In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00230-CV

DIMOCK OPERATING COMPANY AND JOE W. DIMOCK
D/B/A DIMOCK PETROLEUM, APPELLANTS

V.

SUTHERLAND ENERGY CO., LLC, APPELLEE

On Appeal from the 46th District Court
Hardeman County, Texas
Trial Court No. 11098, Honorable Dan Mike Bird, Presiding

April 24, 2018

MEMORANDUM OPINION ON REHEARING

Before QUINN, C.J., and CAMPBELL and PARKER, JJ.

Following our opinion and judgment of March 13, 2018, both parties moved for rehearing. We deny both motions. We withdraw our March 13 opinion and judgment and substitute the following opinion and corresponding judgment in its place.

This is an appeal from three partial summary judgment orders, an order denying joinder of parties, and a final judgment, all arising from disputes over an oil and gas

farmout agreement. Appellants raise sixty-six issues on appeal. We affirm in part and reverse and remand in part.

Background

On November 20, 2012, Sutherland Energy Co., LLC, and Dimock Operating Company and Joe W. Dimock, d/b/a Dimock Petroleum (collectively "Dimock"), signed a Seismic Exploration and Farmout Agreement (SEFA). The two primary aims of the SEFA were drilling a replacement well for the Roy Hamrick No.1 well on Dimock's lease and exploring and developing a surrounding fifteen-section area of Hardeman County, which the parties called the "Hamrick Area 3D Shoot." In conjunction with the SEFA, the parties signed an Operating Agreement, also dated November 20, 2012.

Sutherland was the "farmee" under the SEFA and, as such, fronted the costs and assumed the risks of drilling the replacement well. Sutherland had 240 days to spud the replacement well. If the well was not spud within 240 days, Sutherland would forfeit the $50,000 drilling deposit it had paid Dimock and lose all funds it had spent on the project. If, however, the well was successfully completed, Dimock would assign its interest (100% of the working interest) in the drilling unit to Sutherland and Sutherland could recover two times its costs from the well's production revenue as compensation. The SEFA provided, "When the Farmee's cumulative revenue equals two (2) times the Farmee's capital cost the Initial Earning Well will have reached 'project payout.'" The parties agreed that upon "project payout," Sutherland would assign well operations and 51% of the working interest back to Dimock, while the remaining 49% of the working interest would be assigned to various charities.

In addition to the drilling obligation, Sutherland had the right to conduct seismic exploration operations on the area covered by the SEFA. Under the agreement, Sutherland and Dimock would share all seismic data obtained from the project, and Dimock would have the option of participating in any wells Sutherland successfully drilled on Dimock's leases or on acreage pooled with those leases. The SEFA provided that Sutherland "shall use its sole discretion to determine the type, nature, timing and extent of all Seismic Exploration Operations." Sutherland began its exploration and development efforts in the Hamrick Area 3D Shoot shortly after the SEFA was signed.

Sutherland timely completed a replacement well, named the Hamrick #3. The Hamrick #3 began producing oil in June of 2013 and, pursuant to the terms of the SEFA, Dimock refunded Sutherland's $50,000 drilling deposit and assigned its interest in the well to Sutherland. Sutherland did not perform any seismic shooting prior to drilling the replacement well.

In early November of 2013, production revenue from the Hamrick #3 had reached just over $1,000,000, approximately the amount it had cost to drill and complete the well. Meanwhile, Sutherland's seismic exploration and development efforts continued elsewhere on the Hamrick Area 3D Shoot.

By March of 2014, revenue from the Hamrick #3 totaled $2,195,191. Because this amount was greater than double Sutherland's stated costs of $1,007,445 for drilling and completing the well, Dimock claimed that project payout had been reached. Accordingly, in April of 2014, Dimock instructed Sutherland to refrain from incurring further capital costs on the project. Dimock asserted that the capital costs Sutherland was entitled to recover

(times two) were limited to those expended for the Hamrick #3, and that costs Sutherland incurred related to other portions of the Hamrick Area 3D Shoot were not recoverable from the Hamrick #3's revenues. Based on its belief that project payout had occurred, Dimock demanded that Sutherland assign a 51% working interest and deliver operations of the Hamrick #3 to Dimock. Sutherland responded that project payout had not yet occurred and the SEFA authorized its continued expenditures. In response, Dimock contacted the buyer of the Hamrick #3's oil in an effort to have payments to Sutherland suspended.

Sutherland then filed the underlying lawsuit, alleging breach of contract by Dimock and seeking declaratory judgment as to the legal effect of the SEFA's terms. Dimock filed counterclaims for breach of contract, breach of fiduciary duty, fraud, and declaratory judgment. The parties amended their pleadings several times over the course of the case and most claims were resolved through a series of partial summary judgment motions, which are more fully addressed below. Additionally, the parties reached a partial settlement of their claims in August of 2015, while the suit was pending. A jury trial resolved the matter of attorney's fees.

On appeal, Dimock claims the trial court erred in granting Sutherland's first, third, and fourth motions for partial summary judgment, in denying Dimock's Motion for Leave to Join Parties, and in entering the Final Judgment.

