the late response. The Law Firm and Price did not file a response to the motion to strike.

On April 2, 2020, the trial court signed an order striking the Law Firm and Price's summary-judgment response and granting summary judgment for Virage.

On appeal, the Law Firm and Price argue that, although the summary judgment motion was set for a hearing on April 2, 2020, they believed that the hearing was cancelled as a result of several local governmental orders, issued between March 11, 2020 and March 24, 2020, addressing the COVID-19 pandemic, which they presented with their motion for new trial.

In reviewing the trial court's summary-judgment ruling, we are confined to the evidence that was before the trial court at the time of its ruling. *See Nguyen v. Citibank N.A.*, 403 S.W.3d 927, 932 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (declining to consider evidence not attached to summary-judgment

response); *Blankinship v. Brown*, 399 S.W.3d 303, 309 (Tex. App.—Dallas 2013, pet. denied) (considering only evidence before trial court at time it ruled on summary-judgment motion); *McMahan*, 108 S.W.3d at 482 (declining to consider evidence attached to motion for new trial that was not before trial court when it granted summary judgment).

In sum, the record reflects that the Law Firm and Price were afforded the requisite notice of the summary-judgment hearing and did not file their summary-judgment response until the day before the hearing. Thus, the response was not timely filed. *See* TEX. R. CIV. P. 166a(c). However, the Law Firm and Price did not request leave to file their late response, seek a continuance, respond to Virage's motion to strike the response as untimely filed, attach any evidence to their response, or otherwise raise in the trial court that their response was timely because they believed that the hearing had been cancelled.

"A nonmovant who complains of less than twenty-one days' notice of a summary judgment hearing but admits to knowing of the hearing date before it occurs waives its defense of insufficient notice if he fails to bring the defect to the trial court's attention at or before the erroneously scheduled hearing or submission date." *Schied v. Merritt*, No. 01-15-00466-CV, 2016 WL 3751619, at *4 (Tex. App.—Houston [1st Dist.] July 12, 2016, no pet.) (mem. op.). The party must file a motion for continuance or raise the complaint of late notice in writing, supported by

affidavit evidence, and raise the issue before the trial court. *Nguyen v. Short, How, Frels & Heitz, P.C.*, 108 S.W.3d 558, 560 (Tex. App.—Dallas 2003, pet. denied). The non-movant waives any objection to an untimely notice by failing to object. *Id.* Here, the Law Firm and Price have waived this complaint. *See id.*

The Law Firm and Price complain on appeal that they were not afforded notice that the trial court intended to hear Virage's summary-judgment motion by submission, rather than by oral hearing. They complain that "[i]f the motion is going to be heard by submission, Harris County Local Rule 3.3.3 requires the Motion to state that fact, and also requires 'at least 10 days' notice of the submission date. Harris Cnty. L.R. 3.3.3."

Harris County Local Rule 3.3.3. states: "Submission. Motions may be heard by written submission. Motions shall state Monday at 8:00 a.m. as the date for written submission. This date shall be at least 10 days from filing, except on leave of court. Responses shall be filed at least two working days before the date of submission, except on leave of court." HARRIS CTY. DIST. CT. R. 3.3.3. It is undisputed that the Law Firm and Price were afforded *21 days'* notice of the hearing. *See* TEX. R. CIV. P. 166a(c). Under Rule 166a(c), the date of submission has the same meaning as the date of hearing. *See Martin*, 989 S.W.2d at 359. Although Rule 166a calls for a hearing on the motion, the "term 'hearing' does not necessarily contemplate either a personal appearance before the court or an oral

presentation to the court." *Id*. An oral hearing is not mandatory. *Id.* The trial court may determine the merits of a summary-judgment motion based only upon the pleadings, discovery responses, sworn affidavits, and other valid evidence submitted as grounds for granting or denying the motion. *See* TEX. R. CIV. P. 166a(c). In this case, the trial court chose to take the summary judgment under submission without an oral hearing. *See Giese v. NCNB Tex. Forney Banking Ctr.*, 881 S.W.2d 776, 783 (Tex. App.—Dallas 1994, no pet.) (noting trial court discretion to forego oral hearing in summary judgment proceedings).

