Opinion issued July 7, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00210-CV

FRANCISCO CALLEJA-AHEDO, Appellant

V.

COMPASS BANK, Appellee

On Appeal from the 55th District Court
Harris County, Texas
Trial Court Case No. 2014-22168

MEMORANDUM OPINION

After an imposter drained his bank account, appellant Francisco Calleja-Ahedo (Calleja) sued appellee Compass Bank (the Bank) to recover the stolen funds. On cross-motions for summary judgment, the trial court ruled in favor of the Bank,

ruling that Texas Business & Commerce Code section 4.406 precluded Calleja from recovering the stolen funds because more than a year had passed between the theft from his bank account and the date he reported the theft to the Bank. On original submission of this appeal, Calleja raised eight issues, including a challenge to the trial court's award of attorney's fees to the Bank. This Court reversed the trial court's summary judgment ruling in favor of the Bank, holding that Calleja was entitled to recover the stolen funds, and vacated the award of attorney's fees without reaching the merits of that issue. *See Calleja-Ahedo v. Compass Bank*, 508 S.W.3d 791 (Tex. App.—Houston [1st Dist.] 2016, pet. granted).

The Texas Supreme Court disagreed, holding that section 4.406 operated to bar Calleja's recovery of the funds. *See Compass Bank v. Calleja-Ahedo*, 569 S.W.3d 104, 115–16 (Tex. 2018). The supreme court remanded the appeal to this Court to address Calleja's argument that the Bank was not entitled to an award of attorney's fees. Specifically, Calleja argues that the deposit agreement that governed his account did not provide for an award of attorney's fees to the Bank under the circumstances of this case and that the Bank's affidavits in support of its request for attorney's fees were insufficient to support the fee award.

We reverse and remand.

Background

A. Factual Background

Calleja has maintained a bank account with the Bank since 1988. Because Calleja lives in Mexico City, he directed that the Bank send his bank statements to his brother's address in The Woodlands. Calleja would occasionally view the statements when he visited his brother. The Bank sent a statement for May 2012—reflecting an account balance of over $42,000—to Calleja's brother's address in early June 2012. This was the last bank statement that Calleja's brother received.

Unbeknownst to Calleja, in June 2012, an imposter represented to the Bank that he was Calleja and requested that the Bank change the address on file for Calleja's account. The imposter first requested a change from Calleja's brother's address in The Woodlands to an address in California and later requested a change to another California address and then to two addresses in Georgia. The imposter also ordered checks for the account. In July 2012, the Bank paid a forged check for $38,700 from the account. Over the next several months, the imposter drained the account entirely, leaving a negative balance by February 2013.

According to his affidavit, Calleja learned of the forgeries in January 2014 when he wrote a check to an acquaintance and the acquaintance told him that the check had been returned marked "account closed." Calleja visited a branch of the Bank and completed an affidavit disputing the unauthorized charges. When the Bank

failed to reimburse Calleja for the unauthorized withdrawals from his account, Calleja sued the Bank for breach of contract. Calleja also sought the recovery of attorney's fees.

The Bank asserted several affirmative defenses, including a defense under Texas Business and Commerce Code section 4.406, which requires a bank customer to discover and report an unauthorized signature within one year after the bank sends or makes an account statement available to the customer. *See* TEX. BUS. & COM. CODE ANN. § 4.406(f). In addition to asserting affirmative defenses, the Bank also asserted a counterclaim against Calleja for breach of contract and sought the recovery of attorney's fees.

B. Summary Judgment Proceedings

Calleja and the Bank both moved for summary judgment on Calleja's breach of contract claim. The parties disagreed about the effect of section 4.406 and whether Calleja's statutory duty to report unauthorized transactions within one year ever arose, because the Bank did not send or make account statements available to him.

The parties also disagreed about which version of the Deposit Account Agreement governed Calleja's account with the Bank. Calleja stated that "[t]here are two account agreements which are applicable to the Account. The first agreement became effective in 2008, and governs all transactions prior to August 2013. The second agreement only became effective on August 12, 2013." Calleja sought the

recovery of attorney's fees, arguing that he should prevail on his breach of contract claim and that the account agreement "in effect after August 2013" allows the prevailing party to recover reasonable attorney's fees. As summary judgment evidence, Calleja attached copies of a Deposit Account Agreement that stated that it was "effective August 22, 2008" (the 2008 Agreement) and a Deposit Account Agreement that had a date of "8/12/13" (the 2013 Agreement). The 2008 Agreement did not include a provision allowing for recovery of attorney's fees.[1] The 2013 Agreement included a provision stating, "In any action between you and us in court, the prevailing party shall be entitled to recover its reasonable attorneys' fees expended in the prosecution or defense of the court action from the other party." Calleja also attached copies of his attorney's billing statements and an affidavit from

[1] The 2008 Agreement contained a portion entitled "Visa Check Card Agreement and Disclosure Statement," which governed use of any Visa Check Cards associated with the account. Section 19 of this portion of the 2008 Agreement provided:

> To the extent permitted by applicable law, you shall be liable to us for all costs and damages resulting from any breach of this Agreement; provided, however, that your liability to us for unauthorized use of the [Check] Card shall be determined as provided in Section 14 on the previous page. If you fail to pay any amounts due under this Agreement and your debt is referred to an attorney(s), not one of our salaried employees, for collection or other enforcement proceedings, whether by suit or otherwise, and the unpaid balance of the debt exceeds $300, you agree to pay all reasonable expenses permitted by applicable law, including but not limited to, court costs and attorney's fees set by the court.

