



**COURT OF APPEALS  
SECOND DISTRICT OF TEXAS  
FORT WORTH**

**NO. 02-16-00415-CV**

NEXT GENERATION  
TECHNOLOGY, INC.

APPELLANT

V.

TECH PLAN, INC.

APPELLEE

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FROM THE 48TH DISTRICT COURT OF TARRANT COUNTY  
TRIAL COURT NO. 048-255085-11

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**MEMORANDUM OPINION<sup>1</sup>**

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**I. INTRODUCTION**

In three issues, Appellant Next Generation Technology, Inc. (NGT) appeals the trial court's partial and final summary judgments for Appellee Tech Plan, Inc. Because NGT fails to challenge all grounds on which the trial court's final summary judgment could be based and because NGT has waived any

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<sup>1</sup>See Tex. R. App. P. 47.4.

challenge to the partial summary judgment granted on its antitrust claims, we will affirm.

## II. PROCEDURAL BACKGROUND<sup>2</sup>

NGT sued Tech Plan, alleging claims for antitrust violations, breach of contract, violations of the Texas Deceptive Trade Practices Act (DTPA), and fraud.<sup>3</sup> Tech Plan answered, generally denying all of NGT's allegations, and pleaded affirmative defenses.

Tech Plan filed, and the trial court granted, multiple motions for summary judgment. First, the trial court granted Tech Plan a partial, no-evidence summary judgment on NGT's antitrust claims.

Later, Tech Plan filed a no-evidence and traditional motion for summary judgment on NGT's remaining claims for breach of contract, DTPA violations, fraudulent inducement, and statutory fraud. Tech Plan's motion asserted, in part, that no evidence of damages existed on any of NGT's claims because NGT's only purported evidence of damages was provided by its designated expert Michael Kubik, whom Tech Plan asserted was not qualified.<sup>4</sup> The traditional portion of Tech Plan's motion for summary judgment included a request for

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<sup>2</sup>Because the factual background is not necessary to our disposition, we set forth only the procedural background.

<sup>3</sup>Initially, NGT also sued Liebert Corporation but later dismissed those claims with prejudice.

<sup>4</sup>Tech Plan also filed an objection and motion to exclude Kubik's testimony, which the trial court ultimately granted.

summary judgment on its affirmative defenses of impossibility and statute of limitations, which Tech Plan asserted it had conclusively established. NGT filed a response; Tech Plan filed a reply.

The trial court granted Tech Plan's no-evidence and traditional motion for summary judgment "in all respects" without specifying the basis for its decision. This appeal followed.

### **III. FAILURE TO CHALLENGE ALL GROUNDS ON WHICH FINAL SUMMARY JUDGMENT COULD BE BASED**

NGT's second issue asserts that the trial court erred by granting summary judgment for Tech Plan on NGT's claims for breach of contract, DTPA violations, fraudulent inducement, and statutory fraud because NGT provided evidence of damages through the deposition testimony of Ray Richardson and Philip Bonds, which NGT asserts "provide evidence of causation, damages, and material issues of fact that preclude summary judgment." NGT's fourth issue argues that damages supporting its "breach of contract, misrepresentation, [and] antitrust violations" is established if NGT "missed even one single sales opportunity."

When a party moves for summary judgment on multiple grounds and the trial court's order granting summary judgment does not specify the ground or grounds on which it was based, a party who appeals that order must negate all possible grounds upon which the order could have been based by either asserting a separate issue challenging each possible ground or by asserting a general issue that the trial court erred by granting summary judgment and, within

that issue, providing argument negating all possible grounds upon which summary judgment could have been granted. See *Malooly Bros., Inc. v. Napier*, 461 S.W.2d 119, 121 (Tex. 1970) (articulating this rule); *Scott v. Galusha*, 890 S.W.2d 945, 948 (Tex. App.—Fort Worth 1994, writ denied) (“When the trial court’s judgment rests upon more than one independent ground or defense, the aggrieved party must assign error to each ground, or the judgment will be affirmed on the ground to which no complaint is made.”); see also, e.g., *Star-Telegram v. Doe*, 915 S.W.2d 471, 473 (Tex. 1995); *Rollins v. Denton Cty.*, No. 02-14-00312-CV, 2015 WL 7817357, at \*2 (Tex. App.—Fort Worth Dec. 3, 2015, no pet.) (mem. op.). If an appellant does not challenge and negate each possible ground for summary judgment, we must uphold the summary judgment on the unchallenged ground, without regard to the merits of the unchallenged ground. *Wilhite v. Glazer’s Wholesale Drug Co./Glazer Family of Cos.*, 306 S.W.3d 952, 954 (Tex. App.—Dallas 2010, no pet.); *Krueger v. Atascosa Cty.*, 155 S.W.3d 614, 621 (Tex. App.—San Antonio 2004, no pet.).

