

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-14-00479-CV

MUJTABA ALI KHAN, Appellant

V.

HAROON CHAUDHRY, Appellee

On Appeal from the 284th District Court
Montgomery County, Texas
Trial Cause No. 14-03-02507-CV

MEMORANDUM OPINION

Mujtaba Ali Khan, D.O. (“Khan” or “Appellant”) appeals following the entry of a Final Judgment in favor of Haroon Chaudhry, M.D. (“Chaudhry” or “Appellee”). The appeal relates solely to Chaudhry’s breach of contract claim wherein he sought specific performance of the contract between Chaudhry and Khan. An interlocutory summary judgment in favor of Chaudhry was granted in the original action, Cause No. 12-01-00014-CV (the original suit). The trial court severed the breach of contract claim from the underlying suit and assigned the

severed action Cause No. 14-03-02507-CV (the severed action). In the severed action, the trial court then conducted a jury trial on the attorney's fees relating to the breach of contract action. In the Final Judgment dated July 31, 2014, the trial court ordered Khan to: undertake all actions necessary and execute all documents necessary to transfer his ownership interest in Xenon Anesthesia of Texas, PLLC ("Xenon Texas") to Chaudhry; pay \$430,000.00 (plus a specified additional amount for appellate proceedings) to Chaudhry as reasonable attorney's fees; and, pay costs of court. Khan timely filed his notice of appeal.

Appellant's Original Appellate Brief

On appeal, Khan filed Appellant's Original Brief wherein he asserted four issues: 1) Chaudhry lacked standing to claim any ownership interest in Xenon Texas because, at the time when the suit was filed, Chaudhry did not have a medical license or administrative license in Texas; 2) the summary judgment evidence as to damages for the breach of contract claim is legally insufficient; 3) the judgment granted more relief than requested with respect to attorney's fees; and 4) the question of whether Chaudhry was "ready, willing, and able to perform his contractual obligations when they became due [was] a question of fact." Chaudhry timely filed Appellee's Brief and responded to the issues outlined in Khan's Original Brief.

Motion for Leave to Supplement

Khan filed a Motion for Leave to Supplement Appellant's Brief (Motion to Supplement). Khan included with his Motion to Supplement an unofficial copy of a "Memorandum and Order" from the United States District Court for the Southern District of Texas, Houston Division in civil action number H-13-1828, styled *Xenon Health, LLC and Haroon W. Chaudhry, M.D. v. Mirza Baig*.¹

This Court denied Appellant's Motion to Supplement by letter dated August 20, 2015, and stated:

The appellant's motion for leave to file a supplemental brief was denied on this date. The Court's ruling is without prejudice to the filing of a motion for leave to file a supplemental brief that complies with Tex. R. App. P. 38.1, along with an attached supplemental brief that cites Appellant's new case authority and presents argument that is *specifically related to one of the issues previously identified in the appellant's opening brief.* (emphasis added)

¹ The District Court Memorandum and Order can be found at 2015 U.S. Dist. LEXIS 79663 (S.D. Tex. June 19, 2015). The Memorandum and Order pertained solely to Defendant Mirza Baig's Motion for Summary Judgment which was granted as to all claims made by Plaintiffs Xenon Health LLC and Haroon W. Chaudhry, M.D. against Defendant Mirza Baig, except the trial court did not grant a summary judgment as to the Plaintiffs' claim for tortious interference with Xenon LLC's employment contract with Hashim, which remains for trial. In footnote 31 of the Memorandum and Order the trial court expressly distinguished its facts and the scope of its ruling from the facts and findings in *Xenon Anesthesia of Tex. P.L.L.C. v. Xenon Health L.L.C.*, No. 09-12-00553-CV, 2013 Tex. App. LEXIS 3969 (Tex. App.—Beaumont Mar. 28, 2013, no pet.) (mem. op.). See 2015 U.S. Dist. LEXIS 79663, at *20-22. The federal district court's ruling in *Baig* is not binding or controlling authority for the case at bar. See *Davenport v. Garcia*, 834 S.W.2d 4, 20 (Tex. 1992).

First Amended Motion for Leave to Supplement

After the case was set for submission on the briefs, Khan filed a First Amended Motion for Leave to Supplement Appellant's Brief (First Amended Motion). In the First Amended Motion, Khan asks this Court to take "judicial notice" of the Memorandum and Order from the federal magistrate. Khan attached a new brief to his First Amended Motion which he entitles, "Appellant's First Supplemental Brief." In his First Supplemental Brief he restates the same four issues as stated in his Original Brief. However, he adds an additional section to the end of his discussion of the first and second stated issues. In particular, he adds a contention that the contracts between Chaudhry and Khan "were void as illegal or against public policy[.]" Chaudhry filed an opposition and response to Khan's First Amended Motion.