Neither party argues that this provision applies to this case.

his attorney, who opined that $21,000 would be a reasonable and necessary amount of attorney's fees through summary-judgment proceedings.[2]

As the relevant deposit agreement, the Bank attached an agreement that stated it had been revised in February 2012 (the 2012 Agreement). The 2012 Agreement includes a provision stating, "In any action between you and us in court, the prevailing party shall be entitled to recover its reasonable attorneys' fees expended in the prosecution or defense of the court action from the other party." The Bank also included as summary judgment evidence an affidavit from Kathy Mueller, a Bank employee, who averred that Calleja had a "regular bank account" with the Bank and that the account "was governed by the account agreement governing such account." She also averred that Calleja "agreed to be bound by a deposit agreement governing his account at Compass Bank," and the 2012 Agreement was attached to her affidavit "as a copy of the written contract governing the deposit relationship between [Calleja] and Compass Bank" and "evidences the agreement in effect between [Calleja] and Compass Bank."

The Bank also attached the affidavit of its counsel, William Huttenbach. Huttenbach averred that his hourly rate is $330.00 per hour, "but Compass Bank gets a discount off [his] standard rate." He stated that, up to that time, he "or another

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[2] Calleja later filed a supplemental motion for summary judgment and an updated affidavit from his counsel to reflect increased attorney's fees incurred throughout the summary judgment proceedings

person at [his] firm, ha[d] spent and/or expect[ed] to spend at least Twenty-Eight Thousand Eight Hundred Forty and 19/100 Dollars ($28,840.19) as reasonable and necessary attorneys' fees and costs and expenses." Huttenbach also averred that if Calleja appealed an adverse judgment against him and the Bank ultimately prevailed the Bank should be entitled to a total of $75,000 in conditional appellate attorney's fees. He attached billing records to his affidavit that identified the individual performing work, the work performed, the amount of time each task required, the individual's hourly rate, and the total amount of fees for the particular billing period.

The Bank also responded to Calleja's summary judgment motion, arguing that Calleja's interpretation of section 4.406 was incorrect. As additional summary judgment evidence, the Bank attached a second affidavit from Kathy Mueller. Mueller averred:

> In my first Affidavit, I attached what I believed to be the proper deposit agreement governing the parties' relationship [the 2012 Agreement]. The deposit agreement attached had a revision date of February 2012. Plaintiff [Calleja] claims that an imposter allegedly impersonated Plaintiff and changed the address on the account during the summer of 2012 so it appears that the February 2012 version was the version in effect at that time. Consequently, I believe that the deposit agreement that I attached to my Affidavit was the proper deposit agreement governing the relationship. Because Plaintiff had signed the signature card agreeing to be bound by the deposit agreement, and agreeing that it could be amended from time to time, I believe that deposit agreement governed the parties' relationship. Plus, Plaintiff could have closed his account if he did not want to be bound by the deposit agreement. For all of these reasons and many more reasons, I believe that the deposit agreement I attached to my first affidavit governed the parties' relationship.

Calleja filed a motion to disregard and to strike portions of Mueller's first affidavit. Calleja's objections included objections to all statements by Mueller that the 2012 Agreement governed the banking relationship between Calleja and the Bank at the time of the alleged unauthorized transfers. Specifically, Calleja argued that Mueller's statements were "conclusory and without proper foundation," that Mueller did not "explain how or why" the 2012 Agreement was the proper document governing the account, and that Mueller did not explain the "time periods for which [the 2012 Agreement] was considered effective."

Calleja also responded to the Bank's summary judgment motion. In his response, among other arguments, he noted that a dispute existed concerning which deposit agreement governed his account. He argued that he had attached one version of the agreement—the 2008 Agreement—as summary judgment evidence that was "produced by [the Bank] in discovery, which [he] admits receiving," while the Bank had attached another version—the 2012 Agreement—but the Bank "fails to properly prove it." Calleja did not include any summary judgment evidence—such as affidavit testimony—reflecting that he did not receive the 2012 Agreement.

Calleja also attached to his response an affidavit from his counsel, Michael O'Connor, in which O'Connor raised problems with Huttenbach's affidavit concerning the Bank's attorney's fees. O'Connor first challenged Huttenbach's

assertion that a total of $75,000 in conditional appellate attorney's fees would be reasonable and necessary. O'Connor also averred:

> Paragraph[s] 3, 4, and 5 of [Huttenbach's] affidavit are ambiguous at best. In paragraph 3 of the affidavit, Mr. Huttenbach refers to "another attorney or paralegal with my firm." Attached to the affidavit are bills showing time and charges for two additional persons, one at $165.00 per hour and one at $100.00 per hour. However, Mr. Huttenbach does not provide any experience for these people, and does not identify whether one or both are attorneys or paralegal[s]. I cannot properly evaluate the reasonableness of the charges for these persons without such information. Furthermore, many of the descriptions in the bills are redacted, which provides insufficient description of the work being performed. In paragraph 4, Mr. Huttenbach states that he, "or another person at my firm, have spent and/or expect to spend" $28,840.19 as reasonable and necessary attorney's fees. However, in paragraph 5, Mr. Huttenbach states that "plus" he expects to spend an additional 12 hours dealing with a reply and attending a hearing. It is unclear whether this time is included in the $28,840.19, or is additional.

O'Connor opined that Huttenbach's affidavit had created a fact issue concerning the Bank's reasonable and necessary attorney's fees, and he further opined that the maximum amount of reasonable and necessary trial-level attorney's fees for the Bank would be $25,000.

On October 28, 2014, the trial court issued an order granting the Bank's motion for summary judgment "for the reasons set out in the motion." The trial court issued a separate order on the same date denying Calleja's motion for summary judgment.

