Reversed and remanded in part and Affirmed in part and Opinion filed June 4, 2020.

In The

Fourteenth Court of Appeals

NO. 14-19-00072-CV

ZENTECH, INC. AND RAMESH MAINI, Appellants

V.

S. RAO GUNTER, Appellee

On Appeal from the 164th District Court
Harris County, Texas
Trial Court Cause No. 2017-80281

OPINION

Appellants Zentech, Inc. ("Zentech") and Ramesh Maini ("Maini") seek reversal of the trial court's final summary judgment awarding appellee S. Rao Guntur ("Guntur") judgement against appellants, jointly and severally, for the principal and interest due on two promissory notes. We reverse and remand the judgment against Maini and affirm the judgment against Zentech.

I. BACKGROUND

The parties executed the following two documents:

PROMISSORY NOTE

Borrower Information:	
Name: Zentech, Inc.	Date: 10/30/08
Street Address: 14800 St. Mary's Lane, Suite 270	Date of Birth:
City: Houston	Area code/Telephone number: 281-558-0290
State: TX	Driver's License Number:
Zip: 77079	EIN: 22-2622625
Lender Information:	
Name: S. Rao Guntur	Area code/Telephone number: 281-529-3802 Direct Office Line
Street Address: 5638 Council Grove Lane	If paying by check, make check payable to: S. Rao Guntur Send payments to:
City: Houston	
State: TX	
Zip: 77088	
Loan Information:	
Loan Amount: $298,851.85 Paid by Check # 1817	Interest Rate: 6% per Year

. **Promise to Pay**. For value received, Zentech, Inc. (Borrower) promises to pay S. Rao Guntur (Lender) $ 298,851.85 and interest at the yearly rate of 6 % on the unpaid balance.

Borrower: _____ Date: 10/30/08

Witnessed: _____ Date: 10/30/08

PROMISSORY NOTE

Borrower Information:	
Name: Zentech, Inc.	Date: 11/17/09
Street Address: 14800 St. Mary's Lane, Suite 270	Date of Birth:
City: Houston	Area code/Telephone number: 281-558-0290
State: TX	Driver's License Number:
Zip: 77079	EIN: 22-2622625
Lender Information:	
Name: S. Rao Guntur	Area code/Telephone number: 281-529-3802 Direct Office Line
Street Address: 10607 Wax Mallow Court	If paying by check, make check payable to: S. Rao Guntur Send payments to:
City: Houston	
State: TX	
Zip: 77095	
Loan Information:	
Loan Amount: $480,000 paid by Check # 1949	Interest Rate: 6% per Year

. **Promise to Pay.** For value received, Zentech, Inc. (Borrower) promises to pay S. Rao Guntur (Lender) $ 480,000 and interest at the yearly rate of 6 % on the unpaid balance.

Witnessed: _____ Date: _____

Witnessed: Sonia Ulpad Date: 11/17/09

Borrower: _____ Date: 11/17/09

Borrower: _____ Date: _____

Guntur filed a traditional motion for summary judgment on these documents entitled "Promissory Note" (the "Notes") against both Zentech and Maini, asserting that that $730,169 was due and owing on the Notes. Zentech and Maini filed a response to the motion for summary judgment supported by the affidavit of Maini and other exhibits.

On October 10, 2018, the trial court signed a final summary judgment that "S. Rao Guntur is awarded judgment against the Defendants, Zentech Technical Services, Inc. dba Zentech, Inc. and Ramesh Maini, jointly and severally, for the principal indebtedness due and owing in connection with the Promissory Notes made the basis of this lawsuit in the amount of $730,169 with interest at the rate of 6% per annum as stated in the Promissory Notes from December 23, 2015 until paid."

II. ANALYSIS

A. Standard of Review

We review a grant of summary judgment under a de novo standard of review. *See Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). "[W]e apply the familiar standard of review appropriate for each type of summary judgment, taking as true all evidence favorable to the nonmovant, and indulging every reasonable inference and resolving any doubts in the nonmovant's favor." *Dias v. Goodman Mfg. Co., L.P.*, 214 S.W.3d 672, 675–76 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). To prevail on a traditional motion for summary judgment, a movant must establish that no genuine issue of material fact exists so that the movant is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Mann Frankfort*, 289 S.W.3d at 848.

Once the movant facially establishes its right to summary judgment, the burden shifts to the nonmovant to present a material fact issue that precludes summary judgment. *See City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex.

1979); *Dolcefino v. Randolph*, 19 S.W.3d 906, 916 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). Evidence raises a genuine issue of fact if reasonable and fair-minded jurors could differ in their conclusions in light of all of the summary judgment evidence. *See Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007) (per curiam).

To prevail on a suit for a promissory note, a plaintiff must prove: (1) the note in question; (2) the party sued signed the note; (3) the plaintiff is the owner or holder of the note; and (4) a certain balance is due on the note. *Dorsett v. Hispanic Hous. & Educ. Corp*., 389 S.W.3d 609, 613 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

B. There is a material issue of fact as to whether Maini executed the Notes only as a representative of Zentech and whether Gunter knew it.

