Affirmed in Part, Reversed and Remanded in Part, and Memorandum Opinion Filed September 7, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00260-CV

CARNEGIE HOMES & CONSTRUCTION LLC, Appellant

V.

EROL TURK, Appellee

On Appeal from County Civil Court at Law No. 4
Harris County, Texas
Trial Court Cause No. 1046321

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

Carnegie Homes & Construction LLC appeals from the county court's judgment in favor of Erol Turk, who sued Carnegie for breach of contract in connection with a $10,000 "project initiation deposit" Turk paid to Carnegie for the architectural design of a home. Turk sued after Carnegie did not act on his request to return the deposit following termination of the contract.

The county court granted summary judgment in Turk's favor and awarded $10,000 in damages, along with attorney's fees. Carnegie contends that the county court (1) lacked subject matter jurisdiction to award attorney's fees to Turk; (2) erred in denying Carnegie's objections to Turk's summary judgment evidence; (3) erred because fact issues precluded summary judgment in Turk's favor; and (4) erred in awarding attorney's fees because Turk effectively nonsuited his request for attorney's fees.

We affirm the county court's judgment in part with respect to liability and damages on the contract claim. We reverse and remand the county court's judgment in part with respect to attorney's fees because Carnegie controverted Turk's fee evidence.

BACKGROUND

Turk and Carnegie entered into a "Memorandum of Understanding" on May 2, 2012. The memorandum states in its entirety as follows:

> This letter serves as acknowledgement of the understanding between Carnegie Custom Homes (builder) and Mr. Erol Turk, and/or related parties that a $10,000 project initiation deposit has been received by Carnegie Homes.
>
> This deposit is considered earned upon completion of the architectural design of proposed property on 1116 Drew, Houston, TX 77006 and is credited towards the final contract price for the construction.
>
> Please do not hesitate to call or email me with any questions or concerns.

This text is followed by two signature blocks. Turk signed individually as "Buyer" and Carnegie's president, Arpan Gupta, signed on behalf of "Carnegie Custom Homes (Builder)." The parties signed no other agreements.

Turk sent an email to Carnegie on July 30, 2012, in which he terminated the

contract for Carnegie's services. In a certified letter to Carnegie dated October 1, 2012, Turk stated that "some architectural services for the property . . . were rendered on my behalf by Architect Martin Lide through your firm." Turk's letter further stated that "the architectural design of the property was not completed. As a result, my $10,000 deposit with your firm was not earned, as required by the Memorandum." Turk demanded "[a]n accounting of the architectural services by Martin Lide and already paid to him by your firm . . . ." He also demanded "[a] return of the balance of the $10,000 deposit." Carnegie did not respond.

Acting pro se, Turk filed a petition in small claims court contending that Carnegie was "justly indebted to Plaintiff in the amount of $10,000 for project initiation deposit for completion of architectural design of proposed building at 1116 W. Drew, Houston, TX 77006 . . . ." Turk's small claims petition alleged that "there are no counterclaims existing in favor of the Defendant and against the Plaintiff, except . . . a fee in the amount of $2,400 that defendant is believed to have paid for the architect's services." Turk effected service on Carnegie and its counsel filed an answer. A justice of the peace subsequently signed a default judgment against Carnegie awarding $7,652.50 in damages and $104 in court costs to Turk, along with post-judgment interest.[1]

Carnegie then appealed to County Court at Law No. 4 for a trial *de novo*. *See* Tex. R. Civ. P. 506.3 ("The case must be tried de novo in the county court. A trial de novo is a new trial in which the entire case is presented as if there had been no previous trial.").

[1] Turk filed his petition on March 13, 2013. Small claims courts were abolished effective May 1, 2013; justice courts now handle small claims cases. *See* Act of June 29, 2011, 82d Leg., 1st C.S., ch. 3, §§ 5.02, 5.06, 5.09, 2011 Tex. Sess. Law Serv. 116, 134-35; *see also* Tex. Gov't Code Ann. § 27.060 (Vernon Supp. 2016) and Tex. R. Civ. P. 500.3(a). The justice of the peace signed the default judgment on March 25, 2014.

Turk, now represented by counsel, characterized the Memorandum of Understanding in county court as a "deposit contract" in his live petition. He alleged that "the deposit would be earned 'upon completion of the architectural design'" and "[t]he architectural plans were never completed." He further alleged that Carnegie "has not returned the project initiation deposit" and Carnegie "wrongfully exercised dominion and control over Plaintiff's money, and continues to refuse to return the initiation fee." Turk pleaded that all conditions precedent had been performed, waived, or excused; he asked for judgment against Carnegie awarding actual damages, pre- and post-judgment interest, attorney's fees under Chapter 38 of the Texas Civil Practice and Remedies Code, and court costs. Carnegie's live answer asserted a general denial along with defenses based on modification; novation; ambiguity; mutual mistake; offset; and failure of conditions precedent.

Turk filed a combined traditional and no-evidence motion for summary judgment in county court. The county court granted Turk's motion for summary judgment in its entirety. The county court's judgment awards $10,000 in actual damages and $15,000 in attorney's fees to Turk, along with court costs and pre- and post-judgment interest.[2] Carnegie timely appealed to this court.