We hold that the Law Firm and Price have waived their complaint that the trial court granted Virage summary judgment without proper notice to the Law Firm and Price. *See* TEX. R. CIV. P. 166a(c). We further hold that the trial court did not abuse its discretion in striking the Law Firm and Price's summary-judgment response. *See Carpenter*, 98 S.W.3d at 688.

Accordingly, the Law Firm and Price having presented no evidence to raise a fact issue, we conclude that Virage conclusively established its right to judgment on its claim against the Law Firm for breach of the Note and its claim against Price for breach of the Guaranty. We hold that the trial court did not err in granting summary judgment in favor of Virage on its claims. *See* TEX. R. CIV. P. 166a(c); *KPMG Peat Marwick*, 988 S.W.2d at 748.

We overrule the Law Firm's and Price's first and second issues.

Motion for New Trial

In their third and fourth issues, the Law Firm and Price argue that the trial court erred in denying their motion for new trial because they were not afforded adequate notice of the submission of Virage's summary-judgment motion, Virage failed to conclusively establish its right to judgment, and they "established each of the *Craddock* factors." In their fourth issue, the Law Firm and Price assert that the trial court erred in not allowing them to present evidence and witnesses at the hearing on their motion for new trial and erred in failing to file findings of fact and conclusions of law.

"After a court grants a summary judgment motion, the court generally has no obligation to consider further motions on the issues adjudicated by the summary judgment." *Macy v. Waste Mgmt., Inc*., 294 S.W.3d 638, 651 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). We review the trial court's denial of a motion for new trial for an abuse of discretion. *In re R.R.*, 209 S.W.3d 112, 114 (Tex. 2006); *St. Mina Auto Sales, Inc. v. Al-Muasher*, 481 S.W.3d 661, 664 (Tex. App.—Houston [1st Dist.] 2015, pet. denied). A trial court abuses its discretion if its decision is arbitrary, unreasonable, and without reference to guiding rules and principles. *See Goode v. Shoukfeh*, 943 S.W.2d 441, 446 (Tex. 1997); *Imkie v. Methodist Hosp*., 326 S.W.3d 339, 344 (Tex. App.—Houston [1st Dist.] 2010, no pet.).

A. Evidentiary Hearing on Motion for New Trial

The Law Firm and Price argue that the trial court erred in "refusing to allow [them] to proceed with an evidentiary hearing" on their motion for new trial. They complain that they were not allowed to offer evidence or witnesses at the hearing.

When a party files a motion for reconsideration or new trial after the trial court hears and rules on a motion for summary judgment, the court may ordinarily consider only the record as it existed before hearing the summary-judgment motion for the first time. *Circle X Land & Cattle Co. v. Mumford Indep. Sch. Dist*., 325 S.W.3d 859, 863 (Tex. App.—Houston [14th Dist.] 2010, pet. denied). However, the trial court may consider evidence submitted with a motion for reconsideration if the trial court affirmatively indicates in the record that it accepted or considered the evidence. *Id.*; *Stephens v. Dolcefino*, 126 S.W.3d 120, 133 (Tex. App.—Houston [1st Dist.] 2003, no pet.); *see also* TEX. R. CIV. P. 166a(c) (providing that late-filed summary-judgment evidence requires leave of court); *PNP Petroleum I, LP v. Taylor*, 438 S.W.3d 723, 731 (Tex. App.—San Antonio 2014, pet. denied) (stating that trial court has discretion to refuse to consider new evidence attached to motion to reconsider summary-judgment ruling).

