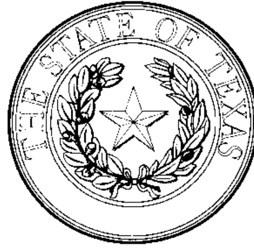
Opinion issued June 30, 2022



In The

Court of Appeals

For The

First District of Texas

NO. 01-21-00447-CV

MEDIC PHARMACY, LLC AND DESIREE COLEMAN, Appellants
V.

AVK PROPERTIES, LLC, Appellee

On Appeal from the 412th District Court
Brazoria County, Texas
Trial Court Case No. 108453-CV

MEMORANDUM OPINION

Appellants, Medic Pharmacy, LLC ("Medic") and Desiree Coleman ("Coleman"), challenge the trial court's summary judgment in favor of appellee, AVK Properties, LLC ("AVK"), in AVK's suit against Medic for breach of a commercial lease and against Coleman for breach of a guaranty. In three issues,

Medic and Coleman contend that the trial court erred in granting summary judgment for AVK on an unpled conversion claim and that AVK failed to conclusively establish that it was entitled to judgment on its breach-of-contract claims.

We reverse and remand.

Background

On May 29, 2019, AVK, as landlord, and Medic, as tenant, entered into a commercial lease ("Lease"), under which AVK let to Medic 1,200 square feet of retail space ("Property") in a shopping center located in Pearland, Brazoria County, Texas. In conjunction with the Lease, AVK entered into a guaranty agreement ("Guaranty") with Medic's owner, Coleman.

The stated term of the Lease was for 39 months, beginning on June 1, 2019. Pursuant to the Lease, Medic agreed to pay "Base Monthly Rent" beginning on October 1, 2019 (after build out) of $2,564.00 and graduating over the term. Medic also agreed to pay "Additional Rent," i.e., its pro rata share of the projected monthly expenses for common area maintenance ("CAM"), taxes, and insurance, as provided in a "Commercial Lease Addendum" ("Addendum"), and to pay most utilities.

Pursuant to the Lease, payment of rent was due on the first day of each month. A failure to pay rent within five days after the due date constituted a default and subjected Medic to fees and penalties. In the event of a default, Article 20 of the

Lease authorized AVK to terminate Medic's occupancy, to accelerate all rents due for the remainder of the Lease, and to recover certain costs and damages, including:

> (1) any lost rent;
>
> (2) [AVK's] cost of reletting the leased premises . . . ;
>
> (3) repairs to the leased premises for use beyond normal wear and tear;
>
> . . .
>
> (5) all [of AVK's] costs associated with collection of rent such as collection fees, late charges . . . ; [and]
>
> . . .
>
> (9) any other recovery to which [AVK] may be entitled under this lease or under law.

The Lease further provided that:

> Any alterations, improvements, fixtures or additions to the Property or leased premises installed by either party during the term of this lease will become [AVK's] property and must be surrendered to [AVK] at the time this lease ends, except for those fixtures [AVK] requires [Medic] to remove . . . or if the parties agree otherwise in writing.

AVK agreed to use commercially reasonable means to mitigate any losses.

In the attached Guaranty, Coleman, in consideration for AVK leasing the Property to Medic, guaranteed Medic's performance of the Lease, as follows:

> If Tenant fails to timely make any payment under the lease, Guarantor[] will promptly make such payment to Landlord . . . . Guarantor is responsible for any property damage to the leased premises or Property (as defined in the lease) for which Tenant is responsible under the lease. If Tenant breaches the lease, Guarantor will: (i) cure the breach as may be required of Tenant by the lease; or (ii) compensate Landlord for Landlord's loss resulting from the breach.

It is undisputed that AVK tendered possession of the Property to Medic, that Medic occupied the Property, and that it vacated the Property during the Lease term.