Summary Judgment Standard of Review

We review the trial court's summary judgment de novo. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). Summary judgment is proper only

when there is no genuine issue of material fact and the movant 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(c). When reviewing a summary judgment, we take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Knott*, 128 S.W.3d at 215.

Discussion

Issues as to First Partial Summary Judgment

As reflected in their pleadings, the parties disputed what expenditures were properly included as capital costs that were to be considered in determining when project payout occurred. In its first motion for partial summary judgment, Sutherland sought summary judgment on two issues: (1) on its declaratory judgment action on the basis that "project payout" is clearly defined in the SEFA and the definition of capital costs includes land and seismic expenditures, and (2) that "project payout" had not yet occurred. The trial court granted Sutherland's motion. Dimock raises seventeen issues challenging this partial summary judgment.

"Project Payout"

We will first address the matter of project payout. At the hearing on the first motion for summary judgment, Sutherland's counsel announced that it was not pursuing summary judgment on the second basis stated in its motion, i.e., the non-occurrence of project payout. Counsel stated, "We ask for two points of relief in the Motion for Summary Judgment. Today, we're only going to ask for one. We're not going to ask for a ruling from the Court that a project payout has actually occurred. We believe if the Court rules

on the issue we are asking you to rule upon, that issue will be resolved." Our review of the order[1] indicates that it does not address Sutherland's project payout claim. Thus, because Sutherland withdrew its request for summary judgment on its claim that project payout had not occurred and because the order granting partial summary judgment does not address the project payout claim, there was no adjudication that project payout had not been reached. Therefore, because the summary judgment did not encompass this issue, we overrule Dimock's issues which assert that Sutherland failed to establish, as a matter of law, that project payout had not occurred.[2]

Declaratory Judgment Regarding "Capital Costs"

We turn next to the declaratory judgment issue. By this issue, Sutherland sought a declaration that costs incurred for land and seismic for the Hamrick Area 3D Shoot are included in the calculation of capital costs when determining project payout. The dispute on the inclusion of land and seismic costs centers on two provisions, one of which is in Exhibit A to the SEFA and one of which is in the Operating Agreement, Exhibit C to the SEFA.

Exhibit A to the SEFA provides the following instruction: "When the Farmee's cumulative revenue equals two (2) times the Farmee's capital cost the Initial Earning Well will have reached "project payout." Exhibit A also provides, "The Farmee's capital cost is defined as cost incurred by Farmee for land and seismic for the Hamrick Area 3D Shoot

[1] The trial court's first order granting Sutherland's partial motion for summary judgment, signed on October 21, 2014, was withdrawn and replaced by an order dated December 19, 2014. We note that neither order speaks to the issue of whether project payout had occurred.

[2] As is more fully set forth below, we disagree with Sutherland's contention that resolution of its remaining summary judgment issue resolves the issue of whether project payout had occurred.

(defined in Exhibit B), a fifty thousand dollar ($50,000) prospect fee, and cost for drilling, testing, completing, and equipping, the Initial Earning Well." Further, section 2.1 of the SEFA provides:

> Farmor [Dimock] grants to Farmee [Sutherland] the sole, exclusive, and irrevocable right to conduct Seismic Exploration Operations on, under, and in the Subject Leases during the term of this Agreement, including any appropriate or necessary related rights of ingress and egress. In conducting all operations under this Agreement, Farmee shall use its sole discretion to determine the type, nature, timing, and extent of all Seismic Exploration Operations.

Sutherland relies on these provisions to support its position that its land and seismic operations for the Hamrick Area 3D Shoot are recoverable as capital costs.

Dimock, on the other hand, points to provisions in the parties' Operating Agreement, signed at the same time as the SEFA, for its claim that not all of Sutherland's expenditures for land and seismic are recoverable. Specifically, Dimock notes that the Operating Agreement provides, "Operator [Sutherland] shall not undertake any single project reasonably estimated to require an expenditure in excess of twenty-five thousand Dollars ($25,000.00) except in connection with the drilling, Sidetracking, Reworking, Deepening, Completing, Recompleting or Plugging Back of a well that has been previously authorized by or pursuant to this agreement . . . ." Based on this provision, Dimock urges that Sutherland's seismic expenses and land expenses, unless previously authorized by Dimock, are subject to a contractual limit of $25,000.

Sutherland counters that the Operating Agreement does not apply. While it acknowledges that the Operating Agreement was signed and made effective on the same date as the SEFA, Sutherland urges that the Operating Agreement could not and did not

become operative until later, when there was joint ownership of the leasehold interest. Thus, Sutherland contends that the parties did not intend for the Operating Agreement to be effective on the stated effective date, but on some other, future date. Moreover, Sutherland observes, the SEFA provides, "The Operating Agreement shall be subject to this Agreement so that in the event of any conflict between the Operating Agreement and this Agreement, this Agreement shall be the governing Agreement."

Again, Sutherland sought a declaration that costs incurred for land and seismic for the Hamrick Area 3D Shoot were properly included in the calculation of capital costs, which in turn determine project payout. In granting Sutherland's partial motion for summary judgment, the trial court made four determinations, two of which are pertinent to our analysis of this issue: First, that Sutherland's "costs incurred for land and seismic operations for the Hamrick Area 3D Shoot are 'capital costs' to be considered in determining 'project payout' under the Agreement," and second, that Sutherland's ability to incur such costs "is not restricted by the parties' joint operating agreement."

