Reversed in Part, Remanded, and Memorandum Opinion filed November 17, 2022.

In The

Fourteenth Court of Appeals

NO. 14-21-00562-CV

PARK TEN INVESTMENTS, LLC, AND INTERFACING COMPANY OF TEXAS, Appellants

V.

FIRST SERVICE CREDIT UNION, Appellee

On Appeal from the 80th District Court
Harris County, Texas
Trial Court Cause No. 2018-36552

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

In this breach-of-contract case, landlord First Service Credit Union leased commercial space to Park Ten Investments, LLC, who subleased a portion of the leased premises back to the landlord. Interfacing Company of Texas guaranteed Park Ten's performance under the lease, and additionally contracted to provide the

landlord colocation[1] and internet services. The parties alleged that all of the contracts were breached. The trial court rendered summary judgment in favor of the landlord, rejecting the other parties' affirmative defenses and counterclaims. We reverse the judgment and remand the case for further proceedings.

I. BACKGROUND

Carl Merzi is the sole owner of Park Ten Investments, LLC, d/b/a Park Ten Data Center (Park Ten), and Interfacing Company of Texas (ICTX; collectively, the Park Ten Parties).[2] Effective December 1, 2008, Park Ten signed a ten-year lease (the Lease) on an office suite (the Leased Premises) in a building owned by Wellbrook Incorporated NV. ICTX signed a Guaranty making it primarily liable, jointly and severally with Park Ten, for Park Ten's obligations to the landlord.

As of the time the Park Ten Parties stopped paying rent in January 2018, the terms of the original lease provided that Park Ten's total rent consisted of "base rent" in the amount of $39,950 per month, plus "rent in addition to Base Rent" consisting of Park Ten's proportionate share of the landlord's "Basic Costs," which included items such as taxes, insurance, common-area maintenance, security, and utilities. The parties refer to this additional rental amount as "CAM Charges." Park Ten initially leased a smaller area so that its proportionate share of the Basic Costs was smaller, but the Lease provided that, beginning in the second year of the Lease when Park Ten began leasing a larger area, Park Ten's CAM Charges would be equal to

[1] "Colocation services are rental agreements where customers lease information technology infrastructure, such as servers and storage hardware, to avoid the cost of establishing and maintaining their own facilities." *Mingbo Cai v. Switch, Inc.*, No. 218CV01471JCMVCF, 2019 WL 3065591, at *1 (D. Nev. July 12, 2019).

[2] ICTX also is identified as Interfacing Company of Texas, Inc.

13.3814% of the landlord's Basic Costs. Park Ten also had the option to obtain janitorial services from a service designated or approved by the landlord.

In 2016, Wellbrook sold the building to First Service Credit Union and assigned Park Ten's lease to it. In July of that year, First Service and Park Ten signed a Sublease under which First Service would sublet a portion of the Leased Premises back from Park Ten until the Lease's stated expiration date of November 30, 2018. Around the same time, First Service entered into the first of two contracts with ICTX for colocation and internet services (the ICTX Contracts).

Beginning in January 2018, the Park Ten Parties began failing to pay the amounts due under the Lease. First Service locked the Park Ten Parties out of the premises in May 2018. The following month, First Service sued the Park Ten Parties for failure to pay the full amounts due under the Lease and the Guaranty. First Service pleaded for its actual damages, pre- and post-judgment interest at the rate of 18%, attorney's fees, and costs of court.

Regarding the Lease, the Park Ten Parties responded that Wellbrook had modified or amended the original Lease to reduce Park Ten's proportionate share of janitorial and electricity charges, and thus, First Service was estopped from recovering the full amount sought. The Park Ten Parties further alleged that First Service committed a prior material breach of the Lease by overcharging for CAM Charges under the Lease as modified by Wellbrook. The Park Ten Parties also pleaded for offset and asserted the affirmative defenses of payment, failure to mitigate, and excessive demand. In addition to these defensive matters, Park Ten counterclaimed for breach of the Lease, breach of the Sublease, and breach of an agreement that First Service would "reimburse Defendant Park Ten for amounts paid by Defendant in connection with certain 'UPS work.'" ICTX asserted claims for breach of the ICTX Contracts and for conversion.