AVK alleged that, beginning in February 2020, Medic breached the Lease by failing to pay as agreed. And, in May 2020, Medic breached the Lease by abandoning the Property, by removing a kitchen vent hood and fire suppression system belonging to AVK under the Lease, and by damaging 700 square feet of ceiling grid during the removal.

On May 28, 2020, AVK sent Medic and Coleman a Notice of Default, stating that Medic had "abandoned the leased premises on or about May 19, 2020 at night without any notice" and had removed fixtures and equipment, including a vent hood and fire suppression system belonging to AVK, and that Medic had damaged the ceiling during the removal. AVK demanded payment of unpaid rent, fees, and utilities, the return of the vent hood and fire suppression system, and reimbursement for ceiling repairs. AVK relet the Property and began collecting rent on July 25, 2020, and it sought it costs from Medic and Coleman.

After Medic and Coleman failed or refused to cure the default, AVK asserted a claim against Medic for breach of the Lease and against Coleman for breach of the Guaranty. Medic and Coleman each answered, generally denying the allegations.

AVK moved for a summary judgment, arguing that it was entitled to judgment as a matter of law on its claims because there were no issues of material fact. With

respect to Medic, AVK asserted that its evidence conclusively established a valid lease, that it had performed its obligations, and that Medic had breached the Lease by failing to pay as agreed, by abandoning the Property, by removing fixtures and equipment owned by AVK, and by damaging the Property during the removal. AVK also asserted that its evidence established that Coleman had unconditionally guaranteed Medic's performance under the Lease and had failed, after notice, to cure the default. AVK sought damages for unpaid rent, fees, and utilities, the vent hood and fire suppression system, and ceiling repairs. In support of its motion, AVK attached the affidavit of its Property Manager, Lomil Truitt, copies of the Lease, Guaranty, and Notice of Default, and an affidavit in support of attorney's fees.

In his affidavit, Truitt testified as follows:

> 2. [AVK] is the owner of the property located at 9603 Broadway Street, Pearland, Texas 77584, and Plaintiff herein.
>
> 3. On or about May 29, 2019, [Medic] (as Tenant) and [Coleman] (as Guarantor) entered into a [Lease] under which there was leased to [Medic] the portion of the shopping center therein described (the "Lease Premises") for a period of thirty-nine (39) months. [Coleman] personally guaranteed the Lease. [AVK] is the party entitled to recover all rentals and other monies due thereunder.
>
> 4. [AVK] tendered possession of the leased premises to Defendants and Defendants occupied the same. The [Lease] provided for Defendants to pay rent in the amounts per month set forth therein, plus taxes, CAM and insurance expenses on the first day of each month. Defendants failed to pay the rent plus taxes, CAM and insurance expenses due for February 1, 2020, and thereafter, and abandoned the leased premises.

5. On or about May 19, 2020, Defendants abandoned the Lease Premises and removed fixtures and equipment attached to the leased premises and thus owned by [AVK]. Defendants removed the following equipment and fixtures and caused the following damage to the Lease Premises in removing said fixtures and equipment:

Item:	Replacement Cost:
700 S.F. of the ceiling grid	$1,800.00
Fire suppression system	$2,700.00
7-foot Vent Hood	$10,000.00
Total:	$14,500.00

6. Defendants' liability for rent and other charges for breach of the Lease Agreement is set forth as follows:

February Rent and CAM Charges	$ 3,200.00
March Rent and CAM Charges	3,200.00
April Rent and CAM Charges (50% paid)	1,600.00
May Rent and CAM Charges (50% paid)	1,600.00
June Rent and CAM Charges	3,200.00
July Rent and CAM Charges (prorated 24/31 days@ $3,200.00)	2,476.80
Late Charges (10% amount owed per Lease)	1,527.68
Fixtures and Equipment taken from Lease Premises	14,500.00
Balance rent owed for September 2019	100.00
CenterPoint Energy (June - September 2019)	531.64
Less Security Deposit	(3,400.00)
TOTAL DUE:	$ 28,536.12

7. [AVK] was able to relet the premises and collect rent beginning on July 25, 2020.

