Affirmed in part, Reversed and Remanded in part, and Reversed in part in Memorandum Opinion filed August 31, 2016.

In The

Fourteenth Court of Appeals

NO. 14-15-00443-CV

JIM-DANIELS NNAH, Appellant

V.

125 INTERESTS, INC., 6219 INTERESTS, LTD. n/k/a 5600 INTERESTS, LTD., AND DAVID NEAL GREENBERG, Appellees

---

On Appeal from the 270th District Court
Harris County, Texas
Trial Court Cause No. 2012-23146

M E M O R A N D U M O P I N I O N

Appellant Jim-Daniels Nnah challenges the summary judgment in favor of appellees 125 Interests, Inc., 6219 Interests, Ltd n/k/a 5600 Interests, Ltd., and David Neal Greenberg on his breach of contract, tortious interference, Texas Theft Liability Act, and Declaratory Judgments Act claims. In three issues, Nnah argues

that the trial court erred in granting appellees' traditional and no-evidence summary judgment motion.

We hold that appellees failed to seek summary judgment on Nnah's breach of contract claim against Greenberg and 125 Interests. Therefore, the trial court erred in granting appellees more relief than they sought in their traditional and no-evidence summary judgment. We nonetheless address the other claims raised in the summary judgment[1] that Nnah challenges[2] and determine that genuine issues of material fact exist on Nnah's claims for tortious interference with a contract, Texas Theft Liability Act, and Declaratory Judgments Act. We further hold that, in light of this conclusion, the trial court erred in awarding attorney's fees to appellees under the Texas Theft Liability Act. Accordingly, we affirm in part, reverse and remand in part, and reverse in part.

I. BACKGROUND

A. Overview

This suit originated as a suit on a personal guaranty. By counterclaims and a third party action, however, it later became a complex commercial real estate dispute over the rights and interests in the assignment of a promissory note regarding 6219 Richmond Avenue, Houston, Texas ("the Richmond property"). Nnah claims that in 2013, he bought the note, which included property taxes paid

[1] *See G & H Towing Co. v. Magee*, 347 S.W.3d 293, 298 (Tex. 2011) (holding that where the trial court grants more relief than requested, the court of appeals "should treat such a summary judgment as any other final judgment, considering all matters raised and reversing only those portions of the judgment based on harmful error") (citations omitted).

[2] Appellees' motion embraced five claims by Nnah: breach of contract, tortious interference, theft under the Texas Theft Liability Act, money had and received, and Declaratory Judgments Act. In his response, Nnah defended all five claims. The trial court granted summary judgment on all five claims. On appeal, however, Nnah does not challenge the trial court's ruling on his claim for "money had and received." Thus, to the extent Nnah raised a claim against 5600 Interests and 125 Interests for money had and received, we do not disturb the trial court's ruling in favor of appellees. *Jacobs v. Satterwhite*, 65 S.W.3d 653, 655–56 (Tex. 2001) (failure to raise an issue on appeal waives error on the issue).

in full. After all rights under the note had been assigned to Nnah, appellee 5600 Interests requested and received a refund on the property taxes it paid for 2011 and 2012. As a result, property taxes for these years became due along with interest and penalties; Nnah paid the property taxes for 2011 and 2012. The propriety of appellees' actions in relation to the sale of the note and the property taxes is the basis of Nnah's claims. Because our consideration of the summary judgment requires us to analyze the relationships of the parties, we detail the transactions fully.

B. The pre-lawsuit Richmond property transactions

Original sale of Richmond property to Coral Pearls

We begin with the prior transactions between the parties involving the Richmond property. In January 2011, Coral Pearls, LLC, which was owned and controlled by Nnah, purchased the Richmond property from 6219 Interests, Ltd. n/k/a 5600 Interests. David Neil Greenberg, a licensed real estate broker, is the sole limited partner of 5600 Interests. Coral Pearls financed $940,000.00 of the purchase price through the lender DG Interests, Ltd., an entity in which Greenberg is the sole director, president, and registered agent.