A. The Summary-Judgment Motions

First Service successfully moved for no-evidence and traditional summary judgment on the Park Ten Parties' defenses based on the alleged amendment of the lease—these defenses being modification, amendment, novation, estoppel by agreement, and prior material breach—as well as on the Park Ten Parties' defenses of failure to mitigate, payment, offset, and excessive demand.

First Service then moved for no-evidence and traditional summary judgment on (a) the Park Ten Parties' liability for unpaid rent, costs of default or remediation, and attorney's fees; (b) Park Ten's counterclaim for amounts allegedly due from First Service under the Sublease; (c) ICTX's counterclaim for charges due from First Service on the ICTX Contracts; and (e) ICTX's counterclaim for conversion.

B. The Original Final Judgment

The trial court originally granted First Service's final summary-judgment motion in its entirety, awarding First Service damages of $491,072.64 on its claim for breach of the Lease and the Guaranty, trial attorney's fees of $317,309.86, prejudgment interest at 18% and post-judgment interest at 5%, together with conditional appellate attorney's fees in the event of an unsuccessful appeal by the Park Ten Parties. The trial court rendered a take-nothing judgment on the Park Ten Parties' counterclaims.

The Park Ten Parties moved for a new trial as to the summary judgment on liability and damages and for reconsideration of the earlier interlocutory summary judgment eliminating their affirmative defenses. In the alternative, the Park Ten Parties asked the trial court to modify the judgment to (a) award First Service breach-of-contract damages of $380,327.79, which was the full amount the evidence supported; (b) remove the award of attorney's fees because it was based in part on a

claim First Service abandoned, and in any event, exceeded the $287,687.08 shown on the attorney's invoices; and (c) specify that the modified judgment is interlocutory, with the remaining issues and damages—which would have included the Park Ten Parties' counterclaims and both sides' competing claims for attorney's fees—still to be tried.

In response, First Service did not controvert any of the Park Ten Parties' statements about the insufficiency of First Service's summary-judgment evidence. Nevertheless, First Service "acknowledge[d] that the judgment should be reduced, in part," and stated that it "does not oppose remittitur of damages in the amount of $154,816.64." First Service's response contained no explanation of how it arrived at this amount.

C. The Amended Final Judgment

The Park Ten Parties' motion for new trial, reconsideration, or modification was rendered moot when the trial court signed an amended final judgment partially granting and partially denying the summary-judgment motion. The trial court ruled in First Service's favor only as to its "claims for breach of lease and guaranty," and consistent with First Service's voluntary remittitur, holding the Park Ten Parties jointly and severally liable to First Service for damages of $336,256.00, a reduction of $154,816.64 from the actual damages awarded in the original judgment. The award of attorney's fees remained the same. But despite the trial court's partial denial of First Service's summary-judgment motion, the trial court included in the judgment the language, "This is a final judgment that fully disposes of all parties and all claims. Any relief not expressly granted herein is DENIED." Thus, the trial court rendered a take-nothing judgment on the Park Ten Parties' counterclaims.

The Park Ten Parties again moved for new trial, reconsideration, or modification on much the same grounds. In its response, First Service asserted that

its $154,816.64 remittitur consisted of $5,412.50 due to ICTX under the colocation contract and $38,658.63 for rent under the Sublease from its inception through April 30, 2017. First Service stated that the remittitur also included the following amounts, some of which correspond to amounts First Service had requested as part of its damages for breach of the Lease and the Guaranty: (a) $16,856.00 for "electrical charges"; (b) $17,854.05 for backup generator fees; (c) $8,668.89 for generator repair; and (d) $67,366.57 for chiller repair.[3]

After the Park Ten Parties' motion for new trial, reconsideration, or modification was overruled by operation of law, the trial court signed an order denying the motion.

II. ISSUES PRESENTED

In two issues, the Park Ten Parties contend that the trial court erred in granting summary judgment in First Service's favor on the Park Ten Parties' affirmative defenses and on First Service's claims for breach of contract and for attorney's fees. First Service cross-appeals on the ground that the trial court erred in awarding post-judgment interest of 5% rather than the 18% specified in the Lease.