8. Defendants . . . owe [AVK] [$28,536.12] in accordance with the terms of the Lease. [AVK] has made written demand upon Defendants, but Defendants have failed to pay the amount owing.

In their summary-judgment response, Medic and Coleman asserted that AVK failed to conclusively establish the elements of its claims. They further denied "owing rent in the amount of $3,200.00 for the months of February 2019 [sic] through July, 2019 [sic]." They asserted that the Lease provided for a "monthly base

rent of $2,564.00 during this period" and was "silent regarding any specific amount of CAM." They asserted that AVK had relet the Property on May 25, 2020, and not on July 25, 2020. They admitted having removed the vent hood and fire suppression system, but asserted that they had purchased and installed these items.

The trial court granted summary judgment for AVK and awarded it damages against Medic and Coleman in the amount of $28,536.12 and attorney's fees.

Summary Judgment

In their second and third issues, Medic and Coleman argue that the trial court erred in granting summary judgment for AVK on a "conversion cause of action" because AVK did not move for a summary judgment on that cause of action and, alternatively, because AVK failed to present "legally sufficient summary judgment evidence" to support a conversion claim. In their first issue, Medic and Coleman argue that the trial court erred in granting summary judgment for AVK on its claim for breach of the Lease because AVK failed to present legally sufficient evidence conclusively proving the validity of the Lease and its damages.

Standard of Review

We review a trial court's summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). In 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 Powe*r, *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). 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, 222–23 (Tex. 1999). A plaintiff seeking a summary judgment on damages must also 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) ("[T]he 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 people could differ in their conclusions in light of all of the evidence. *See Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007).

Conversion

In their second issue, Medic and Coleman argue that the trial court erred in granting summary judgment for AVK on a "conversion cause of action" because AVK did not move for a summary judgment on that claim.

A summary judgment may not be granted on grounds that were not presented. *Nall v. Plunkett*, 404 S.W.3d 552, 555 (Tex. 2013). "Granting a summary judgment on a claim not addressed in the summary judgment motion . . . is, as a general rule, reversible error." *G&H Towing Co. v. Magee*, 347 S.W.3d 293, 297 (Tex. 2011).

The record shows that the trial court granted a summary judgment for AVK without stating its grounds. The trial court's judgment does not reflect any express ruling on a conversion claim.

In its petition, AVK initially asserted damages for the removal of "fixtures and equipment" under breach-of-contract and conversion theories. Subsequently, however, in its summary-judgment motion, AVK requested damages for the removal of the fixtures and equipment under a breach-of-contract theory, as follows:

> On or about May 19, 2020, [Medic] *breached the Lease by* abandoning the Lease Premises and *removing fixtures and equipment* that were owned by [AVK], totaling $33,000.00 in value converted by Defendants. The removal of the fixtures and equipment further caused

> damage to the inside of the Lease Premises. Defendants have *breached the Lease*. During move-out, Defendants damaged the Lease Premises, removed fixtures and equipment belonging to [AVK] and converted same, and *failed to comply with the terms of the Lease*.

(Emphasis added.) AVK sought a judgment against Medic and Coleman "for all rent due as of the time of judgment and other damages *under the Lease Agreement* as allowed by law." (Emphasis added.) It presented an itemized list of damages, which included "Fixtures and Equipment taken from Lease Premises," and it requested damages "[i]n accordance with Lease Article 20."

In its brief on appeal, AVK explains:

> The Lease states that any fixtures installed by either party become [AVK's] property and must be surrendered to [AVK] at the time the lease ends. Thus, Defendants' failure to surrender the fixtures to [AVK] is a breach of the Lease and recoverable under a breach of contract cause of action. The conversion cause of action was simply listed as an alternative cause of action and was [an un]necessary cause of action to be pled in [AVK's] Amended Motion for Summary Judgment as [AVK] could recover the same damages under the breach of contract cause of action.