[2] The record before us is unnecessarily complicated. The January 19, 2016 final judgment at issue in this appeal grants Turk's Second Amended Traditional Motion for Summary Judgment and No-Evidence Motion for Summary Judgment. Turk previously filed an initial summary judgment motion; a "supplemental" summary judgment motion; and an "amended" summary judgment motion. Carnegie, in turn, filed a host of responses and evidentiary objections directed at each prior iteration of Turk's summary judgment motion. Our resolution of this appeal focuses on Turk's Second Amended Traditional and No-Evidence Motion for Summary Judgment filed on July 2, 2015, and on some of the nearly two dozen subsequent filings by these parties – variously labeled as objections, responses, replies, supplements, and amendments. The 655-page clerk's record contains two documents entitled "Erol Turk's Second Amended Traditional and No-Evidence Motion for Summary Judgment" filed on July 2, 2015. One was filed at 3:56 p.m. on that day; the second was filed at 4:06 p.m. We treat the later-filed document as the operative summary judgment motion. The operative response is "Defendant's First Amended Response to Plaintiff's Second Amended Motion for Summary Judgment Filed on July 2, 2015 as Supplemented on November 20, 2015 Subject to Objections on File," which was filed on December 8, 2015.

ANALYSIS

Turk filed a traditional motion for summary judgment under Texas Rules of Civil Procedure 166a(a) and (c) with respect to his affirmative claim against Carnegie seeking return of the $10,000 "project initiation deposit" along with $15,000 in attorney's fees under Chapter 38 of the Civil Practice and Remedies Code.

Turk filed a no-evidence motion for summary judgment under Texas Rule of Civil Procedure 166a(i) with respect to Carnegie's pleadings asserting that Carnegie performed and completed all obligations; the parties modified the contract and established a novation; the agreement is ambiguous and was entered into based on mutual mistake; Carnegie is entitled to offset for services and work performed at Turk's request; and Turk's claims are barred by the failure of conditions precedent.

We review a trial court's grant of summary judgment *de novo*. *See, e.g.*, *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). We consider all of the summary judgment evidence in the light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if a reasonable factfinder could and disregarding contrary evidence unless a reasonable factfinder could not. *See Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006). When a party moves for summary judgment on both traditional and no-evidence grounds, we address the no-evidence grounds first. *See Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004).

In a no-evidence motion for summary judgment, the movant represents that there is no evidence of one or more essential elements of the claims for which the nonmovant bears the burden of proof at trial. Tex. R. Civ. P. 166a(i). The burden then shifts to the nonmovant to present evidence raising a genuine issue of material fact as to the elements specified in the motion. *Tamez*, 206 S.W.3d at 582.

The movant for traditional summary judgment has the burden of showing 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 Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). In particular, a plaintiff moving for summary judgment must conclusively prove all essential elements of its claim. *Cullins v. Foster*, 171 S.W.3d 521, 530 (Tex. App.—Houston [14th Dist.] 2005, pet. denied) (citing *MMP, Ltd. v. Jones*, 710 S.W.2d 59, 60 (Tex. 1986)).

We review a trial court's rulings on admission or exclusion of summary judgment evidence for abuse of discretion. *See, e.g., United Blood Servs. v. Longoria*, 938 S.W.2d 29, 30 (Tex. 1997) (per curiam); *Sloan Creek II, L.L.C. v. N. Tex. Tollway Auth.*, 472 S.W.3d 906, 918 (Tex. App.—Dallas 2015, pet. denied).

Carnegie also asserts a jurisdictional challenge to the attorney's fee award. Whether the fees awarded exceed the jurisdictional limits of the trial court presents a question of law, which we review *de novo*. *See City of Ingleside v. City of Corpus Christi*, 469 S.W.3d 589, 590 (Tex. 2015) (per curiam) (jurisdiction reviewed *de novo*); *Tucker v. Thomas*, 419 S.W.3d 292, 295 (Tex. 2013) (statutory entitlement to fees reviewed *de novo*).

I. Jurisdiction Over Turk's Request for Attorney's Fees

As it did below, Carnegie contends on appeal that the county court lacked jurisdiction to award attorney's fees to Turk in addition to his $10,000 recovery because (1) the upper jurisdictional limit is $10,000 for a justice court handling a small claims case; and (2) "a county court, on an appeal from a suit originating in justice court, has no greater jurisdiction and is unable to grant any greater relief than the justice court."

Justice courts handling a small claims case may entertain claims for "no more

than $10,000, excluding statutory interest and court costs but including attorney fees." Tex. R. Civ. P. 500.3(a); *see also* Tex. Gov't Code Ann. §§ 27.031(a)(1), 27.060(a) (Vernon Supp. 2016).

Generally, "the county court's appellate jurisdiction is confined within the limits of the justice court's jurisdiction." *Kendziorski v. Saunders*, 191 S.W.3d 395, 406 (Tex. App.—Austin 2006, no pet.). This general rule does not apply to additional sums that are "sustained as a result of the passage of time, such as attorney's fees." *Id.* at 409. We agree with the conclusion of our sister court in *Lost Creek Ventures, LLC v. Pilgrim*, No. 01-15-00375-CV, 2016 WL 3569756, at *8 (Tex. App.—Houston [1st Dist.] June 30, 2016, no pet.): "[T]he county court may award attorney's fees in excess of the jurisdictional limits of the small claims court on appeal, because fees increase as litigation continues over time." *Id.*; *see also Crumpton v. Stevens*, 936 S.W.2d 473, 477 (Tex. App.—Fort Worth 1996, no writ) (citing *Mr. W. Fireworks, Inc. v. Mitchell*, 622 S.W.2d 576, 577 (Tex. 1981), and *Flynt v. Garcia*, 587 S.W.2d 109, 109-10 (Tex. 1979)).