Coral Pearls executed a promissory note, which was secured by a deed of trust and vendor's lien upon the Richmond property. Under the terms of the promissory note, Coral Pearls was to pay $340,000.00 within one month of closing and $55,000.00 each quarter until the note was paid. Coral Pearls paid the initial $340,000.00, as well as the first quarterly payment in September 2011. Pursuant to a modification agreement and the addition of Nnah as an individual guarantor on the note, the second quarterly installment was delayed until January 2012.

Default and bankruptcy by Coral Pearls

Coral Pearls defaulted on its payment obligations and DG Interests accelerated the note, demanding that the balance of the note be paid immediately. When DG Interests attempted to foreclose on its security, Coral Pearls went into bankruptcy in March 2012. DG Interests assigned the note, the deed of trust, and the vendor's lien on the Richmond property to 125 Interests. Greenberg is also the sole owner, officer, and director of 125 Interests. Coral Pearls made no further payments on the note and it did not pay the 2011 or 2012 property taxes totaling $71,680.14.

Although 125 Interests remained the holder of the note and deed of trust for the Richmond property, in January 2013, the 2011 and 2012 property taxes for the Richmond property were paid from 5600 Interests' checking account.

C. The post-lawsuit Richmond property transactions

Lawsuit brought by appellees against Nnah

In 2012, to enforce Nnah's obligation as personal guarantor on the note, 125 Interests[3] sued Nnah individually in this case. In response to the lawsuit, Nnah filed counterclaims, joined Coral Pearls as a third-party plaintiff, and filed a third-party petition against Greenberg individually and against several of Greenberg's commonly controlled entities. Nnah's original claims against "the Greenberg parties" were for negligence, misrepresentation, fraud, conspiracy, fraud in the real estate transaction, violations of the Real Estate Licensing Act, alter-ego, successor liability and respondeat superior, and rescission. These claims were related to actions associated with the original real estate transaction for the Richmond property. The Greenberg parties filed their first no-evidence motion for summary

[3] In April 2012, DG Interests initially filed suit against Nnah, but later, in 2012, assigned its rights to 125 Interests.

judgment as to all of Nnah's counterclaims and third party claims, which was granted.[4] This ruling is not in dispute.

Sale of the Coral Pearls' note on the Richmond property to Nnah

In February 2013, after the property taxes had been paid and while the lawsuit against Nnah individually was pending, Greenberg and Nnah negotiated a new transaction involving the Richmond property. Nnah agreed to purchase Coral Pearls' note and deed of trust for the Richmond property from 125 Interests. In exchange for an assignment of all rights and interests in the note and deed of trust associated with the Richmond property, on February 21, 2013, Nnah paid $683,920.10, to 125 Interests. On that same day, Greenberg executed the assignment but refused to deliver it to Nnah until receipt of funds was verified in his bank account. The following day, February 22, 2013, Greenberg acknowledged receipt of the funds, but he did not deliver the assignment.

On February 23, 2013, Greenberg copied Nnah on an email stating that ad valorem property taxes paid for years 2011 and 2012 should have been included as part of the sale of the note. These taxes totaled $71,780.24. Greenberg requested an additional wire transfer in the amount of $71,780.24 to complete the transaction "on the agreed terms."

> We initially calculated the sum of $683,920.10 due under the note …. We double checked our calculations … and realized that we failed to include ad valorem property taxes for years 2011 and 2012. These taxes totaled $71,780.24 and were advanced under the note and pursuant to the deed of trust. Please wire transfer $71,780.20 to our

[4] Nnah filed amended counterclaims and third party claims. In his amended pleading, Nnah acknowledged that several causes of action (*i.e.*, negligence, misrepresentation, fraud, conspiracy, fraud in real estate transaction, violations of Real Estate Licensing Act, alter ego remedies, successor and respondeat superior liability, and rescission) were subject to the trial court's current summary judgment order.

account so that we can complete this transaction on the agreed terms by Monday February 25, 2013.