Thus, the record shows that AVK requested a judgment awarding damages for the removal of the fixtures and equipment under a breach-of-contract theory and not as a conversion claim.[1] *See Eun Bok Lee v. Ho Chang Lee*, 411 S.W.3d 95, 111–

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[1] We note that conversion involves a wrongful exercise of control over the *personal* property of another. *Waisath v. Lack's Stores, Inc.*, 474 S.W.2d 444, 447 (Tex. 1971). "Texas does not recognize conversion claims for real property." *Corral-Lerma v. Border Demolition & Env't Inc.*, 467 S.W.3d 109, 124 (Tex. App.—El Paso 2015, pet. denied). "Fixtures are considered realty." *Id.*

12 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (holding evidence insufficient to support that gasoline tanks, cooler, and vapor recovery system were subject to conversion and considering recovery under theory of unjust enrichment).

We hold that the trial court did not grant summary judgment for AVK on an unpled conversion claim. Accordingly, we do not reach Medic and Coleman's third issue, in which they assert, in the alternative, that AVK "failed to produce legally sufficient summary judgment evidence to support one or more elements of the conversion cause of action upon which summary judgment was granted."

We overrule Medic and Coleman's second issue.

Breach of Contract

In their first issue, Medic and Coleman argue that the trial court erred in granting summary judgment for AVK on its claim for breach of the Lease and Guaranty because AVK failed to "produce legally sufficient summary judgment evidence" of the existence and terms of a valid lease and its damages.

To be entitled to a summary judgment on its breach-of-contract claim against Medic and Coleman, AVK was required to establish, as a matter of law: (1) valid contracts with Medic and Coleman, (2) AVK's performance or tender of performance, (3) Medic's and Coleman's breach of their respective contracts, and (4) damages as a result of each breach. *See Prime Prods., Inc. v. S.S.I. Plastics, Inc.*, 97 S.W.3d 631, 636 (Tex. App.—Houston [1st Dist.] 2002, pet. denied).

(1) *Valid Contract*

The elements of a valid contract are: (1) an offer, (2) an acceptance, (3) a meeting of the minds, (4) each party's assent to the terms, and (5) execution and delivery of the contract with the intent that it be mutual and binding. *Id.* In addition, to be enforceable, a contract must be sufficiently clear and definite in its material terms such that a court can determine the parties' legal obligations. *Fort Worth Indep. Sch. Dist. v. City of Fort Worth*, 22 S.W.3d 831, 846 (Tex. 2000).

AVK presented a copy of the Lease, which reflects that its material terms, i.e., identification of the parties, description of the leased premises, the Lease term, and the parties' obligations thereunder, are specified. *See T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex. 1992). The Lease and Addendum reflect that they were executed by Coleman, as owner of Medic. "[A] party manifests its assent by signing an agreement." *Rachal v. Reitz*, 403 S.W.3d 840, 845 (Tex. 2013). There is a "legal presumption that a party who signs a contract knows its contents." *Cantella & Co. v. Goodwin*, 924 S.W.2d 943, 944 (Tex. 1996). And, a party is "bound by the terms of the contract he signed, regardless of whether he read it or thought it had different terms." *In re McKinney*, 167 S.W.3d 833, 835 (Tex. 2005). Thus, AVK presented evidence establishing that the parties entered into a valid contract. *See DeClaire v. G & B Mcintosh Fam. Ltd. P'ship*, 260 S.W.3d 34, 44 (Tex. App.—Houston [1st Dist.] 2008, no pet.); *Prime Prods.*, 97 S.W.3d at 636.

AVK also presented a copy of the Guaranty, which provides that Coleman, as Guarantor, in consideration for AVK leasing the Property to Medic, guaranteed Medic's performance. The Guaranty is executed by Coleman. The evidence establishes that the parties entered into a valid guaranty agreement. *See Prime Prods.*, 97 S.W.3d at 636.