Carnegie attempts to distinguish *Lost Creek Ventures* because a portion of the analysis in that case discusses former Texas Rule of Civil Procedure 574a, which was repealed in 2013. This attempt fails because the portion of *Lost Creek Ventures* discussing former Rule 574a addressed a different issue focusing on whether a litigant who did not seek attorney's fees in small claims court nonetheless could seek them on appeal in county court. *See Lost Creek Ventures, LLC*, 2016 WL 3569756, at *8.[3]

[3] Although its briefing is not entirely clear, Carnegie arguably suggests that Turk cannot recover attorney's fees for legal representation during a trial *de novo* in county court because he did not seek attorney's fees while he was representing himself pro se in justice court. Insofar as Carnegie attempts to assert this argument, we reject it. *See Jones v. Falcon*, 875 S.W.2d 29, 31 (Tex. App.—Houston [14th Dist.] 1994, writ denied) ("[W]here attorney's fees are provided for in a statute, the specific statute prevails over the generality of Rule 574a."). Carnegie stresses that Rule 574a has been repealed, but it does not (1)

We rely on the portion of *Lost Creek Ventures* that confirms a litigant's ability in appropriate circumstances to recover attorney's fees on appeal to county court beyond the $10,000 ceiling established for small claims under Texas Rule of Civil Procedure 500.3. *See id.* This portion of *Lost Creek Ventures* relies on *Kendziorski*, 191 S.W.3d at 406-09, which Carnegie also relies upon in his briefing.

We overrule Carnegie's first issue.

II. Carnegie's Objections to Turk's Summary Judgment Evidence

Carnegie objected to six of Turk's summary judgment exhibits in the county court; the judge signed an order overruling all of Carnegie's objections. In its second appellate issue, Carnegie contends that the county court erred in denying all objections to these six exhibits. We overrule Carnegie's second issue for the reasons stated below.

Exhibit D: Emails Produced by Turk in Response to Discovery. This exhibit consists of four emails between Turk and Martin Lide, an architect who worked with Carnegie, addressing the status of Turk's design project; the emails were exchanged between June and August 2012.

Carnegie contends that the emails were not authenticated. *See* Tex. R. Evid. 901. We reject this contention because Turk's July 2, 2015 affidavit and Lide's November 20, 2015 affidavit both authenticate these emails; Carnegie does not challenge the portions of these affidavits authenticating these emails.

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identify any portion of current Rules 500-507 that would prohibit a claim for attorney's fees by a represented party for a trial *de novo* in county court when fees were not sought while the litigant was acting pro se in justice court; or (2) explain why, even if such language exists in a current rule, *Jones v. Falcon*'s holding regarding statutory entitlement to fees would be any less applicable now than it was under the prior rule. We do not consider Carnegie's additional contentions regarding the ability to obtain attorney's fees from a limited liability company under Chapter 38 of the Civil Practice and Remedies Code because Carnegie did not raise those contentions in the county court.

Carnegie also contends that these emails "constitute hearsay as to the Defendant Carnegie Homes & Construction as they are communication with a third party that was made outside the presence of the Defendant." We reject this contention because (1) it does not correspond to the hearsay definition under Texas Rule of Evidence 801(d); and (2) Carnegie cites no authority for this contention and does not attempt to explain why these emails, or portions thereof, constitute inadmissible hearsay under Rules 801-804. *See* Tex. R. App. P. 38.1(i).

The county court acted within its discretion in overruling Carnegie's objections to Exhibit D.

Exhibit E: Turk Affidavit Signed on April 1, 2015. Except for paragraph six, Carnegie globally objected in the county court to every part of every paragraph in this affidavit. Carnegie repeats its objections verbatim on appeal.

This affidavit states in its entirety as follows:

1. "My name is Erol Turk. I am over 18 years of age, of sound mind, and capable of making this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct.["]
2. "I paid Carnegie Homes & Construction, L.L.C. $10,000 as a project initiation deposit. Carnegie Homes acknowledged receipt of the $10,000 fee. The project initiation deposit was in the form of a check from my wife, Benita Turk, which I asked her to loan to me.["]
3. "According to the "Memorandum of Understanding", the project initiation deposit was not considered earned until the architectural design of the proposed property on 1116 Drew, Houston, Texas, 77006 was completed.["]
4. "The architectural design of the proposed property on 1116 Drew, Houston, Texas 77006, was never completed. The deposit was not earned because the architectural design of the proposed property was not completed.["]

5. "I made a written request for return of the project initiation deposit, but the project initiation deposit was never returned to me.["]
6. "I did not build or construct anything on the land located at 1116 Drew, Houston, Texas 77006.["]
7. "I did not have any agreements with Carnegie Custom Homes, L.L.C. other than the Memorandum of Understanding and did not agree to pay Carnegie Custom Homes, L.L.C. for goods, materials, or services. I was never told I would be charged for any goods, materials, or services, from Carnegie Custom Homes, L.L.C.["]
8. "I incurred damages and attorney fees and costs as a result of the conduct of Defendant Carnegie Custom Homes, L.L.C.["]

Carnegie's objections are as follows: (1) the affidavit's first paragraph does not explain how Turk acquired personal knowledge of the facts stated in the affidavit; and (2) all portions of paragraphs two through five and seven through eight are conclusory and based on subjective belief.

