Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-17-00332-CV

AME & FE INVESTMENTS, LTD.,
Appellant

v.

NEC NETWORKS, LLC, dba CaptureRx,
Appellee

From the 73rd Judicial District Court, Bexar County, Texas
Trial Court No. 2012-CI-11952
Honorable David A. Canales, Judge Presiding

Opinion by: Irene Rios, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Rebeca C. Martinez, Justice
Irene Rios, Justice

Delivered and Filed: January 23, 2019

AFFIRMED IN PART; REVERSED AND RENDERED IN PART; REVERSED AND REMANDED IN PART

This case arises from a contract dispute between appellant AME & FE Investments, Ltd. ("AME") and appellee NEC Networks, LLC d/b/a CaptureRx ("NEC"). The trial court disposed of various claims, counterclaims, and affirmative defenses through its pretrial rulings on two summary judgment motions filed by NEC. Other claims, counterclaims, and affirmative defenses were resolved by jury verdict. A final issue, concerning the release of certain liens, was resolved by the trial court's post-trial ruling on NEC's motion for specific performance or, alternatively,

motion for further relief under the Uniform Declaratory Judgments Act. Each of these rulings was incorporated into the March 10, 2017 final judgment from which AME now appeals.

Facts

Pursuant to a Note Purchase Agreement ("Contract"), AME loaned NEC $500,000 on February 27, 2009 ("Note 1"), and $1 million on September 1, 2009 ("Note 2"). Those Notes were secured by liens on certain of NEC's property. The original Maturity Date for Note 1 was March 1, 2011; the original Maturity Date for Note 2 was September 1, 2011. The parties, by written agreement, extended the Maturity Date for Note 1 to September 1, 2011. They then extended the Maturity Date for both Notes to October 1, 2011, again by written agreement. The parties dispute whether there was an oral agreement to further extend the Maturity Date beyond October 1, 2011. On October 19, 2011, in response to an inquiry from AME about extending the Maturity Date, NEC informed AME that the time to convert had passed.

Under the Contract, AME had the option of converting the principal amounts of the Notes into a 30% equity interest in NEC on or before the Maturity Date. To do so, it was required to surrender the Notes to NEC, accompanied by a written notice of election and a written representation that AME was the beneficial owner of the Notes. AME was further required to execute and deliver to NEC a copy of a Company Agreement. AME did not exercise its conversion election on or before the Maturity Date.

The Contract provided that, if AME did not convert its Notes on or before the Maturity Date, then the Maturity Date for all purposes other than conversion was deemed to be 180 days later. Thus, NEC's Maturity Date for repaying the Notes was deemed to be 180 days after October 1, 2011, which was March 29, 2012.

Prior to March 29, 2012, NEC informed AME that it had been approved for a new loan that would enable it to pay off the Notes held by AME. NEC asked AME to provide a payoff letter

stating the final amount due to satisfy its obligations on the Notes. Around the same time, Chris Hotchkiss, President of NEC, told Chris Erck, acting representative of AME and son of AME's owner, that Hotchkiss would give Erck 5% out of Hotchkiss's equity interest in NEC. At the time, Hotchkiss did not yet own any interest in NEC, but he was anticipating a future 20% distribution. The parties dispute whether Erck made receipt of the promised 5% interest a condition to AME providing the requested payoff letter. In any event, AME did not provide a payoff letter prior to March 29, 2012 and, as a consequence, NEC did not tender payment of the Notes on or before that date.

On April 2, 2012, AME sent NEC a payoff letter dated March 28, 2012. The letter stated the payoff amount for the Notes and included a provision for late payment: "In the event that [AME] does not receive the Payoff Amount in immediately available funds no later than the Payoff date, an additional per diem charge of $409.84 shall be added to the Payoff Amount." This charge equated to the $12,500 monthly interest payment NEC had been making on the Notes.

NEC continued to make, and AME continued to accept, monthly interest payments of $12,500 until November 19, 2012. On that date, NEC tendered $1,507,916.67 in payment of the outstanding loan principal plus accrued but unpaid interest on both Notes. AME refused to accept the tender and refused to release its liens on NEC's property.

Trial court proceedings

The trial court signed a summary judgment order on February 8, 2016, granting NEC "Judgment for its Breach of Contract Claims" and "Judgment as a matter of law that [AME] breached [the Contract]" when it refused to accept NEC's payoff tender and refused to release its liens on NEC's property. The court also granted the following declarations:

(1) the Maturity Date was October 1, 2011;

(2) AME failed to provide written notice of election to convert on or before the October 1, 2011 Maturity Date;

(3) AME was obligated to, and acknowledged it would, accept payoff in the principal sum of $1.5 million;

(4) AME breached the Contract and Notes when it refused to accept the tendered payoff from NEC on November 19, 2012;

(5) AME breached the Contract and Notes on November 19, 2012 when it refused to release its liens and security interests on NEC's property; and

(6) there are no conditions precedent in the Contract that pertain to the Maturity Date or AME's obligation to provide written notice of the election to convert.

The order also dismissed AME's breach of contract counterclaims. After hearing AME's motion for reconsideration, the court signed an order denying summary judgment on AME's breach of contract counterclaims but otherwise granting the relief recited above.

NEC then filed a second motion seeking traditional and no-evidence summary judgment on AME's breach of contract counterclaims. The motion challenged only the remedies sought in relation to those claims. On May 23, 2016, the court signed an order granting the motion in part and denying it in part. Specifically, the court granted:

(1) traditional summary judgment "against AME on its breach of contract counterclaim for the alleged breach of the [Contract] on or before the October 1, 2011 Maturity Date";

(2) traditional summary judgment "against AME on its breach of contract counterclaim for specific performance"; and

(3) no-evidence summary judgment "against AME on its breach of covenant counterclaim for the alleged breach of any covenant found in Section 5 of the [Contract]."

The remaining claims, counterclaims, and affirmative defenses were presented to a jury. The jury found, as pertinent to this appeal, that NEC breached the Contract by failing to deliver

the loan payoff by April 3, 2012[1]; AME's breach of the Contract[2] was not excused by a prior breach by NEC; AME breached the Contract first; and NEC did not fraudulently induce AME to make the loans. The jury made the following monetary awards: $6,000 to NEC on its breach of contract claim; $0 to AME on its breach of contract counterclaim; and $0 to each party for its attorney's fees.

NEC filed a "Motion For Specific Performance To Vacate AME's Liens And Alternative Motion For 'Further Relief' To Vacate AME's Liens Under The Uniform Declaratory Judgment Act." NEC requested that the court order AME's liens vacated based on the summary judgment ruling that AME breached the Contract by refusing to release those liens. It urged that its request was further supported by the jury's findings that AME breached the Contract first and that its breach was not excused. The court granted the motion and ordered AME's liens vacated.

