

Opinion issued July 28, 2022



In The
Court of Appeals
For The
First District of Texas

NO. 01-20-00761-CV

ZACKERY R. ALOLABI, Appellant

V.

THOMAS J. CHRETIEN AND MICHEL MEYER, Appellees

**On Appeal from the 334th District Court
Harris County, Texas
Trial Court Case No. 2015-00147**

MEMORANDUM OPINION

Zackery Alolabi appeals a final judgment after trial that awarded Thomas Chretien damages for breach of contract and attorney's fees. In four issues, he argues that the judgment is not final and that the court erred in voiding a lis pendens, admitting certain evidence, and awarding attorney's fees. We affirm.

Background

Appellee Thomas Chretien invested in a series of restaurants operated by appellant Zackery Alolabi. After several years, the two decided to end their business relationship. They met at the Houstonian hotel in order to agree to a “business divorce.” Alolabi’s lawyer at the time, Jason Kraus, was present for the negotiations. Chretien and Alolabi reached an agreement that divided their assets and obligations.

The contract included a \$50,000 promissory note to be paid to Chretien by Alolabi in monthly installments. After the contract was executed, Alolabi made two monthly payments on the \$50,000 note but did not pay additional monthly installments. Chretien sued Alolabi for breach of the promissory note. Alolabi answered and asserted affirmative defenses and counterclaims. Alolabi argued that the promissory note was part of the larger contractual agreement negotiated at the Houstonian. He alleged that Chretien had failed to perform under that agreement. Alolabi also filed a notice of lis pendens on a house mentioned in the contract.

After a year of litigation, in February 2016, Michel Meyer intervened in the lawsuit. Meyer sought to protect his interests as part of a deal he had with Chretien concerning a house mentioned in Chretien’s agreement with Alolabi. Meyer nonsuited his claims against Chretien before trial. At the same time, Meyer sought

leave to amend his pleading, asserting new claims against Alolabi. He also asked the court to sever the claims. The court did not rule on the motion.

The case proceeded to a jury trial in February 2020. The principal issue at trial was whether Chretien and Alolabi entered into a contract and if so, whether either party breached the contract. The parties disagreed about the terms of the final contract. According to Chretien, the final signed contract included many struck-through and handwritten terms. According to Alolabi, the signed agreement was a clean copy, without any struck-through sections.

Alolabi argued that termination of a lease at one of the restaurant locations was a condition precedent for his performance of all other terms of the contract. Chretien argued that Alolabi's performance under the contract was not conditioned on the termination of the lease. Chretien also testified that he settled separately with the landlord, paying \$25,000 and incurring attorney's fees to settle the dispute.

The jury found that Chretien and Alolabi had agreed to a binding contract to settle their business disputes. The jury found that Alolabi failed to comply with that contract by failing to make a payment on a credit card, failing to defend and indemnify Chretien, and failing to prepare appropriate tax documentation evidencing a capital loss in 2014 and 2015. The jury found that Alolabi did not fail

to comply with the promissory note. The jury awarded Chretien \$27,800 in actual damages on his contract claim against Alolabi.

A few months after trial, Chretien moved for entry of judgment and sought attorney's fees totaling \$162,852, plus additional fees for appeal. Alolabi responded, objecting to the fees as not reasonable or necessary. He also argued that some of the fees needed to be segregated. Alolabi then filed a crossclaim against Meyer, asserting, for the first time, claims for breach of contract, promissory estoppel, unjust enrichment, fraud, and negligent misrepresentation. The claims concerned an attorney's fee arrangement that Alolabi alleged he had with Meyer.

The court entered final judgment awarding Chretien the \$27,800 damages found by the jury as well as \$162,852 in attorney's fees through trial, with additional amounts defined for stages of appeal. The final judgment also expunged Alolabi's notice of lis pendens.

Alolabi appealed. On appeal, he does not contest the jury's findings. Instead, he challenges that the judgment is not yet final, that the court erred in admitting certain evidence, that the lis pendens was improperly expunged, and that the court erred in awarding attorney's fees. We affirm.

