NUMBER 13-19-00283-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

CLIF MITCHELL, **Appellant,**

v.

R.D. TIPS, INC., **Appellee.**

On appeal from the 438th District Court of Bexar County, Texas.

MEMORANDUM OPINION

Before Chief Justice Contreras and Justices Benavides and Longoria
Memorandum Opinion by Chief Justice Contreras

By four issues on appeal, appellant Clif Mitchell challenges the trial court's summary judgment in favor of appellee R.D. Tips, Inc. (RDTI) on the latter's claim for reimbursement. Mitchell contends the trial court erred by: (1) denying his motion to transfer venue; (2) granting summary judgment to RDTI; and (3–4) sustaining RDTI's

objections to certain summary judgment evidence. We affirm in part and reverse and remand in part.[1]

I. BACKGROUND

Mitchell was married to Virginia Jett, and the two divorced in 2006. The community property included a controlling interest in North America Life Insurance Company (NAL). During the pendency of the divorce, Mitchell finalized an agreement with RDTI to merge NAL with RDTI's subsidiary, MTM Life Insurance Company (MTM). Pursuant to a mediated settlement agreement, the divorce decree provided that Jett would relinquish her share of the community interest in NAL in exchange for Mitchell executing a "Secured Owelty Note" payable to Jett in the amount of $4,637,276.40. The note provided that Mitchell would make monthly payments on the note beginning on November 1, 2006. Jett agreed to this provision only on the condition that RDTI would guarantee payment of the note, and RDTI did so by executing a Guaranty on May 21, 2007.

Mitchell made monthly payments on the note until November 2011, when he stopped paying ostensibly because RDTI "divested [him] of his business interests." After accelerating the debt pursuant to the note's terms, Jett sued RDTI as guarantor, and she obtained judgment against RDTI for $3,354,314.06, plus interest and attorney's fees, on February 11, 2013. RDTI appealed this judgment and a supersedeas bond was filed to suspend its execution pending the appeal. *See generally* TEX. R. APP. P. 24. The Austin Court of Appeals affirmed the judgment. *R.D. Tips, Inc. v. Jett*, No. 03-13-00336-CV, 2015 WL 1612025 (Tex. App.—Austin Apr. 9, 2015, pet. denied) (mem. op.).

[1] This appeal was transferred to this Court from the Fourth Court of Appeals in San Antonio pursuant to an order issued by the Texas Supreme Court. *See* TEX. GOV'T CODE ANN. § 73.001.

In November 2015, RDTI filed the instant suit against Mitchell in the 438th District Court of Bexar County, arguing that it paid Jett more than $3.8 million due to Mitchell's default on the note. RDTI sought reimbursement of the amount it allegedly paid to Jett, plus interest and attorney's fees. The petition alleged that venue is proper because "a substantial part of the events underlying this suit occurred in Bexar County."

Mitchell moved to transfer, contending that venue was mandatory in Travis County under the "Secured Owelty Note"[2] as well as under the Guaranty signed by RDTI and Jett, which stated in part: "This Guaranty shall be governed by and construed in accordance with the laws of the State of Texas (without regard to conflicts of law rules) and shall be deemed performable in Travis County, Texas." After a hearing on May 18, 2016, the trial court denied the motion to transfer venue.

RDTI filed a traditional motion for summary judgment on its reimbursement claim. It attached an affidavit, dated November 22, 2016, by its president Robert D. Tips. Tips stated that "[t]hrough subsidiaries and affiliates, [RDTI] does business under the name 'Mission Park Funeral Chapels and Cemeteries.'" According to Tips, in order to suspend enforcement of the 2013 judgment pending appeal, "[RDTI] posted a supersedeas bond" with SureTec Insurance Company (SureTec) as surety. Tips averred that, after the judgment became final, SureTec paid Jett $3,788,745.47, and "[RDTI] in turn had to pay [SureTec]" that same amount under the terms of the bond. Attached to Tips's affidavit was a "Collateral Receipt and Security Agreement" which he claimed "evidences a deposit of security in the amount of $3,788,745.47 by MPII, Inc., as Depositor of

[2] The "Secured Owelty Note" provides in relevant part: "THIS NOTE SHALL BE CONSTRUED UNDER TEXAS LAW AND IS DEEMED PERFORMABLE IN TRAVIS COUNTY, TEXAS. MAKER AGREES THAT JURISDICTION OVER ANY LEGAL ACTION RELATED TO THE ENFORCEMENT OF THIS NOTE SHALL BE IN THE STATE AND/OR FEDERAL COURTS OF TEXAS IN SUCH COUNTY."

Collateral, on behalf of [RDTI], as Principal." Also attached to the affidavit was a BB&T Bank statement which, according to Tips, "evidences a disbursement in the amount of $3,788,745.47 to Suretec from MPII, Inc. on behalf of [RDTI]." According to Tips, because of the accrual of interest, the supersedeas bond did not cover the entire amount due to Jett, and RDTI thus had to pay Jett an additional $117,629.23. Tips concluded: "In all, [RDTI] paid Ms. Jett a total of $3,909,374.70 as a result of its Guaranty of the Secured Owelty Note."

RDTI later filed an amended summary judgment motion along with a second affidavit by Tips. In his new affidavit, dated May 17, 2017, Tips clarified that RDTI is a "holding company" and that MPII, Inc. (MPII) is one of its wholly-owned subsidiaries. This new affidavit also provided additional details as to how the supersedeas bond was obtained. Specifically, Tips stated that in order to post the supersedeas bond, RDTI "had to post a letter of credit, payable in accordance with its terms, in favor of [SureTec]." Tips stated that, "[b]ecause it owns and operates the funeral chapels and cemeteries, [MPII] was able to provide the security needed to obtain issuance of a letter of credit in favor of [SureTec]." He averred that MPII executed the "Collateral Receipt and Security Agreement" in order to pledge the letter of credit "to secure the obligations of" RDTI to SureTec. The remainder of Tips's May 2017 affidavit was largely the same as his November 2016 affidavit.