Rule 38.7 of the Texas Rules of Appellate Procedure provides that a "brief may be amended or supplemented whenever justice requires, on whatever reasonable terms the court may prescribe." Tex. R. App. P. 38.7. "[T]he appellate court has some discretion in deciding whether to allow" a party to supplement a brief. *Standard Fruit & Vegetable Co. v. Johnson*, 985 S.W.2d 62, 65 (Tex. 1998). The argument Khan attempts to add to his brief is that the contracts between Chaudry and Khan "were void as illegal or against public policy[.]" That argument

could not be grounds for reversal of the summary judgment because Khan did not raise the argument in his response to the traditional motion for summary judgment. Tex. R. Civ. P. 166a(c) (“Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal.”). Justice does not require that this Court allow Khan to supplement his brief with the additional argument. *See Standard Fruit*, 985 S.W.2d at 65. Accordingly, we deny Khan’s First Amended Motion to Supplement.²

Underlying Facts

On January 3, 2012, Chaudhry and Xenon Health LLC (“Xenon”) filed Plaintiff[]’s] Original Verified Petition, Request for Temporary Restraining Order and Temporary Injunction (Original Petition) against defendants Khan and Xenon Texas asserting claims for breach of contract, tortious interference, conversion, defamation, and injunctive relief. On November 5, 2012, Plaintiffs filed their First Amended Petition and Request for Temporary Injunction (First Amended Petition) which adds a request for specific performance to plaintiffs’ original claims.

In the First Amended Petition Chaudhry alleged that he is an anesthesiologist, licensed to practice medicine in several states, and that he owns interests in several companies that provide anesthesia services at health care

² Khan also filed a Second Amended Motion to Supplement his Brief on March 2, 2016, which we denied by separate docket entry.

facilities in the states in which he is licensed. Chaudhry further alleged that he is a member of Xenon Health, which provides management services to companies that provide anesthesia services to health facilities. According to Chaudhry, after expending resources on business development, Chaudhry and Xenon Health identified potential clients in Texas. Chaudhry further alleged that he then contacted an acquaintance, Dr. Khan, who agreed to become involved in forming Xenon Texas and Khan agreed to transfer Khan's ownership interest to Chaudhry once Chaudhry obtained his license in Texas. Chaudhry alleged that Chaudhry and Khan entered into a Purchase and Sale Agreement. Chaudhry also alleged that Khan agreed to sell the entirety of Khan's interest in Xenon Texas to Chaudhry upon Chaudhry's receipt of a medical license in Texas. According to Chaudhry, "[o]n December 23, 2011 (prior to Dr. Chaudhry receiving a medical license in Texas), [] Chaudhry received correspondence from a Virginia attorney purporting to represent Xenon Texas and Dr. Ali Khan[.]" alleging that Chaudhry had failed to disclose an arrest and notifying Chaudhry that Khan and Xenon Texas had suspended the Exclusive Management Services Agreement, that Khan terminated the power of attorney Khan had granted to Chaudhry, and that Khan had repudiated the Purchase and Sale Agreement. According to Chaudhry, Khan decided he wanted to keep the business and refused to transfer the ownership as

agreed. Chaudhry specifically alleged in his First Amended Original Petition that “[a]ll conditions precedent” had been performed or had occurred. Chaudhry asserted a breach of contract action against Khan, and also sought specific performance of the Purchase and Sale Agreement between Chaudhry and Khan, a temporary injunction, and recovery of attorney’s fees. Xenon also asserted a breach of contract action against Xenon Texas. And, Chaudhry and Xenon alleged a tortious interference action against both defendants.

On November 7, 2012, the trial court entered an order granting a temporary injunction in favor of Chaudhry and Xenon Health against Khan and Xenon Texas. The Defendants filed an interlocutory appeal of the temporary injunction to this Court, arguing in part that

. . . Dr. Chaudhry wants Dr. Khan to use his license to get contracts to provide anesthesiology care and staff for surgical sites in exchange for which Xenon Health, LLC would receive the profits made through Dr. Khan’s practice of medicine, thereby indirectly allowing Xenon Health LLC to practice medicine without a license.