Finality of the Judgment

In his first issue, Alolabi claims that the trial court erred by entering a judgment that did not dispose of all parties and claims. Alolabi argues that the trial

court's judgment is erroneous because Meyer had outstanding claims against him and because he asserted crossclaims against Meyer that were not determined in the final judgment. Meyer asserts that he had no pending claims against either Chretien or Alolabi at the time of final judgment. He dismissed his claims against Chretien prior to the suit. He also argues that he never asserted any claims against Alolabi. Chretien argues that Meyer's claims against Alolabi were live at trial, but because Meyer was present at trial and chose not to pursue his claims to the jury, Meyer waived any further right to pursue them.

A. Procedural background

Meyer intervened in the lawsuit between Alolabi and Chretien in 2016. Meyer asserted claims against Chretien for breach of contract, unjust enrichment, and promissory estoppel, which he nonsuited following settlement of those claims with Chretien.

On the same day that he filed the nonsuit, Meyer sought leave to file an amended petition in intervention asserting new claims against Alolabi. Meyer asserted that his new causes of action had not become justiciable until Meyer and Chretien settled their dispute. Meyer sought to add new claims against Alolabi for breach of contract, promissory estoppel, and unjust enrichment based on Alolabi's breach of a 2017 agreement between Meyer and Alolabi. Meyer argued that the claims arose out of a contract separate from the one that was the subject of the

underlying case between Alolabi and Chretien and involved Alolabi's personal debt to Meyer. He also asked that the court sever his claims into a new separate lawsuit.

Alolabi challenged the motion for leave to file an amended petition and motion to sever and sought to strike the pleading. Meyer never set the motion for a hearing or obtained a ruling. On the first day of trial, Meyer's counsel mentioned the amended pleading and motion to sever to the court, and the court responded that it would consider them. Neither Alolabi nor Meyer obtained rulings from the court on their motions.

The judgment concludes, "The court denies all relief not expressly granted in this Final Judgment. This is a final judgment as to all parties and all claims and is appealable for all purposes."

B. Standard of review

There can only be one final judgment in this cause. *See* TEX. R. CIV. P. 301. Generally, a judgment is final when it "actually disposes of all claims and parties then before the court, regardless of its language, or it states with unmistakable clarity that it is a final judgment as to all claims and all parties." *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 192–93 (Tex. 2001). An appellate court determines the finality of a judgment by the language of the judgment. *Id.* at 199.

In the absence of a contrary showing in the record, a judgment rendered after a conventional trial on the merits carries a presumption of finality. *See Houston Health Clubs, Inc. v. First Court of Appeals*, 722 S.W.2d 692, 693 (Tex. 1986) (orig. proceeding); *N.E. Indep. Sch. Dist. v. Aldridge*, 400 S.W.2d 893, 897–98 (Tex. 1966) (“When a judgment, not intrinsically interlocutory in character, is rendered and entered in a case regularly set for a conventional trial on the merits, no order for a separate trial of issues having been entered . . . it will be presumed for appeal purposes that the Court intended to, and did, dispose of all parties legally before it and of all issues made by the pleadings between such parties.”). Otherwise, no such presumption arises. *Lehmann*, 39 S.W.3d at 199–200; *see also Aldridge*, 400 S.W.2d at 898 (concluding, “In the absence of a contrary showing in the record,” judgment entered after case was set for conventional trial on the merits was presumed final for purposes of appeal). “If there is any doubt as to the judgment’s finality, then finality must be resolved by a determination of the intention of the court as gathered from the language of the decree and the record as a whole, aided on occasion by the conduct of the parties.” *Vaughn v. Drennon*, 324 S.W.3d 560, 563 (Tex. 2010) (per curiam) (internal quotation marks, bracketing, and capitalization omitted).