Medic and Coleman argue that the copy of the Lease that AVK presented is "not competent evidence of the existence of a valid lease" because it is (1) not signed by AVK; (2) not accompanied by a business records affidavit; (3) not attached to the affidavit of Truitt; and (4) not sworn to or certified as being a true and correct copy, as required by Texas Rule of Civil Procedure 166a(f). *See* TEX. R. CIV. P. 166a(f).

A lease of real estate for a term longer than one year, as here, must be signed *by the person to be charged*, i.e., Medic. *See* TEX. BUS. & COM. CODE § 26.01(a), (b)(5). Medic and Coleman do not direct us to any authority that the validity or enforceability of the Lease, as against them, requires that AVK, as the party enforcing the Lease, have signed the copy of the Lease presented.

With respect to Medic and Coleman's remaining complaints about the authenticity of the Lease, Rule 166a requires that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." *See* TEX. R. CIV. P. 166a(f). The Rule also states, however, 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). Defects in form do not render 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 v. Bocell*, 982 S.W.2d 52, 60 (Tex. App.—Houston [1st Dist.] 1998, no pet.). Such defects include "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. v. Carver*, No. 01-16-01010-CV, 2018 WL 1473897, at *5 (Tex. App.—Houston [1st Dist.] Mar. 27, 2018, no pet.) (mem. op.) (citing examples).

An objection to a defect in form must be presented to the trial court, and the complaining party must obtain a ruling on its objection. *FieldTurf USA, Inc. v. Pleasant Grove Indep. Sch. Dist*., 642 S.W.3d 829, 837 (Tex. 2022) (citing TEX. R. APP. P. 33.1(a), TEX. R. CIV. P. 166a(f)). "Without both an objection and a ruling, the complained-of evidence remains part of the summary judgment record and should be considered by the court of appeals in reviewing the trial court's judgment." *Id.*

Here, Medic and Coleman complain that Truitt's affidavit is not a proper business records affidavit, that he did not state that the Lease was a true and correct copy, and that the Lease is not attached to Truitt's affidavit.

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." (emphasis added)); *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 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, as here, 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]).

The record shows that Truitt, in his affidavit, referenced specific portions of the Lease, incorporated and discussed the pertinent language in the Lease, and swore under oath that the facts were "within [his] personal knowledge and are true and correct." Medic and Coleman's complaints that Truitt's affidavit is not a proper business records affidavit and that he failed to also state that the Lease was a true

and correct copy assert defects of form. *See id.* Because Medic and Coleman did not raise their objections in the trial court, their complaints are waived. *See FieldTurf USA*, 642 S.W.3d at 837; *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 affiant to state that facts in attached document were true and correct constituted defect of form that was waived by failure to object); *Hicks v. Humble Oil & Ref. Co.*, 970 S.W.2d 90, 93 (Tex. App.—Houston [14th Dist.] 1998, pet. denied) (holding complaint that exhibits were not properly authenticated asserted defect of form requiring objection).

Further, Medic and Coleman's complaint that the Lease, although attached to AVK's summary-judgment motion, is not attached to Truitt's affidavit asserts a defect of form that required an objection in the trial court. *See Penn*, 363 S.W.2d at 234 (holding complaint that agreement, although in record, was not attached directly to affidavit constituted "purely formal" deficiency that was waived). Because they did not object in the trial court and obtain a ruling, the matter is waived. *See id*.

(2) *AVK's Performance*

Medic and Coleman do not dispute that AVK performed its obligations under the Lease and Guaranty, as agreed. *See Prime Prods.*, 97 S.W.3d at 636.

