NUMBER 13-18-00393-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

DAVID KEITH BRANDON, **Appellant,**

v.

WELLS FARGO BANK, N.A., AS TRUSTEE FOR THE REGISTERED HOLDERS OF LASALLE COMMERCIAL MORTGAGE SECURITIES, INC. 2007-MF5, COMMERCIAL MORTGAGE SERIES 2007-MF5, AND MIDLAND LOAN SERVICES, **Appellees.**

On appeal from the 156th District Court of San Patricio County, Texas.

MEMORANDUM OPINION

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

Appellee and cross-appellant, Wells Fargo Bank, N.A.[1] (Wells Fargo), by and through appellee and cross-appellant, Midland Loan Services (Midland), filed suit against appellant and cross-appellee David Keith Brandon alleging that Brandon defaulted on commercial notes held by Wells Fargo and serviced by Midland (collectively, the lenders). While the case was pending, the trial court appointed a receiver, the collateral securing the notes was sold, and the balances on the notes were paid with the sale proceeds. Brandon later filed a counter-petition against Wells Fargo and a third-party petition against Midland, disputing the lenders' handling of the excess sale proceeds, and alleging various causes of action. Following a bench trial, the trial court signed a final judgment awarding Brandon $245,109.20 in actual damages, $245,109.20 in exemplary damages against each Midland and Wells Fargo, and $125,000 in attorney's fees plus additional contingent appellate attorney's fees.

In twelve issues, which we have grouped into four issues,[2] Brandon argues that: (1) the loan balances were not established by legally sufficient evidence and, therefore, Brandon should have been awarded all of the proceeds from the sale of the collateral; (2 and 3) there was legally insufficient evidence supporting the trial court's findings that Brandon did not suffer consequential damages and that the excess sale proceeds were

[1] The full name for this party is Wells Fargo Bank, N.A., as trustee for the registered holders of LaSalle Commercial Mortgage Securities, Inc. 2007-MF5, Commercial Mortgage Pass-Through Certificates, Series 2007-MF5.

[2] Brandon assails several of the trial court's findings of fact without contending that those findings probably caused the rendition of an improper judgment—the standard for reversible error in civil cases. *See* TEX. R. APP. P 44.1. While an erroneous finding of fact on an ultimate fact issue is harmful error, an immaterial finding of fact is harmless and not grounds for reversal. *Cooke Cty. Tax Appraisal Dist. v. Teel*, 129 S.W.3d 724, 731 (Tex. App.—Fort Worth 2004, no pet.) (op. on reh'g). We address only those challenged findings which are necessary to the disposition of the appeal. *See* TEX. R. APP. P. 47.1.

only $188,577.86; and (4) the trial court's award of exemplary damages was insufficient.

In five issues, which we treat as six, the lenders argue: there is legally insufficient evidence supporting Brandon's causes of action for (1) conversion and (2) breach of contract; (3) the trial court erred in finding that the lenders were alter egos of each other and, therefore, the lenders cannot be jointly and severally liable; (4) the trial court's damages award constitutes an impermissible double recovery; and (5 and 6) the trial court's attorney's fees and exemplary damages awards are erroneous. We affirm in part and reverse and render in part.

I. BACKGROUND

A. The Notes, Deed of Trust, and Servicing Agreement

In December 2006, Brandon executed two promissory notes in favor of LaSalle Bank which were secured by a deed of trust on the Sun Valley Apartments (the collateral) located in Portland, Texas. The maturity date for the notes was January 1, 2012, at which point Brandon was required to pay the remaining principal balance. The first note, which the parties refer to as the A-Note, was in the amount of $2,640,000. The A-Note was later assigned to Wells Fargo.[3] The second note, or B-Note, was in the amount of $165,000 and was later assigned to CBA-Mezzanine Capital Finance, LLC (CBA-Mezzanine).

Both notes contained the following language concerning default:

> If any installment under this [note] or any other loan agreements or financing arrangements between the undersigned and the holder hereof now existing or hereafter entered into is not paid when due, the entire principal amount outstanding hereunder and accrued interest thereon shall at once become due and payable, at the option of the holder hereof. The holder hereof may exercise this option to accelerate during any default by the undersigned

[3] The promissory notes permitted the holder of the notes to assign the notes without Brandon's consent.