Calleja filed a motion for reconsideration, in which he again mentioned the dispute concerning the applicable deposit agreement. Calleja argued that the Bank

"never proved that [the 2012 Agreement] is the applicable agreement" and instead stated only that it "believes" the 2012 Agreement "is the effective agreement." Calleja also argued that fact issues precluded an award of attorney's fees to the Bank. Calleja pointed to O'Connor's affidavit challenging Huttenbach's affidavit, and he cited case law for the proposition that Huttenbach's affidavit "fails to comply with the specificity requirements set forth by the Texas Supreme Court" for attorney's fees.[3] After a hearing, the trial court denied Calleja's motion to reconsider and indicated in this order that it would rule separately on attorney's fees.

After the trial court denied his motion for reconsideration, Calleja filed a "Supplemental Response to Defendant's Claim for Attorney's fees" and argued, for the first time, that the Bank was not entitled to recover attorney's fees at all. Calleja acknowledged the dispute between the parties concerning the governing deposit agreement, and he pointed out that the 2008 Agreement, which he contended was the operative agreement, did not allow for the recovery of attorney's fees in a suit such as the one he had brought against the Bank. He argued that while the 2012 Agreement allowed the recovery of attorney's fees, the Bank never presented

[3] In response to Calleja's motion for reconsideration, the Bank produced a second affidavit on attorney's fees from Huttenbach. In this affidavit, Huttenbach listed the work that he performed with respect to the summary judgment proceedings, mentioned the *Arthur Andersen* factors relevant to determining whether attorney's fees are reasonable and necessary, and described his experience in handling banking matters under the Uniform Commercial Code.

summary judgment evidence that the 2012 Agreement was effective for Calleja's account. He contended that the Bank presented evidence that Mueller "believed" the 2012 Agreement was the effective agreement, but it never produced evidence that the Bank had mailed the 2012 Agreement to Calleja or that it had posted notice of the 2012 Agreement in its offices. Calleja argued that the Bank could not recover attorney's fees under Civil Practice and Remedies Code Chapter 38 because the Bank "was only defending against Plaintiff's claims and is not recovering damages." Calleja also continued to argue that the Bank claimed an excessive amount of attorney's fees.

The Bank filed a supplemental response concerning attorney's fees. In this response, the Bank argued that it had incurred $49,186.65 in attorney's fees during the trial court proceedings, and it attached an updated affidavit from Huttenbach, as well as updated invoices and billing records to support its request.

On December 5, 2014, the trial court signed a final judgment granting summary judgment in favor of the Bank and ordering that Calleja take nothing on his claims against the Bank. The trial court awarded the Bank $49,186.65 in trial-level attorney's fees and a total of $60,000 in conditional appellate-level attorney's fees. Calleja filed a motion for new trial, challenging, among other things, the award of attorney's fees. He argued that the Bank was not entitled to attorney's fees under the 2008 Agreement and that it had not properly proved the effectiveness of the 2012

Agreement. He also argued that the Bank did not properly prove the amount of attorney's fees, arguing that a discrepancy existed between the amount sought in Huttenbach's affidavits and the total amounts billed in the billing records attached to Huttenbach's affidavits. The motion for new trial was overruled by operation of law.

C. Proceedings in This Court and the Texas Supreme Court

Calleja appealed the trial court's rulings on the cross-motions for summary judgment to this Court. As an initial matter, this Court agreed with Calleja that the Bank had not established that the 2012 Agreement governed his relationship with the Bank. *See Calleja-Ahedo*, 508 S.W.3d at 797–99. We therefore considered the 2008 Agreement to be the controlling account agreement. *See id.* at 801–04. Ultimately, this Court concluded that the trial court erred in granting the Bank's summary judgment motion and in denying Calleja's motion, and we rendered judgment that Calleja was entitled to a refund in the amount withdrawn from his account without authorization. *Id.* at 807. We vacated the award of attorney's fees in favor of the Bank without reaching the merits of Calleja's arguments concerning the fee award. *Id.* at 808.

The Texas Supreme Court granted review and reversed this Court's judgment. After concluding that section 4.406 precluded any liability on the part of the Bank to Calleja, the supreme court addressed whether the account agreements varied the

terms of section 4.406. *Compass Bank*, 569 S.W.3d at 113–14. The court identified both the 2008 Agreement and the 2012 Agreement and, to address Calleja's arguments, "assume[d] without deciding that the 2008 [A]greement applies." *Id.* The court stated, "We conclude that the proffered agreements, *whichever one applies*, do not alter the portions of section 4.406 that operate to bar Calleja's claims against the Bank." *Id.* at 115 (emphasis added). The Texas Supreme Court, therefore, did not determine which account agreement governed Calleja's account at the time of the underlying fraudulent activity.

Ultimately, the supreme court concluded that the trial court correctly ruled that section 4.406 barred Calleja's claims against the Bank, and it reversed this Court's judgment holding otherwise. *Id.* at 116. The court noted that, before this Court, Calleja had "argued that for various reasons the trial court should not have awarded attorney fees to the Bank even if the Bank was entitled to summary judgment," but this Court "did not reach those arguments because it reversed the trial court's judgment for the Bank, including the award of fees." *Id.* The Texas Supreme Court therefore remanded the appeal to this Court to address the attorney's fees issue. *Id.*

Entitlement to Attorney's Fees

In the sole issue remaining in this appeal, we address whether the trial court erred in awarding attorney's fees to the Bank.