The trial court's summary judgment rulings, the jury verdict, and the order vacating AME's liens are incorporated into the court's March 10, 2017 final judgment. AME raises issues on appeal challenging each aspect of the proceedings below. We first address those issues concerning NEC's affirmative claims and then address those issues concerning AME's affirmative claims.

Discussion

NEC's claim for breach of contract

A threshold issue in this case is whether the trial court properly granted summary judgment declaring that the Maturity Date for purposes of AME exercising its conversion election was October 1, 2011. That declaration was foundational to the court's further summary judgment declaration that AME breached the Contract on November 19, 2012 when it refused NEC's payoff

[1] The April 3, 2012 date apparently derives from a five-day grace period set out in the Contract. Five days after the March 29, 2012 Maturity Date for repayment was April 3, 2012.

[2] In accordance with the trial court's summary judgment ruling, the jury was instructed that AME failed to comply with the Contract on November 19, 2012 when it refused NEC's payoff tender and refused to release its liens.

tender and refused to release its liens. If the Maturity Date for conversion had not yet passed, AME would have had no duty to accept NEC's November 19, 2012 payoff tender or to release its liens. These two summary judgment rulings therefore provide the starting point for our analysis.

An order granting summary judgment is reviewed *de novo*. *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013); *Buck v. Palmer*, 381 S.W.3d 525, 527 (Tex. 2012). "[W]e take as true all evidence favorable to the nonmovant and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor." *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572, 579 (Tex. 2017). A traditional summary judgment is proper when there are no disputed issues of material fact and the movant establishes that it is entitled to judgment as a matter of law. *Shah v. Moss*, 67 S.W.3d 836, 842 (Tex. 2001); TEX. R. CIV. P. 166a.

A no-evidence summary judgment is proper when the nonmovant fails to produce "more than a scintilla of probative evidence to raise a genuine issue of material fact." *Smith v. O'Donnell*, 288 S.W.3d 417, 424 (Tex. 2009); *see* TEX. R. CIV. P. 166a(i). "[M]ore than a scintilla of evidence exists if the evidence rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004) (internal quotation marks omitted).

Summary judgment declaration that the Maturity Date was October 1, 2011

Condition precedent or covenant

AME argues that the Maturity Date did not occur on October 1, 2011, because NEC had not fulfilled its obligations to provide certain financial information under Section 5 of the Contract. More specifically, AME argues that those Section 5 obligations were conditions precedent to occurrence of the Maturity Date. NEC argues that Section 5 contains only covenants, not conditions precedent.

Whether Section 5 contains conditions or covenants is a matter of contract construction, which presents a question of law to be reviewed *de novo*. *See URI, Inc. v. Kleberg Cty*., 543 S.W.3d 755, 763 (Tex. 2018) (contract construction is reviewed *de novo*); *City of Lancaster v. White Rock Commercial, LLC*, No. 05-17-00583-CV, 2018 WL 3968484, at *7 (Tex. App.—Dallas Aug. 20, 2018, no pet.) (mem. op.) (whether contract provision is a condition precedent is a question of law).

"A condition precedent is an event that must happen or be performed before a right can accrue to enforce an obligation." *Solar Applications Eng'g, Inc. v. T.A. Operating Corp*., 327 S.W.3d 104, 108 (Tex. 2010) (quoting *Centex Corp. v. Dalton*, 840 S.W.2d 952, 956 (Tex.1992)). A covenant, on the other hand, "is an agreement to act or refrain from acting in a certain way." *Id.* The two differ in their effect:

> Breach of a covenant may give rise to a cause of action for damages, but does not affect the enforceability of the remaining provisions of the contract unless the breach is a material or total breach. Conversely, if an express condition is not satisfied, then the party whose performance is conditioned is excused from any obligation to perform.

Id. (citation omitted).

Whether a contract provision is a condition precedent is determined by examining the entire contract to ascertain the intention of the parties. *Criswell v. European Crossroads Shopping Ctr., Ltd*., 792 S.W.2d 945, 948 (Tex. 1990); *Hudson v. Wakefield*, 645 S.W.2d 427, 430 (Tex. 1983).

> In order to make performance specifically conditional, a term such as "if," "provided that," "on condition that," or some similar phrase of conditional language must normally be included. If no such language is used, the terms will be construed as a covenant in order to prevent a forfeiture. While there is no requirement that such phrases be utilized, their absence is probative of the parties' intention that a promise be made, rather than a condition imposed.

Criswell, 792 S.W.2d at 948 (citations omitted).

The law does not favor conditions because of their harshness in operation. *Id.* Thus, "forfeiture by finding a condition precedent is to be avoided when another reasonable reading of the contract is possible." *Id.*

Section 5 is contained in a section of the contract titled "Affirmative Covenants." While this title is not dispositive, it provides some indication of the parties' intent. Another indication of intent is that the parties referred to the terms in Section 5 as covenants in Section 10.1.3 of the Contract. In addition, Section 5 does not contain the type of language identified by the supreme court as indicating an intention to impose a condition precedent. In contrast, Section 3.1 of the Contract states that execution and delivery of a copy of the Company Agreement is "*a condition* to consummation of the conversion of the Notes." (Emphasis added.) This demonstrates that the parties knew how to create a condition when that is what they intended.

AME's argument is based on its characterization of the Section 5 disclosures as being for the sole purpose of providing AME "with the necessary information to determine whether to convert the note into equity." But Section 5 does not reference AME's conversion option. Rather, it expressly applies "so long as any principal amount of any Note remains outstanding." This means the parties contemplated that it would apply even *after* the Maturity Date if AME did not elect to convert. Thus, it cannot be said that the purpose of the disclosures was tied to the conversion election.

In a related argument, AME contends that construing the Section 5 requirements to be covenants rather than conditions precedent renders those requirements "mere surplusage." AME appears to argue that, unless failure to comply with those requirements suspends the occurrence of the Maturity Date, such a failure is without consequence. This argument lacks merit.

First, as just noted, the Section 5 disclosure requirements are contractually tied to the repayment of the Notes, not the exercise of the conversion option. Their import is thus independent

of that option, whether exercised or not. In addition, the Contract specifically provides a consequence for the breach of any covenant in Section 5. If any such breach remained uncured for a specified period after AME gave NEC written notice of the breach, AME had the right to accelerate the Notes or foreclose on its liens. The fact that AME may now desire a different remedy does not render the Section 5 covenants "mere surplusage."

The trial court correctly construed Section 5 to contain covenants rather than conditions precedent to the occurrence of the Maturity Date.

AME's affirmative defense of equitable estoppel

AME next contends that NEC is equitably estopped from asserting that the Maturity Date was October 1, 2011 and that AME's conversion option expired on that date.