Xenon Anesthesia of Tex. P.L.L.C. v. Xenon Health L.L.C., No. 09-12-00553-CV, 2013 Tex. App. LEXIS 3969, at *8 (Tex. App.—Beaumont Mar. 28, 2013, no pet.) (mem. op.). On November 7, 2012, Khan and Xenon Texas filed Defendants’ Original Counter-Claims against Xenon Health, L.L.C. and Chaudhry, alleging

claims against Chaudhry for fraud by nondisclosure, as well as violations of the Texas Deceptive Trade Practices Act (“DTPA”), and seeking exemplary damages.

In our Memorandum Opinion dated March 28, 2013, we affirmed the temporary injunction, noting that Chaudhry had obtained his administrative medical license in October 2012, and we stated:

The practice of “administrative medicine” is the “administration or management utilizing the medical and clinical knowledge, skill, and judgment of a licensed physician, and capable of affecting the health and safety of the public or any person.” 22 Tex. Admin. Code § 172.17(b) (2011) (Tex. Med. Bd.). “An administrative medical license does not include the authority to practice clinical medicine, prescribe dangerous drugs or controlled substances, or delegate medical acts or prescriptive authority.” *Id.* at § 172.17(c). Chaudhry testified that he does not practice clinical medicine or administer anesthesia and that Xenon Health is an anesthesia management organization that provides administrative services to its clients. The record does not indicate that Chaudhry’s practice or the services that his business provides conflict with the Texas Administrative Code’s definition of “administrative medicine.” *See id.* at § 172.17(b). . . .

. . . Chaudhry is a physician who received a limited medical license to practice administrative medicine. We perceive no violation of section 301.012(a-4). *See* Tex. Bus. Orgs. Code Ann. § 301.012(a-4).

Xenon Anesthesia of Tex. P.L.L.C., 2013 Tex. App. LEXIS 3969, at **8-10.

On April 4, 2013, Chaudhry filed a traditional motion for summary judgment with the trial court on his breach of contract claim against Khan. In Chaudhry’s motion for summary judgment against Khan, Chaudhry alleged that he acquired his Texas medical license in October of 2012. Chaudhry further alleged

that he sent written notice thereof to Khan, and that Khan has refused to comply with the parties' agreement. Chaudhry argued that

The undisputed facts are that Dr. Chaudhry has complied with the terms of the *Purchase and Sale Agreement*. Dr. Ali Khan has breached that agreement by failing to transfer his interest. The Ninth Court of Appeals has rejected Dr. Ali Khan's defenses and denials (which is now the law of the case). Dr. Chaudhry is entitled to specific performance. Accordingly, Dr. Chaudhry is entitled to summary judgment on his claims against Dr. Ali Khan for breach of contract and specific performance.

Chaudhry attached his affidavit to the motion for summary judgment. In his affidavit Chaudhry referenced true and correct copies of documents that were attached thereto, including the Certificate of Formation for Xenon Texas, the Purchase and Sale Agreement, a Professional Limited Liability Company Agreement for Xenon Texas, an Exclusive Management Services Agreement, a Delegation of Signature Authority, correspondence from an attorney representing Khan and Xenon Texas, a copy of Xenon Texas' Third Party Plaintiff's First Amended Petition Against Third Party Defendants, certain correspondence to Khan dated October 9, 2012 (with attached exhibits), and a copy of this Court's Memorandum Opinion dated March 28, 2012.

Chaudhry stated in his affidavit that he is an anesthesiologist and licensed to practice medicine in several states; he owns interests in several companies that provide anesthesia services at health care facilities in the states in which he is

licensed; he is a member of Xenon Health, which provides management services to companies that provide anesthesia services to health care facilities; after expending significant resources on business development, in 2011 together with Xenon Health he identified potential clients needing anesthesia services in Texas, but he was not yet licensed in Texas, so he approached an acquaintance, Dr. Mujtaba Ali Khan; Chaudhry and Khan discussed Khan becoming involved with the formation of an anesthesia services provider entity in Texas during the period of time required for Chaudhry to obtain a license in Texas; Khan agreed to transfer the ownership of Xenon Texas to Chaudhry once Chaudhry obtained a license in Texas; Xenon Texas was formed in July 2011; contemporaneously with the formation of Xenon Texas, Khan and Chaudhry entered into a Purchase and Sale Agreement providing that Khan would sell all of his interest in Xenon Texas to Chaudhry once Chaudhry obtained his license to practice medicine in Texas; in August 2011, Chaudhry applied for a medical license in Texas; in December 2011, Chaudhry received a letter from an attorney representing Khan; Chaudhry remained ready, willing and able to pay any amounts due under the Purchase and Sale Agreement; and money damages would be an inadequate remedy.