> regardless of any prior forbearance. In the event of any default in the payment of this [note], and if the same is referred to an attorney at law for collection or any action at law or in equity is brought with respect hereto, the undersigned shall pay the holder hereof all expenses and costs, including, but not limited to, attorney's fees.
>
> If any installment under this [note] is not received by the holder hereof within fifteen (15) calendar days after the Installment is due, the undersigned shall pay to the holder hereof a late charge of five percent (5.00%) of such installment, such late charge to be immediately due and payable without demand by the holder hereof. If any installment under this [note] remains past due for thirty (30) calendar days or more, the outstanding principal balance of this [note] shall bear interest during the period in which the undersigned is in default at a "Default Rate of Interest" equal to three percent (3%) per annum over the Interest Rate in effect from time to time during the period of default. If such Default Rate of Interest may not be collected from the undersigned pursuant to applicable law, this [note] shall bear interest during the period of default at the maximum per annum rate of interest, if any, permitted pursuant to such applicable law.

The deed of trust instrument provided the following with respect to the options available to the lenders in the event of default:

> In the event Lender elects to seek the appointment of a receiver for the Property upon Borrower's breach of any covenant or agreement of Borrower in this Instrument, Borrower hereby expressly consents to the appointment of such receiver. Lender or the receiver shall be entitled to receive a reasonable fee for so managing the Property.
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> . . . .
>
> ACCELERATION; REMEDIES. Upon Borrower's breach of any covenant or agreement of Borrower in this Instrument, or in any other loan agreements or financing arrangements now existing or hereafter entered into between Borrower and Lender, the Note, [the Guaranty of Payment executed by David Keith Brandon, in favor of Lender dated on or about the date hereof] and the other agreements and documents executed by Borrower in favor of lender in connection with the Note (the "Loan Documents") including, but not limited to, the covenants to pay when due any sums secured by this Instrument, Lender at Lender's option may declare all of the sums secured by this Instrument to be immediately due and payable without further demand and may invoke the power of sale and any other remedies permitted by applicable law or provided herein. Borrower acknowledges that

> the power of sale herein granted may be exercised by lender without prior judicial hearing to the extent permitted by applicable law. Lender shall be entitled to collect all costs and expenses incurred in pursuing such remedies, including, but not limited to, attorney's fees, costs of documentary evidence, abstracts and title reports. Borrower acknowledges that this Mortgage is granted to Lender with a power of sale to the extent permitted by applicable law.
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> . . . .
>
> The proceeds of the sale shall be applied in the following order; (a) to all costs and expenses of the sale, including, but not limited to, attorney's fees and costs of title evidence; (b) to all sums secured by this Instrument in such order as Lender, in Lender's sole discretion, directs, and (c) the excess, if any, to the clerk of the Circuit Court, of the county in which the sale is held.

Pursuant to a "Pooling and Servicing Agreement" (Servicing Agreement), the duties of collecting note payments, holding and disbursing escrow funds, and performing most of the routine administrative functions regarding the notes were delegated to a Master Servicer and a Special Servicer. The Master Servicer for the A-Note was Midland, and the Master Servicer for the B-Note was Wells Fargo. The Master Servicer services the Note until there is a default or default is imminent, at which time the servicing duties are transferred to the Special Servicer. Midland was the Special Servicer for both notes.

B. Brandon Defaults

Midland sent Brandon notices in the months prior to the loan's maturity date**,** reminding him that he was required to pay the loan in full or he would be subject to interest or other charges as specified by the loan documents. The December 2, 2011 notice indicated an outstanding principal balance of $2,475,110.86. Brandon did not pay the notes' balances by the maturity date, at which time Midland became the Special Servicer for both notes. Midland sent Brandon a notice of default for the A-Note on February 2,

2012, and it later communicated with Brandon concerning his default on the B-Note. Midland instructed Brandon to continue sending payments as he had done prior to default, by sending the A-Note payments to Midland and the B-Note payments to Wells Fargo.

In April 2012, Wells Fargo deposited Brandon's $24,787.41 payment for the A-Note, but Brandon's note was not credited. Wells Fargo maintained at trial that Brandon mistakenly sent the check directly to it, rather than to Midland, the servicer of the note, and that it did not discover the payment was for the A-Note until years after suit was filed. Brandon testified that he sent the payment to Midland.

C. Lawsuit

The lenders filed the instant suit on April 30, 2012, alleging that Brandon defaulted on the notes by failing to pay all amounts due at maturity and by failing to maintain the collateral in good condition and repair. The lenders requested that the trial court appoint a receiver, contending that they had the right to do so pursuant to the loan documents.

The trial court signed an agreed order granting the lenders' application for appointment of a receiver. The order authorized the receiver to take control of the collateral and to secure a buyer. In October 2012, the receiver filed a report of sale and agreed motion to approve the sale of the collateral for $3,200,000. The motion prayed that the trial court confirm the sale of the collateral and authorize the receiver to distribute the net proceeds from the sale to the lenders by and through the receiver. The trial court signed an agreed order granting the receiver's motion, approving the sale, and providing that "any net proceeds from the sale of the [collateral] would be distributed to [the lenders]."