In his response to RDTI's amended motion, Mitchell argued that summary judgment is improper because: (1) RDTI failed to join Mitchell in the earlier lawsuit brought by Jett; (2) fact issues exist as to whether RDTI paid Jett anything and whether Jett was paid in full; (3) fact issues exist as to whether RDTI mitigated its damages; and (4) fact

issues exist as to Mitchell's affirmative defenses. Notably, Mitchell argued that "[RDTI's] own Motion shows that [MPII], not [RDTI], paid the funds that [RDTI] now seeks reimbursement for . . . . The wrong party sued Mitchell." Mitchell also alleged that his "interest in NAL was more than sufficient to pay all amounts owed to Jett." But, according to Mitchell,

> [RDTI] was in control of NAL's liquidation and through self-dealing sold NAL's assets to [RDTI] for only $12 million (less than half their actual value), thereby leaving Mitchell with $0 and [RDTI] with about $13 million in net recovery. [RDTI] allegedly then paid Jett, effectively, with Mitchell's money since [RDTI] had deprived Mitchell of his financial interest in NAL.

Mitchell additionally alleged:

> Additional fact issues exist as to whether [RDTI's] claims are now barred since Mitchell was not joined to the prior lawsuit among Jett and [RDTI], whether [RDTI] paid anything to Jett at all (as opposed to third parties that paid that are not part of this lawsuit), whether the amount alleged paid is accurate by [RDTI] since Jett continues to try to collect against Mitchell for the debt that [RDTI] alleges has been paid in full, whether [RDTI] mitigated its damages when it did not exercise its cure rights under the Guaranty and when it chose instead to litigate for years with Jett, [and] whether [RDTI's] claim is completely setoff by the affirmative defenses asserted by Mitchell related to the merged business that made the basis of the Guaranty.

Mitchell attached his own affidavit to his summary judgment response. In the affidavit, he explained that in 2010, the Texas Department of Insurance (TDI) ordered NAL to stop the sale of new business and "NAL management agreed to liquidate the company . . . with TDI oversight." According to Mitchell, Al Range succeeded him as NAL's president in 2010 and "continued to dispose of NAL assets and policyholder liabilities" until 2015. Mitchell averred:

> 26. As cash was needed to complete the wind down of NAL, in 2014 Mr. Range and Mr. Tips devised a scheme whereby NAL's remaining assets would be sold to Mr. Tips['] company RDTI for pennies on the dollar in lieu of continuing an orderly disposition of NAL's assets on much more favorable terms.

> 27. Without proper corporate or shareholder approval, NAL management sold approximately $25 million of assets (representing all or substantially all of NAL's remaining assets) to RDTI for approximately $12 million to complete the dissolution of NAL thereby depriving NAL's other stockholder, [me], of any benefit from the dissolution of NAL.
>
> 28. Had the assets been sold for $25 million, then approximately $12 million would have been used in dissolution expenses and the remaining $13 million would have been disbursed to the shareholders, meaning I would have ultimately received $6.5 million that would have more than covered the amount owed to Ms. Jett. Instead, I received $0. And, RDTI effectively received $13 million since it received $25 million in assets for payment of only $12 million.

The response also included various objections to RDTI's summary judgment evidence. RDTI filed a reply to Mitchell's response as well as various objections to Mitchell's summary judgment evidence.

On July 13, 2017, the trial court signed orders sustaining some of the parties' evidentiary objections, denying others, and granting RDTI's motion for summary judgment.[3] The final judgment, signed on February 12, 2019, awards RDTI $3,909,374.70 plus pre- and post-judgment interest. This appeal followed.

II. DISCUSSION

A. Motion to Transfer Venue

By his first issue, Mitchell argues the trial court erred in denying his motion to transfer venue to Travis County.

1. Standard of Review and Applicable Law

In general, plaintiffs are allowed to choose venue first, and the plaintiff's choice cannot be disturbed as long as suit is initially filed in a county of proper venue. *Shamoun*

[3] Mitchell attempted to perfect an appeal in 2017, but the appeal was dismissed for want of jurisdiction because RDTI's claim for attorney's fees remained pending. *Mitchell v. R.D. Tips, Inc.*, No. 04-17-00639-CV, 2018 WL 280471, *1 (Tex. App.—San Antonio, Jan. 3, 2018, no pet.) (mem. op.). RDTI later non-suited its attorney's fees claim.

& Norman, LLP v. Yarto Int'l Grp., LP, 398 S.W.3d 272, 287 (Tex. App.—Corpus Christi 2012, pet. dism'd) (combined appeals & orig. proceeding). A trial court must consider all venue facts pleaded by the plaintiff as true unless they are specifically denied by an adverse party. TEX. R. CIV. P. 87(3)(a). Once an adverse party specifically denies venue facts, the plaintiff must then respond with prima facie proof of those facts. *Id*. "Prima facie proof is made when the venue facts are properly pleaded and an affidavit, and any duly proved attachments to the affidavit, are filed fully and specifically setting forth the facts supporting such pleading." *Id*. This prima facie proof is not subject to rebuttal, cross-examination, impeachment, or disproof. *Ruiz v. Conoco, Inc.*, 868 S.W.2d 752, 757 (Tex. 1993); *Shamoun & Norman*, 398 S.W.3d at 287.