III. STANDARD OF REVIEW

First Service moved for both traditional and no evidence summary judgment on the Park Ten Parties' affirmative defenses and for traditional summary judgment on liability and damages for breach of the Lease and the Guaranty. We review both traditional and no-evidence summary judgments de novo. *See Boerjan v. Rodriguez*, 436 S.W.3d 307, 310 (Tex. 2014) (per curiam).

[3] The source of the figures for backup generator fees and chiller repair are unknown; they do not correspond to the amounts First Service requested for these items in its summary-judgment motion, where First Service requested backup generator fees of $23,763.02 and requested $1,788.72 for chiller repair.

To prevail on a traditional motion for summary judgment, the movant 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); *see Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215–16 (Tex. 2003). If the movant carries this burden, the burden shifts to the nonmovant to raise a genuine issue of material fact precluding summary judgment. *Lujan v. Navistar, Inc*., 555 S.W.3d 79, 84 (Tex. 2018) (citing *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995)). On review, we construe the evidence in the light most favorable to the non-movant, crediting evidence favorable to the nonmovant if a reasonable juror could and disregarding contrary evidence unless a reasonable juror could not. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009).

In a no-evidence motion for summary judgment, the movant asserts that there is no evidence of one or more essential elements of the claim or defense for which the nonmovant bears the burden of proof at trial. TEX. R. CIV. P. 166a(i); *see Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009). 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. *See Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006). We will affirm a no-evidence summary judgment when (a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a mere scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact. *See City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005).

IV. EFFECT OF FIRST SERVICE'S VOLUNTARY REMITTITUR

Given First Service's appellate assertion that several of the Park Ten Parties' appellate arguments were resolved by First Service's $154,816.64 voluntary

remittitur, which "corresponds to the balance of credits and offsets that Appellants attempt to raise on appeal,"[4] we begin with a few clarifications.

The final judgment, as amended to reduce the damages in accordance with First Service's voluntary remittitur, awarded damages only on First Service's claims for breach of the Lease and the Guaranty. That amount was undiminished by any credits or offsets. The Park Ten Parties' affirmative defenses of payment (for which the Park Ten Parties sought credit) and offset (by which the Park Ten Parties sought to reduce any amounts owed to First Service by the amount that First Service owed to them) had already been eliminated when the trial court granted First Service's first interlocutory summary judgment, ruling against the Park Ten Parties on all of their affirmative defenses—including those of payment and offset. The trial court did not modify that interlocutory order, which merged into the final judgment. *See Roccaforte v. Jefferson Cty.*, 341 S.W.3d 919, 924 (Tex. 2011). Indeed, the trial court could not properly have determined the amount of any credits or offsets to which the Park Ten Parties were entitled, much less have applied such credits or offsets in the judgment, for no party moved for summary judgment on those issues, which had already been removed from the case. *See Stiles v. Resolution Tr. Corp*., 867 S.W.2d 24, 26 (Tex. 1993) (Texas Rule of Civil Procedure 166a(c) "unequivocally restrict[s]

[4] Some of the items that First Service characterize as credits or offsets are neither; they are simply amounts that First Service claimed as its own damages but that it failed to prove were owed by the Park Ten Parties. *See* footnote 8, *infra*. Unlike credits or offsets, the amounts First Service sought for "electrical restoration fees," "backup generator fees," "generator repair," and "chiller repair" were not shown to have been owed or paid by the Park Ten Parties and therefore are neither credits nor offsets. *Cf. Ortiz Oil Co. v. Geyer*, 138 Tex. 373, 377, 159 S.W.2d 494, 496 (Comm'n App. 1942, op. adopted) (evidence of amounts paid to the plaintiffs before judgment "received as credits upon the judgment"); *Garza v. Allied Fin. Co.*, 566 S.W.2d 57, 63 (Tex. Civ. App.—Corpus Christi 1978, no writ) ("offset" is a demand by the defendant arising "out of a transaction different than the one forming the basis of plaintiff's claim").

the trial court's ruling to issues raised in the motion, response, and any subsequent replies").

First Service's voluntary remittitur did not change that, or even seek to do so. To place that request in context, the trial court originally granted First Service's motion for final summary judgment in its entirety, awarding First Service $491,072.64—the full amount First Service requested. The Park Ten Parties then moved for new trial and for reconsideration of the earlier ruling eliminating their affirmative defenses, or alternatively, for modification to reduce First Service's damages, eliminating charges that First Service failed to prove were owed and allowing the Park Ten Parties to prove their counterclaims.