Affidavits "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify." Tex. R. Civ. P. 166a(f). "To avoid being conclusory, an affidavit must contain specific factual bases, admissible in evidence and upon which conclusions are drawn." *SouthTex 66 Pipeline Co. v. Spoor*, 238 S.W.3d 538, 542 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (citing *Nichols v. Lightle*, 153 S.W.3d 563, 570 (Tex. App.—Amarillo 2004, pet. denied)). "Merely reciting that an affidavit is made on personal knowledge is insufficient." *Id*. at 542-43 (citing *Humphreys v. Caldwell*, 888 S.W.2d 469, 470 (Tex. 1994)). "Instead, the affidavit must go further and disclose the basis on which the affiant has personal knowledge of the facts asserted." *Id*. at 543 (citing *Radio Station KSCS v. Jennings*, 750 S.W.2d 760, 762 (Tex. 1988)).

We reject Carnegie's contentions attacking paragraph one because Turk's affidavit demonstrates the basis for Turk's personal knowledge as a direct participant

in the disputed transaction with Carnegie. Turk himself entered into the Memorandum of Understanding with Carnegie; paid the $10,000 deposit to Carnegie; asked for the deposit to be returned; and did not receive the deposit back from Carnegie as requested. Because Turk was a direct participant in this transaction, Carnegie misplaces its reliance on cases addressing the sufficiency of affidavits proffered on behalf of an employer by an employee who provides only a job title but no other information demonstrating how the employee's job responsibilities establish personal knowledge of a disputed transaction. *See, e.g.*, *Lawrence Marshall Dealerships v. Meltzer*, No. 14-07-00920-CV, 2009 WL136908, at *4 (Tex. App.—Houston [14th Dist.] Jan. 20, 2009, no pet.) (mem. op.) ("Although Bomberger stated his job title, he did not identify his responsibilities or other basis for personal knowledge of the facts he asserts."). This affidavit demonstrates that Turk was a direct participant in this transaction.

We also reject Carnegie's global contention that all statements appearing in paragraphs two through five and seven through eight "are mere conclusions" and "based upon subjective belief." We reject this contention because at least some of the statements in these paragraphs obviously are not conclusory or subjective, and because Carnegie's global attack on the entirety of multiple paragraphs is not specific. Broad-bush affidavit objections of this nature create no obligation on a court's part to go line-by-line attempting to separate the wheat from the chaff. *See Womco, Inc. v. Navistar Int'l Corp.*, 84 S.W.3d 272, 281 n.6 (Tex. App.—Tyler 2002, no pet.) (assertion that individual paragraph in affidavit "contains unsubstantiated legal conclusions" was itself conclusory because it failed to identify which statements in individual paragraph were objectionable or explain precise bases for objection); *see also Stewart v. Sanmina Tex. L.P.*, 156 S.W.3d 198, 207 (Tex. App.—Dallas 2005, no pet.); *Garcia v. John Hancock Variable Life Ins. Co.*,

859 S.W.2d 427, 434 (Tex. App.—San Antonio 1993, writ denied).

The county court acted within its discretion in overruling Carnegie's objections to Exhibit E.

Exhibit F: Poissant Affidavit. This exhibit is a fee affidavit signed by Turk's attorney, Margaret A. Poissant, on January 9, 2015.

In her affidavit, Poissant states that she is "familiar with the reasonable and customary fees that other attorneys charge for performing services of the type I am providing in this case." She describes her experience. She then opines based on her knowledge and experience that "an hourly rate of $250.00 per hour is a reasonable rate for my services" and states that she "worked a total of 60 hours on this dispute in connection with this case, including gathering necessary documents, communication with Opposing Counsel, propounding discovery, reviewing legal precedent, and the drafting and filing of Motions, as well as other activities . . . ." This total is broken down as follows:

- "Communication with Opposing Counsel: 3.5 Hours;"
- "Communications with Clients and Witnesses: 5 Hours;"
- "Reviewing and Obtaining Relevant Documents and Evidence: 7 Hours;"
- "Review Pleadings: 7 Hours;"
- "Drafting Pleadings: 6 Hours;"
- "Drafting Discovery 2.5 Hours;"
- "Drafting, Revising, and Filing Motions: 15 Hours;" and
- "Legal [R]esearch: 14 Hours."

The affidavit further states: "Based on the foregoing, a reasonable fee for my services rendered in connection with this Motion as of the date of the filing of this Motion is $15,000."

Carnegie objected in county court that Poissant's fee affidavit is inadmissible because (1) she opined regarding "reasonable and customary fees" rather than "reasonable and necessary" fees; (2) the affidavit is "vague" and "conclusory" because it "contains time entries in blocks of time" that "cannot be readily contradicted if untrue as there is no detail provided as to what services makes up each block of time;" (3) "there is no attempt to segregate between non-recoverable claims and recoverable ones nor is the issue even addressed;" and (4) "the applicant must provide the court with sufficient documentation that will allow it to determine the reasonableness and necessity of the fees sought." Carnegie repeats these objections verbatim on appeal. We address each in turn.