Greenberg attached to this e-mail an accounting of what Coral Pearls allegedly owed under the note, which was the first time Nnah had seen such an accounting. Nnah refused to modify their prior sale agreement and, on February 26, 2013, Nnah's attorney sent a written demand for 125 Interests to perform as agreed. On March 1, 2013, Nnah received from 125 Interests the note and deed of trust on the Richmond property.

Nnah recorded the assignment of all rights and designated a substitute trustee who conducted the foreclosure sale upon the Richmond property on March 5, 2013. Nnah was the successful bidder and purchased the Richmond property at the foreclosure sale.

D. Appellees obtain a property tax refund from Harris County

On March 1, 2013, the day Nnah received the note and deed of trust, appellee 5600 Interests applied for a refund for the property taxes it paid on the Richmond property from the Harris County Tax Office, claiming the payments were paid in "error." On April 9, 2013, the Harris County Tax Office refunded $71,680.14 in property taxes on the Richmond property to 5600 Interests. As a result, the status of the property taxes for the Richmond property for 2011 and 2012, which had been shown as "paid," was changed to "due" along with interests and penalties. Nnah paid to the Harris County Tax Office $77,669.22 in property taxes, interests, and penalties.

E. Nnah's new counterclaims regarding the property tax refund

Prior to the trial court's determination on the Greenberg parties' first no-evidence motion for summary judgment, Nnah and Coral Pearls amended their counterclaim and third-party petition. As relevant to this appeal, Nnah added 125

Interests as a third-party defendant and Nnah added new claims of (1) breach of contract against Greenberg and 125 Interests, (2) tortious interference with a contract against 5600 Interests and Greenberg, (3) violation of the Texas Theft Liability Act against Greenberg, 125 Interests, and 5600 Interests, and (4) requested a declaratory judgment that 125 Interests' assignment of all of its rights in the note, deed of trust, and vendor's lien actually assigned all rights including the benefit of the property taxes paid by the previous noteholder pursuant to the note and deed of trust that had subsequently been assigned to Nnah. All of these new counterclaims related to the appellees' actions in obtaining the $71,680.14 property tax refund on the Richmond property.

F. The trial court grants final summary judgment

On August 21, 2014, appellees filed a traditional and no evidence motion for summary judgment on "all remaining causes of action." Appellees also sought reimbursement of attorney's fees under the Texas Theft Liability Act. Nnah responded to appellees' summary judgment motion, asserting that appellees' motion addressed some, but not all, of Nnah's claims and that fact issues precluded summary judgment. On November 3, 2014, the trial court granted appellees' summary judgment in full, and signed a final judgment awarding appellees attorney's fees in the amount of $15,000.00.[5] This appeal timely followed.

II. ANALYSIS

A. Issues on appeal

In three issues on appeal, Nnah contends that the trial court erred by (1) granting no-evidence summary judgment on Nnah's breach of contract claim when that claim was not challenged in the motion; (2) granting summary judgment

[5] The trial court later signed a reformed judgment, correcting a clerical error regarding the attorney's fees.

on Nnah's claims for tortious interference with a contract, Texas Theft Liability Act, and Declaratory Judgments Act; and (3) awarding attorney's fees under the Texas Theft Liability Act when there was no evidence as to how the fees were calculated and whether those hours were reasonable and necessary.

B. Summary judgment order

1. Standard of review

We review de novo a trial court's decision to grant a summary judgment. *Ferguson v. Bldg. Materials Corp. of Am.*, 295 S.W.3d 642, 644 (Tex. 2009). We consider the evidence in the light most favorable to the nonmovant, indulging reasonable inferences and resolving doubts in the nonmovant's favor. *Kane v. Cameron Int'l Corp.*, 331 S.W.3d 145, 147 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex. 2005)). We credit evidence favorable to the nonmovant if reasonable fact finders could and disregard contrary evidence unless reasonable fact finders could not. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). When, as here, the trial court grants the judgment without specifying the grounds, we will affirm if any of the theories presented to the trial court and preserved for appellate review are meritorious. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 216 (Tex. 2003); *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000).