In response, First Service urged the trial court to *deny* the Park Ten Parties' motion, but added without explanation, "Nevertheless, Plaintiff does not oppose remittitur of damages in the amount of $154,816.64, which is reflected in the proposed final judgment filed concurrently herewith." A trial court has no discretion to reject or modify a party's voluntary remittitur,[5] and it signed First Service's proposed amended judgment that reduced the damages awarded for breach of the Lease and the Guaranty by the amount remitted. First Service's post-judgment, post-remittitur characterization of its calculations do not alter the unambiguous rulings that the trial court had already rendered at First Service's request denying the Park Ten Parties all credits, offsets, or damages. We accordingly include the Park Ten Parties' challenges to those rulings in our review.

We begin our review with the Park Ten Parties' counterclaims for breach of contract. These are the more straightforward claims inasmuch as the terms of these

[5] *See* TEX. R. CIV. P. 315; *Gillette Motor Transp. v. Blair*, 136 S.W.2d 656, 663 (Tex. App.—Beaumont 1940, writ dism'd judgm't cor.).

contracts are not disputed, and no affirmative defenses to them were litigated in the trial court.

V. PARK TEN'S COUNTERCLAIM FOR BREACH OF THE SUBLEASE

Under the terms of the Sublease, a portion of the premises Park Ten leased from First Service was subleased back to First Service for a term beginning on July 13, 2016 and ending on November 30, 2018, the last day of the term of Park Ten's Lease. The Sublease required First Service to pay Park Ten $4,013.00 rent per month, together with its proportional share of CAM Charges. The Sublease further provided that it was "subject to and subordinate to all provisions of the Base Lease" and that "First Service shall in no event have any rights with respect to the Subleased Premises greater than Sublessor's rights as tenant with respect thereto."

First Service moved for traditional summary judgment on Park Ten's claim for breach of the Sublease on the ground that the Sublease did not survive Park Ten's loss of the right to possess the Leased Premises. In making this argument, First Service appears to have assumed that Park Ten's claim was based solely on an alleged breach that occurred *after* Park Ten lost the right of possession. But, Park Ten did not identify in its pleadings the date on which First Service first allegedly breached the Sublease, and First Service offered no evidence to support its assumption, such as evidence that it fully complied with the Sublease prior to Park Ten's eviction.

Given this deficiency, the burden never shifted to Park Ten to raise a genuine issue of material fact as to whether First Service breached the Sublease before Park Ten was locked out. Nevertheless, Park Ten produced Merzi's affidavit testimony and accounting showing that First Service paid rent to Park Ten only for the period of May 2017 through February 2018 and never paid Park Ten its proportionate share of CAM Charges at all. Stated differently, Park Ten produced uncontroverted

evidence that First Service breached the Sublease almost from its inception, long before Park Ten lost its rights to the Leased Premises.

We accordingly conclude that the trial court erred in granting summary judgment in First Service's favor on Park Ten's claim for breach of the Sublease.

VI. ICTX'S COUNTERCLAIMS FOR BREACH OF THE COLOCATION AND INTERNET-SERVICES CONTRACTS

ICTX had contracts to provide colocation and internet services to First Service and alleged that First Service breached these contracts by failing to pay all amounts due. First Service moved for traditional summary judgment on those claims on the ground that these services were "site-specific," so that when ICTX "lost rights to the Leased Premises it lost the ability to provide the services as agreed." To couch this in terms of the elements of a breach-of-contract claim, First Service argued that ICTX could not prevail because it had not performed or tendered performance of its contractual obligations after it lost access to the premises in May 2018. *See Gen. Growth Props., Inc. v. Prop. Tax Mgmt., Inc.*, 614 S.W.3d 386, 392 (Tex. App.—Houston [14th Dist.] 2020, no pet.) (listing elements of breach of contract).

In response, the Park Ten Parties produced evidence that First Service breached the colocation contract by failing to pay its bill for June 2017, nearly a year before the Park Ten Parties lost access to the premises. First Service's argument was therefore inapplicable to that claim.