"Proper venue" means: (1) the mandatory venue as provided by statute; or (2) if there is no mandatory venue, the venue provided under the general venue statute or the permissive venue provisions of subchapter C of chapter 15. TEX. CIV. PRAC. & REM. CODE ANN. § 15.001(b). The general venue statute states that all lawsuits shall be brought:

> (1) in the county in which all or a substantial part of the events or omissions giving rise to the claim occurred;
>
> (2) in the county of defendant's residence at the time the cause of action accrued if defendant is a natural person;
>
> (3) in the county of the defendant's principal office in this state, if the defendant is not a natural person; or
>
> (4) if Subdivisions (1), (2), and (3) do not apply, in the county in which the plaintiff resided at the time of the accrual of the cause of action.

Id. § 15.002(a). Venue may be proper in more than one county under the general, mandatory, or permissive venue rules. *GeoChem Tech Corp. v. Verseckes*, 962 S.W.2d 541, 544 (Tex. 1998).

A defendant raises the question of proper venue by objecting to a plaintiff's venue

choice through a motion to transfer venue. *See* TEX. R. CIV. P. 86. The motion may allege that mandatory venue lies in a different county. TEX. R. CIV. P. 86(3)(b). If a plaintiff's chosen venue rests on a permissive venue statute and the defendant files a meritorious motion to transfer based on a mandatory venue provision, the trial court must grant the motion. *Wichita County v. Hart*, 917 S.W.2d 779, 781 (Tex. 1996); *Spin Doctor Golf, Inc. v. Paymentech, LP,* 296 S.W.3d 354, 357 (Tex. App.—Dallas 2009, pet. dism'd); *Morris v. Tex. Parks & Wildlife Dep't*, 226 S.W.3d 720, 723 (Tex. App.—Corpus Christi–Edinburg 2007, no pet.). "On appeal from the trial on the merits," as here, "if venue was improper it shall in no event be harmless error and shall be reversible error." TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(b). We review the denial of a motion to transfer venue de novo. *Wilson v. Tex. Parks & Wildlife Dep't*, 886 S.W.2d 259, 261 (Tex. 1994).

In general, the fixing of venue by contract is invalid. *Shamoun & Norman*, 398 S.W.3d at 287; *In re Great Lakes Dredge & Dock Co.*, 251 S.W.3d 68, 76 (Tex. App.—Corpus Christi–Edinburg 2008, orig. proceeding) (citing *Fid. Union Life Ins. Co. v. Evans*, 477 S.W.2d 535, 537 (Tex. 1972)). But a contractual venue selection clause is enforceable in a suit arising from a "major transaction." TEX. CIV. PRAC. & REM. CODE ANN. § 15.020 ("An action arising from a major transaction shall be brought in a county if the party against whom the action is brought has agreed in writing that a suit arising from the transaction may be brought in that county."). A "major transaction" is "a transaction evidenced by a written agreement under which a person pays or receives, or is obligated to pay or entitled to receive, consideration with an aggregate stated value equal to or greater than $1 million." *Id.* § 15.020(a). The definition of "major transaction" excludes transactions "entered into primarily for personal, family, or household purposes, or to

settle a personal injury or wrongful death claim . . . ." *Id.*

2. Analysis

On appeal, Mitchell argues that venue was mandatory in Travis County because RDTI's claim arose from a "major transaction" worth more than $1 million, *see id.*, and "the guaranty that gives rise to the claim expressly provided that it shall be deemed performable in Travis County." But an agreement that a contract is "performable" in a certain county is not the same as an agreement that a *suit* arising from the transaction may be brought in that county, and Mitchell cites no authority indicating that the two are equivalent.[4]

Mitchell further contends that no substantial part of the events or omissions giving rise to the suit occurred in Bexar County. Instead, Mitchell notes that "the debt that [RDTI] seeks reimbursement on is from a judgment entered in Travis County" and again observes that the Guaranty states it is performable in Travis County.

We disagree. As Mitchell acknowledges, "[RDTI]'s reimbursement claim is premised on it having to pay Jett under the guaranty." RDTI's response to the motion to transfer included another affidavit by Tips in which he averred, among other things, that: (1) the potential merger between NAL and MTM was "discussed in meetings" at RDTI's offices in San Antonio and "over the telephone while [Tips] was in" San Antonio; (2) Tips engaged in telephone calls and responded to emails regarding the execution of the Guaranty in San Antonio; (3) Jett's counsel sent correspondence regarding Mitchell's

[4] Mitchell correctly observed in his motion to transfer that the "Secured Owelty Note" does include a clause specifically fixing mandatory venue for litigation in Travis County. However, Mitchell does not argue on appeal that the instant claim arose from or was "related to the enforcement of" that note, nor does he argue that the venue-selection clause in that note applies in this case. We therefore do not address that issue. *See* TEX. R. APP. P. 47.1.

default and her demand for payment to RDTI's address in San Antonio; (4) in order to pay the judgment to Jett, RDTI "drew the necessary funds against a line of credit it maintains with a branch of BB&T Bank in San Antonio"; and (5) "the funds used to pay the judgment were transmitted from [RDTI]'s San Antonio bank to [Jett]'s counsel in Austin." This affidavit testimony constitutes prima facie proof that a substantial part of the events giving rise to RDTI's reimbursement claim occurred in San Antonio, which we judicially notice is the seat of Bexar County. *See In re Sosa*, 370 S.W.3d 79, 82 (Tex. App.—Houston [14th Dist.] 2012, orig. proceeding) ("A court may . . . take judicial notice that a city is the county seat of a particular county for purposes of venue."). Because Bexar County is a proper venue for the suit, the trial court did not err in denying Mitchell's motion to transfer, regardless of whether Travis County would also be a proper venue. *See Ruiz*, 868 S.W.2d at 757; *Shamoun & Norman*, 398 S.W.3d at 287; *Frost Nat'l Bank v. L & F Distribs., Ltd.*, 122 S.W.3d 922, 928 (Tex. App.—Corpus Christi–Edinburg 2003) (holding that "a 'substantial part' of the events or omissions giving rise to a claim may occur in more than one county"), *rev'd on other grounds*, 165 S.W.3d 310 (Tex. 2005) (per curiam).