When a trial court grants a summary judgment on both no-evidence and traditional grounds, we first review the trial court's summary judgment under the no-evidence standard of Tex. R. Civ. P. 166a(i). *PAS, Inc. v. Engel*, 350 S.W.3d 602, 607 (Tex. App.—Houston [14th Dist.] 2011, no pet.). The movant for a no-evidence summary judgment must allege that there exists no evidence to support one or more essential elements of a claim for which the nonmovant bears the

burden of proof at trial. Tex. R. Civ. P. 166a(i); *Kane*, 331 S.W.3d at 147. The nonmovant must then present evidence raising a genuine issue of material fact on the challenged elements. *Kane*, 331 S.W.3d at 147 (citing *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex .2006)). If the nonmovant fails to produce more than a scintilla of evidence raising a genuine fact issue on the challenged elements of his claims, there is no need to analyze whether the movant's summary-judgment proof on the same claim satisfied the traditional summary-judgment burden of proof under Tex. R. Civ. P. 166a(c). A no-evidence summary judgment is essentially a pretrial directed verdict. *Mack Trucks*, 206 S.W.3d at 581.

The movant for a traditional summary judgment must show that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Mann Frankfort*, 289 S.W.3d at 848. Summary judgment is properly awarded to a defendant if the defendant conclusively negates at least one essential element of the plaintiff's claim. *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 508 (Tex. 2010). If the defendant satisfies its burden, the burden shifts to the plaintiff to present evidence raising a genuine issue of material fact. *Kane*, 331 S.W.3d at 147 (citing *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995)).

2. Breach of contract

In his first issue, Nnah asserts that the trial court erred in granting summary judgment on his breach of contract claim because the no-evidence motion fails to mention Nnah's breach of contract claim against Greenberg and 125 Interests; rather, the no evidence motion only argues that there was no contract between Nnah and 5600 Interests. Appellees maintain that the motion was filed as to all the Greenberg parties (defined as all of the appellees) and Nnah failed to identify a

contract between himself and any of the Greenberg parties "relating to the payment of taxes." We disagree.

Nnah's live pleading unequivocally asserts a claim for breach of contract against appellees Greenberg and 125 Interests. Specifically, Nnah pleads:

> Mr. Nnah assert[s] a cause of action against David Neal Greenberg and 125 Interests, Inc. for breach of contract. Further, since all Counterclaim and Third-Party Defendants except Harris County are mere alter egos of Greenberg, Mr. Nnah asserts a cause of action for breach against all Counterclaim and Third-Party Defendants except Harris County.

In their motion for summary judgment, appellees urged:

> Counter-Plaintiff and Third-Party Plaintiffs' cause of action for breach of contract[6] requires proof of the following elements: (1) an offer; (2) acceptance in strict compliance with the offer's terms; (3) a meeting of the minds; (4) consent by both parties; (5) execution and delivery; and (6) consideration. . . . Counter-Plaintiff and Third-Party Plaintiffs' can show no support for element numbers 1 through 6. There was no contract between Jim-Daniels Nnah (the person who took the assignment listed above in Exhibit A), and 5600 Interests, Ltd. f/k/a 6219 Interests, Ltd. (the entity that applied for and received the tax refund set out in Exhibit B). There is no evidence of an offer concerning the taxes, and acceptance of any offer, any meeting of the

[6] In response to the no-evidence summary judgment motion, Nnah asserted, correctly, that the motion for summary judgment was directed at the elements of contract formation, not the elements of breach. The elements for a breach of contract claim are: (1) a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages to the plaintiff resulting from that breach. *West v. Triple B Servs., LLP*, 264 S.W.3d 440, 446 (Tex. App.—Houston [14th Dist.] 2008, no pet.). The requirements of contract formation, which are required to meet the valid contract element of a claim for breach of contract, are: (1) an offer; (2) an acceptance in strict compliance with terms of offer; (3) a meeting of the minds; (4) consent by both parties; (5) execution and delivery of the contract with an intent it become mutual and binding on both parties; and (6) consideration. *Advantage Physical Therapy, Inc. v. Cruse*, 165 S.W.3d 21, 24 (Tex. App.—Houston [14th Dist.] 2005, no pet.). Thus, even if we were to conclude that Appellees' motion was adequate to place the valid contract element of Nnah's breach of contract claim against Greenberg and 125 Interests at issue, we would nonetheless reverse as there is ample summary judgment evidence that these parties formed an agreement to assign the promissory note on the Richmond property. In addition to challenging the adequacy of appellees' motion for summary judgment on such contract, Nnah specifically responded with argument and evidence on the formation of the agreement to assign the note and deed of trust.