NGT’s second and fourth issues assert that the summary-judgment evidence raises a genuine issue of material fact precluding summary judgment on the causation and damages elements of NGT’s claims for breach of contract, DTPA violations, fraudulent inducement, statutory fraud, misrepresentation,<sup>5</sup> and

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<sup>5</sup>NGT did not, however, plead a claim for misrepresentation.

antitrust violations.<sup>6</sup> As Tech Plan points out, however, Tech Plan’s combined no-evidence and traditional motion for summary judgment asserted the conclusive establishment of its affirmative defenses—impossibility and statute of limitations—as to all of NGT’s claims as a basis for summary judgment. Tech Plan argues that this court is required to affirm the trial court’s final summary judgment because NGT did not specifically challenge, either by issue or with argument, all grounds on which the trial court’s summary judgment could have been based, specifically these affirmative defenses. We have closely examined NGT’s brief. NGT did not challenge the propriety of the trial court’s summary judgment based on Tech Plan’s affirmative defenses of impossibility and statute of limitations. Accordingly, we must uphold the trial court’s final summary judgment on the unchallenged grounds it could have been based on—Tech Plan’s affirmative defenses—without regard to the merits of these defenses. See, e.g., *Malooly*, 461 S.W.2d at 120–21; *Rollins*, 2015 WL 7817357, at \*2 (affirming summary judgment based on unchallenged ground of affirmative defense of immunity). We overrule NGT’s second and fourth issues.<sup>7</sup>

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<sup>6</sup>We address NGT’s challenge to Tech Plan’s first no-evidence summary judgment granted on NGT’s antitrust claims in section IV herein.

<sup>7</sup>Because we uphold the summary judgment for Tech Plan based on grounds not challenged on appeal, we need not address NGT’s first issue complaining of the trial court’s exclusion of Kubik’s testimony. See Tex. R. App. P. 47.1 (requiring appellate court to address only issues necessary to disposition of appeal).

#### **IV. NGT RAISES NO CONTENTIONS SUPPORTING REVERSAL OF NO-EVIDENCE SUMMARY JUDGMENT ON ANTITRUST CLAIMS**

NGT's third issue asserts that the trial court erred when it granted the first, partial summary judgment for Tech Plan on NGT's antitrust claims. NGT's argument and analysis under this issue consists of four sentences.

Two sentences set forth a quote from Bonds's deposition. NGT does not indicate on which element of its antitrust claim this statement purportedly raises a genuine issue of material fact. Nor does NGT provide any argument explaining how Bonds's quote purportedly raises a genuine issue of material fact. And NGT cites no legal authority in support of its third issue. See Tex. R. App. P. 38.1(i) (requiring brief to contain clear and concise argument for the contentions made with appropriate citations to authorities and to the record). NGT has waived any contention that may be discernable from these two sentences because this portion of its brief does not comply with rule 38.1(i). See, e.g., *Randolph v. Texaco Expl. & Prod., Inc.*, 319 S.W.3d 831, 834 (Tex. App.—El Paso 2010, pet. denied).

The second two sentences in NGT's third issue complain that it is "likely that additional evidence supporting the antitrust claims exists, but because partial summary judgment for this claim was granted early in the procedural process, [NGT] was not given the opportunity to explore and submit further evidence of collusion and other antitrust violations." The record does not show, and NGT does not assert, that it sought and was denied a continuance concerning Tech

Plan's motion for summary judgment on the antitrust claims. See Tex. R. Civ. P. 166a(g). Thus, NGT has waived any complaint that it did not have an adequate time for discovery prior to the summary-judgment hearing. See, e.g., *Davis v. West*, 317 S.W.3d 301, 313–14 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (citing *Tenneco, Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 647 (Tex. 1996)).

We overrule NGT's third issue.

A portion of NGT's fourth issue claims that NGT proffered summary-judgment evidence on "lost profits" damages. To the extent this argument could apply to NGT's antitrust claims, it is inadequately briefed. See Tex. R. App. P. 38.1(i); *Fredonia State Bank v. Gen. Am. Life Ins. Co.*, 881 S.W.2d 279, 284–85 (Tex. 1994) (recognizing long-standing rule that error may be waived through inadequate briefing). We overrule any portion of issue four intended to address NGT's antitrust claims.

## V. CONCLUSION

Having overruled NGT's second, third, and fourth issues, which are dispositive of this appeal, we affirm the trial court's judgment.

/s/ Sue Walker  
SUE WALKER  
JUSTICE

PANEL: WALKER, MEIER, and GABRIEL, JJ.

DELIVERED: November 9, 2017