In their first issue, appellants argue that the trial court erred by awarding judgement against Maini because: (1) Maini is not named or referenced in either Note; (2) the promise to pay stated in the Notes is made only by Zentech; and (3) the affidavit of Maini proves that he executed the Notes as the President of Zentech, not in his individual capacity.

Maini is the president and primary shareholder of Zentech. Maini signed both Notes in a blank with the designation "Borrower" and did not indicate in the signature form of either Note that he was signing in a representative capacity, rather than in an individual capacity.

On appeal,[1] appellee relies on Section 3.402 of the of the Texas Business and Commerce Code which provides:

> (b) If a representative signs the name of the representative to an instrument and the signature is an authorized signature of the

[1] Neither party briefed this section of the Texas Business and Commerce Code in the trial court. Instead appellee relied on common law agency cases.

represented person, the following rules apply:

> (1) If the form of the signature shows unambiguously that the signature is made on behalf of the represented person who is identified in the instrument, the representative is not liable on the instrument.
>
> (2) Subject to Subsection (c), the representative is liable on the instrument to a holder in due course that took the instrument without notice that the representative was not intended to be liable on the instrument if (i) the form of the signature does not show unambiguously that the signature is made in a representative capacity, or (ii) the represented person is not identified in the instrument. With respect to any other person, the representative is liable on the instrument unless the representative proves that the original parties did not intend the representative to be liable on the instrument.

Tex. Bus. & Com. Code Ann. § 3.402. Comment 2 to Section 3.402 provides in relevant part:

> But the situation is different if a holder in due course is not involved. In each case Roe is liable on the note. Subsection (a). If the original parties to the note did not intend that Doe also be liable, imposing liability on Doe is a windfall to the person enforcing the note. Under subsection (b)(2) Doe is prima facie liable because his signature appears on the note and the form of the signature does not unambiguously refute personal liability. But Doe can escape liability by proving that the original parties did not intend that he be liable on the note. This is a change from former Section 3-403(2)(a).

Tex. Bus. & Com. Code Ann. § 3.402 cmt. 2.

Because the form of Maini's signature on the Notes does not unambiguously refute personal liability, Maini can only escape liability by proving that Guntur and Maini did not intend for Maini to be liable on the Notes.

Appellants' argument—that Maini signed the Notes as a representative of Zentech, Inc. and not as an individual—is an affirmative defense which appellants had the burden to support with summary judgment proof. *See Seale v. Nichols*, 505 S.W.2d

251, 254 (Tex. 1974). Such defense requires not only proof that the agent intended to sign only in a representative capacity, but also that the agent disclosed his representative capacity. "Texas law provides that in order for an agent to avoid liability for his signature on a contract, he must disclose his intent to sign as a representative to the other contracting party. Uncommunicated intent will not suffice." *Id*. at 255; *accord Caraway v. Land Design Studio*, 47 S.W.3d 696, 700–01 (Tex. App.—Austin 2001, no pet.) (affirming summary judgment on note because the note does not indicate that Caraway signed only in a representative capacity and because Caraway presented no evidence that he disclosed his intent to sign the note solely as an agent).

With respect to the facts of this case, we are guided by two decisions. First, in *Antil v. Southwest Envelope*, 601 S.W.2d 47 (Tex. Civ. App.—Beaumont 1979, no writ), the appellant signed a corporate check, but the check did not show the signature was made in a representative capacity. The trial court granted summary judgment in favor of the appellee. The Beaumont Court of Appeals reversed, concluding that the appellant had presented sufficient evidence to raise a fact issue on whether it was "otherwise established" between the parties that appellant signed only in his representative capacity. *Id*. at 48. The court relied on appellant's affidavit, stating that he: (1) signed the check only in his representative capacity, and (2) told the appellee that he was the president of the corporation named on the check. Further, the appellant stated that, in prior dealings with the appellee, orders were placed in the name of his corporate principal. *Id*.

Similarly, in *Eubank v. Myre Construction Company, Inc*., No. 05-93-01536-CV, 1995 WL 238568, at *4–5 (Tex. App.—Dallas Apr. 24, 1995, writ denied) (not designated for publication), the Dallas Court of Appeals reversed a summary judgment on three corporate checks against the two individual defendants who signed the checks. The defendants presented evidence that they disclosed to plaintiff their status as officers

of the corporation and that the checks were drawn on a corporate account. *Id*. The court of appeals concluded that such evidence was sufficient to raise a fact issue with regard to whether the parties understood defendants signed the checks in their representative capacities only. *Id*. at *5.

Turning to the facts of the instant case, the following evidence raises an issue of material fact that precludes summary judgment against Maini. Maini's affidavit states:

> In both October of 2008 and November of 2009, Zentech had three (3) shareholders. They were me, Guntur and Said Irannezhhaad ... At those times all three of us were Officers of Zentech and all three (3) of us were Directors of Zentech. I have always been the President of Zentech. Guntur and I have been Officers and Directors of Zentech through at least 2016.