In his Motion for Summary Judgment, Chaudhry argued that he had obtained sufficient licensure in Texas, and he referenced the discussion of his

licensure from this Court's Memorandum Opinion dated March 28, 2013; Chaudhry also attached a copy of a printout from the State Board of Medical Examiners website pertaining to his license.

Khan filed a response to the motion for summary judgment. In his response, Khan argued that there was "a genuine issue of material fact" on the breach of contract and specific performance claims that precluded summary judgment. Khan argued that Chaudhry did not allege that he complied with all conditions precedent until he filed his First Amended Petition, and further that Chaudhry did not comply with the Purchase and Sale Agreement because he only obtained a license to practice "administrative medicine" and not a "medical license[.]" Khan further argued in his response that Chaudhry was practicing medicine in Texas "before the time Movant obtained any license from the State of Texas." Khan attached an excerpt from an oral deposition of Dr. Trickey, taken in the underlying suit wherein Dr. Trickey offered his opinion regarding his understanding of the facts as follows:

Therefore, effectively, what I'm believing is that Dr. Khan . . . was negotiating with a physician to provide to some extent physician-based practice.

The second aspect of this essentially is was Dr. Khan within his rights to take the action he did upon learning of the arrest. And I stated earlier, there are no requirements for a doctor to disclose an arrest because this is not customarily asked on application forms, et cetera. But as I described earlier, I think Dr. Khan on learning this had

the duty to ask Dr. Chaudhry questions about this because any patients who were dealing with . . . the whole enterprise might find out about this and they would be asking what is this person acting as a physician doing with an arrest history and he has the right to know about this and to ask Dr. Chaudhry what's happening here.

Khan did not argue in his response to the motion for summary judgment that the purchase and sale agreement was void, nor did he allege that the contract was unenforceable or illegal.

The trial court granted Chaudhry's Motion for Traditional Summary Judgment by order dated June 20, 2013, without specifying in its order the grounds on which it granted the motion. On July 18, 2013, Khan joined Xenon Texas' Amended Motion for Re-hearing and Alternatively to Modify, Correct or Reform the Partial Summary Judgment ("Amended Motion for Rehearing"). The trial court entered an order denying the Amended Motion for Rehearing. On September 30, 2013, Chaudhry filed a Motion for Partial Summary Judgment as to Khan's DTPA counterclaim. On October 7, 2013, Chaudhry filed a Motion for Partial Summary Judgment as to Khan's fraud by nondisclosure counterclaim. On October 15, 2013, Khan filed Defendants' First Amended Counter-Claims. In two orders dated November 25, 2013, the trial court granted Chaudhry's motions for partial summary judgment regarding Khan's counterclaims. On December 13, 2013, Xenon Texas filed a Chapter 7 (liquidation) bankruptcy.

On December 26, 2013, the Plaintiffs in Cause No. 12-01-00014-CV filed a Motion to Sever the breach of contract claim brought by Dr. Chaudhry against Khan. On January 30, 2014, the trial court signed an Order Granting Plaintiff's Motion to Sever Chaudhry's breach of contract claim against Khan, severing the claims and assigning Cause No. 14-03-02507-CV to the severed action.

On May 1, 2014, the Bankruptcy Court signed an Agreed Order providing that the automatic stay of 11 U.S.C. § 362(a) does not apply to the breach of contract claim of Chaudhry against Khan, and a copy of that Agreed Order was filed with the trial court in the severed action. On May 5, 2014, the Bankruptcy Court also signed a Judgment that further provides the automatic stay was lifted to allow Xenon and Chaudhry to proceed against Khan in the state court proceedings.

On June 5, 2014, Khan filed a Motion for New Trial with the trial court, wherein Khan argued that the trial court erred in granting Chaudhry a summary judgment on his breach of contract claim against Khan. Khan argued that because Chaudhry did not have his medical license in the State of Texas at the time he filed his Original Petition, Chaudhry had no "standing" to bring the suit to enforce the contract and the case should be dismissed. Chaudhry filed a Brief in Opposition to the Motion for New Trial. On June 12, 2014, the trial court denied the Motion for New Trial.