C. Analysis

The trial court's judgment is final and properly disposes of all claims and parties before it. A judgment need not explicitly address every party and claim for it to be a final judgment for purposes of appeal. *See Moritz v. Preiss*, 121 S.W.3d 715, 718–19 (Tex. 2003). In *Moritz*, the Supreme Court held that though the plaintiff sued four parties for medical malpractice but only submitted jury questions as to three, the judgment was final for purposes of appeal as to all parties. *Id.* at 719 (stating nothing in the record indicated that the trial court did not intend the judgment to dispose of the entire case). Similarly, the Supreme Court held in *John v. Marshall Health Servs., Inc.*, 58 S.W.3d 738, 740 (Tex. 2001) (per curiam), that even though a judgment failed to mention three defendants who had settled, the finality presumption applied to all parties.

1. Meyer did not have any live claims against Chretien at the time of trial.

Less than a week before trial, on January 30, 2020, Meyer nonsuited his claims against Chretien. A plaintiff may take a nonsuit at any time before introducing all of his evidence other than rebuttal evidence. TEX. R. CIV. P. 162. A plaintiff's nonsuit is effective immediately on filing. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). At the time of trial, Meyer did not have any live claims against Chretien.

2. Meyer waived his claims against Alolabi by not presenting them to the jury.

Less than a week before trial, Meyer sought leave to file his amended petition in intervention asserting new claims against Alolabi, and he also moved to sever the new claims from the underlying case. *See* TEX. R. CIV. P. 63 (stating that any pleadings filed within seven days of trial or thereafter, shall be filed only after obtaining leave of court). Alolabi moved to strike the pleading. Neither party obtained rulings on these motions. *See* TEX. R. APP. P. 33.1 (failure to obtain a ruling waives complaint for appellate review). Therefore, this complaint is not preserved for our review.

Even assuming the trial court granted leave to file the amended pleading but did not sever the claims, Alolabi did not seek a continuance to prepare for trial. Meyer was present for trial and did not present his claims to the jury. Meyer waived his claims. *See* TEX. R. CIV. P. 279 (claims not submitted to the jury are waived).

3. Alolabi's late-filed amended petition against Meyer was not properly before the court at the time of final judgment.

Alolabi also argues that he had claims against Meyer that were not disposed by the final judgment. Months after trial, Chretien moved for entry of final judgment. Alolabi then filed a crossclaim against Meyer for breach of contract, alleging that Meyer failed to pay his portion of attorney's fees pursuant to their

joint defense agreement. The trial court entered the final judgment a week later. Alolabi did not obtain leave of court to file his pleading after trial. *See* TEX. R. CIV. P. 63.

“A court may not refuse a [post-verdict] trial amendment unless (1) the opposing party presents evidence of surprise or prejudice, or (2) the amendment asserts a new cause of action or defense and thus is prejudicial on its face.” *State Bar of Tex. v. Kilpatrick*, 874 S.W.2d 656, 658 (Tex. 1994) (citing *Greenhalgh v. Serv. Lloyds Ins. Co.*, 787 S.W.2d 938, 939 (Tex. 1990)); *accord Hardin v. Hardin*, 597 S.W.2d 347, 349–50 (Tex. 1980). The court’s decision to grant or deny such an amendment will not be reversed unless “a clear abuse of discretion” is shown. *Kilpatrick*, 874 S.W.2d at 658 (citing *Hardin*, 597 S.W.2d at 349–50).

Alolabi’s post-verdict amendment is prejudicial on its face because it asserted a new cause of action. *Kilpatrick*, 874 S.W.2d at 658. The claims tried to the jury concerned whether Alolabi breached a contract with Chretien regarding the dissolution of their business relationship. The amended cause of action concerned attorney’s fees and an alleged agreement between Meyer and Alolabi. This amendment is not the type contemplated by Rule 67 of the Rules of Civil Procedure, as a dispute about attorney’s fees was not tried by consent to the jury. *See* TEX. R. CIV. P. 67. Therefore, the trial court did not abuse its discretion in denying the amended pleading. *Kilpatrick*, 874 S.W.2d at 658.

* * *

The language of the decree, the record as a whole, and the conduct of the parties support the presumption that the judgment was final. *See Lehmann*, 39 S.W.3d at 203. There is nothing in the record to rebut the presumption that the trial court intended to, and did, dispose of all parties and all issues before it. *Aldridge*, 400 S.W.2d at 897–98. The trial court did not err in entering the final judgment.