> minds concerning the payment of the taxes, certainly no consent by both parties, know[sic] execution and delivery, and no consideration for any contract regarding those taxes. The Greenberg parties pray for summary judgment as to this cause.

We must first determine whether appellees' motion for summary judgment was adequate to include Nnah's breach of contract claims against 125 Interests and Greenberg. More to the point, we must analyze whether (a) appellees' specific reference to the absence of contract between Nnah and 5600 Interests within its sole paragraph challenging Nnah's breach of contract action defines the scope of the motion for summary judgment or, as appellees argue (b) the motion applies to any claims Nnah may have plead for breach of contract because the motion globally states that it is directed to "all remaining causes of action" or generally urges that Nnah has no support for "element numbers 1 through 6." For the reasons outlined below, we conclude that appellees motion did not include Nnah's breach of contract claims against 125 Interests or Greenberg.

It is well-settled that a "trial court may not grant summary judgment on grounds not raised in the motion." *Timpte Indus. Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009). We have also previously held that a sentence within a motion for summary judgment purporting to seek judgment "regarding all claims and causes of action asserted in Plaintiff's Response to Defendant's Special Exceptions and Plaintiff's First Amended Petition" was insufficient to place all such claims at issue where there is "no mention of or reference to" a specific claim. *See Guest v. Cochran*, 993 S.W.2d 397, 402 (Tex. App.—Houston [14th Dist.] 1999, no pet.); *see also Narnia Invs., Ltd v. Harvestons Sec., Inc.*, No. 14-10-00244-CV, 2011 WL 3447611, at *5 (Tex. App.—Houston [14th Dist.] Aug. 9, 2011, no pet. (mem. op.) (noting that claims not addressed in the motion for summary judgment, though arising from the same facts, could not be construed as eliminating an essential element of the unmentioned claims because the summary judgment motion

"neither conclusively disproves any element of [plaintiff's] causes of action, nor challenges the existence of any evidence of any element supporting [plaintiff's] causes of action").

Here, appellees summary judgment did not mention or reference Nnah's breach of contract claim against Greenberg and 125 Interests. Appellees focus their argument in both their motion for summary judgment and brief in this court toward Nnah's alleged failure to "identify any contract between himself and any of the Greenberg Parties relating to the payment of taxes."

In fact, notwithstanding the language of Nnah's pleading above, appellees, in their motion, profess confusion about what contract is at issue, referring in the background section of the motion to "some unknown contractual relationship." And, just as in *Narnia Investments*, even if appellees established the "lack of formation" of a contract between Nnah and 5600 Interests, as a matter of law, such proof would have no impact on an asserted contract between Nnah and 125 Interests or Nnah and Greenberg. Thus, we conclude that appellees' no evidence summary judgment motion did not challenge Nnah's breach of contract claim against Greenberg and 125 Interests. Moreover, Nnah presented evidence in support of his breach of contract claims against both 125 Interests and Greenberg. Appellees' no evidence grounds for summary judgment are insufficient to support the trial court's judgment. *See Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 204 (Tex. 2002) (holding that a trial court may not grant summary judgment on grounds not presented in the motion). Consequently, the trial court erred by granting summary judgment in favor of appellees on Nnah's breach of contract claims against 125 Interests and Greenberg. We sustain issue one.

3. Tortious interference with a contract, Texas Theft Liability Act, and Declaratory Judgments Act

In his second issue, Nnah maintains that the trial court erred in granting summary judgment on his claims for tortious interference with a contract and claims under the Texas Theft Liability Act and Declaratory Judgments Act. Appellees argue that Nnah fails to present evidence of essential elements as to each of his claims.

a. Tortious interference with a contract

Nnah claims that Greenberg and 5600 Interests interfered with Nnah's assignment agreement with 125 Interests and with Nnah's contract, as assignee of the note and deed of trust, with Coral Pearls.