This is evidence that Guntur knew that Maini was the President of Zentech when he signed the Notes. Maini's affidavit further states: "At the special request of, and agreement with, Guntur, I executed those documents [the Notes] as the President of Zentech. I did not execute them in my individual capacity as Guntur has alleged." This is evidence that Guntur agreed and therefore knew that Maini executed the Notes as President of Zentech, not as an individual. Further, the partial payments, which Guntur admits were made on the Notes, were made through checks on the corporate account of Zentech. Under the applicable standard of review, we are required to take as true all evidence favorable to the nonmovant, and indulge every reasonable inference and resolve any doubts in Maini's favor. *See Dias*, 214 S.W.3d at 675–76. Such evidence is sufficient to create a material issue of fact as to whether Guntur agreed and knew that Maini intended to sign the Notes only as a representative of Zentech. *See Antil*, 601

S.W.2d at 48; *Eubank*, 1995 WL 238568, at *4–5.[2]

Accordingly, we sustain appellants' first issue and conclude that the summary judgment against Maini should be reversed.

C. There is no competent evidence that the Notes are not promissory notes.

In their second issue, Appellants argue the evidence shows the documents at issue were to evidence an investment in the company, not debt obligations, which explains why the parties did not include due dates in the Notes. Maini's affidavit states:

> Neither of the documents was intended to be a promissory note or other obligation to pay monies. All of the shareholders, officers and directors agreed at the time that they were intended as representative and to document investments made to Zentech.

Further, when Gunter was asked whether the Notes were an investment, he responded "Yes."

This argument fails for several reasons. First, both Notes are entitled "PROMISSORY NOTE" and specifically state that they are "promises to pay S. Rao Guntur (Lender) $[amount] and interest at the yearly rate of 6% on the unpaid balance." The Notes clearly state a promise to pay a debt.

Appellants cannot vary the terms of these Notes through Maini's parol evidence that the Notes were not intended to be promissory notes. "Generally, a negotiable instrument which is clear and express in its terms cannot be varied by parol agreements." *Roberson v. Allied Bank W.*, No. B14-88-00032-CV, 1989 WL

[2] In an attempt to prove that Maini failed to disclose his intent to sign only as an agent of Zentech, Gunter references the deposition testimony of Maini that he did not have any conversation at or near the time of the execution of the Notes in regard to the repayment terms, other than what's set forth in the Notes. However, the record does not show that such deposition testimony was presented in support of Guntur's motion for summary judgment or was considered by the trial court.

40673, at *3 (Tex. App.—Houston [14th Dist.] Apr. 27, 1989, no writ) (not designated for publication) (citing *Town N. Nat'l Bank v. Broaddus*, 569 S.W.2d 489 (Tex. 1978)). The parol evidence rule prohibits the enforcement of any agreements that are inconsistent with the Notes, whether made before or contemporaneous with the execution of the notes. *See Simmons v. Compania Financiera Libano, S.A.*, 830 S.W.2d 789, 791 (Tex. App.—Houston [1st Dist.] 1992, writ denied); *see also DeClaire v. G & B Mcintosh Family Ltd. P'ship*, 260 S.W.3d 34, 46 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (the trial court is precluded from enforcing an oral agreement that is inconsistent with the note). "It is well settled that a written instrument may not be varied by evidence of an oral agreement that contravenes its terms." *Litton v. Hanley*, 823 S.W.2d 428, 430 (Tex. App.—Houston [1st Dist.] 1992, no writ) (citing *Tex. Export Dev. Corp. v. Schleder*, 519 S.W.2d 134, 137 (Tex. Civ. App.—Dallas 1974, no writ)).

Second, Guntur's testimony does not contradict the language of the Notes which clearly state promises to pay a debt with interest. Guntur explained that the Notes were an "investment" because he expected to be repaid his principal and six percent interest.

Finally, that the Notes state no due dates for repayment does not negate their effect as promissory notes. The Business and Commerce Code supplies the missing term; it provides that a promise is payable on demand if it "does not state any time of payment." Tex. Bus. & Com. Code Ann. § 3.108(a). *See also Parker v. Dodge*, 98 S.W.3d 297, 300 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

Accordingly, we overrule appellants' second issue.

D. There is no evidence that the Notes have been paid in full.

In their third issue, appellants argue that Maini's affidavit presents evidence that the Notes have been paid in full. However, appellants' assertion that that the Notes were

paid in full are based on W-2 forms which show compensation Zentech paid to Guntur as an employee. It is undisputed that Guntur was an employee of Zentech who received compensation and bonuses for his work. On their face, the W-2 forms relied on by appellants reflect Guntur's salary and other compensation—not loan repayments. Accordingly, we overrule appellants' third issue.

III. CONCLUSION

We reverse the part of the judgment awarding sums against Maini and remand the case for further proceedings consistent with this opinion. We affirm the part of the judgment awarding sums against Zentech.

/s/ Ken Wise
Ken Wise
Justice

Panel consists of Justices Christopher, Wise, and Zimmerer.