We overrule Alolabi’s first issue.

Admission of Evidence

In his second issue, Alolabi argues that the trial court erred by admitting certain evidence. Specifically, Alolabi contends that the trial court erroneously admitted a pleading filed in a separate lawsuit. The lawsuit was filed by Alolabi against his former attorney, Jason Kraus, who helped negotiate the contract between Alolabi and Chretien at the Houstonian. Alolabi argues that the admission of the evidence was reversible error because it caused the rendition of an improper judgment in favor of Chretien. We disagree.

A. Standard of review

We review a trial court’s decision to admit evidence for an abuse of discretion. *Bay Area Healthcare Grp., Ltd. v. McShane*, 239 S.W.3d 231, 234 (Tex. 2007). A trial court abuses its discretion when it acts arbitrarily or unreasonably, or without reference to any guiding rules and principles. *Bowie*

Mem'l Hosp. v. Wright, 79 S.W.3d 48, 52 (Tex. 2002). To show the trial court abused its discretion, an appellant must demonstrate that: (1) the trial court erred in admitting the evidence; (2) the evidence was controlling on a material issue dispositive of the case and not cumulative; and (3) the error probably caused rendition of an improper judgment in the case. *Jones v. Pesak Bros. Constr., Inc.*, 416 S.W.3d 618, 632 (Tex. App.—Houston [1st Dist.] 2013, no pet.). If there is any legitimate basis for a trial court's evidentiary ruling, the appellate court must uphold it. *Id.* (citing *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998)).

B. Analysis

Alolabi argues that the pleading that Chretien offered into evidence was not relevant because pleadings are mere allegations and the underlying lawsuit was dismissed. Chretien responds that the petition was relevant to whether Alolabi breached a contract with Chretien. The issue between Chretien and Alolabi at trial was whether they had contracted to dispose of their business dealings, and if so, whether that contract was conditioned upon the termination of a lease at one of the restaurant's locations.

Outside the jury's presence during his questioning of Alolabi, Chretien's counsel offered the petition filed by Alolabi against lawyer Jason Kraus, who attended the contract negotiation between Alolabi and Chretien at the Houstonian.

Kraus helped Alolabi negotiate the underlying contract with Chretien. Alolabi objected, claiming that the petition was irrelevant. Chretien responded that it was relevant because Alolabi's theory at trial was that the contract between Alolabi and Chretien was conditioned on the termination of a restaurant lease. The petition showed that, in 2017, when suing his attorney for malpractice, Alolabi claimed the opposite. He sued his attorney claiming that his attorney failed to make the contract with Chretien contingent on the termination of the lease. The court overruled Alolabi's objection and admitted the pleading into evidence.

In front of the jury, Alolabi testified that his performance under the contract with Chretien was conditioned upon the termination of the lease, and that it was Chretien's responsibility to help obtain it. Chretien's counsel read from Alolabi's petition against Kraus and questioned Alolabi about it. The petition against the attorney alleged that the attorney breached a fiduciary duty by "fail[ing] to make the promissory note conditioned upon the execution of the Westheimer lease termination agreement." Alolabi did not deny that he made that allegation in the lawsuit against his former attorney. On appeal, Alolabi argues that the pleading was irrelevant because the cause of action was dismissed and his former attorney was not found liable for malpractice.

Texas Rule of Evidence 401 provides that evidence is relevant if it has any tendency to make a fact of consequence more or less probable than it would be

without the evidence. TEX. R. EVID. 401. The evidence was relevant to the question of whether Alolabi breached a contract with Chretien. At trial, Alolabi testified that he did not breach because lease termination was a condition precedent. The pleading showed that he sued his former attorney alleging the opposite. The suit against the attorney alleged that the attorney committed malpractice by not making the contract between Alolabi and Chretien contingent on the termination of the lease. The petition against the attorney arises from the same facts that were at issue in the trial between Alolabi and Chretien. We cannot say that the trial court acted unreasonably or arbitrarily in admitting the petition. *Bowie Mem'l Hosp.*, 79 S.W.3d at 52.