The elements of tortious interference with a contract are: (1) the existence of a contract subject to interference; (2) willful and intentional interference; (3) interference that proximately caused damage; and (4) actual damage or loss. *Powell Indus., Inc. v. Allen*, 985 S.W.2d 455, 456 (Tex. 1998) (citing *ACS Investors, Inc. v. McLaughlin*, 943 S.W.2d 426, 430 (Tex. 1997)); *Baty v. Protech Ins. Agency*, 63 S.W.3d 841, 856-57 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (elements).

In their no evidence motion, appellees maintain "[t]here was no contract between [Nnah] . . . and 5600 Interests . . . that was subject to any alleged interference, tortious or otherwise." As set forth above, however, the operative contract that Nnah pleads is a contract between Nnah and 125 Interests – the agreement for Nnah to pay 125 Interests for the assignment of all rights in the note and deed of trust for the Richmond property.

In support of interference with that contract, Nnah relies upon a February 23, 2013, email from Greenberg in which Greenberg acknowledges an agreement with

Nnah to sell the note and a miscalculation based upon failure "to include the ad valorem property taxes for years 2011 and 2012" in the amount of $71,780.24. In response to this email, in a February 26, 2013, letter to Greenberg, Nnah's counsel refers to the agreement negotiated between Nnah and 125 Interests; declares 125 Interests' failure to perform as agreed a breach; and demands fulfillment of the original, agreed-upon terms. And, then, the record contains a March 1, 2013, letter from Greenberg, on behalf of 5600 Interests, to the Harris County Tax Assessor-Collector making a "request for refund" of $71,680.24 in property taxes on the property at issue for 2011 and 2012 and stating the reason for the request as "Paid incorrect account."

We conclude that this evidence raises fact issues on whether Greenberg and 5600 Interests intentionally interfered with Nnah's contract with 125 Interests for the assignment of all rights in the note and deed of trust on the Richmond property by obtaining a tax refund on the Richmond property after it had been transferred to Nnah. Because Nnah presented evidence raising genuine issues of material fact, the trial court erred in granting summary judgment on this claim.

b. Texas Theft Liability Act

Nnah plead theft claims under the Texas Theft Liability Act against Greenberg, 125 Interests, and 5600 Interests. Nnah claims that as the assignee of 125 Interests and the holder of all rights under the note and deed of trust, he was the rightful owner to any refund or reimbursement or credit from the Harris County Tax Office for the advance of payment of property taxes belonged to him. Nnah contends that Greenberg and 5600 Interests deprived Nnah of his reimbursement and credit rights, damaging him in the amount of $77,669.22.

The Texas Theft Liability Act provides a civil remedy for damages sustained by the victim of a theft, including reasonable and necessary attorney's fees. *See*

Tex. Civ. Prac. & Rem. Code §§ 134.002(2), 134.003(a); Tex. Penal Code § 31.03(a). It provides liability against a person who commits theft by unlawfully appropriating property with the intent to deprive the owner of property. *Id.* Appropriation is unlawful if it is without the owner's effective consent. Tex. Penal Code § 31.03(b)(1).

In their no-evidence summary judgment motion, appellees maintain there was no evidence that "5600 Interests" unlawfully appropriated any specific property, intended to deceive Nnah, was not the owner of the property, and did not have the owner's consent. As outlined above, Nnah countered appellees' allegations with evidence that he purchased all rights in the note and deed of trust in the Richmond property in February 2013 and, at that time, the taxes were paid in full; Nnah filed the assignment of the note and deed of trust in the real property records with taxes in good standing; he purchased the Richmond property at a foreclosure sale with taxes paid; and Nnah was the owner of the Richmond property with all taxes paid. Finally, Nnah relied upon Greenberg's letter on behalf of 5600 Interests seeking the tax refund of $71,680.24, stating that 5600 Interests had paid those taxes on an "incorrect account."