Jury Trial Regarding Attorney's Fees

On July 28, 2014, the trial court conducted a jury trial in the severed action on the only remaining issue, which the parties agreed related only to attorney's fees. Chaudhry called Lee Kaplan (Kaplan) as a witness at trial. Kaplan testified that he is a lawyer who graduated with honors from the University of Texas Law School in 1976, worked for one year as a briefing clerk for a federal judge in the Fifth Circuit Court of Appeals, and then worked as an attorney for seventeen years with Baker Botts law firm, where he was a partner for ten years. Thereafter, in 1995, Kaplan formed his own law firm with two of his friends and the firm is named Smyser, Kaplan & Veselka. Kaplan testified that he is a member of the American Board of Trial Advocates and the American Law Institute, and he is board-certified in civil trial law. According to Kaplan, he is familiar with the usual and customary hourly rates for legal services in Montgomery County, Texas, for this type of case, and the rates could range between "[\\$]200 to \$750, or even \$900 an hour; or maybe even [\\$]1,000." Kaplan stated that "a blended rate for something like this would be a minimum -- a minimum of [\\$]350, \$400 an hour." However, he stated he selected a blended rate of \$325 an hour, which he testified was reasonable and takes into account the time put into the case by those that worked on the case.

Kaplan testified that he had reached an opinion about the reasonable and necessary attorneys' fees for the breach of contract case and not "about the other parts of the lawsuit[.]" and that he applied the *Arthur Anderson*³ factors in arriving at his conclusion. After considering the nature of the case and time involved, as well as the result, Kaplan testified that a reasonable and necessary attorney's fee for Chaudhry all the way through the final judgment in the trial court would be \$430,000, along with at least \$50,000 for an appeal, \$25,000 for petition for review with the Supreme Court, an additional \$25,000 if merits briefing is requested, and \$15,000 for oral argument if review is granted by the Texas Supreme Court. Kaplan stated that \$430,000 is the number he reached "after deducting 20 percent for everything through June 30th as being something that wasn't necessary for this case, the individual's case for breach of contract." After presenting Kaplan's testimony, Chaudhry rested his case.

Khan made a motion for directed verdict relating to presentment which the trial court denied. Khan then called his attorney, Jay Asafi (Asafi), to testify. Asafi testified that he has been licensed to practice law in Texas for more than ten years, that he regularly practices law in Montgomery County, Texas, and that he graduated "about 2004" from Thurgood Marshall School of Law. Asafi stated that

³ *Arthur Anderson & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812 (Tex. 1997).

he charges \$250 an hour, and that he believes “\$300 plus” an hour is a “little bit too much.” Asafi testified that he has represented Khan from the beginning of the lawsuit and he explained he is familiar with the claims. According to Asafi, the investigation, pleadings, and motion for summary judgment preparation and hearing should have taken “about ten hours” and cost about \$3,000. And, the appeal to the court of appeals should cost between \$5,000 and \$7,500, the cost for the petition for review should be \$2,500, with another \$2,500 if review is granted by the Texas Supreme Court. On cross-examination, Asafi admitted that he graduated from law school in 2002 and he took the bar exam “maybe three or four times” before he was licensed in 2004. Asafi agreed that he holds no board certifications.

The jury was asked to determine:

What is a reasonable fee for the service of Haroon Chaudhry’s attorneys in this case for prosecuting his breach of contract claim against Mujtaba Ali-Khan?

The jury returned a unanimous verdict and awarded Chaudhry \$430,000 in attorney’s fees for representation in the trial court, \$50,000 for representation on appeal to the court of appeals, \$25,000 for representation at the petition for review stage in the Supreme Court of Texas, \$25,000 for representation at the merits briefing stage in the Supreme Court of Texas, and \$15,000 for representation

through oral argument and the completion of proceedings in the Supreme Court of Texas.

On July 31, 2014, the trial court entered a Final Judgment in favor of Chaudhry against Khan. The Final Judgment ordered Khan to: undertake all actions necessary and execute all documents necessary to transfer his ownership interest in Xenon Texas to Chaudhry, pay \$430,000.00 (plus specified additional amounts for appeals) to Chaudhry as reasonable attorney's fees, and pay costs of court.