To the extent Alolabi argues that the evidence was not admissible because it was hearsay or improper impeachment evidence, this argument is waived. A complaint on appeal that does not comport with the party's objection at trial is not preserved for review. TEX. R. APP. P. 33.1(a). At trial, he objected based only on relevancy. Alolabi did not raise any other objections to the evidence in the trial court. Any argument regarding its admissibility based on hearsay or improper impeachment is not preserved for our review. TEX. R. APP. P. 33.1(a).

The trial court did not abuse its discretion in admitting the evidence over Alolabi's relevancy objection.

We overrule Alolabi's second issue.

Lis Pendens

Chretien originally sued Alolabi for breach of a promissory note. Alolabi responded that the note was part of a larger contract. Among the terms of the contract was an agreement regarding a residential property. According to the contract, once Alolabi paid Chretien \$50,000 that was subject to a promissory note, Chretien was to transfer his interest in the property to Michel Meyer. When Alolabi filed his answer to Chretien's suit, he also filed a notice of lis pendens regarding the residential property.

On appeal, Alolabi argues that the trial court erred by expunging the lis pendens in the final judgment. Chretien responds that any issue with the lis pendens is moot because the property was sold after the final judgment was entered. We hold that the trial court did not err by declaring the lis pendens void.

A. Applicable law

A lis pendens placed in the property records is notice to third parties of a dispute concerning ownership of the property. *See In re Miller*, 433 S.W.3d 82, 84 (Tex. App.—Houston [1st Dist.] 2014, orig. proceeding). “[D]uring the pendency of an action involving title to real property [or] the establishment of an interest in real property,” a party seeking affirmative relief may file a lis pendens in the real property records of the county where the property is located. TEX. PROP. CODE § 12.007(a). The notice must contain certain information, including the style and

cause number of the proceedings, the court where it is pending, the names of the parties, identification of the kind of proceedings, and a description of the property affected. *Id.* at §12.007(b). A properly filed lis pendens is not itself a lien, but rather it operates as constructive notice “to the world of its contents.” *Id.* at § 13.004(a); *see also B & T Distribs., Inc. v. White*, 325 S.W.3d 786, 789 (Tex. App.—El Paso 2010, no pet.) (“The purpose of a notice of lis pendens is to put those interested in a particular tract of land on inquiry about the facts and issues involved in the suit and to put prospective buyers on notice that they acquire any interest subject to the outcome of the pending litigation.”).

Once a lis pendens has been filed, the statute allows removal of the lis pendens either by expunction or cancellation. *See* TEX. PROP. CODE §§ 12.0071 (motion), 12.008 (cancellation). The court “shall” expunge the lis pendens if (1) “the pleading on which the notice is based does not contain a real property claim,” or (2) the claimant fails to establish by a preponderance of the evidence the probable validity of the real property claim.” *Id.* § 12.0071(c)(1–2). The court is required to rule on the motion to expunge based on affidavits and counter affidavits on file and on any other proof the court permits. *Id.* § 12.0071(e).

B. Analysis

Chretien moved to expunge the lis pendens because Alolabi did not plead a real property claim. *See* TEX. PROP. CODE § 12.0071(c)(1). We begin with an

analysis of whether each claim as pleaded is a “real property claim” *In re Gaudet*, 625 S.W.3d 887, 892 (Tex. App.—El Paso 2021, orig. proceeding). At the time Alolabi filed the notice of lis pendens, the only pending pleadings before the court were Chretien’s petition against Alolabi, which was a claim for breach of a promissory note, and Alolabi’s counter-petition against Chretien.*

To constitute a real property claim, the claim must “involv[e] title to real property, the establishment of an interest in real property, or the enforcement of an encumbrance against real property.” TEX. PROP. CODE § 12.007(a). A real estate claim must “support the award of real property based on” the claim asserted. *Gaudet*, 625 S.W.3d at 892 (quoting *In re Chong*, No. 14-19-00368-CV, 2019 WL 2589968, at *2 (Tex. App.—Houston [14th Dist.] June 25, 2019, orig. proceeding) (mem. op.) (relator’s breach of contract claim was not a real property claim because it would result in damages only and not a claim to title to the property)).