We overrule Mitchell's first issue.

B. Evidentiary Rulings

Mitchell's third and fourth issues argue the trial court erred by granting certain objections to his summary judgment evidence. We review such rulings for abuse of discretion. *Starwood Mgmt., LLC v. Swaim*, 530 S.W.3d 673, 678 (Tex. 2017) (per curiam). A trial court abuses its discretion when it rules without reference to any guiding rules or principles. *Id.* (quoting *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985)). That a trial judge decides a matter within his discretionary authority

in a matter different than we would in a similar circumstance does not mean that an abuse of discretion has occurred. *Downer*, 701 S.W.2d at 242.

Among the items of evidence attached to Mitchell's summary judgment response was a copy of Tips's November 22, 2016 affidavit in which Tips stated in part that "[RDTI] posted a supersedeas bond" and then "had to pay [SureTec]" after SureTec paid Jett. This affidavit was attached as evidence to RDTI's original summary judgment motion; as noted, RDTI later filed an amended summary judgment motion containing a revised affidavit. Mitchell's summary judgment response, which was filed after the amended summary judgment motion was filed, included Tips's 2016 affidavit as an exhibit but stated the affidavit is "[n]ot provided for the truth of matters asserted but rather to show discrepancies in revised affidavit now being relied on in amended motion for summary judgment." RDTI objected to the affidavit as not properly authenticated and unfairly prejudicial. *See* TEX. R. EVID. 403, 901, 902. The trial court sustained the objection without stating a reason. By his third issue, Mitchell contends the trial court erred by doing so.

We agree with Mitchell. Tips's 2016 affidavit is duly notarized and complies with the rules governing the use of affidavits as summary judgment evidence. *See* TEX. R. CIV. P. 166a(f) ("Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."); *see also* TEX. R. EVID. 902(8) (providing that "[a] document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public" is self-authenticating). RDTI contended in its objection that the 2016 affidavit was "supersede[d]" by the affidavit attached to the amended summary judgment motion, but as Mitchell notes, the revised

affidavit was not itself designated as amended. Even if it was so designated, that would not be a reason to exclude it under any of the rules of evidence cited by RDTI. *See* TEX. R. EVID. 403, 901, 902. The trial court abused its discretion by granting RDTI's objections to Tips's 2016 affidavit. We sustain Mitchell's third issue.

As additional evidence to support his summary judgment response, Mitchell attached a document directly comparing Tips's 2016 and 2017 affidavits and highlighting the differences. Mitchell proclaimed that this "redline" comparison is "[n]ot provided for truth of matters asserted but rather as demonstrative exhibit to show changes made to sworn statements relied on by [RDTI]." RDTI objected to this exhibit as inadmissible hearsay, unauthenticated, and unfairly prejudicial or confusing. *See* TEX. R. EVID. 403, 802, 901, 902. The trial court sustained the objections without stating a basis. Mitchell argues by part of his fourth issue on appeal that this was error. He does not, however, argue that the exclusion of this exhibit (1) probably caused the rendition of an improper judgment or (2) probably prevented him from properly presenting his case on appeal. *See* TEX. R. APP. P. 44.1(a) (setting forth standard for reversible error in civil cases); TEX. R. APP. P. 38.1(i). This part of Mitchell's fourth issue is overruled.

Finally, the evidence attached to Mitchell's summary judgment response included two email exchanges discussing the money owed to Jett—one from June 2016 between his counsel and Jett's counsel, and one from March 2012 between Mitchell and Range. The trial court sustained RDTI's objections to these exhibits; Mitchell's fourth issue also challenges these rulings.

As to the June 2016 email exchange, Mitchell's summary judgment response stated that the exhibit was "not being offered to prove the truth of the matter asserted by

the declarant in the document but solely to demonstrate continued collection activity taking place by Jett notwithstanding allegation by [RDTI] that Jett was paid in full." Mitchell contends on appeal that it "was not offered for the truth of the matter asserted (i.e. Jett is owed 'x' dollar) but rather to impeach the sworn statement provided by [RDTI]." He claims "[t]he impeachment evidence should have been considered" and "[i]t created a genuine issue of material fact of whether [RDTI] did in fact pay the claim it sought reimbursement on." We disagree. Hearsay—an out-of-court statement which "a party offers in evidence to prove the truth of the matter asserted" therein—is inadmissible unless an exception applies. TEX. R. EVID. 801(d), 802. To the extent the emails show that Jett continued to allege that Mitchell owed her money even after the 2013 judgment was satisfied, they constituted hearsay, and Mitchell did not establish that any exception applied. Accordingly, the trial court did not abuse its discretion by granting RDTI's objection to this exhibit.