A. Standard of Review

We review a trial court's ruling on a summary judgment motion de novo. *City of Richardson v. Oncor Elec. Delivery Co.*, 539 S.W.3d 252, 258 (Tex. 2018). To prevail on a traditional summary judgment motion, the movant bears the burden of proving that no genuine issues of material fact exist and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *City of Richardson*, 539 S.W.3d at 258–59. On cross-motions for summary judgment, each party bears the burden of establishing that it is entitled to judgment as a matter of law. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 356 (Tex. 2000); *see City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005) ("Evidence is conclusive only if reasonable people could not differ in their conclusions, a matter that depends on the facts of each case."). When the trial court grants one summary judgment motion and denies the other, the reviewing court should review both parties' summary judgment evidence, determine all questions presented, and render the judgment the trial court should have rendered. *S. Crushed Concrete, LLC v. City of Houston*, 398 S.W.3d 676, 678 (Tex. 2013); *City of Garland*, 22 S.W.3d at 356.

B. Governing Law Regarding Recovery of Attorney's Fees

Generally, in Texas, each party must pay their own attorney's fees. *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 483 (Tex. 2019). There are certain circumstances, however, in which the prevailing party can recover fees

from the opposing party. *Id.* at 484; *In re Nat'l Lloyds Ins. Co.*, 532 S.W.3d 794, 809 (Tex. 2017) ("Texas follows the American rule on attorney's fees, which provides that, generally, 'a party may not recover attorney's fees unless authorized by statute or contract.'") (quoting *Wheelabrator Air Pollution Control, Inc. v. City of San Antonio*, 489 S.W.3d 448, 453 n.4 (Tex. 2016) (per curiam)). When shifting of attorney's fees is authorized, whether by statute or contract, the party seeking the fee award must prove that the requested attorney's fees are reasonable and necessary. *Rohrmoos Venture*, 578 S.W.3d at 484.

In *Rohrmoos Venture*, the Texas Supreme Court stated that it intended for the "lodestar analysis to apply to any situation in which an objective calculation of reasonable hours worked times a reasonable rate can be employed" to determine the amount of attorney's fees to be awarded in a fee-shifting scenario. 578 S.W.3d at 497–98. The fact finder's "starting point" for calculating an award of attorney's fees is "determining the reasonable hours worked multiplied by a reasonable hourly rate," and the party seeking recovery of attorney's fees bears the burden of providing sufficient evidence on both counts. *Id.* at 498; *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 760 (Tex. 2012) (stating that first step of lodestar analysis involves determining reasonable hours spent by counsel and reasonable hourly rate, then multiplying number of hours by rate to get base lodestar and that second step of analysis involves adjusting base amount up or down "if relevant factors indicate an adjustment is

necessary to reach a reasonable fee in the case"). "This base lodestar figure should approximate the reasonable value of legal services provided in prosecuting or defending the prevailing party's claim through the litigation process." *Rohrmoos Venture*, 578 S.W.3d at 498. "[T]here is a presumption that the base lodestar calculation, when supported by sufficient evidence, reflects the reasonable and necessary attorney's fees that can be shifted to the non-prevailing party." *Id.* at 499.

At a minimum, "sufficient evidence" to support a fee award includes evidence of (1) particular services performed, (2) who performed those services, (3) approximately when the services were performed, (4) the reasonable amount of time required to perform the services, and (5) the reasonable hourly rate for each person performing such services. *Id.* at 498; *El Apple I*, 370 S.W.3d at 764 ("But when applying for a fee under the lodestar method, the applicant must provide sufficient details of the work performed before the court can make a meaningful review of the fee request."); *City of Laredo v. Montano*, 414 S.W.3d 731, 736 (Tex. 2013) (per curiam) ("[A] lodestar calculation requires certain basic proof, including itemizing specific tasks, the time required for those tasks, and the rate charged by the person performing the work."). "General, conclusory testimony devoid of any real substance" will not support an award of attorney's fees. *Rohrmoos Venture*, 578 S.W.3d at 501; *Long v. Griffin*, 442 S.W.3d 253, 255 (Tex. 2014) (per curiam) ("[G]eneralities about tasks performed provide insufficient information for the fact

finder to meaningfully review whether the tasks and hours were reasonable and necessary under the lodestar method."). Although contemporaneous billing records are not required to prove that the requested attorney's fees are reasonable and necessary, the Texas Supreme Court has held that such records are "*strongly* encouraged." *Rohrmoos Venture*, 578 S.W.3d at 502; *El Apple I*, 370 S.W.3d at 762–63 (stating that when expectation exists that lodestar method will be used, "attorneys should document their time much as they would for their own clients, that is, contemporaneous billing records or other documentation recorded reasonably close to the time when the work is performed").

When a party seeks payment for work completed by paralegals or legal assistants, courts require information such as (1) the qualifications of the legal assistant to perform substantive legal work, (2) that the legal assistant performed substantive legal work under the direction and supervision of an attorney, (3) the nature of the legal work performed, (4) the legal assistant's hourly rate, and (5) the number of hours expended by the legal assistant. *El Apple I*, 370 S.W.3d at 763 (quoting *All Seasons Window & Door Mfg., Inc. v. Red Dot Corp.*, 181 S.W.3d 490, 504 (Tex. App.—Texarkana 2005, no pet.)). Fees for paralegals and legal assistants "have been denied absent such proof." *Id.* (citing *Moody v. EMC Servs., Inc.*, 828 S.W.2d 237, 248 (Tex. App.—Houston [14th Dist.] 1992, writ denied)).