As for the agreement to provide internet services, First Service contracted in April 2018 for ICTX to provide these services for thirty-six months, that is, for more than two years after the Lease's expiration. The contract was independent of the Lease, because as Merzi explained in his affidavit, ICTX does not require access to the Leased Premises to render its internet services inasmuch as the internet lines at issue are on the outside of the building. At the time of Merzi's affidavit, the term of

the contract had not yet expired, and Merzi attested that "ICTX was able to continue, and has continued, to provide the internet lines and connectivity to [First Service] under the [contract]." This evidence was sufficient to raise a genuine issue of material fact as to whether ICTX had performed or tendered performance of its contractual obligations, and thus, to defeat summary judgment.

We accordingly conclude that the trial court erred in granting summary judgment in First Service's favor on both of ICTX's breach-of-contract claims.[6]

VII. FIRST SERVICE'S CLAIM FOR BREACH OF THE LEASE AND THE GUARANTY

It is undisputed that the Park Ten Parties failed to pay all amounts due under the Lease and the Guaranty; thus, both of First Service's summary-judgment motions concerning these claims—one motion addressing the Park Ten Parties' affirmative defenses and one motion addressing First Service's claimed damages and attorney's fees—ultimately go to the question of the amounts that First Service can recover for these claims, rather than whether it can recover at all. But, the trial court erred in granting both summary-judgment motions.

Setting aside for a moment the Park Ten Parties' affirmative defenses, First Service sought to recover various categories of damages, reduced by amounts corresponding to Park Ten's late payments, its security deposit, and credit for certain work that Park Ten or ICTX performed for First Service. When one actually performs the calculations First Service describes, the net damages First Service claimed was $431,404.46.[7] But, First Service did not mention this figure in its

[6] ICTX has not appealed the summary judgment as to its conversion claim.

[7] The charges were as follows: rent, $406,450.00; CAM Charges, $145,557.94; late fees, $55,200.79; janitorial services, $1,867.30; changing locks, $746.47; storage fees, $6,965.44; "electrical restoration fees," $16,856.00; "backup generator fees," $23,763.02; generator repair, $8,668.89; chiller repair, $1,788.72; signage removal, $1,077.09. These charges total $668,941.66. First Service then applied credits for Park Ten's late payments of $98,000.00 and $100,365.08; its

motion, instead asking for an award of $491,072.64, without explaining the discrepancy.

In their summary-judgment response, the Park Ten Parties correctly pointed out that First Service failed to prove that it was entitled to all of the non-rent damages it claimed for breach of the Lease and the Guaranty.[8] The Park Ten Parties stated that if the earlier interlocutory summary judgment eliminating their affirmative defenses were to remain in place, and one were to eliminate the charges that First Service failed to prove it was owed, then First Service "would be entitled to recover" $380,327.79 under the Lease. The Park Ten Parties' calculations are correct, and because the amended final judgment, after remittitur, awarded First Service damages of only $336,256.00, the Park Ten Parties would have been unharmed by the error, standing alone, in awarding First Service this amount on its breach-of-contract claims.

But the award also was affected by the trial court's error in granting First Service's summary-judgment motion as to the Park Ten Parties' affirmative defenses.

Take, for example, the Park Ten Parties' affirmative defense of failure to mitigate. In breach-of-contract cases, Texas law requires a plaintiff to mitigate its

---

security deposit of $25,000.00; and "credit for UPS work" in the amount of $14,172.13. These credits totaled $237,537.20, so that the net of charges and credits is $431,404.46.

[8] The "electrical restoration fees" were incurred by First Service's decision to move some of its own equipment from the first floor to the fifth floor of its building, and when asked why Park Ten should pay for it, First Service's corporate representative Scott Bowdre answered, "I don't know." Regarding the electricity charges, Bowdre agreed that the bills "[a]bsolutely" could commingle charges for power to First Service's equipment and to the Park Ten Parties' equipment, but he had "no idea" what portion of the bills First Service was seeking to recover from the Park Ten Parties. Finally, Bowdre admitted that he first learned of the need to repair the generator and chiller in 2019, which was long after the lease expired, and longer still since Park Ten and ICTX were locked out of the premises. Bowdre did not know if the repairs had been needed at an earlier date.