Turk pleaded for attorney's fees under Chapter 38, which allows recovery of "reasonable attorney's fees" on a claim for "an oral or written contract." Tex. Civ. Prac. & Rem. Code Ann. § 38.001(8) (Vernon 2015). "Well-settled law recognizes that the affidavit of the attorney representing a claimant constitutes expert testimony that will support an award of attorney's fees in a summary judgment proceeding." *Haden v. David J. Sacks, P.C.*, 332 S.W.3d 503, 513 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (citing *Tesoro Petroleum Corp. v. Coastal Ref. & Mktg., Inc.*, 754 S.W.2d 764, 767 (Tex. App.—Houston [1st Dist.] 1988, writ denied)); *see also* Tex. R. Civ. P. 166a(c).

"Although courts should consider several factors when awarding attorney's fees, a short hand version of these considerations is that the trial court may award those fees that are 'reasonable and necessary' for the prosecution of the suit." *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 10 (Tex. 1991). "In order to show

the reasonableness and necessity of attorney's fees, the plaintiff is required to show that the fees were incurred while suing the defendant sought to be charged with the fees on a claim which allows recovery of such fees." *Id.* The Poissant affidavit's reference to customary fees invokes section 38.003's rebuttable presumption of reasonableness and sufficiently demonstrates that the fees at issue were incurred while suing Carnegie on Turk's contract claim. Therefore, we reject Carnegie's first objection that the affidavit is deficient based on its use of the phrase "reasonable and customary fees" instead of the phrase "reasonable and necessary" fees. *See id.*

With respect to Carnegie's second objection, the affidavit is neither conclusory nor vague. It provides an adequate description of the services provided and hours expended sufficient to allow it to be controverted — which Carnegie's attorney undertook to do at length in his own five-page, 23-paragraph affidavit. *See Haden*, 332 S.W.3d at 514 (Fee affidavit sufficiently "described the work encompassed by the fees sought, which included drafting original and amended pleadings, conducting discovery, filing motions, responding to motions, and preparing for and appearing in court. These facts are not 'generalities' . . . but [instead are] 'clear, positive, and direct . . . .'").

Finally, we reject Carnegie's third and fourth objections regarding segregation and documentation. This is a straightforward contract case between one plaintiff and one defendant arising from a one-page agreement containing three paragraphs and fewer than 100 words. Carnegie identifies no basis for segregation; the attorney's fee affidavit is adequate under the circumstances even without invoices. *See Milliken v. Turoff*, No. 14-13-00710-CV, 2014 WL 4557651, at *4 (Tex. App.—Houston [14th Dist.] Sept. 16, 2014, pet. denied) (mem. op.) (citing *Dodd v. Savino*, 426 S.W.3d 275, 294 (Tex. App.—Houston [14th Dist.] 2014, no pet.)); *see also Haden*, 332 S.W.3d at 515.

The county court acted within its discretion in overruling Carnegie's objections to Exhibit F.

Exhibit H: Lide Affidavit Signed on June 30, 2015. This affidavit states in its entirety as follows:

> 1. "My name in Martin Lide. I am over the age of 18 and of sound mind. I have personal knowledge of the facts in this affidavit because I worked for Carnegie Homes & Construction, LLC, in regard to 1116 Drew Street, Houston, Texas 77006. I swear that the following statements are true and correct:["]
> 2. "I am an architect. I used to perform architectural work for Carnegie Homes & Construction, LLC. I was hired to complete the architectural design of the house at 116 Drew, Houston, Texas 77006.["]
> 3. "I never completed the architectural plans for the house for the proposed property on 1116 Drew, Houston, Texas, 77006. In my opinion, the architectural documentation for the house never advanced beyond the preliminary design. As I recall, I was paid reasonably by Carnegie Homes for that portion of the work, which was completed.["]
> 4. "The architectural design at 1116 Drew Street, Houston, Texas, 77006 was never completed."

Carnegie objected below and objects again on appeal to the entirety of paragraphs two, three, and four on grounds that these paragraphs are conclusory. We reject this contention for the same reason we rejected Carnegie's global and non-specific objections to the entirety of multiple paragraphs in the April 1, 2015 Turk affidavit. *See Stewart*, 156 S.W.3d at 207; *Womco, Inc.*, 84 S.W.3d at 281 n.6; *Garcia*, 859 S.W.2d at 434.

The county court acted within its discretion in overruling Carnegie's objections to Exhibit H.

Exhibit I: Turk Affidavit Signed on July 2, 2015. Paragraph six of this affidavit states as follows: "The architectural design at 1116 Drew Street, Houston, Texas, 77006 was never completed. This fact was confirmed to me by Martin Lide, the architect." Carnegie objected below and contends again on appeal that "[t]his statement constitutes hearsay as to the Defendant Carnegie Homes & Construction as [it is a] . . . communication with a third party that was made outside the presence of the Defendant."

We reject this contention because (1) it does not correspond to the hearsay definition under Texas Rule of Evidence 801(d); and (2) Carnegie cites no authority for this contention and does not attempt to explain why this paragraph or a portion of it constitutes inadmissible hearsay under Rules 801-804. *See* Tex. R. App. P. 38.1(i).

The county court acted within its discretion in overruling Carnegie's objection to Exhibit I.