As to the March 2012 emails, RDTI objected that they are inadmissible hearsay and not properly authenticated. *See* TEX. R. EVID. 802, 901, 902. Mitchell argues on appeal that this was error because the emails are "are party statements that can be used as well as a prior inconsistent statement by [RDTI]." However, this argument only pertains to RDTI's hearsay objection. *See* TEX. R. EVID. 801(e)(1)(i) (stating that a declarant-witness's prior inconsistent statement under oath is excluded from hearsay), 803(24) (setting forth hearsay exception for statements against interest). Mitchell does not dispute on appeal that the 2012 emails were not properly authenticated. Accordingly, we must overrule this issue. *See, e.g., Hartwell v. Lone Star, PCA*, 528 S.W.3d 750, 763 (Tex. App.—Texarkana 2017, pet. dism'd) ("When an unchallenged independent ground or

basis supports the trial court's complained[-]of ruling or order, we must accept the validity of that unchallenged independent ground" and "any error in the grounds challenged on appeal is harmless because the unchallenged independent ground fully supports the complained-of ruling or judgment.").

We overrule the remainder of Mitchell's fourth issue.

C. Summary Judgment

By his second issue, Mitchell contends the trial court erred by granting RDTI's summary judgment motion because: (1) a fact issue exists as to "what amount, if any, [RDTI] paid"; (2) RDTI's cause of action is barred because it failed to join Mitchell in the prior lawsuit against it brought by Jett; (3) fact issues exist as to affirmative defenses raised by Mitchell in his summary judgment response; and (4) a fact issue exists as to whether RDTI complied with its duty to mitigate damages.

1. Standard of Review

A movant for traditional summary judgment has the burden to establish that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Amedisys, Inc. v. Kingwood Home Health Care, LLC*, 437 S.W.3d 507, 511 (Tex. 2014). If the movant's motion and summary judgment proof facially establish a right to judgment as a matter of law, then the burden shifts to the non-movant to raise a material fact issue. *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995). If the party opposing summary judgment relies on an affirmative defense, it must come forward with summary judgment evidence on each element of the defense to avoid summary judgment. *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984); *Rogers v. RREF II CB Acquisitions, LLC*, 533 S.W.3d 419, 438 (Tex. App.—Corpus Christi–

Edinburg 2016, no pet.); *Mena v. Lenz*, 349 S.W.3d 650, 656 (Tex. App.—Corpus Christi–Edinburg 2011, no pet.) (op. on reh'g).

We review summary judgments de novo. *Id.* In doing so, we view the evidence in the light most favorable to the non-movant, indulging every reasonable inference and resolving any doubts against the motion. *Buck v. Palmer*, 381 S.W.3d 525, 527 (Tex. 2012) (per curiam); *City of Keller v. Wilson*, 168 S.W.3d 802, 824 (Tex. 2005). Because the trial court did not specify the basis for the ruling, we must affirm the judgment if any theory advanced in RDTI's motion is meritorious. *W. Invs., Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005).

2. Reimbursement

RDTI's live petition raised a cause of action based on the common law right of reimbursement. *See Wiman v. Tomaszewicz*, 877 S.W.2d 1, 7 (Tex. App.—Dallas 1994, no writ) ("[A] guarantor who is forced to pay under a guaranty agreement may sue the maker of the note to recover his payment of the obligation."); *see also Reed v. Hanover Ins. Co.*, No. 13-98-00010-CV, 1999 WL 34972227, at *3 (Tex. App.—Corpus Christi–Edinburg July 1, 1999, no pet.). Strictly speaking, the claim is not for enforcement of the guaranty; rather, "when a [guarantor] pays a note for his principal and sues the principal on such payment, the suit is one in assumpsit upon the implied promise to repay the [guarantor]." *Lewis v. Easley*, 34 S.W.2d 376, 377 (Tex. App.—Amarillo 1930, no writ); *see Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools, Inc.*, 246 S.W.3d 42, 49 (Tex. 2008) (noting that, under the "equitable theor[y]" of assumpsit, "a cause of action arises when money is paid for the use and benefit of another"); *Willis v. Chowning*, 40 S.W. 395, 396–97 (Tex. 1897) ("The right of action in favor of the surety

arises when he pays the debt, and is not based upon the original debt itself, but upon the implied contract which exists at law between the principal and surety in such cases."); *King v. Tubb*, 551 S.W.2d 436, 442 (Tex. App.—Corpus Christi–Edinburg 1977, no writ) ("Assumpsit is a recovery for the unjust retention of a benefit to the loss of another, or the retention of money of another against the fundamental princip[le]s of justice and equity."); *U.S. Fid. & Guar. Co. v. Huffmaster*, 204 S.W. 337, 338 (Tex. App.—Texarkana 1918, no writ) ("In this state the right of action of the guarantor who has paid the debt of his principal is not predicated upon the doctrine of subrogation, but upon 'an implied promise raised by law' on the part of the principal to reimburse the guarantor the sum he was bound to pay to satisfy the debt."). The party seeking reimbursement must establish suretyship and provide proof of payment. *Reed*, 1999 WL 34972227, at *3 (citing *Caldwell v. Stevenson*, 567 S.W.2d 278, 280 (Tex. App.—Austin 1978, no writ); *U.S. Fire Ins. Co. v. Twin City Concrete, Inc.*, 684 S.W.2d 171, 174 (Tex. App.—Houston [14th Dist.] 1984, no writ)).

In his affidavit attached to RDTI's amended summary judgment motion, Tips averred that: (1) RDTI posted a bond to suspend enforcement of the February 11, 2013 judgment, with SureTec as surety; (2) MPII pledged a letter of credit to secure RDTI's obligations to SureTec; (3) SureTec paid $3,788,745.47 to Jett when the 2013 judgment became final; (4) MPII then reimbursed SureTec $3,788,745.47 "on behalf of [RDTI]"; and (5) RDTI later paid Jett "an additional" $117,629.23 representing interest that accrued since the bond was posted.