(3) *Breach*

In his affidavit, Truitt testified that Medic and Coleman breached the Lease and Guaranty, respectively, as follows:

> 4. . . . . The [Lease] provided for Defendants to pay rent in the amounts per month set forth therein, plus taxes, CAM and insurance expenses on the first day of each month. Defendants failed to pay the rent plus taxes, CAM and insurance expenses due for February 1, 2020, and thereafter, and abandoned the leased premises.
>
> 5. On or about May 19, 2020, Defendants abandoned the Lease Premises and removed fixtures and equipment attached to the leased premises and thus owned by the Plaintiff. Defendants removed the following equipment and fixtures and caused the following damage to the Lease Premises in removing said fixtures and equipment: [List]
>
> . . . .
>
> 8. . . . . [AVK] has made written demand upon Defendants, but Defendants have failed to pay the amount owing.

Thus, AVK presented evidence establishing that Medic breached the Lease by failing to pay rent as agreed, by abandoning the Property during the term of the Lease, by removing fixtures and equipment attached to the Property, and by damaging the Property in their removal. *See id.* AVK's evidence also establishes that Coleman breached the Guaranty by failing or refusing, after notice, to cure Medic's default. *See id.*

(4) *Damages*

Medic and Coleman assert that AVK's only evidence of the damages element of its claim "is a single paragraph in [Truitt's] amended affidavit which lists the

amount of claimed damages with no reference to any underlying facts to support the conclusions."

The objective in measuring damages in a breach-of-contract claim is to provide just compensation for any loss or damage actually sustained as a result of the breach. *See Clear Lake City Water Auth. v. Friendswood Dev. Co*., 344 S.W.3d 514, 523 (Tex. App.—Houston [14th Dist.] 2011, pet. denied). Benefit-of-the-bargain damages restore a party to the economic position it would have been in had the contract been performed. *See id.* "Measuring benefit-of-the-bargain damages often entails looking back to the time of the transaction and reconstructing an asset's hypothetical value at a particular point in the past." *Credit Suisse AG v. Claymore Holdings, LLC*, 610 S.W.3d 808, 821 (Tex. 2020).

"[T]he general rule in cases involving injury to real property is that the proper measure of damages is the cost to restore or replace, plus loss of use for temporary injury, and loss in fair market value for permanent injury." *Gilbert Wheeler, Inc. v. Enbridge Pipelines (E. Tex.), L.P.*, 449 S.W.3d 474, 479, 481 (Tex. 2014) (holding cost to restore applicable to breach-of-contract actions). A property owner "may recover reasonable costs of such replacements and repairs as are necessary to restore damaged property to its condition immediately prior to the injury." *Z.A.O., Inc. v. Yarbrough Drive Ctr. Joint Venture*, 50 S.W.3d 531, 544–45 (Tex. App.—El Paso 2001, no pet.) (internal quotations omitted) (holding that cost to restore was an

appropriate measure of damages for injury to real property caused by breach of commercial lease agreement).

In support of its damages, AVK presented the terms of the Lease, which provided that AVK agreed to lease to Medic a commercial space, described as 1,200 square feet of rentable area, for a term of 39 months, beginning on June 1, 2019. In exchange, Medic agreed to pay Base Monthly Rent in the amount of $2,564.00 from October 1, 2019 through September 30, 2020, and graduating thereafter, but not pertinent here. (The Lease refers to the period between June 1, 2019 and September 30, 2019 as "Build out time" and states no amount for Base Monthly Rent.) Medic also agreed to pay Additional Rent, as provided in the Addendum. The Addendum states that Medic agreed to pay its pro rata share of the projected monthly expenses for CAM, taxes, and insurance, which totaled $0.53 per rentable square foot and that the area of Medic's lease space was 1,200 square feet. Further, Medic was to pay all utilities, except for water, sewer, and trash, and to reimburse AVK for any payment it made on behalf of Medic. Medic agreed to pay rent on the first of each month, or to otherwise pay certain fees and penalties, and that a failure to pay rent within five days after the due date constituted a default.