Exhibit J: Lide Affidavit Signed on November 20, 2015. This affidavit states in its entirety as follows.

> 1. "My name is Martin Lide. I am over 18 years of age, of sound mind, and capable of making this affidavit. The facts stated in this affidavit and within my personal knowledge and are true and correct.["]
> 2. "I am a licensed architect who worked on the architectural design of the house at 1116 Drew, Houston, Texas 77006. I never completed the architectural design for the house at 1116 Drew, Houston, Texas 77006. To my knowledge, Carnegie Homes & Construction, LLC never completed the architectural design for the house at 1116 Drew, Houston, Texas 77006. I know about this because I was subpoenaed to appear in the small claims case that was filed by Erol Turk against Carnegie Custom Homes & Construction, LLC prior to this litigation for the same claims.["]
> 3. "I reviewed the emails attached to this Affidavit as Exhibit C and

> Exhibit D. The emails and invoice, are 5 pages of emails I personally received or sent. I am familiar with the email addresses of Arpan Gupta of Carnegie Homes, and the email of Erol Turk. I personally sent the email to Arpan Gupta, never completed the architectural design of the house for the proposed property on 1116 Drew, Houston, Texas 77006.["]
>
> 4. "I received a sole payment of $2,347.50 for architectural design work billed as 'Architectural Design @50% draw' on June 14, 2012.["]

Carnegie objected in the trial court and contends again on appeal that specific portions of the affidavit are inadmissible.

Carnegie assails as conclusory, unsupported, and speculative the statements in paragraph two in which Lide says he "never completed architectural designs for the house" and "Carnegie Homes & Construction, LLC never completed the architectural design for the house . . . ." Carnegie objects on hearsay grounds to copies of emails between Lide and Turk "which do not include Defendant. These emails are clearly hearsay and not admissible as summary judgment evidence . . . ."

We reject Carnegie's first contention because Lide's affidavit adequately discloses the factual basis for his knowledge about completion of the architectural design as the licensed architect hired by Carnegie to do the design work on Turk's project. *See SouthTex 66 Pipeline Co.*, 238 S.W.3d at 543 (affidavit must "disclose the basis on which the affiant has personal knowledge of the facts asserted").

We reject Carnegie's second contention because (1) it does not correspond to the hearsay definition under Texas Rule of Evidence 801(d); and (2) Carnegie cites no authority for this contention and does not attempt to explain why these emails, or portions thereof, constitute inadmissible hearsay under Rules 801-804. *See* Tex. R. App. P. 38.1(i).

The county court acted within its discretion in overruling Carnegie's

objections to Exhibit J.

III. Propriety of Granting Summary Judgment

We next turn to Carnegie's third issue contending that the trial court erred by granting summary judgment in favor of Turk on (1) no-evidence grounds with respect to Carnegie's defenses; and (2) traditional grounds with respect to Turk's contract claim and request for attorney's fees. We address the no-evidence summary judgment first.

A. No Evidence Summary Judgment

1. Modification and novation

Parties may modify an agreement, but the new or modifying agreement must possess the essential elements of a contract. *Mandril v. Kasishke,* 620 S.W.2d 238, 244 (Tex. Civ. App.—Amarillo 1981, writ ref'd n.r.e.). There must be a meeting of the minds of the parties with respect to the modification; the terms of the original contract cannot be unilaterally remade by one of the parties. *Id.* A party relying on a modification has the burden of proving that the parties agreed to the modification. *Stowers v. Harper,* 376 S.W.2d 34, 39 (Tex. Civ. App.—Tyler 1964, writ. ref'd n.r.e.); *see also In re Comerica Bank,* No. 14-16-00418-CV, 2016 WL 3574644, at *2 (Tex. App.—Houston [14th Dist.] June 30, 2016, orig. proceeding) (per curiam) (mem. op.).

"A novation is the substitution of a new agreement between the same parties or the substitution of a new party on an existing agreement." *Honeycutt v. Billingsley*, 992 S.W.2d 570, 576 (Tex. App.—Houston [1st Dist.] 1999, pet. denied). "The elements of a novation are: (1) a previous, valid obligation; (2) an agreement of the parties to a new contract; (3) the extinguishment of the old contract; and (4) the validity of the new contract." *Id*. (citing *Mandell v. Hamman Oil & Ref.*

Co., 822 S.W.2d 153, 163 (Tex. App.—Houston [1st Dist.] 1991, writ denied)).

Carnegie contends that Turk modified the Memorandum of Understanding or created a novation when he sought an accounting of amounts Carnegie paid to architect Lide and then asked for "a refund of less than the $10,000 that he now claims in this action." According to Carnegie, Turk changed the contract terms by inviting Carnegie to deduct amounts paid to Lide from the $10,000 deposit and then "refund the balance" to Turk.

We reject these contentions because, at most, they focus on an attempted and ineffective unilateral modification of the Memorandum of Understanding that Carnegie never accepted. Carnegie proffered no evidence that Carnegie itself agreed to (1) modified terms for returning a portion of the deposit; or (2) an entirely new contract under which the remaining balance of the deposit would be returned after deducting Lide's fee. It is undisputed on this record that Carnegie failed to return any portion of the $10,000 deposit to Turk.

The trial court did not err in granting a no-evidence summary judgment in Turk's favor with respect to modification and novation.