Alolabi’s pleading did not allege any real property claims against Chretien. Alolabi’s breach of contract claim alleges that Chretien breached an agreement to transfer title of a motorcycle to Alolabi. The conversion claim alleges that Chretien retained possession of the motorcycle despite Alolabi’s demand for its return. Alolabi’s unjust enrichment claim alleges that Chretien was unjustly enriched

* While Meyer, as an intervenor, asserted a claim against Chretien regarding an interest in real property, Meyer had not filed his claims at the time Alolabi filed the notice of lis pendens. Meyer nonsuited his claims before trial.

when Alolabi paid him \$110,000 in cash without the occurrence of a condition precedent. Alolabi asserts that the condition precedent that did not occur was the leasing company's cancellation of the restaurant lease. In the alternative, Alolabi alleges a claim for promissory estoppel based on his reliance to his economic detriment that Chretien would transfer title to the motorcycle. Finally, Alolabi sought a declaratory judgment that he was excused from further performance of his agreement with Chretien.

Alolabi's claims cannot form the basis for a valid *lis pendens*. *See* TEX. PROP. CODE § 12.007(a). None of the claims he alleges against Chretien support the award of real property. *Gaudet*, 625 S.W.3d at 892 (quoting *Chong*, 2019 WL 28589968, at *2). Alolabi does not explain how his notice of *lis pendens* is based on a pleading that alleges a real property claim. When the underlying pleading does not assert a real property claim, the statute dictates that the trial court must expunge the *lis pendens*. TEX. PROP. CODE § 12.0071(c)(1). The trial court did not err in expunging the *lis pendens* in the final judgment because the underlying pleadings did not include a real property claim.

We overrule Alolabi's third issue.

Attorney's Fees

In his final issue, Alolabi complains about the attorney's fees awarded by the court. He contends that the trial court erred in awarding attorney's fees without an

oral hearing, that the amount the trial court awarded needed to be segregated because Chretien did not prevail on all causes of actions, that there was no evidence of presentment for the claim on which Chretien prevailed, and that the attorney's fees award was disproportionate to the damages awarded by the jury. We hold that the trial court did not err in awarding attorney's fees.

A. Lack of hearing

Alolabi argues that the trial court erred by awarding attorney's fees without an oral hearing. Chretien responds that Alolabi did not preserve this complaint for appellate review. We agree.

Before trial, the parties agreed that the court would decide the issue of attorney's fees, rather than the jury. Months after the jury's verdict, Chretien moved for entry of judgment, including attorney's fees. He attached an affidavit from his counsel and time sheets to support his fee request.

Alolabi opposed the motion. He objected to the amount of fees, but he did not object to the procedure of submitting them through a motion or to the court deciding them without an oral hearing. He also did not attach evidence to controvert the evidence Chretien presented regarding attorney's fees. After the judgment was entered, Alolabi moved to modify the judgment and for remittur. Again, he did not argue that the trial court erroneously entered judgment on attorney's fees without a hearing.

As a prerequisite to presenting a complaint for appellate review, the record must reflect that the complaint was made to the trial court by a timely request, objection, or motion with enough specificity to make the trial court aware of the complaint. TEX. R. APP. P. 33.1(a)(1). Alolabi failed to present his complaint to the trial court. We hold that his complaint regarding the entry of attorney's fees without oral hearing is waived.

B. Fee segregation

Alolabi contends that the trial court erred in awarding Chretien 100% of the fees he requested because Chretien did not segregate the fees. Chretien responds that he did not need to segregate the fees. We agree with Chretien.