Again, although Rule 166a calls for a hearing on the motion for summary judgment, the term "hearing" does not necessarily contemplate either a personal appearance before the court or an oral presentation to the court. *Martin*, 989 S.W.2d

at 359. Because oral testimony cannot be adduced in support of, or in opposition to, a motion for summary judgment, an oral hearing is not mandatory. *Id.* Whether to hold an evidentiary hearing on a motion for new trial in a civil matter is within the sound discretion of the trial court. *Jefa Co. v. Mustang Tractor & Equip. Co*., 868 S.W.2d 905, 909 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

Here, the record shows that the trial court held a hearing on the Law Firm and Price's motion for new trial. The reporter's record of the hearing reflects that, at the hearing, the Law Firm and Price offered the same documents into evidence that they attached to their motion for new trial, including the affidavit of their counsel, Alan Gerger, and the documents he referenced in his affidavit, i.e., the March 24, 2020 "Order of County Judge Lina Hidalgo, Stay Home, Work Safe"; the "Harris County District Courts Inclement Weather, Emergency, and Public Health Scheduling Procedures"; a printout of "Current Events" from the Harris County District Court's website and "Harris County District Courts—Civil Division, Alternate Schedule"; and the Harris County District Court's civil docket for April 2, 2020. Counsel for the Law Firm and Price explained on the record: "Basically what we did, Judge, we just made a copy of that declaration and the attachments and marked it Defendant's Exhibit 1 for purposes of this hearing so the Court could, hopefully, admit it into evidence." Counsel for Virage responded, "I can't object to what's in the Court's file anyway." The trial court expressly stated that it would take judicial notice of the

documents and consider them. The Law Firm and Price agreed and continued, throughout the hearing, to ask the trial court to take judicial notice of each of their documents. Each time, the trial court agreed. The Law Firm and Price do not direct us to any point in the record in which they objected to a refusal by the trial court to consider or admit their evidence. Thus, this issue is not preserved for our review. *See* TEX. R. APP. P. 33.1.

To the extent that the Law Firm and Price complain that the trial court erred in refusing to allow them to present oral testimony, such was entirely within the trial court's discretion, as oral testimony is inadmissible at a summary-judgment hearing. *See* TEX. R. CIV. P. 166a(c) ("No oral testimony shall be received at the hearing."); *see, e.g.*, *Herrera v. Alejos*, No. 01-16-00841-CV, 2017 WL 4545728, at *7 (Tex. App.—Houston [1st Dist.] Oct. 12, 2017, no pet.) (mem. op.) (holding trial court did not err in refusing oral testimony at hearing on motion for new trial after summary judgment). We hold that the Law Firm and Price have not demonstrated that the trial court abused its discretion in refusing to hold an evidentiary hearing on their motion for new trial. *See Jefa*, 868 S.W.2d at 909.

B. Notice and Response

The Law Firm and Price argue that the trial court erred in denying their motion for new trial because the evidence they adduced at the hearing on their motion for new trial established that they were not afforded adequate notice that Virage's

summary-judgment motion would be heard by submission on April 2, 2020. In their brief on appeal, they admit: "The summary judgment motion was filed on March 12, 2020, and set for a hearing on April 2, 2020." They assert, however, that the April 2, 2020 hearing was cancelled as a result of several local orders addressing COVID-19. They complain that Virage never reset its motion or informed them that the motion would be considered by submission on April 2, 2020. And, "[d]espite the lack of notice, the Trial Court granted summary judgment on April 2, 2020," which "deprived [them] of their due process right to notice and an adequate opportunity to respond."

The Law Firm and Price attached to their motion for new trial the affidavit of their counsel, Gerger, who testified: "On or about March 12, 2020, I received [Virage's] Motion for Final Summary Judgment . . . . At the same time, I also received a Notice of Oral Hearing . . . , stating that 'Plaintiff's Final Motion for Summary Judgment is set to be heard in this Matter on **Thursday, April 2, 2020 at 8:30 a.m.** . . ." (Emphasis in original). Gerger testified, "I then believed that the deadline for filing a response . . . was March 26, 2020." However, on March 24, 2020, he "read and became aware of orders from various governmental authorities regarding staying place in Harris County, Texas, due to the COVID-19 pandemic." Based on these orders, he concluded that the hearing on Virage's summary-judgment motion had been cancelled, and he "stopped further work on the [Law Firm's and

Price's] response to the Motion [for summary judgment] and did not finalize it or obtain an affidavit from [Price] at that time."