Nnah has produced more than a scintilla of evidence that Greenberg and 5600 Interests appropriated the reimbursement or tax refund belonging to Nnah knowing that such appropriation was without Nnah's consent. As such, the trial court erred in granting summary judgment on the Texas Theft Liability Act claims against 5600 Interests.

Nnah also challenges the trial court's summary judgment on his individually plead claims against Greenberg and 125 Interests, urging that the Greenberg parties "only challenged the Texas Theft Liability Act claim as it related to Appellee 5600 Interests." We agree with Nnah that the Greenberg parties' motion specifically

challenged the evidentiary support for Nnah's Theft Liability Act claim against 5600 Interests. The Greenberg parties' general plea for a no-evidence summary judgment "on the theft claims" is insufficient to embrace those claims against the parties no mentioned. *See Johnson*, 73 S.W.3d at 204. Thus, the trial court erred in granting summary judgment on the Texas Theft Liability Act claims against Greenberg and 125 Interests.

c. Declaratory Judgments Act

In his Declaratory Judgments Act pleading, Nnah seeks "a declaratory judgment against David Greenberg, 125 Interests, and 5600 Interests, Ltd, regarding the rights of the parties, if any, in or under the agreement to assign the Coral Pearls Note to the guarantor Mr. Nnah, that the assignment did not reserve any rights to 125 Interests, that all rights were assigned to Mr. Nnah." Appellees' motion does not challenge the evidentiary basis of Nnah's Declaratory Judgment Act claim. Instead, appellees challenge whether the Declaratory Judgments Act is a remedy available to Nnah.

The purpose of the Uniform Declaratory Judgments Act is "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and it is to be liberally construed and administered." Tex. Civ. Prac. & Rem. Code § 37.002(b). The act further provides in relevant part:

> A person interested under a deed ..., written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a ... contract ... may have determined any question of construction or validity arising under the instrument ... [or] contract ... and obtain a declaration of rights, status, or other legal relations thereunder.

Tex. Civ. Prac. & Rem. Code § 37.004(a).

In suits for declaratory relief, a trial court has limited discretion to refuse a declaratory judgment, but it may do so where judgment would not remove the uncertainty giving rise to the proceedings.[7] *SpawGlass Constr. Corp. v. City of Houston*, 974 S.W.2d 876, 878 (Tex. App.—Houston [14th Dist.] 1998, pet. denied). A declaratory judgment is appropriate when a real controversy exists between the parties and a court may determine the entire controversy by judicial declaration. *Id*. at 879. To constitute a justiciable controversy, the controversy must be real and substantial and involve a genuine conflict of tangible interests and not merely be a theoretical dispute. *Id*.

The Declaratory Judgments Act also is not available to settle disputes already pending before a court. *Riddick v. Quail Harbor Condo. Ass'n*, 7 S.W.3d 663, 672 (Tex. App.—Houston [14th Dist.] 1999, no pet.). A defensive declaratory judgment, however, may present issues beyond those the plaintiff has raised. *BHP Petroleum Co. v. Millard*, 800 S.W.2d 838, 841 (Tex. 1990). When a declaratory judgment counterclaim has greater ramifications than the original suit—such as settling future disputes—a court may allow the counterclaim. *See Winslow v. Acker*, 781 S.W.2d 322, 328 (Tex. App.—San Antonio 1989, writ denied), cited with approval in *Millard*, 800 S.W.2d at 841–42. A counterclaim has greater ramifications than the original suit if it seeks affirmative relief. *HECI Exploration Co. v. Clajon Gas Co.*, 843 S.W.2d 622, 638–39 (Tex. App.—Austin 1992, writ denied). A counterclaim states a claim for affirmative relief if it alleges that the defendant has a cause of action independent of the plaintiff's claim, on which the defendant could recover benefits, compensation, or relief, even if the plaintiff were to abandon or fail to establish his cause of action. *See Millard*, 800 S.W.2d at 841.