On August 29, 2014, Khan filed a Motion for New Trial. In his Motion for New Trial, Khan argued that the Summary Judgment was improperly granted because under the terms of the written contract between the parties, Khan was to turn over the practice to Chaudhry no later than seven business days following the date on which Chaudhry notified Khan in writing that Chaudhry had obtained a license to practice medicine in Texas, and Khan argued that Chaudhry never obtained a license to practice medicine in Texas. Khan maintained that because Chaudhry still does not have a license to practice medicine in Texas as required by the contract between the parties, he failed to meet a condition precedent to recovery, and therefore there could be no breach as a matter of law. Khan reasserted that Chaudhry lacked standing to bring the suit against Khan because

Chaudhry did not have his medical license in the State of Texas at the time he filed his Original Petition. Khan further argued that Chaudhry failed to provide evidence of presentment of his claim for attorney's fees, and that the evidence was factually and legally insufficient to support the award of attorney's fees. Khan also argued that the trial court's order granting summary judgment for Chaudhry and the final judgment violated the bankruptcy stay by changing the ownership of the Debtor, Xenon Texas. The Motion for New Trial was denied by operation of law. *See* Tex. R. Civ. P. 329b(c).

Issues on Appeal

On appeal, Khan argues that 1) the trial court erred in granting Chaudhry a summary judgment on the breach of contract action because Chaudhry lacked standing to claim any ownership interest in Xenon Texas because, at the time when the suit was filed, Chaudhry did not have a medical license or administrative license in Texas; 2) the summary judgment evidence as to damages for the breach of contract claim is legally insufficient; 3) the summary judgment grants more relief than requested with respect to attorney's fees; and 4) the question of whether Chaudhry was "ready, willing, and able to perform his contractual obligations when they became due [was] a question of fact."

Standard of Review

The trial court's order granting Chaudhry's motion for summary judgment on the breach of contract claim was interlocutory until the claim was severed from the remaining action and then merged into the final judgment that was rendered in the severed action after the jury trial on the issue of attorney's fees. *See Pan Am. Petroleum Corp. v. Tex. Pac. Coal & Oil Co.*, 324 S.W.2d 200, 201 (Tex. 1959). "[T]he propriety of granting a partial summary judgment must be determined from the posture of the pleadings and evidence at the time the court granted the motion." *State Farm Fire & Cas. Co. v. Griffin*, 888 S.W.2d 150, 153 (Tex. App.—Houston [1st Dist.] 1994, no writ). When the trial court does not specify the grounds on which it granted the summary judgment, we must affirm if any of the grounds specified in the motion for summary judgment are meritorious. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 216 (Tex. 2003); *Preston Gate, LP v. Bukaty*, 248 S.W.3d 892, 895 (Tex. App.—Dallas 2008, no pet.).

A summary judgment motion must stand on its own merits. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979). Even if the nonmovant does not file a response to a traditional motion for summary judgment, "[t]he movant still must establish his entitlement to a summary judgment on the

issues expressly presented to the trial court by conclusively proving all essential elements of his cause of action or defense as a matter of law.” *Id.*

We review a trial court’s summary judgment de novo. *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 156 (Tex. 2004). To prevail on a traditional motion for summary judgment, the movant must show “there is no genuine issue as to any material fact and the [movant] is entitled to judgment as a matter of law[.]” Tex. R. Civ. P. 166a(c); *accord Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985). In our review of the trial court’s judgment, we examine “the evidence presented in the motion and response in the light most favorable to the party against whom the summary judgment was rendered, crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not.” *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009); *see City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). “We indulge every reasonable inference and resolve any doubts in the nonmovant’s favor.” *Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999); *accord Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 756 (Tex. 2007) (per curiam). “Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal.” Tex. R. Civ. P. 166a(c).

Standing

In his first issue on appeal, Khan argues that the trial court erred in granting Chaudhry a summary judgment on the breach of contract action because Chaudhry lacked standing to claim any ownership interest in Xenon Texas. Khan contends that Chaudhry had no standing to file the suit because Chaudhry did not have a medical license or administrative license in Texas when he first filed his suit. Chaudhry argues that he had standing to file his suit because he was a party to the contract at issue and there was a real controversy between the parties.

Standing requires the presence of a real controversy between the parties that will actually be determined by the judicial declaration sought. *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 848 (Tex. 2005). In making a determination regarding a party's standing, the court takes the pleadings as true and construes them in the pleader's favor, and it considers evidence relevant to the jurisdictional inquiry. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000); *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993).

“A plaintiff has standing when [he] is personally aggrieved, regardless of whether [he] is acting with legal authority[.]” *Nootsie, Ltd. v. Williamson Cty. Appraisal Dist.*, 925 S.W.2d 659, 661 (Tex. 1996) (emphasis omitted). As a general rule, in order to enforce a contract, a litigant must be either a party to that

contract or an intended third-party beneficiary. *See Wells v. Dotson*, 261 S.W.3d 275, 284 (Tex. App.—Tyler 2008, no pet.); *Yasuda Fire & Marine Ins. Co. of Am. v. Criaco*, 225 S.W.3d 894, 898 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (citing *MCI Telecomms. Corp. v. Tex. Utils. Elec. Co.*, 995 S.W.2d 647, 650-54 (Tex.1999)).