C. Analysis

1. Whether Attorney's Fees are Recoverable in this Case

Whether the Bank, as the prevailing party on the question of liability, which has been settled by the Texas Supreme Court, can recover its attorney's fees from Calleja depends on which version of the account agreement was in effect at the time of the underlying fraudulent activity. Calleja contends that the 2008 Agreement applies. This agreement does not contain a provision allowing a party to recover its attorney's fees if it prevails in an action in court.[4] The Bank, on the other hand, contends that the 2012 Agreement applies. This agreement provides that "[i]n any action between you and us in court, the prevailing party shall be entitled to recover its reasonable attorneys' fees expended in the prosecution or defense of the court action from the other party."

On original submission of this appeal, this Court held that the Bank had not met its summary judgment burden to conclusively establish that the 2012 Agreement governed Calleja's account. *See Calleja-Ahedo*, 508 S.W.3d at 797–99. We noted that both the Texas Finance Code and the 2008 Agreement allowed the Bank to amend a deposit contract by, among other methods, mailing a written notice of the

[4] As stated in Footnote 1, the only attorney's fees provision contained in the 2008 Agreement concerns situations involving the use of a Visa Check Card, and it applies only if the Bank, in seeking to recover an unpaid debt, refers the matter to outside counsel for collection and enforcement proceedings. Neither Calleja nor the Bank argue that this provision is applicable to this case.

amendment to the account holder. *See id.* at 798 (citing TEX. FIN. CODE ANN. § 34.302(a)–(b)). The 2008 Agreement also provided that the Bank could amend the deposit agreement "by making the notice available with the periodic statement of your account (as applicable), or by posting notice of the amendment in our offices." *Id.* We stated:

> The Bank argues that it amended the deposit agreement in February 2012 and that, because Calleja indisputably maintained the account after this date, he agreed to the February 2012 amendments, and thus the 2012 Agreement controls. As summary judgment evidence, the Bank attached an affidavit completed by Kathy Mueller, an employee of the Bank, and the 2012 Agreement, which was incorporated into the affidavit by reference. Mueller averred that the 2012 Agreement governed Calleja's account, stating, "[Calleja] agreed to be bound by a deposit agreement governing his account at Compass Bank. Attached as Tab 1 is a copy of the written contract [the 2012 Agreement] governing the deposit relationship between [Calleja] and Compass Bank" and "the [attached] account agreement evidences the agreement in effect between [Calleja] and Compass Bank." The last page of the 2012 Agreement states, "Revision Feb 2012 Al Nova Branches Only." The Bank presented no evidence, either from Mueller or another Bank employee, concerning what "Al Nova Branches Only" meant, whether this applied to Calleja, or whether notice of the 2012 Agreement was mailed to Calleja, provided with his account statement, or posted in the Bank's offices.
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> Based on this record, we conclude that the Bank has not established that the 2012 Agreement was ever effective as to Calleja. Although both the Finance Code and the 2008 Agreement allow the Bank to amend the deposit agreement, the Bank has not established that it did so in a manner allowed by either the Finance Code or the 2008 Agreement. The Bank presented no summary judgment evidence that it mailed notice of the proposed amendments to Calleja, that it included the proposed amendments with his account statement, or that it posted notice of the amendments in its offices. Instead, the Bank merely attached the 2012 Agreement as summary judgment evidence and

> provided conclusory affidavit testimony from one of its employees that the 2012 Agreement governed Calleja's account.

Id. at 798–99 (internal citations omitted). We concluded that the Bank did not present sufficient evidence to establish that the 2012 Agreement governed the Bank's relationship with Calleja, and we therefore considered the 2008 Agreement to be the controlling agreement. *Id.* at 799.

In deciding whether the Bank was liable to Calleja for the amounts drained from his account by the imposter, the Texas Supreme Court did not make a holding concerning which account agreement—the 2008 Agreement or the 2012 Agreement—applied to Calleja's account. Instead, after concluding that the statutory language of Business and Commerce Code section 4.406 precluded the Bank's liability to Calleja, the court addressed whether the statutory language was varied by an applicable account agreement. *See Compass Bank*, 569 S.W.3d at 111–14. The court noted the disagreement between the parties concerning which agreement applied and, in order to address Calleja's arguments, "assume[d] without deciding that the 2008 [A]greement applies." *Id.* at 114. The court later stated, "We conclude that the proffered [account] agreements, *whichever one applies*, do not alter the portions of section 4.406 that operate to bar Calleja's claims against the Bank." *Id.* at 115 (emphasis added).

The Texas Supreme Court did not disagree with our prior conclusion that the Bank did not conclusively establish that the 2012 Agreement governed Calleja's

account—it expressly did not decide which agreement governed—and we continue to conclude that the Bank did not conclusively establish this applicability of this Agreement. As noted above, Kathy Mueller, a Bank employee, averred that the 2012 Agreement governed the relationship between Calleja and the Bank. In a later affidavit, Mueller averred:

> In my first Affidavit, I attached what I believed to be the proper deposit agreement governing the parties' relationship. The deposit agreement attached had a revision date of February 2012. [Calleja] claims that an imposter allegedly impersonated [him] and changed the address on the account during the summer of 2012 so it appears that the February 2012 version was the version in effect at that time. Consequently, I believe that the deposit agreement that I attached to my Affidavit was the proper deposit agreement governing the relationship. Because [Calleja] had signed the signature card agreeing to be bound by the deposit agreement, and agreeing that it could be amended from time to time, I believe that deposit agreement governed the parties' relationship. Plus, [Calleja] could have closed his account if he did not want to be bound by the deposit agreement. For all of these reasons and many more reasons, I believe that the deposit agreement I attached to my first affidavit governed the parties' relationship.