Equitable estoppel is an affirmative defense. *Doncaster v. Hernaiz*, 161 S.W.3d 594, 604 (Tex. App.—San Antonio 2005, no pet.). A plaintiff moving for summary judgment on its own claims has no obligation to negate a defendant's affirmative defenses. *Marx v. FDP, LP*, 474 S.W.3d 368, 377 (Tex. App.—San Antonio 2015, pet. denied) (citing *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex.1984)). "To the contrary, a defendant relying upon an affirmative defense must bring forward sufficient summary judgment evidence to raise an issue of fact on each element of that defense to avoid summary judgment." *Id.* at 378. It was therefore AME's burden to produce evidence raising an issue of fact on every element of equitable estoppel.

The elements of equitable estoppel are: "(1) a false representation or concealment of material facts; (2) made with knowledge, actual or constructive, of those facts; (3) with the intention that it should be acted on; (4) to a party without knowledge or means of obtaining knowledge of the facts; (5) who detrimentally relies on the representations." *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc*., 962 S.W.2d 507, 515–16 (Tex. 1998). AME contends that it raised a fact issue on each of these elements by presenting evidence that NEC knowingly

provided incomplete and inaccurate financial information that was necessary for AME to determine whether to exercise its conversion option.

In its summary judgment response, AME identified undisputed evidence that NEC learned in 2010 that its bookkeeper had committed errors that "caused NEC's financial accounting to be erroneous for 2010 and probably for prior years." But that same undisputed evidence establishes that NEC candidly informed AME that the information was inaccurate because of the bookkeeper's errors.

"Undisputed evidence may be conclusive of the absence of a material fact issue, but only if reasonable people could not differ in their conclusions as to that evidence." *Schlumberger Tech. Corp. v. Pasko*, 544 S.W.3d 830, 833 (Tex. 2018) (quoting *Buck*, 381 S.W.3d at 527). Reasonable people could not conclude that NEC intended for AME to act on financial information that it had told AME was inaccurate and incomplete. Similarly, reasonable people could not conclude that AME did, in fact, rely on financial information that it knew was inaccurate and incomplete. Rather than raising a fact issue on the elements of equitable estoppel, the summary judgment evidence conclusively establishes the absence of a material fact issue on at least two essential elements of that affirmative defense. *See id.* AME did not sustain its burden of showing that this defense precluded the court from granting summary judgment declaring that the Maturity Date was October 1, 2011.

AME's affirmative defense of prior breach of the Contract

AME also sought to avoid enforcement of the October 1, 2011 Maturity Date by asserting a prior breach by NEC of Section 5 of the Contract. It appears that AME is asserting the affirmative defense of excuse—that its failure to exercise the conversion option on October 1, 2011 was excused by NEC's prior breach of the Contract. But failure to timely exercise the conversion option was not a breach of contract subject to being excused. AME had no contractual obligation to

exercise the conversion option, so failing to exercise it cannot constitute a breach. There being no breach, there is nothing to excuse.

AME's assertion is another attempt to extend the Maturity Date because of NEC's failure to comply with Section 5. But, as we have held above, compliance with Section 5 was not a condition precedent to occurrence of the Maturity Date. Even if AME's performance of the conversion election was subject to being excused, NEC's failure to comply with Section 5 covenants would not provide that excuse. *See Solar Applications*, 327 S.W.3d at 108 (breach of condition excuses other party; breach of covenant gives rise to claim for damages).

AME's affirmative defense of prior breach of an oral agreement

AME next contends that NEC cannot enforce October 1, 2011 as the Maturity Date because NEC breached an oral agreement to extend that date. AME did not assert this affirmative defense in response to NEC's summary judgment motion. Rather, it asserted that NEC was equitably estopped from enforcing the October 1, 2011 Maturity Date by its "conduct surrounding" AME's request to extend that date. NEC had no burden to negate AME's affirmative defenses, particularly one that AME did not assert in response to NEC's summary judgment motion. *See Marx*, 474 S.W.3d at 377. It was AME's burden to assert, and raise fact issues on, any affirmative defense it contends precluded summary judgment. *See id.* at 378. Because AME did not assert the affirmative defense of prior breach of an oral agreement in response to NEC's summary judgment motion, its complaint on appeal is not preserved for review. *See* TEX. R. CIV. P. 166a(c) ("Issues not expressly presented to the trial court by written [summary judgment] motion, answer or other response shall not be considered on appeal as grounds for reversal.").

In any event, the summary judgment evidence does not raise a fact issue that the parties reached any binding agreement to extend the Maturity Date. First, the Contract requires that any amendment to its terms be in writing. AME acknowledges that there is no written agreement to

extend the Maturity Date. In addition, the evidence does not raise even a fact issue concerning the existence of a binding oral agreement.

"In general, a contract is legally binding only if its terms are sufficiently definite to enable a court to understand the parties' obligations." *Fort Worth Indep. Sch. Dist. v. City of Fort Worth*, 22 S.W.3d 831, 846 (Tex. 2000). "Where an essential term is open for future negotiation, there is no binding contract." *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex. 1992). The same principles apply to agreements to reach an agreement in the future. "[A]n agreement to make a future contract is enforceable only if it is specific as to all essential terms, and no terms of the proposed agreement may be left to future negotiations." *Fort Worth*, 22 S.W.3d at 846 (internal quotation marks omitted).

AME's own evidence shows that essential terms of the purported agreement to extend were left open for negotiation. For example, AME relies on a text exchange concerning its request for an extension in which NEC stated, "write up the documents to extend." But, in that same exchange, NEC also stated, "we still need to talk about the details." There is no evidence that the parties ever reached an agreement on the details, which AME later admitted included the essential term of what interest rate would be charged.

AME's contention that the trial court was precluded from granting summary judgment enforcing the October 1, 2011 Maturity Date because NEC breached an alleged agreement to extend that date is not preserved for review and, in any event, lacks merit.

Having determined that the trial court did not err by declaring that the Maturity Date was October 1, 2011, we now address its declaration that AME breached the Contract by refusing NEC's November 19, 2012 payoff tender and refusing to release its liens.

Summary judgment declaration that AME breached the Contract

AME argues that NEC bore the burden of proving that NEC made, or was excused from making, a *timely* tender of repayment in order to prove that AME's refusal to accept its tender constituted a breach of contract. *See Blanco Nat'l Bank v. Gonzalez*, No. 04-12-00079-CV, 2013 WL 1760604, at *4 (Tex. App.—San Antonio April 24, 2013, no pet.) (mem. op.) (tender of performance is element of breach of contract claim to be proved by plaintiff). AME contends, in effect, that it had no duty to accept any tender by NEC after the March 29, 2012 repayment Maturity Date, so its refusal to accept the November 19, 2012 tender could not be a breach of contract.