Chretien initially sued Alolabi for breach of a promissory note. Alolabi responded with affirmative defenses and counterclaims, arguing that the promissory note was part of a larger contract. Alolabi argued that Chretien had breached the larger contract and that the promissory note must be considered in context. On appeal, Alolabi appears to argue the opposite. He argues that the claims for breach of the promissory note and breach of the contract were not part of the same transaction. According to Alolabi, Chretien needed to segregate fees because Chretien did not prevail on his claim for breach of promissory note.

Because "Texas law [does]not allow[] for recovery of attorney's fees unless authorized by statute or contract," attorney's fees claimants "have always been

required to segregate fees between claims for which they are recoverable and claims for which they are not.” *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 310–11 (Tex. 2006). The need to segregate attorney’s fees is a question of law, and the extent to which certain claims can or cannot be segregated is a mixed question of law and fact. *Id.* at 312–13.

The party seeking to recover attorney’s fees carries the burden of demonstrating that fee segregation is not required. *See Hong Kong Dev., Inc. v. Nguyen*, 229 S.W.3d 415, 455 (Tex. App.—Houston [1st Dist.] 2007, no pet.). If any attorney’s fees relate solely to claims for which fees are not recoverable, a claimant must segregate recoverable from unrecoverable fees. *Tony Gullo Motors I, L.P.*, 214 S.W.3d at 313. “Intertwined facts do not make all attorney’s fees recoverable; it is only when discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated.” *Id.* at 313–14.

Parties are not required to segregate attorney’s fees when expended on defeating counterclaims or affirmative defenses that were an obstacle to recovery of the party’s own claims. *Tony Gullo Motors I, L.P.*, 214 S.W.3d at 314. Chretien initially brought suit against Alolabi in January 2015, and Alolabi asserted his defenses and filed his counterclaims about one month later. Chretien prevailed on his breach of contract claim but not on his breach of promissory note claim.

All the parties claims and counterclaims arose out of the same transaction, depended upon the same essential facts, and used the same documents and witnesses. *Cajun Constructors, Inc. v. Velasco Drainage Dist.*, 380 S.W.3d 819, 827–28 (Tex. App.—Houston [14th Dist.] 2012, pet. denied). Chretien argued that Alolabi did not fulfill his obligation under a promissory note, and Alolabi argued that the promissory note obligation was part of a larger contractual obligation between the parties. The parties disputed the terms and conditions precedent for the larger contractual obligation. Defending against Alolabi’s counterclaims and affirmative defenses was intertwined with Chretien’s claims regarding the settlement agreement. *Tony Gullo Motors I, L.P.*, 214 S.W.3d at 313–14. Because all of the litigation centered on the same facts and documents, Alolabi’s defenses were based on the same transaction that Chretien needed to defend to recover on his own contract claim. The trial court did not err in awarding the attorney’s fees without segregation.

C. Presentment

Alolabi argues that attorney’s fees are not available because Chretien failed to present his claim for attorney’s fees to Alolabi. Chretien responds that Alolabi waived this argument. We agree.

Under section 38.002 of the Texas Civil Practice and Remedies Code, to recover attorney’s fees on a breach of contract claim: (1) the claimant must be

represented by an attorney; (2) the claimant must present the claim to the opposing party or his authorized agent; and (3) payment for the just amount owed must not have been tendered before the expiration of 30 days after the claim is presented. *See* TEX. CIV. PRAC. & REM. CODE § 38.002. “The purpose of presentment is to allow the opposing party a reasonable opportunity to pay a claim without incurring an obligation for attorney’s fees.” *Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 809, 818 (Tex. 2006). Presentment must be raised at the trial court to be preserved on appeal. *See* TEX. R. APP. P. 33.1(a); *Coleman v. Coleman*, No. 01-09-00615-CV, 2010 WL 5187612, at *2 (Tex. App.—Houston [1st Dist.] Dec. 23, 2010, no pet.) (mem. op.) (holding failure to raise section 38.002 presentment at the trial court waived issue on appeal); *Dumler v. Quality Work by Davidson*, No. 14-06-00536-CV, 2008 WL 89961, at *6 (Tex. App.—Houston [14th Dist.] Jan. 10, 2008, no pet.) (mem. op.) (same).