In March 2013, Brandon filed a counterclaim against Wells Fargo alleging that the sale price of the collateral exceeded the "payoff balance owed to Wells Fargo" by $600,000. Brandon alleged that Wells Fargo's retention of those funds amounted to a conversion of Brandon's property. At this time, Brandon also filed a motion to terminate the receivership and require distribution of the sale proceeds.

In June 2015, Brandon filed a third-party petition against Midland alleging that Midland was jointly and severally liable with Wells Fargo for refusing to distribute the excess sale proceeds. In his live pleading, which encompasses a petition and multiple supplemental petitions, Brandon alleged causes of action for breach of contract, negligence, conversion, and liability under the Theft Liability Act. Brandon further alleged that he was entitled to consequential damages because his intended purchase of another property fell through when he did not have sufficient cash to get a loan. As a result, Brandon contended he was unable to defer certain income taxes and he lost out on the income the property would have generated. Brandon also claimed that the lenders failed to return the "escrow balances for taxes and insurance."

The lenders later filed an amended pleading, alleging that they were entitled to an offset of $103,160.89 for payments recently made to Brandon. The lenders contended that this amount represented the net sale proceeds owed to Brandon, the amount of the April 2012 payment for the A-Note, and accrued interest.

D. Bench Trial

A two-day bench trial commenced on January 16, 2018. At the outset, the lenders stated they were not proceeding on any affirmative claims for relief because Brandon's

obligation on the notes was satisfied by application of the proceeds of the collateral. Brandon argued that the funds he received as excess sale proceeds were inadequate, and he intended to proceed on his claims.

1. The Lenders' Evidence

David Bornheimer, Midland's vice president, testified based on his review of the loan file and accounting records. He maintained that Midland allowed Brandon seven months following the notes' maturity dates to sell the collateral or refinance the notes. When Brandon was unable to do so, the parties agreed to the receiver's sale of the collateral.

Bornheimer testified that there were a number of charges and deductions relating to the sale. An exhibit titled "Seller's Statement" prepared by the title company indicated that the property sold for $3,200,000. After the deductions of charges and fees, which included property tax payments, $3,005,915.44 was paid to Midland. Bornheimer testified that any excess funds from the sale were not immediately available to Brandon because the receiver was entitled to look to those funds for any expenses he may have. According to Bornheimer, the lenders were required to wait for the receiver's final accounting before they were able to calculate the amount due to Brandon. Bornheimer testified that the receiver continued to pay bills for the collateral through January 2013.

In March 2013, after receiving a final accounting from the receiver, Midland notified Brandon that he was entitled to $58,293.35 of the net sale proceeds. Bornheimer was questioned about Plaintiff's Exhibit 3, which contained an accounting of the application of the sale proceeds, and which we reproduce below:

A NOTE	
$2,546,352.64	Payoff Quote
$123.060.77	Late Charge @ 5% of principal loan amount due
$9,667.43	Per diem interest @ $604.2142 x 16 days (10/15 to 10/30)
$20,000.00	Legal fees
$759.28	Protective Property Advances – Inspection
$9,942.27	Special Servicing Fees
$2,709,762.39	Subtotal
$51,726.40	Liquidation Fee @ 2%
$2,761,508.79	Payoff "A" note to 10/31/12 – funds received 11/1/12

B NOTE	
$184,807.36	Payoff B to 10/15/12 (interest through 10/14)
$1,235.39	Per diem interest @ $72.67 x 17 days (10/15 to 10/30)
$70.55	Special Servicing Fees
$186,113.30	Subtotal
$0.00	Liquidation Fee @ 1% (included above)
$186,113.30	Payoff "B note to 10/31/12 – funds received 11/1/12

$2,947,622.09	Payoff "A" & "B" Notes
$3,005,915.44	Net Sale Proceeds to Lender
$2,947,622.09	Lender Payoff
$0.00	Funds Held by Receiver
$58,293.35	Proceeds Due Borrower

Bornheimer provided explanations for each charge in Plaintiff's Exhibit 3, stating that they were justified by the loan documents. In particular, the deed of trust for the collateral provided that in the event of Brandon's default, the lenders would have the power to sell the property, and the lenders would "be entitled to collect all costs and expenses incurred in pursuing such remedies, including, but not limited to, attorney's fees, costs of documentary evidence, abstracts and title reports." In addition, the promissory notes authorized a five percent late charge and a three percent default rate of interest.