The effect of the October 1, 2011 Maturity Date was to put AME to a choice—either elect to convert the Notes to a 30% equity interest in NEC, or forego that election and trigger NEC's obligation to repay the Notes. By failing to exercise the conversion election, AME chose repayment. And by making that choice, AME accepted a corollary obligation to *accept* repayment. Under the Contract, repayment was due on or before March 29, 2012. But in its April 2, 2012 payoff letter, AME not only acknowledged its obligation to accept repayment, it specifically provided terms for repayment *after* the contractual deadline: "In the event that [AME] does not receive the Payoff Amount in immediately available funds no later than the Payoff Date, an additional per diem charge of $409.84 shall be added to the Payoff Amount."

"Where one party materially breaches a contract, the non-breaching party is forced to elect between two courses of action—continuing performance or ceasing performance." *Chilton Ins. Co. v. Pate & Pate Enterprises, Inc*., 930 S.W.2d 877, 887–88 (Tex. App.—San Antonio 1996, writ denied). "A party who elects to treat a contract as continuing deprives himself of any excuse for ceasing performance on his own part." *Hanks v. GAB Bus. Servs., Inc*., 644 S.W.2d 707, 708 (Tex. 1982); *see Chilton*, 930 S.W.2d at 888.

If AME accepted payments made by NEC pursuant to the late-payment term of the payoff letter, it effectively elected to treat the Contract as continuing. It therefore had an obligation to accept NEC's payoff tender and to release its liens. In that case, NEC's November 19, 2012 payoff tender would be deemed to be timely.

The summary judgment evidence includes the payoff letter containing the late-payment term. But NEC did not present summary judgment evidence that it actually made, and AME actually accepted, payments in accordance with that term. Without this evidence, NEC did not conclusively prove that AME treated the Contract as continuing and so was required to accept NEC's tender even after March 29, 2012. It was therefore error for the trial court to grant summary judgment declaring that AME breached the contract by refusing the tender. But this does not end the analysis.

Before reversing a judgment because of an error of law, we must find that the error "probably caused the rendition of an improper judgment" or "probably prevented the appellant from properly presenting the case to the court of appeals." TEX. R. APP. P. 44.1. "The rule applies to all errors," including error in granting summary judgment. *DeNucci v. Matthews*, 463 S.W.3d 200, 207 (Tex. App.—Austin 2015, no pet.) (quoting *G & H Towing Co. v. Magee*, 347 S.W.3d 293, 297 (Tex. 2011)). Indeed, the supreme court has expressly held that "a trial court's erroneous decision to grant summary judgment can be rendered harmless by subsequent events in the trial court." *Progressive Cty. Mut. Ins. Co. v. Boyd*, 177 S.W.3d 919, 921 (Tex. 2005). This is such a case.

The fact that AME accepted NEC's post-March 29, 2012 interest payments was not disputed at trial. In fact, AME has admitted that fact on appeal, both in its brief and at oral argument. The jury was asked to determine whether AME's breach of contract was excused by a prior breach by NEC, and was instructed that it would not be excused if AME treated the contract

as continuing or if it continued to accept benefits under the contract. Although the jury found that NEC breached the Contract by not tendering payment by April 3, 2012, it also found that AME's breach was not excused by that breach.[3] This necessarily means that the jury found that AME treated the Contract as continuing or continued to accept benefits under it.[4]

Error in granting summary judgment in the absence of evidence that AME treated the Contract as continuing or continued to accept interest payments under it was rendered harmless by the undisputed trial evidence, related jury finding, and AME's admission that it continued to accept interest payments. *See Andrew Shebay & Co., P.L.L.C. v. Bishop*, 429 S.W.3d 644, 649 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (error in granting summary judgment when movant adduced inadequate evidence rendered harmless by nonmovant's later admission of omitted fact). The record conclusively establishes that AME had a duty to accept the November 19, 2012 payoff tender and to release its liens. Its failure to do so was a breach of contract. The trial court's declaration to that effect does not present reversible error.

We conclude that the declarations contained in the first summary judgment order and subsequently incorporated into the final judgment do not present reversible error. Those declarations establish that AME did not exercise its conversion election by the October 1, 2011 Maturity Date, resulting in its obligation to accept repayment of the Notes, and further resulting in breaches of the Contract by refusing to accept NEC's tender of repayment and refusing to release its liens. The declarations do not, however, establish NEC's entitlement to recover on its claim for breach of contract because they do not address the element of damages. That issue, and defensive issues raised by AME, were submitted to the jury for decision.

[3] AME's challenges to the jury question submitting excuse are discussed below.
[4] AME does not challenge the sufficiency of the evidence supporting the jury's implicit finding that it treated the Contract as continuing or continued to accept benefits under it.

Jury finding on AME's affirmative defense of excuse

The jury was asked in Question 2 whether AME's breach of the Contract was excused. It was instructed that the breach was not excused if AME treated the contract as continuing after any material breach by NEC after October 1, 2011, or if AME sought to benefit from the contract after any such breach by NEC. The jury found that AME's breach was not excused. AME contends that this finding is immaterial.

"A question is immaterial when it should not have been submitted, or when it was properly submitted but has been rendered immaterial by other findings." *Spencer v. Eagle Star Ins. Co. of Am*., 876 S.W.2d 154, 157 (Tex. 1994). A question may also be considered immaterial "when its answer can be found elsewhere in the verdict or when its answer cannot alter the effect of the verdict." *BP Am. Prod. Co. v. Red Deer Res., LLC*, 526 S.W.3d 389, 402 (Tex. 2017) (quoting *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 752 (Tex. 1995)). "Submission of an immaterial issue is not harmful error unless the submission confused or misled the jury." *City of Brownsville*, 897 S.W.2d at 752.

AME argues that Question 2 was rendered immaterial by the jury's finding in answer to Question 4B that NEC breached the Contract on April 3, 2012 by failing to tender the loan payoff. AME points out that NEC's April 3, 2012 breach necessarily preceded AME's November 19, 2012 breach. It concludes that, once NEC breached the Contract, AME was not required to comply with its own contractual obligations, *i.e.*, it was excused. It then urges that the jury's answer to the excuse question cannot change the verdict's effect. But AME ignores the fact that it is *seeking to change* the verdict's effect by disregarding the answer to the excuse question.

AME's argument also disregards the fact that the jury was instructed that AME was *not* excused by a prior breach by NEC if "AME treated the contract as continuing" or "[sought] to benefit from the contract" after such breach. AME improperly ends its analysis with establishing

a prior breach. The finding that AME's breach was not excused *even though* NEC committed a prior breach establishes AME's liability for breach of contract and NEC's entitlement to a remedy for that breach. Question 2 is thus not immaterial because its answer affects the verdict.