Gerger further testified in his affidavit that, at 7:00 a.m. on April 1, 2020, he accessed the dockets on the Harris County District Clerk's website and did not see this case set for an oral hearing. He noted, however, that other cases appeared. He called the trial court clerk and asked "whether the hearings on the Court's docket for April 2, 2020, the next day, were proceeding and [the clerk] said 'of course.'" Further, Gerger noted, the clerk said that "the Motion [in this case] would be heard on submission." And, the clerk suggested that "if [Gerger] wanted the Court to consider anything on submission, [he] should be sure that it was in the Court's file before submission."

Later that day, the Law Firm and Price filed their summary-judgment response. Although, as Gerger acknowledged that their response was due on March 26, 2020, the Law Firm and Price did not file a motion for leave to file their late response or move for a continuance. We note that the orders from the various governmental authorities, regarding the COVID-19 pandemic and on which the Law Firm and Price now rely, are dated March 12, 2020 through March 24, 2020. And, Gerger testified that he reviewed them on March 24, 2020. Thus, these orders, and the Law Firm's and Price's awareness of the orders, pre-date the filing of their April 1, 2020 summary-judgment response and the April 2, 2020 hearing. However,

despite having learned from the clerk that the trial court intended to move forward with submission as previously scheduled, the Law Firm and Price did not complain in their response or present the COVID-19 orders in a motion for leave to file their late response or in a motion for continuance.

In addition, also on April 1, 2020, Virage filed a motion to strike the Law Firm and Price's summary-judgment response on the ground that it was not timely filed—having been filed only one day before the April 2, 2020 hearing on the motion for summary judgment. *See* TEX. R. CIV. P. 166a(c). However, the Law Firm and Price did not file a response to the motion to strike or otherwise argue in the trial court that their summary-judgment response was timely because the hearing had been cancelled based on the COVID-19 orders.

The record shows that on April 2, 2020, the trial court signed an order striking the Law Firm and Price's summary-judgment response and granting summary judgment for Virage.

Because the Law Firm and Price admit that they had 21 days' notice and that their response was due by March 26, 2020, they were afforded requisite notice of the hearing and received a reasonable opportunity to present a written response and evidence. *See id.*; *Whiteside v. Ford Motor Credit Co.*, 220 S.W.3d 191, 194–95 (Tex. App.—Dallas 2007, no pet.) (mem. op.). They were not deprived of an

adequate opportunity to respond to the motion for summary judgment. *See Martin*, 989 S.W.2d at 359; *Tex. Integrated Conveyor Sys.*, 300 S.W.3d at 363.

Because the Law Firm and Price did not file a motion for leave to file a late response, or a motion for continuance, their complaint of inadequate notice is waived. *See Schied*, 2016 WL 3751619, at *4 ("A nonmovant who complains of less than twenty-one days' notice of a summary judgment hearing but admits to knowing of the hearing date before it occurs waives its defense of insufficient notice if he fails to bring the defect to the trial court's attention at or before the erroneously scheduled hearing or submission date."); *Nguyen*, 108 S.W.3d at 560 (holding party must file motion for continuance or raise complaint of late notice in writing, supported by affidavit evidence, and raise issue before trial court or it is waived). We need not parse through the various COVID-19 orders presented with their motion for new trial, or determine their effect on this case, because the record shows that the Law Firm and Price had an opportunity to present them to the trial court prior to the scheduled summary-judgment hearing and did not. *See Schied*, 2016 WL 3751619, at *4; *Nguyen*, 108 S.W.3d at 560.

We hold that the trial court did not abuse its discretion in denying the Law Firm and Price's motion for new trial on this ground. *See St. Mina Auto Sales*, 481 S.W.3d at 664.