As for the first determination, we agree. Based on the language of the parties' agreement set forth above, Sutherland was entitled to judgment as a matter of law that land and seismic operations for the Hamrick Area 3D Shoot are capital costs. Again, Sutherland's capital cost is expressly defined by the agreement as "cost incurred by Farmee [Sutherland] for land and seismic for the Hamrick Area 3D Shoot (defined in Exhibit B), a fifty thousand dollar ($50,000) prospect fee, and cost for drilling, testing, completing, and equipping, the Initial Earning Well."

Dimock argues that, due to the placement of the comma after the word "equipping," the definition of "capital costs" is ambiguous. Dimock suggests that this comma creates a limiting clause, signifying that "the Initial Earning Well" modifies all three elements in the series (land and seismic for the Hamrick Area 3D Shoot, the prospect fee, and cost for drilling, testing, completing, and equipping). We reject this argument. The placement of this comma to indicate a modifying element is not grammatically correct. We read the definition of capital costs to include three components: (1) land and seismic for the Hamrick Area 3D shoot, (2) the prospect fee, and (3) cost for drilling, testing, completing, and equipping the Initial Earning Well. We find additional support for this construction by looking at the contract as a whole. In light of the parties' overall intent to explore a fifteen-section tract of land and drill multiple wells, we cannot conclude the comma directs us to the meaning suggested by Dimock.

As for the court's second determination, we again agree. The trial court did not specify the reason it concluded that Sutherland's ability to incur land and seismic costs is not restricted by the Operating Agreement, e.g., whether it was because the Operating Agreement was not yet in effect, or because the terms of the SEFA controlled over the terms of the Operating Agreement. If the trial court does not specify a basis for granting summary judgment, the judgment will be affirmed if any ground asserted in the motion has merit. *Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 473 (Tex. 1995).

In our opinion, although it has not been established as a matter of law that the stated effective date of November 20, 2012, is not the effective date of the Operating Agreement, it has been established that the terms of the SEFA control to the extent they conflict with the terms of the Operating Agreement. The SEFA gives Sutherland

discretion "to determine the type, nature, timing, and extent" of seismic operations. We conclude that this authorization controls over the Operating Agreement's restriction providing that Sutherland was not to undertake any project reasonably estimated to cost more than $25,000. Therefore, we overrule Dimock's issues on this point.

Remaining Issues in First Partial Summary Judgment

We also overrule Dimock's issue by which it argues that the trial court erred in granting summary judgment because an adequate time for discovery had not passed. Sutherland's first motion for partial summary judgment does not state that it is a no-evidence motion, nor does it refer to Texas Rule of Civil Procedure 166a(i). The motion does not challenge any specific elements of a claim. However, the motion does attach evidence, as is required in a traditional motion. See TEX. R. CIV. P. 166a(c). We therefore conclude that Sutherland's first motion is, in substance, a traditional motion for summary judgment and will construe it as such. Accordingly, there is no requirement for an adequate time for discovery to have passed before the trial court considered the motion. A traditional motion for summary judgment may be made at any time after the adverse party has answered or appeared, although it may rely on evidence obtained through discovery. TEX. R. CIV. P. 166a(a)-(c).

By five issues, Dimock asserts that the trial court erred in granting summary judgment because there are fact issues regarding the propriety of the specific land and seismic costs claimed by Sutherland. We agree that there are fact issues concerning whether Sutherland's claimed costs are recoverable under the parties' agreement. However, Sutherland did not move for summary judgment on these claims and the trial

court did not grant summary judgment on these claims. We therefore overrule these issues.

Dimock further complains that the trial court erred in granting summary judgment because there were fact issues as to Dimock's breach of contract and conversion counterclaims. Dimock's counterclaims were not addressed in the first motion for partial summary judgment; therefore, we overrule this issue.

Having overruled the twelve above-mentioned issues, we decline to address Dimock's remaining five issues concerning the first partial summary judgment, as they are encompassed in our disposition of these issues. *See* TEX. R. APP. P. 47.1.

Issues as to Third Partial Summary Judgment

By thirty-five issues, Dimock challenges the trial court's ruling granting Sutherland's third motion for partial summary judgment. In its third motion for partial summary judgment, Sutherland sought summary judgment on its claims for declaratory judgment (specifically requesting a declaration the SEFA was not ambiguous) and on Dimock's counterclaims for breach of contract, suit for debt, breach of fiduciary duty, conversion, fraud, "and any other claim asserted by Dimock." The trial court granted the motion.