Mueller's affidavit testimony is evidence that the Bank revised its form deposit agreement in 2012. As we noted in our previous opinion, however, Mueller's affidavits contain no evidence concerning how the Bank notified its customers generally, and Calleja in particular, of the amendments to the deposit agreement.[5]

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[5] In its brief on remand, the Bank argues that Mueller's affidavits are not conclusory, pointing out that the Texas Supreme Court relied on statements from her affidavits in its analysis on the merits of the liability issue. *See, e.g., Compass Bank v. Calleja-Ahedo*, 569 S.W.3d 104, 111 (Tex. 2018) (discussing ways in which Calleja could have accessed his account statements after he stopped receiving them at his

The Bank presented no evidence that it mailed notice of the amendments to Calleja, that it provided notice of the amendments through Calleja's monthly statements, or that it posted notice of the amendments in its offices. Although it is possible, and even likely, that the Bank took one or more of these steps, we can only speculate on whether it did so based on this record. We therefore continue to conclude that the Bank has not conclusively established that the 2012 Agreement governs its relationship with Calleja.

In its brief on remand, the Bank argues that even if it did not conclusively establish that the 2012 Agreement governed its relationship with Calleja, Calleja failed to conclusively establish that the 2008 Agreement governed. The Bank argues that Calleja's affidavit testimony that the 2008 Agreement was the agreement "pertaining" to his account was conclusory and there is no evidence in the record

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brother's address, which had been identified in Mueller's affidavits as ways in which Bank made account statements available to Calleja). However, simply because Mueller's affidavits contain some statements relied upon by the Texas Supreme Court does not mean that other statements in her affidavits are not conclusory. Mueller averred that she "believed" that the 2012 Agreement is the governing agreement and that it "appears that the February 2012 version was the version in effect at [the] time" that the fraudulent activity occurred later in 2012. Her affidavits did not, however, contain any evidence concerning how the Bank notified Calleja of the amendments, and, therefore, her conclusion that the 2012 Agreement was the governing agreement lacked factual support. *See Contractors Source, Inc. v. Amegy Bank Nat'l Ass'n*, 462 S.W.3d 128, 133 (Tex. App.—Houston [1st Dist.] 2015, no pet.) ("An affiant's belief about the facts is legally insufficient evidence. . . . 'A conclusory statement is one that does not provide the underlying facts to support the conclusion.'") (quoting *Rizkallah v. Conner*, 952 S.W.2d 580, 587 (Tex. App.—Houston [1st Dist.] 1997, no writ)).

that, if the 2012 Agreement does not govern the account, then the 2008 Agreement must. We agree.

In his affidavit in support of his own summary judgment motion, Calleja stated, "A true and correct copy of the Agreement pertaining to the Account, which I received from the Bank, is attached hereto at Attachment 2." Calleja attached a copy of the 2008 Agreement—which was Bates-stamped by the Bank, indicating that it was produced during the course of the litigation—to his affidavit. Calleja offered no testimony concerning when he received this agreement from the Bank. Nor did he offer, once the Bank argued that the 2012 Agreement applied and governed the account, any testimony that he never received notice of the 2012 Agreement.

Given the state of the record, in which both parties assert, without factual support, that their preferred version of the account agreement applies, we conclude that neither Calleja nor the Bank has conclusively established that their preferred versions of the account agreement—the 2008 Agreement and the 2012 Agreement, respectively—govern the relationship between Calleja and the Bank. We therefore remand this case to the trial court to determine which account agreement was

effective as to Calleja at the time of the underlying fraudulent activity for the purpose of determining whether the Bank is entitled to attorney's fees under the agreement.[6]

2. Whether Awarded Fees are Reasonable and Necessary

Although we hold that remand is appropriate for the trial court to determine which version of the account agreement applies and governs this case, Calleja raised in his original briefing arguments concerning the amount of attorney's fees awarded, and whether the Bank's evidence was sufficient to prove that the awarded fees were

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[6] Because we agree with the Bank's argument on remand that Calleja failed to conclusively establish that the 2008 Agreement was the governing account agreement, we do not address the Bank's additional argument on remand that it was entitled to attorney's fees even if the 2008 Agreement applied because, by granting summary judgment in its favor on liability, the trial court effectively enforced specific performance of a contractual covenant not to sue, which supports an award of attorney's fees under Civil Practice and Remedies Code Chapter 38. *See Felix v. Prosperity Bank*, No. 01-14-00997-CV, 2015 WL 9242048, at *2–3 (Tex. App.—Houston [1st Dist.] Dec. 17, 2015, no pet.) (mem. op.) (holding, in case in which deposit agreement included provision that stated "[y]ou further agree that if you fail to report any unauthorized signatures, alterations, forgeries or any other errors in your account within 60 days of when we make the statement available, you cannot assert a claim against us on any items in that statement, and the loss will be entirely yours," that this provision was "covenant not to sue," that trial court's judgment in favor of bank on liability effectively required specific performance of material contract right, and that this would support award of attorney's fees under Chapter 38 despite lack of monetary award in favor of bank, which is usually required to recover attorney's fees under Chapter 38); *see also Ashford Partners, Ltd. v. ECO Res., Inc.*, 401 S.W.3d 35, 40–41 (Tex. 2012) ("[T]o qualify for fees under [section 38.001(8), which allows recovery of attorney's fees the claim is based on an oral or written contract], a litigant must prevail on a breach of contract claim and recover damages."). Here, although both parties agree that their relationship is a contractual one, there is a dispute regarding which version of the deposit agreement—the contract—governs, and neither party has conclusively established the governing version.

reasonable and necessary. We address those arguments, as they are likely to persist on remand.