2. Carnegie's performance, ambiguity, mutual mistake, offset, and conditions precedent

Relying on Gupta's affidavit, Carnegie contends it achieved "completion of the architectural design" as required under the Memorandum of Understanding and thereby earned the full $10,000 deposit. Carnegie also invokes again evidence of Turk's request for a refund of the deposit balance after deduction of Lide's fee; Carnegie variously characterizes this circumstance as giving rise to defenses based on ambiguity, mutual mistake, offset, and a condition precedent.

Our primary concern in construing a contract is to ascertain and give effect to the intentions the parties objectively manifested in that instrument.

v. L & F Distribs., Ltd., 165 S.W.3d 310, 311-12 (Tex. 2005) (per curiam); *see also Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 746 (Tex. 2006) ("As with any other contract, the parties' intent is governed by what they said, not by what they *intended* to say but did not.").

Contract terms are given their plain, ordinary, and generally accepted meanings unless the contract itself shows them to be used in a technical or different sense. *Valence Operating Co.*, 164 S.W.3d at 662. In determining the meaning of contract terms, we also may consider the context of the circumstances existing at the time the contract was executed and the particular business activity sought to be served. *See Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.*, 940 S.W.2d 587, 589 (Tex. 1996); *Reilly v. Rangers Mgmt., Inc.*, 727 S.W.2d 527, 530 (Tex. 1987).

If we can give the contract a definite or certain legal meaning, it is unambiguous and we construe it as a matter of law. *Willis v. Donnelly*, 199 S.W.3d 262, 275 (Tex. 2006); *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003). If, on the other hand, the contract is subject to two or more reasonable interpretations, it is ambiguous, which creates a fact issue as to the parties' intent. *Columbia Gas Transmission Corp.*, 940 S.W.2d at 589. Whether a contract is ambiguous is a question of law. *Id.*

With respect to "completion," Carnegie cites generally to the entirety of Gupta's four-page affidavit; it asserts broadly that this affidavit "speaks to this issue that the designs were completed . . . this is the fact issue that is at the heart of this case, were the designs complete or not." A non-specific contention of this nature provides no basis for reversing a summary judgment because "a nonmovant cannot allege a defense to the summary judgment and then simply 'cite to the contents of his affidavit attached to his response.'" *Lee v. Rogers Agency*, 517 S.W.3d 137, 164

(Tex. App.—Texarkana 2016, pet. filed) (op. on rehearing) (quoting *Tello v. Bank One, N.A.*, 218 S.W.3d 109, 116 (Tex. App.—Houston [14th Dist.] 2007, no pet.)).

Even if we treat Carnegie's asserted performance as an affirmative defense and undertake to search for the pertinent portion of Gupta's affidavit, that affidavit still fails to provide a legally cognizable basis supporting Carnegie's contentions regarding completion. Gupta states as follows in his affidavit: "The $10,000 fee was considered fully earned once initial designs were complete. The initial architectural designs were completed and Mr. Turk was informed of this fact." Based on these statements, Gupta asserts that the architectural design was completed.

These statements impermissibly attempt to change the Memorandum of Understanding's unambiguous language. They do so by inserting the word "initial," which does not appear in the contract's operative sentence. That sentence says the deposit "is considered earned upon completion of the architectural design of proposed property on 1116 Drew, Houston, TX 77006 . . . ." This language unambiguously ties the earned deposit to "completion of the architectural design" — not completion of the ***[initial]*** architectural design. Therefore, these statements in Gupta's affidavit provide no legally cognizable basis for disturbing the county court's grant of summary judgment. *See David J. Sacks, P.C. v. Haden*, 266 S.W.3d 447, 450 (Tex. 2008) (per curiam) ("An unambiguous contract will be enforced as written, and parol evidence will not be received for the purpose of creating an ambiguity or to give the contract a different meaning from that which its language imports."); *see also Tex-Fin, Inc. v. Ducharne*, 492 S.W.3d 430, 442 (Tex. App.—Houston [14th Dist.] 2016, no pet.). We do not consider Carnegie's remaining generalized assertions regarding ambiguity, offset, and conditions precedent because Carnegie's opening brief neither develops these arguments nor cites authority to

support them. *See* Tex. R. App. P. 38.1(i).[4]

Carnegie's contentions provide no basis for reversing the county court's grant of a no-evidence summary judgment in favor of Turk.

B. Traditional Summary Judgment

1. Breach of contract

Carnegie contends that fact issues preclude traditional summary judgment in Turk's favor on his contract claim seeking return of the $10,000 deposit under the May 2, 2012 Memorandum of Understanding.

"To prevail on a breach of contract claim, a party must establish the following elements: (1) a valid contract existed between the plaintiff and the defendant; (2) the plaintiff tendered performance or was excused from doing so; (3) the defendant breached the terms of the contract; and (4) the plaintiff sustained damages as a result of the defendant's breach." *West v. Triple B Servs., LLP*, 264 S.W.3d 440, 446 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

Carnegie first argues that Gupta's four-page affidavit signed on July 5, 2015, is uncontroverted and "constitutes fact issues that preclude Summary Judgment." It further argues that "[d]efendant's evidence shows that the architectural design [was] . . . completed and thus any alleged contract was complied with." We interpret this argument to challenge the third element of Turk's contract claim by contending that Carnegie achieved "completion of the architectural design" as required and thereby earned the full $10,000 deposit.