AME next contends that the court erred by including the October 1, 2011 time limitation in Question 2, and by refusing to submit AME's requested instructions on equitable estoppel. It acknowledges that the date limitation was included, and the estoppel defense was excluded, based on the court's prior summary judgment rulings. We have addressed and upheld those rulings above. In addition, AME did not object in the trial court to the inclusion of the October 1, 2011 time limitation. Any error regarding that limitation is waived. TEX. R. CIV. P. 274.

AME also argues that the Question 2 instructions concerning treating the contract as ongoing and seeking to benefit from the contract are defective because they "contradict and undermine" a provision in the Contract that prohibits waiver of any contract term unless the parties unanimously agree in writing. The charge instructions, however, do not constitute a waiver of a contractual term. Rather, they are principles of contract law to which the contractual anti-waiver provision simply does not apply. *See Chilton Ins. Co.*, 930 S.W.2d at 888 (stating the same legal principles as are recited in the Question 2 instructions).

AME has not demonstrated error in the submission of Question 2 or its instructions. It is thus established at this point that AME breached the contract on November 19, 2012, and that its breach was not excused. We now address the impact of a related jury submission inquiring whether AME or NEC breached the contract first.

Jury finding on who breached first

The jury was asked in Question 5 to determine whether AME or NEC breached the Contract first. It answered, "AME." As it did in relation to Question 2, AME argues that this question was rendered immaterial by the jury's finding that NEC failed to comply with the

Contract on April 3, 2012. It again asserts that April 3, 2012 necessarily comes before November 19, 2012, and that this chronology ends the analysis. NEC agrees that Question 5 is immaterial, but for a different reason. It asserts that, because the jury found AME incurred no breach of contract damages, AME could not recover even if the jury had answered Question 5 "NEC." NEC's analysis also falls short, though, because it does not address the impact on NEC's own recovery if the jury had found NEC committed the first breach.

We conclude that Question 5 was, in fact, rendered immaterial, but not for the reasons offered by either party. *See BP America*, 526 S.W.3d at 402 (finding jury question immaterial for reason other than that stated by appellant). It was rendered immaterial by the jury's answer to Question 2 (finding that AME's breach was not excused) *combined with* the jury's answer to Question 7 (finding that AME incurred no damages).

The reason for asking which party breached a contract first is to determine whether the other party was released from performing its obligations under the contract. *See Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 200 (Tex. 2004). But, as discussed above, a party's performance is *not* excused by the other party's prior material breach if the non-breaching party treats the contract as continuing. *See Hanks*, 644 S.W.2d at 708; *Chilton*, 930 S.W.2d at 888.

By answering Question 5 "AME," the jury established that NEC was entitled to recover on its breach of contract claim but AME was not. The same result obtains if the jury had answered Question 5, "NEC." AME would theoretically have been entitled to recover damages for that breach.[5] But, in answer to Question 7, the jury found the amount of those damages to be $0. AME does not contest that finding on appeal. Thus, regardless of the jury's answer to Question 5, the result is a take-nothing judgment on AME's breach of contract claim. NEC's recovery, however,

[5] As discussed below, AME's claim to the remedy of specific performance was properly disposed of by summary judgment.

would not have been eliminated even if the jury had found NEC committed the first breach. This is because the jury found in answer to Question 2 that AME was *not* excused from performing its contractual obligations even if NEC breached first. NEC would still be entitled to recover for AME's unexcused breach of contract.

The jury's answer to Question 5 makes no difference in this case. Whether that answer is "NEC" or "AME," the remainder of the verdict establishes that the result is the same—NEC is entitled to a remedy for breach of contract; AME is not. We hold that Question 5 is immaterial and, because of that holding, we need not address AME's assertion of charge error in the submission of that question.

Jury finding on NEC's damages

We turn now to NEC's remedy for breach of contract. The jury was asked to determine the amount of damages that resulted from AME's breach of contract. It was instructed to measure NEC's damages by "[t]he difference in the interest paid by NEC to AME from April 1, 2012 through November 19, 2012, and the interest that would have been paid under the Roy Terracina loan."[6] The jury awarded $6,000 in damages. AME contends that the evidence is legally insufficient to support this award. We agree.

When reviewing a jury finding for legal sufficiency, the court considers the evidence in the light most favorable to the verdict and indulges every reasonable inference that would support it, crediting favorable evidence if a reasonable factfinder could and disregarding contrary evidence unless a reasonable factfinder could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 822, 827 (Tex. 2005).

[6] There is evidence that NEC negotiated a loan from Roy Terracina to pay off the Notes on or before the Maturity Date, but that that loan fell through because AME did not provide a payoff letter prior to that date.

AME's breach of contract occurred on November 19, 2012. The jury was asked to determine what damages to NEC resulted from that breach. Damages could "result from" a November 19, 2012 breach only on or after that date. But the damage measure submitted by NEC limits the jury's consideration to a seven-and-a-half month period *preceding* the breach. There is no evidence that any difference in interest payments during that period *resulted from* AME's breach.

NEC argues that the damage measure encompasses the date of AME's breach because the relevant time period is stated to be *through* November 19, 2012. There is, however, no evidence that NEC incurred any damages, much less $6,000, *on* November 19, 2012 as a result of AME's breach.

AME's legal sufficiency challenge to NEC's damage award is sustained. This would ordinarily result in the rendition of a take-nothing judgment on NEC's breach of contract claim, but NEC also sought, and obtained, relief in the form of specific performance or, alternatively, "further relief" under the Uniform Declaratory Judgments Act. We now address the propriety of that relief.

Specific performance vacating AME's liens

NEC filed a motion asking the court to grant specific performance vacating AME's liens based on the court's summary judgment ruling that AME breached the Contract by refusing to release those liens. It urged that this relief was further supported by the jury's findings that AME breached the Contract first and that AME's breach was not excused. The court granted the motion and vacated AME's liens.

AME complains that the judgment vacates AME's liens without requiring NEC to pay back the $1.5 million loan plus interest, costs, and attorney's fees. It urges that the Contract clearly

requires that the Notes be paid before AME's liens can be released and that vacating AME's liens without also requiring NEC to repay the Notes grants a windfall to NEC.

Specific performance is an equitable remedy for a breach of contract. *Stafford v. Southern Vanity Magazine, Inc.*, 231 S.W.3d 530, 535 (Tex. App.—Dallas 2007, pet. denied). A party seeking specific performance "must plead and prove that [it] was ready, willing, and able to timely perform [its] obligations under the contract." *DiGiuseppe v. Lawler*, 269 S.W.3d 588, 593 (Tex. 2008). A party must also show that it has complied with its obligations under the contract. *Id.* at 594. "As a consequence, a plaintiff seeking specific performance, as a general rule, must actually tender performance as a prerequisite to obtaining specific performance." *Id.*

The supreme court has emphasized the requirement that a party seeking specific performance uphold its own end of the bargain:

> [T]o be entitled to specific performance, the plaintiff must show that it has *substantially performed its part of the contract*, and that it is *able to continue performing its part of the agreement*. The *plaintiff's burden* of proving readiness, willingness and ability is a continuing one that *extends to all times relevant to the contract and thereafter*.