In arguing that the Bank did not properly prove that it was entitled to the amount of attorney's fees awarded by the trial court, Calleja first points to several apparent discrepancies between Huttenbach's affidavit testimony and the billing records that he attached. Calleja argues that in his first affidavit, attached to the Bank's summary judgment motion, Huttenbach averred that the Bank was entitled to recover $28,840.19 in attorney's fees, but the fees contained in the billing records attached to this affidavit only added up to $22,722.69. Calleja argues that, although Huttenbach stated in each of his affidavits that the Bank received a discount from his usual hourly rate of $345 and the billing records attached to Huttenbach's first affidavit reflected an hourly rate of $315, the billing records attached to Huttenbach's third affidavit—filed as a supplement to the Bank's response to Calleja's motion to reconsider the summary judgment ruling—reflected an hourly rate of $345. Finally, Calleja argues that the billing records submitted by the Bank do not add up to $49,186.65, the amount of trial-level attorney's fees awarded by the trial court.

During the course of the litigation, Huttenbach, on behalf of the Bank, submitted an affidavit concerning attorney's fees and attached the Bank's billing records on three different occasions. In his first affidavit, completed on September

19, 2014, and submitted in connection with the Bank's summary judgment motion, Huttenbach averred that his current hourly rate is $330, but the Bank "gets a discount off [his] standard rate" and that he "or another person at [his] firm, [has] spent and/or expect[s] to spend at least" $28,840.19 as reasonable and necessary attorney's fees. He estimated that he would need to spend an additional twelve hours of work if he needed to reply to a response filed by Calleja or attend a hearing. Huttenbach attached five months' worth of redacted billing records to this affidavit. These records reflected a $315 hourly rate for Huttenbach, and he and other personnel at his firm billed a total of $25,201.69 in fees and expenses for this time period.

In his second affidavit, completed on November 21, 2014, and submitted in connection with the Bank's response to Calleja's motion for the trial court to reconsider its interlocutory order granting summary judgment in favor of the Bank on liability, Huttenbach averred that his current hourly rate was $345, although the Bank received a discount. He attached two months' worth of redacted billing records to this affidavit. The first invoice reflected that his hourly rate was $315, while the second reflected that his hourly rate was $345. During this two-month time period, Huttenbach and another individual at his firm billed a total of $16,592.46 in fees and expenses.

Finally, Huttenbach submitted a third affidavit, completed on December 5, 2014, as a supplement to the Bank's response to Calleja's motion to reconsider the

summary judgment ruling. Huttenbach again averred that his current hourly rate was $345, but the Bank received a discount. He stated, "I, or another person at my firm, have spent and/or expect to spend at least" $49,186.65 in reasonable and necessary attorney's fees, costs, and expenses. He attached an invoice and redacted billing records for the previous month. This invoice reflected that Huttenbach's hourly rate was $345. The invoice also reflected that Huttenbach and two individuals at his firm billed a total of $9,933.90 in fees and expenses for the preceding one-month period.

During the proceedings, the Bank submitted a total of eight invoices reflecting the attorney's fees and expenses it incurred in defending against Calleja's claim. These eight invoices totaled $51,728.05 in fees and expenses. The trial court ultimately awarded the Bank $49,186.65 in attorney's fees. We conclude that any discrepancies that existed between Huttenbach's affidavits and the billing records themselves are minor. At the time it made its ruling on attorney's fees, the trial court had before it evidence that the Bank had incurred over $51,000 in fees. The trial court awarded the Bank slightly over $49,000 in fees, an amount approximately $2,000 less than the total amount of fees incurred as reflected by the billing records.

Calleja also argues that the Bank's evidence on attorney's fees does not comply with requirements set out in two Texas Supreme Court cases: *City of Laredo v. Montano* and *Long v. Griffin*. *Montano* involved a challenge to the attorney's fees awards in favor of two attorneys representing a property owner in a condemnation

case. *See* 414 S.W.3d at 733. One of the attorneys generally described the work he performed on the case, testified that he worked on the case for 226 weeks, and estimated that he worked a minimum of six hours per week on the case. *Id.* at 734. This attorney admitted that he did not keep contemporaneous time records and he "apparently did not have a firm idea about what [the property owners] owed him for his work before his testimony at trial," calculating on the witness stand that his clients owed him $339,000 in fees based on an estimate that he had spent 1,356 hours on the case, multiplied by his $250 hourly rate. *Id.* Although the second attorney did not bring any billing records with her to trial, she testified that she did keep contemporaneous billing records, that she had billed $25,000 in fees, and that she had been paid that amount. *Id.* at 735. This attorney requested an additional $12,000 in fees covering the trial based on working twelve-hour days for the five-day trial. *Id.*

The Texas Supreme Court reversed the fee award for the first attorney but affirmed the fee award for the second attorney. *Id.* at 737. The court characterized the first attorney's testimony as "devoid of substance," noting that the record "provides no clue as to how [the first attorney] came to conclude that six hours a week was a 'conservative' estimate of his time in the case," that the attorney did not "appear to have known how much he was owed for his services until the calculations at trial," and that the attorney "offered nothing to document his time in the case other

than the 'thousands and thousands and thousands of pages' generated during his representation of the [property owners] and his belief that he had reasonably spent 1,356 hours preparing and trying the case." *Id.* at 736. The court concluded, however, that the second attorney's testimony was "not similarly deficient," noting that this attorney's testimony reflected that she "used a billing system to keep track of her time in the case and that she had billed, and been paid, $25,000 for her work up to trial." *Id.* at 737. The court also held that the second attorney's testimony about her fees for trial was supported by sufficient evidence, noting that "[t]he billing inquiry here involves contemporaneous events and discrete tasks—the trial and associated preparation for each succeeding day," that opposing counsel witnessed these tasks "at least in part," and that this attorney was not cross-examined concerning her trial fees. *Id.*