No-Evidence Motion for Summary Judgment

Sutherland's third motion included both traditional and no-evidence grounds for summary judgment. When a party files both a no-evidence and a traditional motion for summary judgment, we first consider the no-evidence motion. *See Ford Motor Co. v.*

Ridgway, 135 S.W.3d 598, 600 (Tex. 2004). A no-evidence motion for summary judgment is essentially a motion a for pretrial directed verdict, and we apply the same legal sufficiency standard we would apply in reviewing a directed verdict. *See King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 750-51 (Tex. 2003). In a no-evidence motion, the movant must state the elements as to which it contends there is no evidence. TEX. R. CIV. P. 166a(i). The burden shifts to the non-movant to present evidence raising an issue of material fact as to those challenged elements of its cause of action or defense. *See Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006). The trial court must deny the motion if the non-movant produces more than a scintilla of probative evidence raising a genuine issue of material fact on the challenged elements. *See Hamilton v. Wilson*, 249 S.W.3d 425, 426 (Tex. 2008) (per curiam). "More than a scintilla of evidence exists when the evidence rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *King Ranch, Inc.*, 118 S.W.3d at 751.

In its no-evidence motion for summary judgment, Sutherland listed twenty elements for which it claimed there was no evidence. Sutherland did not favor the court with any explanation as to which causes of action were implicated in its list of elements or which elements were necessary to which claims.

In our review of the evidence and pleadings, we note that although the trial court correctly determined that the SEFA gives Sutherland discretion to incur land and seismic costs, such a determination is not the same as a finding that the charges Sutherland deemed land and seismic costs actually were land and seismic costs. That is, the trial court's determination only established the parameters of the parties' agreement; it did not establish whether the expenses Sutherland incurred conformed to the parties' agreement.

We conclude that there are fact issues as to whether the costs Sutherland claimed as land and seismic costs (such as title work and contract labor) are land and seismic costs recoverable under the parties' agreement. We further note that the trial court made no determination as to when project payout occurred, and without such a determination, Sutherland could not establish that it was entitled to judgment as a matter of law on certain of Dimock's counterclaims.

Having reviewed the record, considering all the evidence in the light most favorable to Dimock, crediting evidence favorable to Dimock if reasonable jurors could and disregarding contrary evidence unless reasonable jurors could not, *see City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005), we conclude that Dimock produced more than a scintilla of summary judgment evidence to raise a genuine issue of material fact regarding its counterclaims for breach of contract, suit for debt, breach of fiduciary duty, conversion, and fraud. *See* TEX. R. CIV. P. 166a(i). Therefore, a no-evidence summary judgment was not proper as to those claims.

We further find that Dimock brought forth more than a scintilla of probative evidence to raise a genuine issue of material fact on the issues of the parties' opposing interpretations of the SEFA and Operating Agreement. Therefore, a no-evidence summary judgment is not proper as to the declaratory judgment claims.

Traditional Motion for Summary Judgment

We must next examine Sutherland's traditional bases for summary judgment to determine if they suffice to support the summary judgment. Sutherland's traditional motion portion of its third motion for partial summary judgment addresses three

claims: Dimock's claims of fraud, breach of fiduciary duty, and ambiguity of terms in the SEFA.

Fraud

Dimock's fraud claim is based on Sutherland's alleged representations regarding the need for obtaining seismic before drilling the Hamrick #3. Dimock asserts that Sutherland represented that seismic was necessary for drilling the replacement well (the Hamrick #3), thereby inducing Dimock to agree to include seismic costs in the payout calculation in the parties' contract. As it turned out, Sutherland did not obtain any seismic information prior to drilling the Hamrick #3, which was ultimately drilled 500 feet from the well it replaced. After the Hamrick #3 was drilled, Sutherland obtained seismic for other portions of the Hamrick 3D Area, at a cost of nearly $1,000,000.

The elements of fraud are: (1) that the speaker made a material misrepresentation, (2) that he knew was false when he made it or that he made it recklessly without any knowledge of its truth and as a positive assertion, (3) with the intent that the other party act upon it, and (4) that the other party acted in reliance on the misrepresentation, and (5) suffered injury thereby. *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 337 (Tex. 2011). In addition, fraud requires a showing of actual and justifiable reliance. *Grant Thornton LLP v. Prospect High Income Fund*, 314 S.W.3d 913, 923 (Tex. 2010). Dimock contends that Sutherland misrepresented that seismic was needed to locate the place to drill the Hamrick #3, thereby inducing Dimock to agree to include seismic cost in the agreement, leading to

Dimock's injury. Sutherland argues that Dimock did not show actual and justifiable reliance.

Dimock presented evidence that, in the negotiations leading up to the agreement, Rod Sutherland sent multiple emails to Dimock stating that Sutherland would need to acquire seismic before drilling a replacement well. In addition, Joe Dimock provided an affidavit stating that, but for Sutherland's representation that seismic was necessary to select a location for the replacement well, Dimock would not have agreed to include any seismic cost in the payout calculation. Moreover, we conclude Sutherland has not conclusively established that Dimock could not have justifiably relied on Sutherland's statements.

The issue of justifiable reliance is generally treated as a question of fact for the factfinder. *1001 McKinney Ltd. v. Credit Suisse First Boston Mortg. Capital*, 192 S.W.3d 20, 30 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). When we view the facts most favorably to Dimock, we believe that a genuine issue of material fact exists as to whether Dimock reasonably relied to its detriment on Sutherland's representations. Therefore, summary judgment on Dimock's fraud claim was not proper.