[7] We review declaratory judgments under the same standards as other judgments and decrees. Tex. Civ. Prac. & Rem. Code § 37.010; *Guthery v. Taylor*, 112 S.W.3d 715, 720 (Tex. App.—Houston [14th Dist.] 2003, no pet.). We look to the procedure used to resolve the issue at trial to determine the standard of review on appeal. *Id*.

The Greenberg parties allege that there was no evidence of a justiciable controversy and that a declaratory judgment was improper because Nnah was asking the trial court to issue an advisory opinion regarding whether Harris County should have refunded the property taxes to 5600 Interests. This misconstrues Nnah's pleading outlined above. Nnah asked the trial court to construe the meaning of the "all rights" provision of the assignment, the substance of which was presented to the trial court as summary judgment evidence. Contrary to appellees' assertion, it was not a request for an advisory opinion relating to Harris County. Nnah's counterclaim presents a justiciable controversy with greater ramifications than appellees' original suit on the guarantee. *HECI Exploration Co.*, 843 S.W.2d at 638–39. To the extent appellees argue that Nnah's claim for declaratory relief and breach of contract are duplicative, it is not a bar to Nnah bringing a claim. *See MBM Fin. Corp. v. Woodlands Operating Co.*, 292 S.W.3d 660, 669-70 (Tex. 2009) ("prohibiting declaratory judgments whenever a breach of contract claim is available would negate the Act's explicit terms covering such claims").[8] As such, the trial court erred in granting summary judgment on Nnah's Declaratory Judgments Act claim.

Viewing all of the evidence in the light most favorable to the party against whom the no-evidence summary judgment was rendered and disregarding all contrary evidence and inferences, we conclude the trial court erred when it granted appellees' no-evidence summary judgment as to Nnah's claims alleging tortious interference with a contract, violation of the Texas Theft Liability Act, and the Declaratory Judgments Act. Thus, we sustain issue two.

[8] "[T]he rule is that a party cannot use the [Declaratory Judgments Act] as a vehicle to obtain otherwise impermissible attorney's fees." *MBM Fin. Corp.*, 292 S.W.3d at 669; *accord Tanglewood Homes Ass'n, Inc. v. Feldman*, 436 S.W.3d 48, 68-69 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). Thus, a party may request declaratory relief that duplicates his breach of contract claim, but may not receive attorney's fees for doing so. *See MBM Fin. Corp.*, 292 S.W.3d at 669-70.

4. Attorney's fees

In his third issue, Nnah challenges the trial court's granting a traditional summary judgment award on appellees' cross-claim for attorney's fees under the Texas Theft Liability Act. *See* Tex. Civ. Prac. & Rem. Code § 134.005(b). Nnah maintains that it was error for the trial court to dismiss his theft claims against appellees. He further argues, in the alternative, that even if dismissal was proper, an award of attorney's fees was still in error because appellees failed to submit competent summary judgment evidence demonstrating the amount, necessity, and reasonableness of the fees.

Under the Texas Theft Liability Act, a prevailing party shall be awarded attorney's fees as long as the fees are both "reasonable and necessary." Tex. Civ. Prac. & Rem. Code § 134.005(b). An award of attorney's fees to a prevailing party in a Texas Theft Liability Act action is mandatory. *Arrow Marble, LLC v. Est. of Killion*, 441 S.W.3d 702, 705 (Tex. App.—Houston [1st Dist.] 2014, no pet.). "If there is any evidence in support of the award of fees, the factfinder does not have discretion to award no fees." *Id.*, at 709.

Because we held, *supra*, the trial court erred in dismissing Nnah's claim under the Texas Theft Liability Act, we hold that appellees' fee award must be reversed. Thus, Nnah's third issue is sustained.

III. CONCLUSION

Nnah has not challenged the judgment on his claim for money had and received against appellees, thus we affirm the trial court's judgment. On Nnah's remaining claims for breach of contract, tortious interference with a contract, Texas Theft Liability Act, and Declaratory Judgments Act, we reverse the trial

court's judgment and remand for further proceedings. Finally, we reverse the portion of the trial court's judgment that awarded appellees attorney's fees.

/s/ Sharon McCally
Justice

Panel consists of Justices Christopher, McCally, and Busby.