Mitchell's principal argument on appeal is that, according to the evidence, RTDI was not the entity that reimbursed SureTec for the amount SureTec paid to Jett pursuant

to the supersedeas bond—instead, MPII was the entity that did so.[5] We agree. In his May 17, 2017 affidavit, Tips referred to a bank statement which he claimed "evidences a disbursement in the amount of $3,788,745.47 to Suretec from MPII, Inc. on behalf of [RDTI]." The bank statement, which was attached to the affidavit as an exhibit, is entitled "Business Loan Statement" and was sent to MPII on October 21, 2016. It contains a "Loan Summary" indicating that the outstanding balance of the loan is $3,788,745.47 and that the maturity date is November 5, 2016. It also contains a "Transaction History" showing a "disbursement" of $3,788,745.47 on November 5, 2015. Contrary to Tips's representation, the bank statement does *not* show a disbursement from MPII to SureTec; rather, it shows a disbursement of loan proceeds from the bank to MPII.

This is consistent with Tips's statement that MPII paid SureTec "on behalf of [RDTI]." But it does not support a finding that RDTI was entitled to judgment as a matter of law on its common law reimbursement claim. In order for a guarantor to obtain reimbursement after paying a debt on behalf of a principal, the guarantor must provide proof of payment—that is, it must prove that it actually paid the debt. *See Reed*, 1999 WL 34972227, at *3. Though Tips generally concluded in his affidavit that "[RDTI] paid Ms. Jett a total of $3,909,374.70 as a result of its Guaranty of the Secured Owelty Note," this conclusory statement is belied by the factual details and summary judgment evidence. There is no documentary evidence that RDTI ever paid $3,788,745.47 to any party in

[5] Throughout the summary judgment proceedings and on appeal, Mitchell has emphasized the fact that Tips's May 17, 2017 affidavit (attached to RDTI's amended summary judgment motion) differs from his November 22, 2016 affidavit (attached to RDTI's original summary judgment motion). He argues that comparison of the two affidavits reveals a fact issue as to which entity reimbursed SureTec. But the only material difference between the two affidavits is that the 2017 version added detail regarding MPII's acquisition of a letter of credit in order to guarantee the obligations of RDTI to SureTec arising from the supersedeas bond. In both affidavits, Tips stated that MPII reimbursed SureTec "on behalf of [RDTI]." In neither affidavit did Tips represent that RDTI paid SureTec directly.

connection with the 2013 judgment. Instead, it is apparent from Tips's affidavit and its accompanying evidence that *SureTec* paid the 2013 judgment and *MPII* reimbursed SureTec.[6] And though MPII may be entitled to reimbursement from Mitchell, there is no allegation or evidence that RDTI repaid MPII or otherwise obtained MPII's rights to reimbursement. RDTI has therefore failed to establish its right to judgment as a matter of law with respect to the $3,788,745.47 paid pursuant to the supersedeas bond.

The situation is different with respect to the "additional" amount paid for interest that accrued after the bond was filed. In his affidavit, Tips stated: "The supersedeas bond did not cover the entire amount owed to Ms. Jett. [RDTI] therefore had to pay her an additional $117,629.23. This amount was sent to Ms. Jett's lawyer by a wire transfer in November 2015." Tips attached a "business record made by [RDTI]" which he claimed "evidences a successful wire transfer in the amount of $117,629.33 from the Compass Bank account of [RDTI] to the IOLTA account of the law firm representing Ms. Jett." The business record is a receipt indicating that Mary Jo Hauser of Mission Park Funeral Chapels wired $117,629.23 from a Compass Bank account to the account of Jett's counsel's firm on November 9, 2015. In a field entitled "Originator-to-Beneficiary," the receipt states: "[RDTI] balance due after Bond applied." Unlike the evidence concerning the reimbursement to SureTec, this is consistent with Tips's conclusory statement that

[6] In arguing that it, and not some other entity, paid the amount at issue, RDTI points to two other exhibits it attached to its amended summary judgment motion: (1) an "Acknowledgement of Satisfaction of Judgment" filed by Jett's counsel in her suit against RDTI, and (2) a "Release of Judgment" filed by Jett in the Travis County public records. The "Release of Judgment" states that the judgment was satisfied but does not state which entity satisfied it. The "Acknowledgement of Satisfaction of Judgment" states that "[RDTI] has paid to [Jett] all sums due to her" under the February 11, 2013 judgment. However, that document is unsworn and was approved by RDTI's counsel "as to form" only. Even if we were to consider the "Acknowledgement" as some evidence that RDTI itself paid the judgment, that would only raise a fact issue concerning the identity of the payor, given the exhibits attached to Tips's affidavits. Either way, summary judgment in favor of RDTI would be improper as to the $3,788,745.47 payment.

RDTI—and not some other entity—made the subject payment. Accordingly, RDTI established the essential elements of its reimbursement claim as to this amount. *See Reed*, 1999 WL 34972227, at *3; *U.S. Fire Ins. Co.*, 684 S.W.2d at 174.

3. Defenses

Having found that RDTI established its right to reimbursement for its $117,629.23 payment to Jett on November 9, 2015, we must still address Mitchell's responsive arguments to determine whether summary judgment was proper.

First, Mitchell argued that RDTI's claim is barred because RDTI did not join Mitchell as a party in the earlier litigation brought by Jett to collect on the Guaranty. He notes that civil practice and remedies code § 17.001 provides as follows:

> (a) Except as provided by this section, the acceptor of a bill of exchange or a principal obligor on a contract may be sued alone or jointly with another liable party, but a judgment may not be rendered against a party not primarily liable unless judgment is also rendered against the principal obligor.
>
> (b) The assignor, endorser, guarantor, or surety on a contract or the drawer of an accepted bill may be sued without suing the maker, acceptor, or other principal obligor, or a suit against the principal obligor may be discontinued, if the principal obligor:
>
> (1) is a nonresident or resides in a place where he cannot be reached by the ordinary process of law;
>
> (2) resides in a place that is unknown and cannot be ascertained by the use of reasonable diligence;
>
> (3) is dead; or
>
> (4) is actually or notoriously insolvent.