Breach of Fiduciary Duty

Dimock's claim of breach of fiduciary duty arises from Sutherland's alleged noncompliance with the parties' Operating Agreement. The Operating Agreement created a contractual fiduciary duty for Sutherland to properly account for the distribution of well proceeds to Dimock. Dimock alleged Sutherland breached this duty by failing to distribute these proceeds to Dimock and by converting the proceeds for Sutherland's own

use. Sutherland argues, again, that the Operating Agreement does not apply. Specifically, Sutherland urges that because the trial court declared in its first partial summary judgment that the Operating Agreement did not restrict Sutherland's spending, the first summary judgment disposed of Dimock's counterclaims regarding the applicability of the Operating Agreement. We do not agree. As set forth above, the trial court determined the Operating Agreement did not restrict Sutherland's ability to incur land and seismic costs. We agreed with this conclusion because the terms of the SEFA, which give Sutherland discretion on incurring costs, control over the terms of the Operating Agreement which might limit that discretion. However, Sutherland did not disprove a fiduciary relationship between the parties as a matter of law.

We recognize that a joint operating agreement alone does not generally create a fiduciary relationship. *Cone v. Fagadau Energy Corp.*, 68 S.W.3d 147, 169 (Tex. App.—Eastland 2001, no pet.). And while the existence of a fiduciary duty is a question of law for the court, the determination of factual issues underlying a fiduciary duty is a question of fact for the factfinder. *Taylor v. GWR Operating Co.*, 820 S.W.2d 908, 911 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

Here, the parties' Operating Agreement includes a "Custody of Funds" provision which states that the agreement does not establish a fiduciary relationship between the parties "for any purpose other than to account for Non-Operator funds as herein specifically provided." The Operating Agreement expressly states that it "shall be effective as of the 20th day of November, 2012," the same day the SEFA was signed. Sutherland argues that although the Operating Agreement was in effect as of November

20, “its jointly-owned interest provisions were not (and could not have been) operative” in the absence of any jointly-owned interest.

However, Sutherland has conceded that since the Hamrick #3 is an “earned well,” then “the JOA certainly applies to the Hamrick #3. The question is when.” The question of “when” is critical, as Sutherland’s contractual fiduciary duty to account was operative whenever the Operating Agreement applied to the Hamrick #3. Sutherland maintains that the “jointly-owned interest provisions” (which Sutherland presumes include the Custody of Funds provision) were not operative until August 1, 2015, when Sutherland assigned 51% of the Hamrick #3 working interest to Dimock pursuant to the parties’ partial settlement agreement. However, as set forth above, Dimock had a right to a 51% working interest whenever project payout occurred, and there was no adjudication as to when project payout occurred.

Any role the Operating Agreement has is based on the particularities of this case. Here, the unresolved fact issues, including the date of project payout, have a bearing on the resolution of Dimock’s remaining claims. Under these circumstances, we decline to hold as a matter of law that the Custody of Funds provision in the parties’ Operating Agreement was inoperative before August 1, 2015. Sutherland failed to establish that it did not owe Dimock a fiduciary duty and that it was entitled to judgment on Dimock’s breach of fiduciary duty claim. Consequently, summary judgment on this claim was not proper.

Ambiguity

Sutherland also sought summary judgment on Dimock's claims of ambiguity in the SEFA. Dimock claimed that three terms of the SEFA are ambiguous: (1) whether capital costs for calculation of project payout are limited to costs attributable to the initial earning well, (2) whether the $50,000 "deposit" and the $50,000 "prospect fee" are the same, and (3) the definition of "land" and "seismic."

Whether a contract is ambiguous is a legal question for the court, reviewed de novo. *Dynegy Midstream Servs., Ltd. P'ship v. Apache Corp.*, 294 S.W.3d 164, 168 (Tex. 2009). If a contract can be given a certain or definite legal meaning or interpretation, then it is not ambiguous and we will construe it as a matter of law. *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). However, if a contract's meaning is reasonably susceptible to more than one meaning, it is ambiguous, and the interpretation of the contract becomes a fact issue. *See id*. at 393-94. When a contract contains an ambiguity, the granting of a motion for summary judgment is improper because the proper construction of the contract presents a genuine issue of material fact. *Id.* at 394.

The SEFA defines capital cost as follows: "The Farmee's capital cost is defined as cost incurred by Farmee for land and seismic for the Hamrick Area 3D Shoot (defined in Exhibit B), a fifty thousand dollar ($50,000) prospect fee, and cost for drilling, testing, completing, and equipping, the Initial Earning Well." As set forth in our analysis of the first motion for partial summary judgment, we reject Dimock's argument that the last comma in this definition indicates that each component of "capital cost" is modified by "the Initial Earning Well." We likewise reject the contention that the meaning of capital

cost is ambiguous. The contractual definition of capital cost is subject to one clear, certain meaning: there are three components, only one of which is specifically tied to the initial earning well.