C. Breach-of-Contract Claims

The Law Firm and Price argue that the trial court erred in denying their motion for new trial because Virage failed to conclusively establish its right to judgment on its breach-of-contract claims. Having held above, however, that the trial court did not err in granting summary judgment for Virage on its breach-of-contract claims, we likewise hold that the trial court did not err in denying the Law Firm's and Price's motion for new trial asserting the same grounds. *See id.*

D. *Craddock* Factors

The Law Firm and Price argue that, because the trial court struck their summary-judgment response, the trial court's summary judgment in favor of Virage should be treated like a default judgment and reviewed under the equitable standard articulated in *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124 (Tex. 1939). In *Craddock*, the Texas Supreme Court held that a trial court should set aside a default judgment if the non-movant establishes that (1) its failure to respond resulted from an accident or mistake and not from conscious indifference or an intentional act; (2) the motion for new trial alleges a meritorious defense; and (3) granting the motion will not cause undue delay or otherwise injure the plaintiff. *Id.* at 126. If the defaulting party establishes that it did not receive notice of the default judgment hearing, then it need not establish proof of a meritorious defense. *Ayele v. Jani-King of Hous., Inc.*, 516 S.W.3d 630, 632 (Tex. App.—Houston [1st Dist.] 2017, no pet.).

The Law Firm and Price argue that the trial court erred in denying their motion for new trial because they satisfied the *Craddock* factors, as applied in the context of no-response summary-judgment cases.

In *Carpenter v. Cimarron Hydrocarbons Corp*., however, the supreme court held that *Craddock* does not extend to a "motion for new trial filed after summary judgment is granted on a motion to which the nonmovant failed to timely respond when the [non-movant] had notice of the hearing and an opportunity to employ the means our civil procedure rules make available to alter the deadlines Rule 166a imposes," such as a motion for leave to file a late response or a motion for continuance. 98 S.W.3d 682, 683–84 (Tex. 2002).

Here, as discussed above, the Law Firm and Price received timely notice of the summary-judgment hearing, and they had an opportunity to file a motion for leave to file a late response or to request a continuance. *See id*. They did not employ any procedural means to alter the deadlines imposed by Rule 166a. *See id*. Accordingly, *Craddock* is inapplicable. *See id*. at 686.

E. Findings of Fact and Conclusions of Law

The Law Firm and Price assert that the trial court erred in not filing findings of fact and conclusions of law after the denial of their motion for new trial. They assert that they timely requested findings of fact and conclusions of law and timely filed a notice of past due findings. However, the trial court never filed its findings.

They assert: "To the extent the Motion for New Trial Hearing was evidentiary and the evidence [they] submitted to the Trial Court in support of their Motion for New Trial is not taken as true even though it was largely uncontroverted, then the trial court erred in failing to file findings of fact and conclusions of law." They assert that they are harmed because they are "left to guess at the reasons why their Motion for New Trial was denied."

"In any case tried in the district or county court without a jury, any party may request the court to state in writing its findings of fact and conclusions of law." TEX. R. CIV. P. 296. A case is "tried" when there is an evidentiary hearing before the court upon conflicting evidence. *Puri v. Mansukhani*, 973 S.W.2d 701, 708 (Tex. App.—Houston [14th Dist.] 1998, no pet.). Rule 296 gives a party "a right to findings of fact and conclusions of law finally adjudicated *after a conventional trial on the merits* before the court." *IKB Indus. (Nigeria) Ltd. v. Pro-Line Corp*., 938 S.W.2d 440, 442 (Tex. 1997) (emphasis added). In cases other than those finally adjudicated after a conventional trial on the merits, "findings and conclusions are proper, but a party is not entitled to them." *Id.* Although a trial court may make findings of fact and conclusions of law following an evidentiary hearing on a motion for new trial, Rule 296 does not require such findings or conclusions. *Cf.* TEX. R. CIV. P. 296. Notably, a motion for new trial may be overruled by operation of law. TEX. R. CIV . P. 329b(c). We conclude that the trial court was not required to issue

findings of fact and conclusions of law after the hearing on the Law Firm and Price's motion for new trial. *See Puri*, 973 S.W.2d at 707.

In sum, we hold that the trial court did not abuse its discretion in denying the Law Firm and Price's motion for new trial on the asserted grounds. *See St. Mina Auto Sales*, 481 S.W.3d at 664.

We overrule the Law Firm's and Price's third and fourth issues.

Conclusion

We affirm the trial court's judgment.

Sherry Radack
Chief Justice

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