[4] Unlike the opening brief, Carnegie's reply brief cites authorities generally discussing ambiguity, offset, mutual mistake, and conditions precedent. These additional authorities are unavailing because Carnegie identifies no ambiguous language in the Memorandum of Understanding; no language within the Memorandum of Understanding or legal authority outside of it giving rise to offset rights; no evidence of mutual mistake; no language in the Memorandum of Understanding creating a condition precedent; and no unsatisfied condition precedent.

This argument fails as a matter of law for reasons already discussed above. Gupta's affidavit assertion that Carnegie completed the architectural design is predicated on his statements that "[t]he $10,000 fee was considered fully earned once initial designs were complete" and "[t]he initial architectural designs were completed and Mr. Turk was informed of this fact." Carnegie cannot defeat summary judgment with parol evidence seeking to rewrite unambiguous contract language by inserting the word "initial" into the Memorandum of Understanding where it does not appear. *See David J. Sacks, P.C.*, 266 S.W.3d at 450; *Tex-Fin, Inc.*, 492 S.W.3d at 442.

Carnegie next argues that a fact issue exists because Turk expected Carnegie to deduct the sum it paid as a fee to architect Lide before returning the remaining deposit balance to Turk. Carnegie points to Turk's October 1, 2012 letter to Gupta; the sworn petition filed in small claims court alleging that "there are no counterclaims existing in favor of the Defendant and against the Plaintiff, except . . . a fee in the amount of $2,400 that defendant is believed to have paid for the architect's services;" and a July 30, 2012 email from Turk to Gupta. Carnegie characterizes this evidence as an "admission by Plaintiff of the potential offset." We interpret this argument to challenge the fourth element of Turk's contract claim.

We reject this argument because Carnegie articulates no legal basis under which Turk was obligated to pay the cost associated with Lide's services or reimburse Carnegie for doing so. Carnegie identifies no language in the Memorandum of Understanding itself creating such an obligation. Carnegie identifies no legal basis outside of the Memorandum of Understanding giving rise to such an obligation. In the absence of any identified legal basis for the claimed

"offset," the evidence Carnegie points to is immaterial. *See* Tex. R. Civ. P. 166a(c).[5]

Carnegie's contentions provide no basis for reversing the county court's grant of traditional summary judgment in favor of Turk on his contract claim.

2. Attorney's fees

Carnegie contends that summary judgment as to the amount of Turk's attorney's fees is foreclosed because it controverted attorney Poissant's fee affidavit with an affidavit from Carnegie's counsel, Robert Buchholz. The Buchholz affidavit details his education and experience, and opines that $15,000 is not a reasonable and necessary fee based on a number of factors including excessive time spent on various tasks. He also opines that a $15,000 fee is unreasonable in light of Turk's $10,000 recovery. The Buchholz affidavit concludes that the maximum amount for Turk's reasonable and necessary attorney's fees in this case is $2,500.

Turk assails Buchholz's affidavit as being conclusory. Turk identifies no other basis for rejecting Buchholz's fee affidavit. We reject Turk's contention because the level of specificity and factual underpinning in Buchholz's affidavit is on par with Poissant's affidavit and specifically controverts Poissant's affidavit. The Buchholz affidavit does not merely assert that $15,000 is unreasonable and unnecessary; to the contrary, the affidavit offers detailed discussion and proffers underlying facts to challenge the fee amount and the time spent on this case. Because Buchholz's affidavit supplies a factual basis for its conclusion that Turk's attorney's fees are unreasonable and unnecessary, this affidavit suffices to create a fact issue

[5] It is not entirely clear whether Carnegie's nonspecific references to an "offset" are intended to characterize the claimed "offset" as an affirmative defense or as a counterclaim. Turk contends that Carnegie's references to "offset" are couched as a defense but impermissibly operate as a "de facto counterclaim." We need not decide which characterization is most appropriate because the absence of any identified legal basis for the claimed "offset" means that Carnegie cannot rely on this contention to defeat summary judgment in favor of Turk. *See Lauderback v. FMWB, Inc.*, No. 02-16-00057-CV, 2016 WL 5845928, at *3 & n.4 (Tex. App.—Fort Worth Oct. 6, 2016, no pet.).

as to the reasonableness of Turk's attorney's fees. *See Affordable Motor Co. v. LNA, LLC*, 351 S.W.3d 515, 522 (Tex. App.—Dallas 2011, pet. denied).

We sustain Carnegie's third issue in part with respect to attorney's fees. We overrule Carnegie's third issue in all other respects.

IV. Nonsuit of Claim for Attorney's Fees

In its fourth issue, Carnegie contends that Turk effectively nonsuited his request for attorney's fees by filing a third amended petition that omitted the request. We reject this contention because Turk pleaded for "attorney's fees" in connection with his cause of action for breach of contract and requested attorney's fees again in the prayer of his petition. This suffices. *See Mitchell v. LaFlamme*, 60 S.W.3d 123, 130 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

We overrule Carnegie's fourth issue.

CONCLUSION

We reverse only that portion of the county court's final judgment awarding attorney's fees to Turk and remand the attorney's fee claim to the county court for further proceedings consistent with this opinion. We affirm the county court's judgment in all other respects.

/s/ William J. Boyce
Justice

Panel consists of Justices Boyce, Busby, and Wise.