Next, Dimock asserts that the "deposit" and "prospect fee" are ambiguous. The SEFA required an up-front payment of $50,000 from Sutherland at the time the agreement was made. The SEFA provided:

> Concurrent with approval of this document, by both parties, Farmee shall make a fifty thousand dollar ($50,000) deposit with Farmor. If Farmee spuds the Initial Earning Well by the Deadline Date the deposit will be refunded. If not, it will be forfeited and this Agreement shall automatically terminate without notice, effective as of the Deadline Date.

The deposit thus served the purpose of securing Sutherland's promise to timely drill the replacement well. Sutherland made the deposit and the deposit was refunded when Sutherland drilled the well.

The "prospect fee" takes us back once again to the definition of capital cost: "The Farmee's capital cost is defined as cost incurred by Farmee for land and seismic for the Hamrick Area 3D Shoot (defined in Exhibit B), a fifty thousand dollar ($50,000) prospect fee, and cost for drilling, testing, completing, and equipping, the Initial Earning Well." The prospect fee is therefore an element of what Sutherland could earn, separate and distinct from the refundable deposit, which simply returned the parties to their original positions. We conclude that these words are clear and must be given their plain meaning.

Lastly, Dimock urges that ambiguity exists in the terms "land" and "seismic," expense categories in the SEFA. Neither "land" nor "seismic" is defined in the parties'

agreement. The determination of whether terms are ambiguous is a question of law. *Yancey v. Floyd West & Co.*, 755 S.W.2d 914, 917 (Tex. App.—Fort Worth 1988, writ denied). When there is no ambiguity in the term, it is the court's duty to give the words used their plain meaning. *Transport Ins. Co. v. Standard Oil Co. of Tex.*, 337 S.W.2d 284, 288 (Tex. 1960).

After looking within the four corners of the parties' agreement, we are not convinced that the words "land" and "seismic" are ambiguous. Although the terms are broad, it was the parties' choice to use such broad terms, and the SEFA does not indicate that the terms are to be read in the narrow sense proposed by Dimock. As used in the SEFA, the term "land" is unambiguous and broad. As such, it is not limited to surface acreage or surface rights, but includes mineral interests and mineral rights. Similarly, the term "seismic" is unambiguous and broad, such that it includes everything necessary to obtain the seismic information the parties sought in the SEFA.

Our conclusion does not undertake to dispose of Dimock's claim that Sutherland breached the parties' agreement by categorizing certain costs as land or seismic costs when they were not; it simply means that Dimock's claim is for the breach of compliance with those terms as we have construed them. The trial court was not presented with specific "land" or "seismic" costs to adjudicate, and it did not reach the issue of whether Sutherland's claimed costs were in fact land costs and/or seismic costs. Dimock has not

lost the right to dispute the costs charged.[3] We remand those claims for a trial on whether Sutherland breached the SEFA as unambiguously written.

We have concluded that Sutherland was not entitled to a no-evidence summary judgment on Dimock's counterclaims for breach of contract, suit for debt, breach of fiduciary duty, conversion, or fraud. We have further concluded that Sutherland did not meet its traditional summary judgment burden regarding Dimock's claims for fraud and breach of fiduciary duty. Therefore, we sustain Dimock's issues which allege that there are fact issues on these claims, and we reverse and remand the case for trial on the merits of these issues.

We have also concluded that, while Sutherland was not entitled to a no-evidence summary judgment on its declaratory judgment claims, it did meet its traditional summary judgment burden establishing that the terms of the SEFA are not ambiguous. We affirm the trial court's summary judgment on that issue.

Because the matters raised in other issues depend upon resolution of questions the trial court must settle, no discussion of those issues is now required.

Issues as to Fourth Partial Summary Judgment

In three issues, Dimock complains that the trial court erroneously granted Sutherland's fourth motion for partial summary judgment. Sutherland's fourth motion addressed Dimock's breach of fiduciary duty and breach of contract claims related to

[3] Sutherland erroneously characterizes the trial court's summary judgment order as so expansive as to bar consideration of Dimock's counterclaims but, as we have explained, those counterclaims were not disposed of by the trial court.

Sutherland's treatment of its legal fees and expenses incurred in this litigation. Beginning in April of 2014, Sutherland began charging its attorney's fees and other expenses incurred in this lawsuit as "operating costs" for the Hamrick #3, such that such fees and expenses were improperly deducted from the well's revenue. Sutherland acknowledged that it charged its litigation expenses to the Hamrick #3's operating account and it eventually reimbursed Dimock $97,469.79.

Breach of Fiduciary Duty

Sutherland's claimed fiduciary duty to Dimock arises from the parties' Operating Agreement, which provides, "Nothing in this paragraph shall be construed to establish a fiduciary relationship between Operator and Non-Operators for any purpose other than to account for Non-Operator funds as herein specifically provided." As set forth above, Sutherland has not established as a matter of law that it did not owe Dimock a fiduciary duty. Summary judgment was not properly granted on this claim.

Breach of Contract

Sutherland pleaded the affirmative defense of payment in response to Dimock's breach of contract claim. Sutherland provided evidence that it paid Dimock $97,469.79 on May 5, 2016, and that such payment constituted the full amount of deductions attributable to Dimock's 51% working interest in the Hamrick #3. Sutherland's total deductions for litigation costs were $184,032. Additionally, Sutherland's payment included interest from August 1, 2015.