TEX. CIV. PRAC. & REM. CODE ANN. § 17.001; *see* TEX. R. CIV. P. 39(a)(1) (requiring joinder of a party, where feasible, if "in his absence complete relief cannot be accorded among those already parties"). Mitchell argued that, because he was a living resident of Travis

County at all times relevant to the lawsuit and is not actually or notoriously insolvent, RDTI's suit may not be sustained.

In its reply to Mitchell's summary judgment response and on appeal, RDTI contends that § 17.001 is inapplicable because the May 21, 2007 Guaranty is a guaranty of payment, not a guaranty of collection. We agree. "The law recognizes two distinct types of guaranty: a guaranty of collection (or conditional guaranty) and a guaranty of payment (or unconditional guaranty)." *Cox v. Lerman*, 949 S.W.2d 527, 530 (Tex. App.—Houston [14th Dist.] 1997, no writ); *Ford v. Darwin*, 767 S.W.2d 851, 854 (Tex. App.—Dallas 1989, writ denied); *see Universal Metals & Machinery, Inc. v. Bohart*, 539 S.W.2d 874, 877 (Tex. 1976). A guaranty of collection is an undertaking of the guarantor to pay if the debt cannot be collected from the primary obligor by the use of reasonable diligence. *Cox*, 949 S.W.2d at 530. With such a guaranty, the principal debtor must be joined in the suit unless excused pursuant to § 17.001. *Ford*, 767 S.W.2d at 854. By contrast, a guaranty of payment is an obligation to pay the debt when due if the debtor does not; it requires no condition precedent to its enforcement against the guarantor other than a default by the principal debtor. *Id.* A creditor may bring an action against a guarantor of payment without joining the principal debtor. *Cox*, 949 S.W.2d at 530; Ford, 767 S.W.2d at 854; *see Hopkins v. First Nat'l Bank at Brownsville*, 551 S.W.2d 343, 345 (Tex. 1977) (per curiam) (holding that "a guarantor of payment is primarily liable" and "waives any requirement that the holder of the note take action against the maker as a condition precedent to his liability on the guaranty").

The May 21, 2007 Guaranty states, in relevant part:

> 1. [RDTI], a Texas corporation ("Guarantor") hereby unconditionally guarantees the payment by [Mitchell] ("Debtor") of all obligations (the

> "Obligations") owed to [Jett] and her assigns ("Payee") arising under that certain Secured Owelty Note dated effective as of November 1, 2006 (the "Note"), as same may hereafter be amended or extended, subject to the provisions below.
>
> 2. This guaranty of payment (the "Guaranty") shall not be discharged or voided by any subsequent modification, renewal, extension, forbearance or assignment of the Note, whether or not approved by Guarantor, or by any failure of Payee to pursue remedies under the Note.
>
> 3. Guarantor waives any requirement under (i) Sections 34.02 and 34.03 of the Texas Business and Commerce Code that Payee first bring an action against Debtor on the Note or levy first against Debtor's assets before enforcing this Guaranty, (ii) Rule 31 of the Texas Rules of Civil Procedure that Debtor be made a party to an action on this Guaranty, and (iii) Section 17.001 of the Texas Civil Practice & Remedies Code that judgment must first be rendered against Debtor to secure or enforce any judgment on this Guaranty.

These terms leave no doubt that RDTI guaranteed the payment of the note unconditionally, without regard to whether the payment could be collected from Mitchell by the use of reasonable diligence. As an unconditional guarantor of payment, RDTI was primarily liable on the note, and § 17.002 did not require Jett to obtain a judgment against Mitchell before collecting from RDTI. *See Hopkins*, 551 S.W.2d at 345; *Ford*, 767 S.W.2d at 854.

The rest of Mitchell's second issue asserts that summary judgment was improper because he raised fact issues as to his affirmative defenses. In his summary judgment response, Mitchell stated he "pled affirmative defenses that [RDTI]'s claim is barred due to: waiver, setoff, fraud, breach of fiduciary duty, misrepresentation, equitable estoppel, failure to mitigate damages, failure to satisfy a condition precedent, quasi-estoppel, release, statute of frauds, undue influence, unclean hands and mistake."[7] He further

[7] The record does not contain Mitchell's answer to RDTI's petition. Nevertheless, RDTI does not dispute that Mitchell properly pleaded these affirmative defenses under the rules of civil procedure. *See*

asserted:

> The affirmative defenses are based on allegations by Mitchell that [RDTI] is liable to Mitchell because [RDTI] divested Mitchell of his substantial financial stake in [NAL]. Mitchell could sue [RDTI] and recover damages that would offset [RDTI]'s claims in full, however, such lawsuit is costly and Mitchell is incapable financially of bringing such lawsuit at this time. The affirmative claims, however, remain available as a defense to any damage award. Thus, the claims are the subject of defenses and affirmative defenses instead of counterclaims.

Mitchell then discussed the allegations, which he made in his affidavit, that Range and Tips "devised a scheme" to sell NAL's assets "for pennies on the dollar," thereby depriving Mitchell of "$6.5 million" in shareholder distributions "that would have more than covered the amount owed to Ms. Jett."