Bornheimer also discussed Plaintiff's Exhibit 31, a Midland document that provided a calculation for the payoff quote found in Plaintiff's Exhibit 3. According to Bornheimer, this document indicated that Midland deducted the amounts held in Brandon's escrow account from his debt. Bornheimer stated that on December 6, 2017, Midland paid Brandon $72,196.31, which represented the proceeds he was due plus accrued interest at the rate of 5%. Bornheimer testified that Midland paid Brandon $30,364.58 on October 27, 2017, which was intended to be a refund of Brandon's April 2012 A-Note payment of $24,787.41 plus accrued interest at the rate of 5%. Bornheimer contended that Midland never received the payment because Brandon sent it directly to Wells Fargo. Because Brandon insisted that he sent the check to Midland, the search for the payment focused on Midland's records. Bornheimer stated that Midland's internal departments conducted at least three extensive searches for the payment, but they could neither match the check number nor check amount to any deposits. According to Bornheimer, Wells Fargo was able to locate the payment after Midland provided Wells Fargo the amount of the check and possible dates of receipt.

Brandon's counsel questioned Bornheimer about Midland's internal accounting records, which were admitted into evidence. Those records indicated that Midland deposited $3,005,915.44 for the sale of the collateral and $56,561.34 from the escrow account. Midland's accounting records provided that the payoff for the A-Note was $2,498,812.40, and the payoff for the B-Note was $186,411.74. Bornheimer agreed that these figures indicated approximately $377,000 in excess sale proceeds before the deduction of any penalties, fees, or costs. Midland's accounting records reflected that

there remained $245,109.20 in unapplied funds on March 6, 2013.

Bornheimer agreed that the deed of trust for the notes required the lender to release the instrument upon payment of all sums secured by the instrument. A release of the deed of trust was filed on November 2, 2012. When questioned why Midland did not pay the excess funds to Brandon when the notes were satisfied, Bornheimer stated that Midland was waiting for the receiver's final accounting. He explained:

> So the net sale proceeds were sent to Midland, pursuant to the receivership—to the order, to the agreed order, that Mr. Brandon . . . agreed to and told us to do—or told the receiver to do. And then the concern is we would wait for the receiver to close out his books so he knows what all the trailing expenses are. Because the receiver, if he was short of cash, would be looking for those net sale proceeds to pay any final bills if he didn't have money. So it's prudent and appropriate to wait until the receiver closes out his books before any excess money is distributed.

The trial court admitted a Midland document dated October 31, 2012, calculating a payoff amount for the notes of $2,826.320.28. When asked about the $121,000 discrepancy between this and the payoff amount of $2,947,622.09 shown in Plaintiff's Exhibit 3, Bornheimer maintained that the October 31, 2012 document was a draft and did not represent the final calculation.

Kris Degraff-Tully, a former Midland employee, testified that she recommended that Midland pursue a receivership for the collateral because the loan had matured and there were health and safety issues relating to the condition of the property.

2. Brandon's Evidence

Patricia Reed Constant, Brandon's previous attorney in the case, testified that she requested a payoff statement for Brandon in May 2012. The lenders' counsel informed her that it typically takes several days to a week "in order to get it done[.]" Constant

continuously requested the payoff amounts for the notes and asked what Brandon could expect to receive following the sale of the collateral, but the lenders' counsel never responded.

Constant also communicated with the lenders' counsel regarding the April 2012 payment. The trial court admitted a copy of the cleared check for the April 2012 payment, which was made payable to Midland. The check contained an account number and the reference "Mortgage-Sun Valley." Constant testified that Brandon continued to make payments through August 2012, and the trial court admitted exhibits to that effect.

Constant testified that Brandon intended to use the excess proceeds from the sale of the collateral to invest in a separate piece of property and that she communicated Brandon's intentions to the lenders' counsel. She provided wiring instructions to the lenders' counsel on January 28, 2013. At that time, the lenders had not provided Constant a payoff statement. After getting no response from the lenders, Constant contacted Brandon's trial counsel, who filed a counterclaim in March 2013.

Brandon testified that he made the required monthly payments on both notes through the maturity date. He used rental income from the collateral to make the payments. Brandon anticipated that he would be able to refinance the notes prior to maturity, but he was unable to do so. Following default, he stated that Degraff-Tully instructed him to continue making payments, and he did so, believing that he would be able to keep the property. According to Brandon, he mailed the April 2012 A-Note payment to Midland, and he provided a copy of the cleared check to Degraff-Tully when she said the payment was not received.