On appeal, Dimock argues that (1) interest on Sutherland's payment should have been calculated from April of 2014, not August of 2015, and (2) Dimock is entitled to attorney's fees for Sutherland's breach.

As set forth above, we have found that there are issues, including the date of project payout, requiring factual determinations at the trial court level. We therefore remand the issue of the interest calculation for a determination of the appropriate sum.

As to the attorney's fees issue, Texas Civil Practice and Remedies Code section 38.002 provides that, to recover attorney's fees under Chapter 38, "the claimant must present the claim to the opposing party or to a duly authorized agent of the opposing party." TEX. CIV. PRAC. & REM. CODE ANN. § 38.002(2) (West 2015). Sutherland claimed it was entitled to judgment as a matter of law because Dimock had no evidence of presentment as required by the statute. We disagree.

Generally, presentment is a question of fact. *Lyon v. Bldg. Galveston, Inc.,* No. 01-15-00664-CV, 2017 Tex. App. LEXIS 9610, at *31 (Tex. App.—Houston [1st Dist.] Oct. 12, 2017, no pet. h.) (mem. op. on rehearing). Moreover, no particular form of presentment is required. *Jones v. Kelley*, 614 S.W.2d 95, 100 (Tex. 1981). The purpose of presentment is to make the opposing party aware that a claim is asserted against him, and to allow him an opportunity to pay the claim and thereby avoid incurring an obligation for attorney's fees. *Carrington v. Hart*, 703 S.W.2d 814, 818 (Tex. App.—Austin 1986, no writ). The requirements of presentment are satisfied when there is evidence showing that a party knew of the specific demands of another. *See Stuckey v. White*, 647 S.W.2d 35, 38 (Tex. App.—Houston [1st Dist.] 1982, no writ).

The record shows that, after suit was filed by Sutherland, Dimock sent a demand letter in which it alleged Sutherland had breached the contract and that it was entitled to attorney's fees. Following discovery, in December of 2015 Dimock asserted counterclaims for breach of contract specifically based on Sutherland's improper charges of its litigation expenses. Sutherland tendered payment to Dimock as reimbursement for these improper charges by check dated May 5, 2016. The following day, May 6, 2016, Sutherland filed a verified denial claiming that Dimock had not made presentment. We find that more than a scintilla of evidence exists as to presentment; therefore, Sutherland was not entitled to a no-evidence summary judgment on that ground.

Therefore, the fourth partial summary judgment is reversed and remanded to the trial court.

Issues as to Order Denying Motion for Leave to Join Parties

In one issue, Dimock maintains that the trial court erred in denying Dimock's Motion for Leave to Join Parties. Dimock's brief does not cite to any authority on this issue or discuss how the law relating to joinder of parties applies to the facts of this case. In short, there is no substantive analysis of the issue.

To be adequately briefed, a point of error must cite relevant legal authority and provide legal argument based upon that authority. *See* TEX. R. APP. P. 38.1(i) ("The brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record."). Failure to either cite authority or advance substantive analysis waives the issue on appeal. *Sunnyside Feedyard, L.C. v. Metro.*

Life Ins. Co., 106 S.W.3d 169, 173 (Tex. App.—Amarillo 2003, no pet.). We conclude that this issue is inadequately briefed and the error, if any, is waived.

Issues as to Trial and Final Judgment

In its final ten issues, Dimock presents arguments related to the jury trial and final judgment entered in this case.

Sutherland's Attorney's Fees

First, Dimock challenges the jury's award of attorney's fees. Specifically, Dimock argues that the trial court erred in (1) awarding Sutherland's attorney's fees and expenses on claims other than its declaratory judgment claim, (2) entering judgment because there was no evidence or insufficient evidence of Sutherland's attorney's fees segregated as to its declaratory judgment claim, and (3) entering judgment because evidence of the finding of $200,000 in attorney's fees was factually insufficient.

We apply an abuse of discretion standard to review an award of attorney's fees in a declaratory judgment action. *Roberson v. City of Austin*, 157 S.W.3d 130, 137 (Tex. App.—Austin 2005, pet. denied). Texas law does not allow the recovery of attorney's fees unless the award is authorized by statute or contract. *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 310 (Tex. 2006). The party seeking to recover attorney's fees carries the burden of proof to show entitlement to those fees. *Llanes v. Davila*, 133 S.W.3d 635, 640 (Tex. App.—Corpus Christi 2003, pet. denied).

The segregation of recoverable from unrecoverable fees is normally required. *Tony Gullo Motors I, L.P.,* 212 S.W.3d at 311. However, an exception arises when

discrete legal services advance both recoverable and unrecoverable claims that are so intertwined that the fees need not be segregated. *Id.* at 313-14. The burden to illustrate that the exception applies lies with the party claiming entitlement to attorney's fees. *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 11 (Tex. 1991). The extent to which claims can or cannot be segregated is a mixed question of law and fact for the jury. *Tony Gullo Motors I, L.P.,* 212 S.W.3d at 313.