On appeal, Alolabi argues that he preserved his complaint by including it in his response to the motion for entry of judgment and his motion to modify the judgment. A review of the trial court briefing does not support this assertion. These motions argued that attorney’s fees should be segregated and were excessive. Alolabi failed to raise presentment at the trial court and failed to preserve error. TEX. R. APP. P. 33.1.

D. Excessive award

Alolabi argues that the trial court's \$162,852.00 attorney's fees award is excessive. Specifically, he argues that the amount of attorney's fees is excessive in relation to the \$27,800 in damages that the jury awarded.

We review a trial court's award of attorney's fees for an abuse of discretion. *See Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 850 (Tex. 2018). We review the amount of attorney's fees awarded under a legal sufficiency standard. *See Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 490 (Tex. 2019). We may sustain a legal sufficiency challenge only when (1) the record bears no evidence of a vital fact, (2) the rules of law or of evidence bar the court from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a mere scintilla, or (4) the evidence establishes conclusively the opposite of a vital fact. *City of Keller v. Wilson*, 168 S.W.3d 802, 819 (Tex. 2005). In determining whether there is legally sufficient evidence to support the finding under review, we must consider evidence favorable to the finding if a reasonable factfinder could, and disregard evidence contrary to the finding unless a reasonable factfinder could not. *Id.* at 827.

To establish entitlement to attorney's fees, a prevailing party has the burden to prove his fees are both reasonable and necessary. *Rohrmoos*, 578 S.W.3d at 387. Factfinders should consider the following factors when determining the

reasonableness of a fee: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly; (2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered. *Id.* at 494 (citing *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997)). Attorney's fees must bear some reasonable relationship to the amount in controversy. *Bank of Tex. v. VR Elec., Inc.*, 276 S.W.3d 671, 684 (Tex. App.—Houston [1st Dist.] 2008, pet. denied). But the amount of damages awarded is only one factor in determining the reasonableness of a fee award. *Id.* at 684–85.

The record shows that the litigation in this case took place over the course of five years. It culminated with a jury trial that lasted several days with multiple witnesses. The parties engaged in post-trial litigation as well. Chretien's counsel submitted a detailed affidavit explaining the legal work performed. He also stated that the rates charged were reasonable rates based on the experience of each

attorney who worked on the case. He submitted invoices showing the work performed.

Alolabi did not submit a controverting affidavit contesting the reasonableness of the legal fees incurred by Chretien. Section 18.001 of the Texas Civil Practice and Remedies Code provides that, unless a controverting affidavit is filed, an affidavit as to the amount of attorney's fees will be presumed reasonable. *See* TEX. CIV. PRAC. & REM. CODE § 18.001; *see also Hunsucker v. Fustok*, 238 S.W.3d 421, 432 (Tex. App.—Houston [1st Dist.] 2007, no pet.). Although Alolabi contends that the amount of attorney's fees awarded is excessive, he presented no evidence that the rate charged is unreasonable or that the amount of time dedicated to the case was unreasonable or unnecessary. *See Bank of Tex.*, 276 S.W.3d at 685).

On appeal, Alolabi complains that the amount of attorney's fees awarded is disproportionate to the damages awarded by the jury. The amount of damages awarded is but one factor to consider when assessing the reasonableness of an attorney's fees award, and a disproportionate relationship between the amount of damages and attorney's fees awarded does not alone render the attorney's fees award excessive. *Jetall Cos., Inc. v. Plummer*, No. 01-18-01091-CV, 2020 WL 5900577 at *11, (Tex. App.—Houston [1st Dist.] Oct. 6, 2020, pet. denied) (mem. op.) (citing cases upholding attorney's fee awards of six to ten times amount of

actual damages after considering entire record in each case). The trial court did not err in awarding \$162,852.00 in attorney's fees.

We overrule Alolabi's issues related to attorney's fees.

Conclusion

We affirm the judgment of the trial court. All pending motions are dismissed as moot.

Peter Kelly
Justice

Panel consists of Justices Kelly, Countiss, and Rivas-Malloy.