Long involved several claims relating to participation in oil and gas ventures, including a claim relating to an agreement for the plaintiffs to pay a portion of drilling and operating costs in exchange for an assignment of a partial working interest in producing wells. *See* 442 S.W.3d at 254. The plaintiffs' attorney submitted an affidavit supporting their request for attorney's fees. *Id.* The affidavit indicated that two attorneys spent 644.5 hours on the suit and segregated the time spent on each claim, with 30% of their time spent on the assignment claim. *Id.* The affidavit also reflected that "the assignment issue was inextricably intertwined with

claims on which the attorneys spent 95% of their time." *Id.* In reviewing the fee award, the Texas Supreme Court agreed with the defendants that the plaintiffs "did not provide the trial court with legally sufficient evidence to calculate a reasonable fee" because the plaintiffs "offered no evidence of the time expended on particular tasks, as we have required when a claimant elects to prove attorney's fees via the lodestar method." *Id.* at 254–55. The court stated:

> Here, as in *El Apple* and *Montano*, the affidavit supporting the request for attorney's fees only offers generalities. It indicates that one attorney spent 300 hours on the case, another expended 344.50 hours, and the attorneys' respective hourly rates. The affidavit posits that the case involved extensive discovery, several pretrial hearings, multiple summary judgment motions, and a four and one-half day trial, and that litigating the matter required understanding a related suit that settled after ten years of litigation. But no evidence accompanied the affidavit to inform the trial court [of] the time spent on specific tasks. The affidavit does claim that 30% of the aggregate time was expended on the assignment claim (part of which [the plaintiffs] prevailed on) and that the assignment issue was inextricably intertwined with matters that consumed 95% of the two attorneys' time on the matter. But without any evidence of the time spent on specific tasks, the trial court had insufficient information to meaningfully review the fee request. We note that here, as in *El Apple*, contemporaneous evidence may not exist. But the attorneys may reconstruct their work to provide the trial court with sufficient information to allow the court to perform a meaningful review of the fee application.

Id. at 255–56. The supreme court ultimately remanded the case to the trial court to redetermine the attorney's fees award. *Id.* at 256.

We disagree with Calleja that the evidence of attorney's fees in this case does not meet the standards set out by the Texas Supreme Court in *Montano*, *Long*, and,

more recently, *Rohrmoos Venture*. In addition to Huttenbach's three affidavits, which generally summarized the work performed on behalf of the Bank, the Bank also submitted eight invoices. All eight invoices described the tasks performed, the date the tasks were performed, the individual performing the tasks, the number of hours billed for each task, and the amount billed for each task. For each individual performing tasks, the invoices summarized the number of hours that individual worked and multiplied that number by their hourly rate for a total amount billed by that person. Although portions of the billing records are redacted, the redactions are not so significant that a court cannot determine what tasks were being performed. In *Rohrmoos Venture*, the Texas Supreme Court stated that sufficient evidence to support an attorney-fee award includes, at a minimum, evidence of (1) particular services performed, (2) who performed those services, (3) approximately when the services were performed, (4) the reasonable amount of time required to perform the services, and (5) the reasonable hourly rate for each person performing such services. *See* 578 S.W.3d at 502. With one exception discussed below, the Bank's evidence meets this standard.

Calleja argues that the Bank's attorney's fees affidavits are deficient in part because Huttenbach's affidavits do not "provide information concerning the identity and experience of the other attorneys and paralegals working on the case and whose time is billed in the fee statements," which leaves Calleja's attorney unable to assess

whether the work and fees charged by these individuals is reasonable and necessary. We agree with Calleja.

Huttenbach's second affidavit provided some information on his background and expertise in banking law. Many of time entries on the billing records reflected work performed by Huttenbach. However, the records also reflected that work was performed, throughout the case, by four other individuals. These individuals are identified by name in the invoices, and the invoices state the amount of hours these individuals worked as well as their hourly rates.[7] The record includes no evidence, however, concerning the qualifications of these individuals or whether the legal assistants and paralegals performed substantive legal work under Huttenbach's direction. *See El Apple I*, 370 S.W.3d at 763 (listing information Texas courts have required to obtain payment for legal work performed by paralegals and legal assistants and noting that "[p]aralegal fees have been denied absent such proof"); *State Farm Lloyds v. Hanson*, 500 S.W.3d 84, 99 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (upholding fee award and noting that evidence included testimony concerning experience and qualifications not just of lead attorney, but also his two associates and additional lawyer who assisted on case); *River Oaks L-M, Inc. v. Vinton-Duarte*, 469 S.W.3d 213, 233 (Tex. App.—Houston [14th Dist.] 2015, no

[7] Based on the hourly rates identified, it appears that three of these four individuals are paralegals or legal assistants (billing between $100 and $165 per hour) and one is an attorney (billing at $325 per hour).

pet.) (holding that sufficient evidence supported fee award and noting that attorney "expressly described the qualifications of his legal assistant, that she performed substantive legal work under his direction and supervision, and the nature of the legal work she performed"). In the absence of this information, Huttenbach's affidavits and the billing records do not establish that the amounts charged by these individuals are reasonable and necessary.

Conclusion

We reverse the judgment of the trial court as it relates to the attorney's fees awarded to the Bank, and we remand that portion of the judgment to the trial court for further proceedings.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Goodman, and Countiss.