At trial, both Sutherland's counsel and Dimock's counsel testified at length on the issue of attorney's fees. Indeed, the issue of attorney's fees was the only issue taken up at trial. Sutherland's counsel testified that Sutherland's total reasonable and necessary attorney's fees in the case were $269,111.60, and then specified that $36,276 of those fees were not recoverable because they were allocated to claims on which the recovery of fees was disallowed. He further testified regarding how certain claims advanced in the case were intertwined with the declaratory judgment claims. He agreed that "anything that didn't relate to the declaratory judgment pleadings by either [Sutherland] or Mr. Dimock" was taken out of the total. Sutherland therefore requested $232,835.60 in attorney's fees. In his testimony, Dimock's counsel agreed that Dimock's counterclaims, for which attorney's fees are not recoverable, had "a lot of overlap" with the declaratory judgment claims.

The jury was asked only one question: "What is a reasonable fee for the necessary services of *Sutherland Energy Co., LLC's* attorneys to pursue and defend the claims for declaratory judgment in this lawsuit, stated in dollars and cents?" As to the representation in the trial court portion, the jury answered, "$200,000.00."

The jury had considerable evidence, in the form of testimony and billing records, before it. The jury ultimately awarded Sutherland roughly $32,000 less than what it requested. We conclude that the evidence of Sutherland's attorney's fees was factually sufficient, and that Dimock has not demonstrated the trial court abused its discretion in making its decision. We overrule Dimock's issues concerning the award of attorney's fees. In conjunction, we overrule Dimock's issue claiming that the trial court erred in denying its motion for instructed verdict, which was premised on the claim that Sutherland failed to properly segregate fees.

Court Costs

Next, Dimock asserts that the trial court erred in submitting courts costs in the amount of $435 to the jury. Sutherland's counsel's billing records, presented in support of Sutherland's claim for attorney's fees, included $435 in court costs. Sutherland's counsel testified that Sutherland did not seek to recover those costs twice. Neither party disputes that a party is not entitled to recover costs as attorney's fees and again as court costs, which would allow a double recovery for those costs. However, there is no indication that this occurred. As set forth above, Sutherland sought $232,835.60 in attorney's fees (the $435 was included in this total). The jury awarded $200,000. Therefore, the jury's answer indicates that the jury could have adjusted its fee award downward to account for the improper costs. We overrule Dimock's two issues on this point.

Offer of Proof

Dimock next asserts that the trial court committed reversible error by refusing to allow Dimock to make an offer of proof at trial. At trial, Dimock sought to re-offer evidence which was previously submitted for consideration as to the summary judgment orders. Dimock's counsel stated that the offer of proof also included additional evidence which had been produced or discovered after the summary judgments were entered. He stated, "We just want to recite those to you so that you have an opportunity to reconsider your rulings, reopen the evidence and allow a trial on that." Sutherland objected to the presentment of additional evidence. The trial court denied Dimock's request.

An offer of proof serves to preserve errors in excluding evidence. TEX. R. EVID. 103. Dimock did not identify what evidence, if any, had been erroneously excluded by the trial court. Any evidence that was previously submitted was available to the trial court prior to the granting of the summary judgments and did not need to be re-offered.

Dimock also sought to submit "additional evidence" in its offer of proof. To the extent Dimock's offer of proof was a request to reopen the summary judgment evidence, we note that the trial court's determination of whether to allow such reopening is left to its discretion. *See Beavers v. Goose Creek Consol. I.S.D.*, 884 S.W.2d 932, 935 (Tex. App.—Waco 1994, writ denied). Based on the record before us, we conclude that Dimock has not demonstrated that the trial court abused its discretion when it refused to permit the filing of additional evidence after it had ruled on the three partial motions for summary judgment. This issue is overruled.

Dimock's Attorney's Fees

Dimock argues the trial court erred in denying Dimock's request to submit its attorney's fees claim for breach of contract to the jury. Dimock presented its attorney's fees and costs incurred through November of 2015. On appeal, Dimock asserts that its subsequent legal bills and expenses were exhibits for its offer of proof, which was disallowed.

We have reversed the trial court's summary judgment with respect to Dimock's breach of contract claim. The appropriate appellate remedy for Dimock's request for reasonable and necessary attorney's fees related to that claim is also to reverse and remand for further proceedings regarding that request.

Motion for New Trial and Motion to Modify, Correct, or Reform Judgment

In the last of its sixty-six issues, Dimock claims the trial court erred in denying its motion for new trial and motion to modify, correct, or reform the judgment. The trial court did not sign any orders concerning Dimock's motions. Dimock's motions were based on the trial court's inclusion of courts costs in the attorney's fees submitted to the jury and on the attorney's fee award of $200,000. We have already addressed the errors as to court costs and the sufficiency of evidence of Sutherland's recoverable attorney's fees. This issue is overruled.

Conclusion

We affirm the first partial summary judgment order, affirm in part and reverse in part the third partial summary judgment order, and reverse the fourth partial summary

judgment order. We also affirm the trial court's order denying Dimock's Motion for Leave to Join Parties. Finally, we affirm the trial court's final judgment awarding Sutherland attorney's fees in the amount of $200,000. We remand this cause to the trial court for further proceedings consistent with this opinion.

Judy C. Parker
Justice