Id. at 594 (bracket in original; emphasis added); *accord Marx*, 474 S.W.3d at 374.

Even if "tender of performance is excused, a plaintiff is still obligated to plead and prove his readiness, willingness, and ability to perform at relevant times before specific performance may be awarded." *DiGiuseppe*, 269 S.W.3d at 595. The rule should be no different when a tender is made but rejected. There is no basis in law or logic for demanding that a plaintiff seeking specific performance plead and prove that it is ready, willing, and able to perform, but then granting specific performance without requiring the plaintiff to follow through with that performance.

NEC argues that it is too late for AME to claim it is entitled to repayment of the Notes because AME refused NEC's tendered payment and then did not seek to recover the amount of the Notes at trial. Instead, AME submitted to the jury a damage measure relating solely to the value

of a 30% equity interest in NEC. NEC contends that AME cannot seek to recover different damages on appeal.

NEC is confusing repayment of the Notes as a measure of damages for AME's breach of contract counterclaims with repayment of the Notes as a requirement NEC must fulfill to establish its entitlement to specific performance. It is the latter circumstance that is here at issue. In that context, AME had no burden to seek damages based on the amount of the Notes.

The trial court erred by granting the equitable remedy of specific performance without requiring NEC to perform its repayment obligation under the Contract. *See id.* at 594 (plaintiff must fulfill contractual obligations and must be ready, willing, and able to perform at all times relevant to contract).

AME asks this Court to modify the judgment to award it $1,511,855.25, which it contends is the undisputed amount of principal, interest, fees, costs, and expenses due on March 28, 2012.[7] This figure does not account for interest payments made by NEC after that date. Remand is necessary to determine the amount NEC must pay under the Contract to support the award of specific performance vacating AME's liens.

Permanent injunction vacating AME's liens

As an alternative to its request for specific performance vacating AME's liens, NEC asked the court to issue a permanent injunction as "further relief" under the Uniform Declaratory Judgments Act. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 37.011. That relief was granted and is incorporated into the final judgment.

Section 37.011 provides that "[f]urther relief based on a declaratory judgment or decree may be granted whenever necessary or proper." *Id.* Under this provision, "[a] permanent injunction

[7] This is the figure included in the payoff letter AME provided on April 2, 2012, but which was dated March 28, 2012.

may be obtained when the evidence establishes that a defendant will not comply with a declaratory judgment." *Shelton v. Kalbow*, 489 S.W.3d 32, 48 (Tex. App.—Houston [14th Dist.] 2016, pet. denied); *see State v. Anderson Courier Serv*., 222 S.W.3d 62, 66 (Tex. App.—Austin 2005, pet. denied). The grant or denial of such "further relief" is reviewed for abuse of discretion. *Tanglewood Homes Ass'n, Inc. v. Feldman*, 436 S.W.3d 48, 76 (Tex. App.—Houston [14th Dist.] 2014, pet. denied).

NEC's motion for "further relief" was filed after the close of evidence, but before the jury returned its verdict in this case. In the motion, NEC asserted that the fact that AME had not yet released its liens demonstrated that AME would not comply with the court's summary judgment declarations. But those interlocutory declarations merely established the breach element of NEC's breach of contract claim. They did not impose a duty on AME to release its liens before that claim—including AME's defense that its breach was excused—was fully adjudicated.

NEC did not establish that permanent injunctive relief was necessary or proper. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 37.011. The trial court abused its discretion by granting that relief.

Conclusion on NEC's claim for breach of contract

NEC obtained appropriate summary judgment rulings and jury findings establishing AME's liability for breach of contract. It is not entitled to recover damages on that claim, though, because the evidence is legally insufficient to support the jury's damage award. NEC is also not entitled to a permanent injunction as "further relief" under the Uniform Declaratory Judgments Act. NEC's request for specific performance vacating AME's liens is remanded to the trial court for a determination of the amount to be paid by NEC to AME pursuant to the Notes.

AME's counterclaims for breach of contract

AME asserted that NEC breached the Contract in numerous respects, including failures to comply with contractual obligations in Sections 4, 5, and 6 of the Contract. NEC filed a summary judgment motion challenging the remedies sought by AME in conjunction with those counterclaims. The trial court determined that AME was not entitled to pursue a claim for damages for any breach alleged to have occurred prior to October 1, 2011, because AME produced no evidence to support the proper measure of damages. This ruling precluded AME's claims for breach of Section 5 covenants because all such breaches were alleged to have occurred prior to October 1, 2011. The court also determined that AME was not entitled to the remedy of specific performance.

Summary judgment on damages

"[T]he rule in Texas has long been that contract damages are measured at the time of breach, and not by the bargained-for goods' market gain as of the time of trial." *Miga v. Jensen*, 96 S.W.3d 207, 214 (Tex. 2002). Even so, AME sought to recover benefit-of-the-bargain damages measured by the value of NEC at the time of trial as a remedy for NEC's alleged breach of contract. AME contends that the supreme court in *Miga* recognized an exception to the general rule that supports its assertion of this damage measure.

Miga involved the breach of an option agreement. The issue before the supreme court was "how to properly measure the damages caused by [the defendant's] failure to deliver the stock under the option's terms." *Id.* at 209. The court began its analysis with the traditional rule stated above. It then noted a limited exception that it had applied in two cases decided in the 1800's. *Id.* at 214 (citing *Randon v. Barton*, 4 Tex. 289 (1849); *Calvit v. McFadden*, 13 Tex. 324 (1855)). That exception "allow[ed] damages for the highest value of the article between the time of breach and the time of trial, because the purchasers had paid the contract price in advance." *Id.*

While the supreme court did not expressly overrule *Randon* and *Calvit*, it did note that the New York rule on which the exception in those cases was based was subsequently modified. *Id.* It also noted that the United States Supreme Court had stated in 1889 that "the rule allowing damages to be measured by the stock's highest value up to the time of trial had proved unworkable." *Id.* The *Miga* court clearly cast doubt on the continued viability of the *Randon*/*Calvit* exception.