Whether a party is entitled to sue on a contract is not “truly a standing issue because it does not affect the jurisdiction of the court; it is, instead, a decision on the merits.” *Heartland Holdings, Inc. v. U.S. Trust Co. of Tex. N.A.*, 316 S.W.3d 1, 6-7 (Tex. App.—Houston [14th Dist.] 2010, no pet.). When it is established that the plaintiff lacks the right to sue on a contract, the proper disposition may be a summary judgment on the merits, but it is not dismissal for lack of standing or want of jurisdiction. *Id.* at 7. In the case at bar, the parties agree that Chaudhry and Khan were both signatories on and parties to the underlying contract. Even assuming that Chaudhry lacked any license from the Texas Board of Medical Examiners at the time Chaudhry filed the underlying suit, he would not lack standing to file a breach of contract action arising from the contract in question. We overrule his first issue.

Evidence Regarding Damages

In his second issue, Khan argues that there is legally insufficient evidence that Chaudhry sustained any damages from the alleged breach, which Khan argues is a necessary element for the breach of contract claim. Khan contends that the Motion for Summary Judgment presented no evidence “respecting the measure of damages.” Chaudhry responds and argues that Khan waived this argument by failing to timely preserve this complaint in that Khan never presented this complaint to the trial court, either in his response to the motion for summary judgment, by timely objection, or in a post-trial motion presenting this argument to the trial court. In a nonjury case, a complaint as to the sufficiency of the evidence may be made for the first time on appeal. Tex. R. App. P. 33.1(d). However, the rules governing summary judgments expressly provide that “[i]ssues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal.” Tex. R. Civ. P. 166a(c). The “non-movant who fails to raise any issues in response to a summary judgment motion may still challenge, on appeal, ‘the legal sufficiency of the grounds presented by the movant.’” *Amedisys, Inc. v. Kingwood Home Health Care, LLC*, 437 S.W.3d 507, 512 (Tex. 2014) (quoting *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 343 (Tex. 1993)).

To the extent Khan is making a challenge to the legal sufficiency of the evidence to support the summary judgment, we examine the motion for summary judgment to determine whether or not the evidence is legally sufficient to support the trial court's order granting the summary judgment. In Chaudhry's Motion for Summary Judgment he asserted that: "Dr. Chaudhry has brought a claim for breach of contract against Dr. Ali Khan and seeks specific performance of the *Purchase and Sale Agreement*." Chaudhry specifically included a request for specific performance in his First Amended Petition, and he included a statement therein that he has "performed all obligations required of him under the Purchase and Sale Agreement by notifying Dr. Ali Khan of his licensure and requesting the necessary financial information [] and remains ready, able and willing to pay any amounts due under the Purchase and Sale Agreement to [] Khan." Chaudhry further alleged in his First Amended Petition that

Money damages for Dr. Ali Khan's violation of Dr. Chaudhry's rights under the Purchase and Sale Agreement would be an inadequate remedy because it would constitute a total loss of the business, which has a unique nature, as well as create issues of confusion in the marketplace if Dr. Chaudhry were to attempt to conduct business in Texas in the anesthesia services industry under another business. The only adequate remedy for the violation of Dr. Chaudhry's rights would be to compel Dr. Ali Khan to specifically perform the Purchase and Sale Agreement between Dr. Chaudhry and Dr. Ali Khan.

Chaudhry included similar language in his affidavit attached to Chaudhry's

Motion for Traditional Summary Judgment:

Money damages for [] Khan's violation of my rights under the *Purchase and Sale Agreement* would be an inadequate remedy because it would constitute a total loss of the business, which has a unique nature, as well as create issues of confusion in the marketplace if I were to attempt to conduct business in Texas in the anesthesia services industry under another business.

Specific performance is an equitable remedy committed to the trial court's discretion. *Stafford v. S. Vanity Magazine, Inc.*, 231 S.W.3d 530, 535 (Tex. App.—Dallas 2007, pet. denied). The equitable remedy of specific performance may be awarded upon a showing of a breach of contract. *Id.* Specific performance is not a cause of action separate from a breach of contract, but rather it is an equitable remedy used as a substitute for monetary damages when such damages would be inadequate. *Id.*; *Scott v. Sebree*, 986 S.W.2d 364, 368 (Tex. App.—Austin 1999, pet. denied).