damages "if it can do so with 'trifling expense or with reasonable exertions.'" *Atrium Med. Ctr., LP v. Houston Red C LLC*, 595 S.W.3d 188, 197 n.40 (Tex. 2020) (quoting *Great Am. Ins. Co. v. N. Austin Mun. Util. Dist. No. 1*, 908 S.W.2d 415, 426 (Tex. 1995)) (cleaned up). If the contract is a lease allegedly breached by the tenant resulting in the tenant's loss of possession, the landlord's duty to mitigate requires that the landlord use reasonable efforts to relet the vacated premises to a tenant "suitable under the circumstances." *Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc.*, 948 S.W.2d 293, 299 (Tex. 1997). A tenant bears the burden to prove that its landlord "has mitigated or failed to mitigate damages and the amount by which the landlord reduced or could have reduced its damages." *Id.* The allegation that the landlord failed to mitigate its damages is an affirmative defense, but evidence that the landlord did mitigate its damages is not; such evidence merely "tends to rebut the measure of damages under the landlord's claim of breach and may be admitted under a general denial." *Id.* at 300.

First Service sought summary judgment on the ground that the Park Ten Parties had no evidence "of an amount by which First Service Credit Union could have or did reduce its damages." In response, the Park Ten Parties stated that First Service failed to give Park Ten credit for amounts First Service owed Park Ten under the Sublease. It appears to be undisputed that, rather than attempting to reduce its damages by reletting the entire space leased by Park Ten, First Service continued to occupy the subleased space after Park Ten was locked out in May 2018. It also is undisputed that, under the terms of the Sublease, the rent for this area was $4,013.00 per month plus a proportionate share of the area's CAM Charges.

Under these circumstances, the trial court erred in granting summary judgment as to mitigation for two reasons. Viewed one way, First Service failed to mitigate its damages because it chose not to relet the portion of the Leased Premises

covered by the Sublease, instead continuing to occupy it. Viewed another way, First Service *did* mitigate its damages by allowing the area covered by the Sublease to continue to be occupied by a tenant "suitable under the circumstance"—itself. In either event, First Service's breach-of-contract damages would be reduced by the rental value of the area First Service continued to occupy. Because the terms of the Sublease are legally sufficient evidence of that amount, the trial court erred in granting summary judgment on the issue of mitigation.

VIII. CONCLUSION

We need not go through the rulings on all of the Park Ten Parties' affirmative defenses, because even if the trial court did not err in granting summary judgment as to some of them, we conclude that, on this record, the Park Ten Parties' affirmative defenses are not separable from the remainder of case without unfairness to the parties. *See* TEX. R. APP. P. 44.1(b). For example, Park Ten's claim for breach of the Sublease must be remanded, and on remand, First Service's proportionate share of CAM Charges will have to be determined. But the Sublease incorporates the Lease's terms, and the Park Ten Parties allege that the Lease's provision regarding CAM Charges was changed, whether by modification, amendment, novation, or estoppel by agreement. As a result, the same evidence would apply both to these defenses and to Park Ten's damages for First Service's failure to pay its share of CAM Charges. Then, too, the damages awarded to First Service for the Park Ten Parties' breach of the Lease and the Guaranty were the result of a remittitur, and First Service appears to have mistakenly believed that the remittitur would foreclose consideration of the Park Ten Parties' counterclaims, as well as their affirmative defenses such as payment and failure to mitigate. Because we remand First Service's breach-of-contract claims in fairness to First Service, fairness also dictates that we remand the Park Ten Parties' affirmative defenses to those claims.

We accordingly reverse the final judgment as to all of the breach-of-contract claims, including the interlocutory summary judgment on the Park Ten Parties' affirmative defenses which merged into it, and we remand the case for further proceedings.[9] Our disposition of the issues and remand of the contract claims, counterclaims, and affirmative defenses renders moot the Park Ten Parties' challenge to the award of attorney's fees and First Service's challenge to the post-judgment interest rate.

/s/ Tracy Christopher
Chief Justice

Panel consists of Chief Justice Christopher and Justices Wise and Jewell.

[9] We exclude from the scope of remand only ICTX's conversion claim, on which the trial court granted First Service's request for no-evidence summary judgment, and which ICTX did not address in its summary-judgment response or on appeal.