In the event of a default, the Lease authorized AVK to recover, as pertinent here, lost rent, repairs to the leased premises for use beyond normal wear and tear, late fees, and "any other recovery to which [AVK] may be entitled" under the Lease.

The Lease also provided that:

> *Any alterations, improvements, fixtures or additions* to the Property or leased premises *installed* by either party during the term of this lease *will become [AVK's] property and must be surrendered* to [AVK] at the time this lease ends, except for those fixtures [AVK] requires Tenant to remove . . . or if the parties agree otherwise in writing.

(Emphasis added.)

AVK also presented Truitt's affidavit, stating the following list of damages:

February Rent and CAM Charges	$ 3,200.00
March Rent and CAM Charges	3,200.00
April Rent and CAM Charges (50% paid)	1,600.00
May Rent and CAM Charges (50% paid)	1,600.00
June Rent and CAM Charges	3,200.00
July Rent and CAM Charges (prorated 24/31 days@ $3,200.00)	2,476.80
Late Charges (10% amount owed per Lease)	1,527.68
Fixtures and Equipment taken from Lease Premises	14,500.00
Balance rent owed for September 2019	100.00
CenterPoint Energy (June - September 2019)	531.64
Less Security Deposit	(3,400.00)
TOTAL DUE:	$ 28,536.12

Regarding the line item "Fixtures and Equipment taken from Lease Premises," Truitt presented the following list:

Item:	Replacement Cost:
700 S.F. of the ceiling grid	$1,800.00
Fire suppression system	$2,700.00
7-foot Vent Hood	$10,000.00
Total:	$14,500.00

With respect to "Rent and CAM Charges" for February, March, and June 2020, these amounts are supported by and readily ascertainable from the face of the Lease. *See Miller v. Vineyard*, 765 S.W.2d 865, 868 (Tex. App.—Austin 1989, writ

denied) (holding evidence based on terms of lease agreement sufficient to support damages awarded for breach). The Lease states that the applicable Base Monthly Rent for these months was $2,564.00. The Addendum further provides that the monthly CAM, taxes, and insurance due was $0.53 per rentable square foot and that the total area of the Property was 1,200 rentable square feet. When multiplied, these equal $636.00. The sum of $2,564.00 and $636.00 is $3,200.00. *See id.* Truitt's list of damages reflects that Medic paid "50%," or $1,600.00, of the same amounts due for April and May. Truitt also testified that, after Medic vacated the Property, AVK relet the Property to a new tenant and began collecting rent on July 25, 2020. Truitt's list of damages reflects that he applied prorated Rent and CAM Charges through July 24, 2020. The Lease states that Medic agreed to pay a "10% late fee on rent payments received after the 3rd day of the month." Truitt's list of damages reflects the addition of a 10% late fee in arriving at a total of $1,527.68.[2]

With respect to Truitt's listed damages of $100.00 for "Balance rent owed for September 2019," however, the Lease refers to the period between June 1, 2019 and September 30, 2019 as "Build out time" and states no amount for Base Monthly Rent. Truitt did not present any underlying facts or calculations regarding the source of this amount, as Additional Rent or otherwise.

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[2] The sum of $320.00 (February), $320.00 (March), $160.00 (April), $160.00 (May), $320.00 (June), and $247.68 (July) is $1,527.68.