Chaudhry sought specific performance of the contract in his pleadings and in his motion for summary judgment, and Chaudhry attached his own affidavit in support of his motion. Khan responded to the Motion for Traditional Summary Judgment. In his response Khan did not object to Chaudhry's affidavit and he did not make the argument or complaint he now makes on appeal. *See* Tex. R. Civ. P. 166a(c). As a general rule, a party must object in writing to formal defects in the

summary judgment proof or the objections will be waived. *City of Houston*, 589 S.W.2d at 677.

On appeal, Khan argues that the summary judgment evidence was legally insufficient on its face to support the breach of contract action because Chaudhry submitted no evidence respecting the measure of damages. As we previously noted, Chaudhry sought specific performance of the contract. If the evidence submitted with Chaudhry's motion for summary judgment was sufficient to establish the prima facie elements to a recovery of specific performance for the breach of contract, then the burden shifted to Khan to raise a fact issue on this point. *See Amedisys, Inc.*, 437 S.W.3d at 517.

Chaudhry's affidavit expressly recited that damages would be an inadequate remedy "because it would constitute a total loss of the business, which has a unique nature, as well as create issues of confusion in the marketplace if [Chaudhry] were to attempt to conduct business in Texas in the anesthesia services industry under another business." Khan did not submit any contrary evidence to raise a fact issue relating thereto, nor did Khan challenge the availability of the remedy of specific performance. The affidavit submitted with the motion for summary judgment constituted prima facie evidence to support the remedy of

specific performance. *See generally Stafford*, 231 S.W.3d at 535; *Scott*, 986 S.W.2d at 368. We overrule Khan’s second issue.

Relief Granted by Summary Judgment

In his third issue, Khan contends that the summary judgment granted more relief than requested with respect to “the entitlement to attorney’s fees.” Khan’s briefing with respect to this issue does not clearly or concisely explain or support his argument. *See Tex. R. App. P. 38.1(i)*. Khan’s brief references certain statements made by Chaudhry’s counsel to the jury in the jury trial regarding attorney’s fees. However, Khan did not object to such statements during the trial and complaints regarding such comments have been waived. *See Tex. R. App. P. 33.1*. This Court has “no duty—or even right—to perform an independent review of the record and applicable law to determine whether there was error.” *Hernandez v. Hernandez*, 318 S.W.3d 464, 466 (Tex. App.—El Paso 2010, no pet.). Khan’s brief is not sufficient to acquaint the Court with a specific challenge with respect to this issue and does not present an argument that would allow this Court to decide an appellate issue. *See Tex. R. App. P. 38.1*. When, as here, an appellate issue is asserted generally, but not supported by argument or citation to the record or applicable legal authority, nothing is presented for review. *See Hernandez*, 318

S.W.3d at 466 (citing *Republic Underwriters Ins. Co. v. Mex-Tex, Inc.*, 150 S.W.3d 423, 427 (Tex. 2004)). We overrule issue three.

Ready, Willing, and Able to Perform Contract

In his fourth issue Khan argues that whether or not Chaudhry was “ready, willing, and able to perform his contractual obligations when they became due is a question of fact.” Specifically, Khan generally cites to *DiGiuseppe v. Lawler*, 269 S.W.3d 588 (Tex. 2008), without providing any particular discussion and argues that Khan’s response to the motion for summary judgment raised a fact issue about whether Chaudhry was “ready, willing, and able to perform his obligations under the purchase contract as a prerequisite to obtaining the equitable relief of specific performance.” Khan does not cite to any portion of the appellate record or provide a citation to that portion of his response to the motion for summary judgment to which he refers. When, as here, an appellate issue is asserted generally, but not supported by argument or citation to the record or discussion pertaining to applicable legal authority, nothing is presented for review. *See Hernandez*, 318 S.W.3d at 466. Khan’s brief is not sufficient to acquaint the court with a specific challenge and does not present an argument that would allow this Court to decide an appellate issue. *See Tex. R. App. P. 38.1*. Additionally, we do not find any argument in his response to the traditional motion for summary judgment wherein

Khan raised a fact issue as to whether Chaudhry was “ready, willing, and able to perform his obligations under the purchase contract[.]” We overrule issue four.

Having overruled all of Khan’s issues, we affirm the judgment of the trial court.

AFFIRMED.

LEANNE JOHNSON
Justice

Submitted on September 4, 2015
Opinion Delivered March 24, 2016

Before McKeithen, C.J., Kreger and Johnson, JJ.