In any event, the court in *Miga* ultimately applied the general rule that damages are measured at the time of breach. *Id.* at 215. It expressly stated that its "decision does not turn on when [the plaintiff] offered payment for the stock." *Id.* Rather, because the defendant breached the contract on the same day the plaintiff tried to exercise his option, "the correct measure of damages for Jensen's failure to perform on his promise is the traditional one: the difference between the price contracted to be paid and the value of the article at the time when it should [have been] delivered." *Id.* (internal quotation marks omitted; brackets in original); *see Bowers Steel, Inc. v. DeBrooke*, 557 S.W.2d 369, 373 (Tex. Civ. App.—San Antonio 1977, no writ) (proper measure of damages for breach of promise to pay employee a percentage of stock was fair market value of the stock at the time of the employee's termination).

AME argues that, under the *Randon*/*Calvit* exception referenced in *Miga*, it can recover damages measured by NEC's value at the time of trial because it paid the $1.5 million purchase price for the conversion option in advance. AME ignores the *Miga* court's criticism of the "paid in advance" exception and its statement that its own application of the traditional measure of damages did *not* turn on when payment was made. In any event, AME does not fall within the "paid in advance" exception.

AME confuses its $1.5 million loan with payment of the price to exercise an option. An example of the latter is the $40,800 purchase price for the 528.96 shares of stock at issue in *Miga*. *Miga*, 96 S.W.3d at 209. AME cannot be said to have paid $1.5 million as the price to purchase a

30% equity interest in NEC because AME held two Notes requiring NEC to repay that sum. If AME had exercised its conversion option, NEC would have been released from its obligation to repay the Notes by the express terms of the Contract. But AME never exercised that option and the Notes were not released. In fact, AME continues to assert that it is entitled to repayment of the $1.5 million loan. Its assertion that it paid in advance for a 30% equity interest—which is its only argument for avoiding application of the generally-recognized measure of damages—is not supported by the facts.

The trial court did not err by granting summary judgment rejecting AME's damage measure based on NEC's value at the time of trial.

Assuming that AME could recover benefit-of-the-bargain damages for failure to receive a 30% equity interest in NEC pursuant to an option it did not exercise, those damages would be measured by the value of that interest at the time of the breach giving rise to the damage claim. AME contends that it did not exercise the option on the October 1, 2011 Maturity Date because NEC breached financial disclosure covenants prior to that time. Thus, the relevant time period for measuring damages is on or before October 1, 2011.

NEC alleged in its motion for no-evidence summary judgment that AME had no evidence of the value of NEC on or before October 1, 2011. In response, AME offered the affidavit of its expert, Kim Ford, as evidence of the value of NEC at that time. But Ford's affidavit unequivocally states her opinion that "NEC had no readily ascertainable market value" as of October 1, 2011, and explains why it is "extremely difficult, if not impossible, to place an ascertainable market value on the company" at that time. Ford further states that a report prepared by Padgett Stratemann "does not represent a reliable valuation of NEC as of October 1, 2011." She then repeats her

opinion that "NEC has no ascertainable market value as of that date." Ford's affidavit is no evidence of the value of NEC on or before October 1, 2011.[8]

On appeal, AME contends that NEC's own evidence provided a value for NEC on or before October 1, 2011. But the evidence to which AME cites is a letter by its own expert (Ford) criticizing the expert report of Scott Bayley, which is based, at least in part, on Bayley's review of the report by Padgett Stratemann that Ford also criticized. Ford's letter, like her affidavit, is no evidence of the value of NEC on or before October 1, 2011.

The trial court did not err by granting summary judgment against AME on its counterclaim for any breach occurring on or before October 1, 2011, because AME did not produce any evidence of the proper measure of damages.

Summary judgment on specific performance

As an alternative to its request for breach of contract damages, AME sought "specific performance to enforce the Contract." While not expressly stated, AME presumably sought to be awarded a 30% equity interest in NEC.

AME asserts that the following language from *Miga* supports its entitlement to specific performance: "When a closely held corporation's stock has no ascertainable market value, one could seek specific performance to enforce a stock purchase agreement . . . ." 96 S.W.3d at 217. But, unlike *Miga*, the breach of contract alleged in this case is *not* the breach of an option agreement. AME never exercised its option, so it cannot be said that NEC refused to perform under the option provision. Rather, the foundation for AME's claim is that NEC breached *covenants* in the Contract, not the conversion option itself.

[8] The trial court later granted NEC's motion to exclude Ford's expert opinions.

NEC argues that specific performance is not an available remedy for breach of a covenant. The cases on which it relies do not support this assertion. For example, *Arbor Windsor Court, Ltd. v. Weekley Homes, LP*, 463 S.W.3d 131 (Tex. App.—Houston [14th Dist.] 2015, pet. denied), states, as a general matter, "[t]he remedy for a party's breach of a covenant is a claim for damages." *Id.* at 137 n.6. That case, in turn, cites the supreme court's opinion in *Solar Applications Engineering, Inc.*, which states, "[b]reach of a covenant may give rise to a cause of action for damages . . . ." 327 S.W.3d at 108. Neither case states that damages are the *only* remedy or that specific performance is *never* a remedy for breach of a covenant. The question, then, is whether specific performance is an available remedy for AME in this case.

As previously noted, "a plaintiff seeking specific performance, as a general rule, must actually tender performance as a prerequisite to obtaining specific performance." *DiGiuseppe*, 269 S.W.3d at 594. NEC moved for summary judgment on the ground that AME did not perform or tender performance of its obligations under the Contract conversion provision for which it seeks specific performance.

Section 3.1 of the Contract imposed the following obligations on AME in conjunction with exercising the conversion election:

> Each Note holder so electing to convert shall surrender its Notes to [NEC], accompanied by written notice of election to convert the Notes, and a written representation reasonably acceptable to [NEC] to the effect that the Note holder is the beneficial owner of the Notes, and that each Note being converted is free and clear of any liens or encumbrances. As a condition to the consummation of the conversion of Notes to Class A Units, a Note holder must duly execute and deliver to [NEC] a copy of the Company Agreement contemporaneously with the delivery of the Note.

It is undisputed that AME did not perform, or tender performance of, any of these obligations. AME argues that it was excused from tendering performance on October 1, 2011

because, on October 19, 2011, NEC repudiated the contract by stating that the date for electing conversion had passed.

The supreme court has stated that "[a] plaintiff need not actually tender performance when the defendant has repudiated his own obligations." *DiGiuseppe*, 269 S.W.3d at 600. This necessarily means that the defendant's repudiation precedes (or at least coincides with) the time for the plaintiff's tender. A timely tender cannot be excused by something that has not yet occurred. Therefore, AME's argument that its tender of performance on October 1, 2011 was excused by an alleged October 19, 2011 repudiation fails. In addition, NEC's October 19, 2011 notice that the conversion date had passed is not a *repudiation* of the Contract; it is insistence on *enforcing* the Contract.