Mitchell states in his brief that "[t]he affirmative defenses raised in response to the summary judgment needed to be conclusively negated by [RDTI], or alternatively, a no evidence summary judgment was required." This is incorrect. As noted, if the party opposing traditional summary judgment relies on an affirmative defense, it must produce summary judgment evidence on each element of the defense. *Brownlee*, 665 S.W.2d at 112; *Rogers*, 533 S.W.3d at 438; *Mena*, 349 S.W.3d at 656.

With respect to the allegations of malfeasance by RDTI, Mitchell has not met his burden. He has not specified, in either his summary judgment response or his brief on appeal, any element of any affirmative defense which he believes is supported by these allegations. *See* 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."); *see also* TEX. R. APP. P. 38.1(i) (providing that an appellant's brief "must

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TEX. R. CIV. P. 94 (providing that affirmative defenses must be "set forth affirmatively" in the pleadings).

contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record"). In his affidavit, Mitchell generally accused Range and Tips of conspiring to sell NAL's assets for less than they were worth, but he did not establish how or why that action would have affected his liability on RDTI's reimbursement claim. Moreover, as RDTI notes, Mitchell did not establish that he had a direct ownership interest in NAL such that he would have been entitled to an increased distribution had NAL received additional proceeds from the sale of its assets. Under these circumstances, we cannot conclude the trial court erred in determining that no fact issue was raised as to these defenses.

Finally, we address Mitchell's contention that RDTI is not entitled to summary judgment on its reimbursement claim because it failed to mitigate damages. Mitchell stated in his affidavit:

> [RDTI] did not exercise its rights under paragraph six of the Guaranty it made to [Jett]. [RDTI] has the option to cure any default and resume the payments under the note. If [RDTI] would have exercised its cure rights, then it would have avoided substantial amounts of interest it now is seeking to collect against me. Instead, [RDTI] refused to pay the amounts under the Guaranty, vigorously defended the lawsuit by [Jett], appealed the lawsuit, and then had to surrender its appeal bond to pay [Jett].

Paragraph 6 of the Guaranty states in relevant part:

> 6. Notwithstanding anything to the contrary in this Guaranty, in the event [Mitchell] defaults in the payment of the Obligations or the performance of any obligation in the Pledge Agreement securing the Obligations, [Jett] shall provide written notice to [RDTI] of such default before [Jett] exercises any right to accelerate the Note or to sell the collateral securing same. Within ten (10) days after notice to [RDTI] (given in accordance with paragraph 16 below) (the "Cure Period"), [RDTI] may, in lieu of making immediate payment of the Obligations, elect (by written notice to [Jett] given in accordance with paragraph 16 below) to assume all Obligations in the Note and in the Pledge Agreement securing the Note (an "Assumption"). In the event of an effective Assumption by [RDTI], [RDTI] shall remedy within the Cure Period any existing financial default by [Mitchell] under the Note and the Pledge Agreement, and shall thereafter

> pay according to the terms of the Note, all remaining Obligations due under the Note, and shall perform the obligations thereafter arising under the Pledge Agreement securing the Note in accordance with its terms, and while [RDTI] is so performing, [Jett] shall not accelerate the Note or proceed against the collateral.[8]

Generally, if a plaintiff fails to mitigate his damages by treating his injury "as a reasonable prudent person would have done in the same or similar circumstances," the plaintiff cannot recover damages proximately resulting from that failure. *Gunn Infiniti v. O'Byrne*, 996 S.W.2d 854, 862 (Tex. 1999) (citing *Moulton v. Alamo Ambulance Serv.*, Inc., 414 S.W.2d 444, 447, 449 (Tex. 1967)); *Mondragon v. Austin*, 954 S.W.2d 191, 195 (Tex. App.—Austin 1997, writ denied) (noting a plaintiff may not recover damages that could have been avoided or minimized "at a trifling expense or with reasonable exertions"). RDTI contends that the mitigation of damages doctrine "does not apply to this case because Mitchell, as the first defaulting party, had the same opportunity to mitigate and cannot legally complain of [RDTI's] failure to do so." *See Walker v. Salt Flat Water Co.*, 96 S.W.2d 231, 232 (Tex. 1936) ("[W]here the party in default was in duty bound to prevent damages, and had equal opportunity with the person injured for performance, and equal knowledge of the consequences of nonperformance, he cannot, while the contract is in force and effect, be heard to say that the plaintiff might have performed for him, and thus avoided such damages.").

Mitchell's affidavit states that RDTI would have "avoided substantial amounts of interest" had it assumed his payments under paragraph 6 of the note after his default, but it does not state or imply that RDTI could have done so "at a trifling expense or with

[8] The "Secured Owelty Note" provided that Jett could accelerate "all indebtedness due under this Note" in the event of Mitchell's default.

reasonable exertions." *See Mondragon*, 954 S.W.2d at 195. Further, as RDTI notes, there is no evidence indicating that Mitchell did not have an opportunity equal to RDTI to make the payments. His affidavit states: "I continued to pay per the terms of the Owelty Note until November, 2011 when the note went into default." He does not explain why the "note went into default," however, and there is nothing else in the record indicating that his ability to make the payments was inferior to RDTI's. *See Walker*, 96 S.W.2d at 232. The trial court did not err in determining that no fact issue exists as to Mitchell's failure-to-mitigate defense.

Mitchell's second issue is sustained in part as set forth above.

III. Conclusion

The trial court's judgment is affirmed as to the $117,629.23 payment made by RDTI directly to Jett on November 9, 2015, and any corresponding interest. The remainder of the trial court's judgment is reversed, and we remand for further proceedings consistent with this opinion.

DORI CONTRERAS
Chief Justice

Delivered and filed the
30th day of July, 2020.