An affidavit from a company officer claiming personal knowledge of the issue and of the company's records can support a summary judgment. *Brown v. Mesa Distribs., Inc.*, 414 S.W.3d 279, 287 (Tex. App.—Houston [1st Dist.] 2013, no pet.). "However, such an affidavit is sufficient summary judgment evidence only when it gives detailed accounts of the facts it attests to or when it provides supporting documents which tend to support the statements made." *Id.* An affidavit that constitutes "a conclusion without any explanation," does not provide the underlying facts to support the statement, or asks the factfinder to "take [the affiant's] word for it" is conclusory. *Arkoma Basin Expl. Co. v. FMF Assocs. 1990—A, Ltd.*, 249 S.W.3d 380, 389 (Tex. 2008). Conclusory statements are not competent summary-judgment evidence because they are not susceptible to being readily controverted. *Schindler v. Baumann*, 272 S.W.3d 793, 796 (Tex. App.—Dallas 2008, no pet.). Conclusory opinion testimony constitutes no evidence, regardless of whether it is challenged, and is insufficient to support a summary judgment. *See Nat. Gas Pipeline Co. of Am. v. Justiss*, 397 S.W.3d 150, 159 (Tex. 2012); *City of San Antonio v. Pollock*, 284 S.W.3d 809, 816 (Tex. 2009); *Juen v. Rodriguez*, 615 S.W.3d 362, 367 (Tex. App.—El Paso 2020, no pet.).

Similarly, with respect to Truitt's listed damages in the amount of $531.19 for "CenterPoint Energy (June - September 2019)," the Lease provides that Medic agreed to pay all utilities, except for water, sewer, and trash, and to reimburse AVK

for any payment of utilities for which Medic was responsible. However, Truitt did not provide any underlying facts or evidence of such payments.

Finally, Truitt's affidavit cannot be considered probative evidence of the value of the vent hood, fire suppression system, and property damage.

The Lease reflects that the parties intended that:

> *Any alterations, improvements, fixtures or additions* to the Property or leased premises *installed* by either party during the term of this lease *will become [AVK's] property and must be surrendered* to [AVK] at the time this lease ends, except for those fixtures [AVK] requires Tenant to remove . . . or if the parties agree otherwise in writing.

(Emphasis added.) Thus, regardless of the character of the vent hood and fire suppression system as fixtures or otherwise, the parties agreed to treat them as permanently affixed to the Property, unless AVK required their removal or the parties agreed otherwise. There is no evidence of such requirement or agreement.

However, Truitt's testimony does not reflect any of the underlying facts supporting his "Replacement Cost" valuation of the vent hood at $10,000.00 or the fire suppression system at $2,700.00. *See Juen*, 615 S.W.3d at 367; *Z.A.O., Inc.*, 50 S.W.3d at 544–45; *see, e.g.*, *Dayco Corp. v. Sherman*, No. 02-92-00229-CV, 1994 WL 17100832, at *8–9 (Tex. App.—Fort Worth Mar. 23, 1994, no writ) (discussing evidence of replacement costs of fixtures removed by tenant).

Further, Truitt does not provide any underlying facts or supporting evidence of the damage to the ceiling and the repairs he valued at $1,800.00. "A party seeking

recovery for the cost of repairs must prove their reasonable value." *Fort Worth Hotel Ltd. P'ship v. Enserch Corp.*, 977 S.W.2d 746, 762 (Tex. App.—Fort Worth 1998, no pet.); *see, e.g.*, *Samuels v. Nasir*, 445 S.W.3d 886, 893 (Tex. App.—El Paso 2014, no pet.) (holding landlord's evidence of property damage and repairs legally and factually sufficient); *Dayco Corp.*, 1994 WL 17100832, at *7 (considering evidence of costs to repair leased building).

Taking as true all evidence favorable to Medic and Coleman and indulging every reasonable inference and resolving any doubts in their favor, we conclude that AVK's summary-judgment evidence does not conclusively establish the damages element of its breach-of-contract claim. *See Prime Prods.*, 97 S.W.3d at 636; *see also Dorsett*, 164 S.W.3d at 661; *Rhône–Poulenc*, 997 S.W.2d at 223; *McRay*, 554 S.W.3d at 705. We hold that the trial court erred in granting summary judgment for AVK. *See* TEX. R. CIV. P. 166a(c).

We sustain Medic and Coleman's first issue.

Conclusion

We reverse the trial court's judgment and remand for further proceedings.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Goodman and Hightower.