AME also argues that it was excused from tendering performance because it "reasonably believed" that NEC had agreed to extend the Maturity Date for twelve months. But, as noted above, the evidence shows that there was no binding agreement to extend because essential terms were left open for negotiation. AME's unilateral belief that there was an agreement to extend, or that the parties would later agree to extend, does not constitute a legal basis for relieving it of the obligation to tender performance as a prerequisite to obtaining specific performance.

NEC conclusively negated AME's entitlement to specific performance. The trial court did not err by granting summary judgment denying that remedy.

Effect of the jury's zero damages finding

AME's causes of action at trial included four claims of breach of contract and one claim of fraudulent inducement. It obtained a favorable finding from the jury on one of those claims, but the jury awarded zero damages. AME raises a number of issues on appeal concerning the jury's failure to find liability on the remaining claims and its failure to award AME any attorney's fees.

But we must first determine the effect on those issues of the jury's finding that AME did not establish any damages.

"When a separate and independent ground that supports a judgment is not challenged on appeal, the appellate court must affirm." *Hernandez v. Garcia*, No. 04-02-00180-CV, 2003 WL 724182, *1 (Tex. App.—San Antonio March 5, 2003, no pet.) (mem. op.) (quoting *Harris v. General Motors Corp.*, 924 S.W.2d 187, 188 (Tex. App.—San Antonio 1996, writ denied)). "This rule has been consistently applied to jury findings that a plaintiff did not establish damages. When an unchallenged no-damages finding supports a take-nothing judgment, any error in the liability findings is harmless." *San Antonio Press, Inc. v. Custom Bilt Mach.*, 852 S.W.2d 64, 65 (Tex. App.—San Antonio 1993, no writ); *see James v. Hudgins*, 876 S.W.2d 418, 423 (Tex. App.—El Paso 1994, writ denied) (listing cases so holding). "If the rule were otherwise, an appellant could avoid the adverse effect of a separate and independent basis for the judgment by ignoring it and leaving it unchallenged." *San Antonio Press*, 852 S.W.2d at 65.

In *Cooper v. Lyon Financial Services, Inc.*, 65 S.W.3d 197 (Tex. App.—Houston [14th Dist.] 2001, no pet.), the court held that any error in granting a directed verdict on breach of warranty claims was harmless because the damages attributable to those claims were the same as the damages attributable to the plaintiff's DTPA claim, which the jury found to be zero. *Id.* at 209. Thus, "even if all of [plaintiff's] liability claims had been submitted to the jury, the finding of zero damages would have remained the same." *Id.*

Similarly, in *Canales v. National Union Fire Insurance Company*, 763 S.W.2d 20 (Tex. App.—Corpus Christi 1988, writ denied), the trial court refused to submit some of plaintiff's requested issues to the jury. *Id.* at 22. The jury found zero damages in connection with the liability theories that were submitted. *Id.* The appellate court first considered "the general rule that where the jury finds no damages, findings on issues of liability are immaterial and harmless." *Id.* at 23.

It then addressed the impact on this general rule of liability theories being excluded from the jury's consideration:

> This case is distinguishable on the facts from the cases cited [for the general rule] because appellants complain that they were not allowed to submit complete theories of liability. We perceive that this could make a difference *if additional types of damages were recoverable* under the liability theories not properly allowed by the trial court. *Here, however, the damages are the same, both as to the issues submitted and those denied*. . . . Thus, if all the appellants' requested issues had been submitted and answered in their favor, they would still recover zero damages.

Id. (emphasis added).

In this case, the jury was asked whether NEC breached the Contract in any of four specific ways. It answered "No" to three of the alleged breaches and "Yes" to one. It was then instructed, if it answered "Yes" to any of the alleged breaches, to determine AME's breach of contract damages. The damage issue contained only one measure of damages and asked for only one answer, which the jury found was zero. AME does not challenge this finding on appeal.

The jury's finding of zero damages renders harmless any error in the jury's failure to find liability based on the three alleged breaches of contract for which it answered "No." *San Antonio Press*, 852 S.W.2d at 65. AME's failure to establish that it suffered any breach of contract damages is a separate and independent ground supporting the take-nothing judgment on those claims. *See Hernandez*, 2003 WL 724182, at *1. We therefore need not address AME's factual sufficiency challenges to the jury's negative findings on liability.

AME submitted the exact same damage measure for its counterclaim of fraudulent inducement. The jury did not answer that damage question, though, because it did not find that NEC committed fraud. This situation is akin to those presented in *Cooper* and *Canales*. In each of those cases, the plaintiff did not obtain a liability finding, albeit because the court refused to submit its liability theories. Yet, error was rendered harmless because the jury answered "zero" to the same damage measure in conjunction with a different liability theory. So, too, in this case, the

jury's zero answer to the breach of contract damage question, utilizing the identical measure of damages as was submitted for fraud, renders harmless any error in the jury's failure to find liability for fraud. *See Cooper*, 65 S.W.3d at 209 (error in failing to submit liability theory rendered harmless by zero damage finding on same measure of damages in submitted theory); *Canales*, 763 S.W.2d at 23 (same). We therefore need not address AME's assertion of charge error in the instructions accompanying the fraud liability question.

Finally, AME challenges the jury's finding that its reasonable and necessary attorney's fees were zero. On appeal, AME contends it was entitled to attorney's fees under the parties' security agreement. But in its pleadings, AME sought attorney's fees only under section 38.001 of the Civil Practice and Remedies Code. To recover attorney's fees under that statute, a party must not only establish liability, but must recover damages. *State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 437 (Tex. 1995). The jury's zero damage finding therefore renders harmless any error in its failure to assess any attorney's fees in AME's favor. *See San Antonio Press*, 852 S.W.2d at 65.

Conclusion

For all the reasons previously stated, we conclude that the trial court did not err in ordering that AME take nothing on its claims against NEC or in issuing the declarations incorporated from its prior summary judgment rulings which establish that AME committed a breach of contract. NEC is not, however, entitled to a monetary recovery for breach of contract, nor is it entitled to "further relief" or a permanent injunction under the Uniform Declaratory Judgments Act. NEC is entitled to specific performance requiring AME to release its liens and security interests upon tender of payment by NEC of its obligations under the Notes, in an amount to be determined on remand.

We, therefore,

- reverse that portion of the judgment awarding to NEC $6,000 in damages, plus pre- and post-judgment interest, and render judgment that NEC take nothing on its claim for damages;
- reverse that portion of the judgment granting NEC's request for a permanent injunction, and render judgment that NEC take nothing by that request;
- reverse that portion of the judgment granting NEC's request for specific performance and vacating AME's liens and security interests, and remand the request for specific performance to the trial court for a determination of the amount to be paid by NEC to AME pursuant to the Convertible Promissory Notes dated February 27, 2009 and September 1, 2009; and
- affirm the remainder of the judgment.

Irene Rios, Justice