After a receiver was appointed to sell the property, Brandon intended to use the excess sale proceeds to purchase a separate property which would allow him to defer tax obligations on any realized profits. Brandon identified property in Inglewood, California with a $1,900,000 purchase price. He anticipated he would receive $400,000 from the sale of the collateral, which he would use to purchase the Inglewood property. Brandon and the seller executed a purchase agreement for the property in October 2012. Brandon testified that he was unable to obtain financing to purchase the property because he did not have sufficient cash.

The trial court admitted an internal Midland report dated October 10, 2012, which concerned the impending sale of the collateral. Through that report, Midland estimated that the sale proceeds would pay off the notes' balance and the excess proceeds due to Brandon would be "approximately" $200,000. The report also indicated that Midland did not intend to charge Brandon default interest on the notes. The trial court also admitted an exhibit showing that Brandon had paid a total of $141,379.78 toward the notes following default.

On cross-examination, Brandon conceded that he was never guaranteed by anyone that the notes would be refinanced prior to maturity. He also acknowledged that the loan documents provided the lenders the right upon default to take control of the property through a court-appointed receiver. He further conceded that the loan for the Inglewood property was declined for the additional reason that Brandon did not have sufficient liquid assets.

Cornell Sandifer, the former owner of the Inglewood property, testified concerning

the income-producing capabilities of the property. The trial court admitted an income and expense statement that indicated an annual profit of $67,000. Jonathan Meier Nikfarjam, a California real estate broker, testified that the current market value for the Inglewood property is $3,750,000.

Terry Dean Reigert, a Midland employee, testified that he reviewed Brandon's loan file in September 2013 and concluded Brandon was owed money at that time from the sale of the collateral. Reigert stated that it generally takes five to ten days to compute a "payoff request."

E. Trial Court's Ruling

The trial court signed a final judgment awarding $245,109.20 in actual damages recoverable from Wells Fargo and Midland, jointly and severally, $245,109.20 in exemplary damages against each Wells Fargo and Midland, and $125,000 in attorney's fees, plus contingent appellate attorney's fees, interest, and costs.

The trial court issued findings of fact and conclusions of law, which, in pertinent part, provided as follows:

> FINDINGS OF FACT:
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> . . . .
>
> 6. Both notes matured by their own terms on January 1, 2012 but Brandon was directed by the loan servicer (Midland) to continue making payments to the loan servicer as he had done prior to maturity.
>
> 7. David Brandon thought that the property would be re-financed but Brandon was not able to secure re-financing prior to the balloon payment due at maturity.
>
> 8. Brandon made timely loan payments for January, February, March and April, 2012 as directed by the loan servicer (Midland). Payments were made

as they had been before maturity, but there was no action regarding re-financing.

9. The April, 2012 loan payment from Brandon to Midland was inexplicably deposited in a bank account belonging to Wells Fargo and not properly credited as a payment from David Brandon on the subject notes.

10. Also inexplicably, it took Midland and Wells Fargo over five (5) years to trace David Brandon's April, 2012 payment and properly apply / account for those funds.

. . . .

13. On October 31, 2012 the Receiver sold the Sun Valley Apartments for $3,200,000. After deduction of closing costs and brokerage fees, the title company wired the net sales proceeds of $3,005,915.44 to Midland Loan Services.

14. The net sales proceeds were more than enough to pay off both notes.

15. The net sales proceeds included escrow reserves of $56,531.34.

. . . .

17. During the time that the Receiver was actively endeavoring to sell the Sun Valley Apartments, David Brandon began to negotiate for the purchase of a similar apartment complex in Inglewood, California. Brandon intended to utilize IRS sec. 1031 to defer payment of taxes on any profit that might materialize from the sale of the Sun Valley Apartments.

18. The Inglewood, California transaction and contract (late October, 2012) had a 30-day window for Brandon to secure financing. Brandon's loan application regarding financing for the purchase was some three (3) months after the contract signing.

19. Brandon and the seller of the Inglewood, California property continued to discuss the sale but Brandon's financing through Chase was denied due to insufficient cash to close.

20. Brandon never re-applied for financing with Chase and did not apply for financing with any other entity.

21. The Court Finds that the Deeds of Trust obligated Wells Fargo Bank to promptly deliver any excess sales proceeds to David Brandon.

22. On March 1, 2013 David Brandon filed his counterclaim against Wells Fargo Bank to recover the excess proceeds from the Receiver's sale of Sun Valley Apartments.

23. Directly after the time that David Brandon filed his counterclaim there was $245,109.20 in the account balance for the subject notes. This amount includes the escrow funds of $56,531.34 which were on [sic] present at the time of property sale and which were included in the net sales proceeds wire to Midland Loan Services.

24. The Court Finds that Wells Fargo Bank and Midland Loan Services refused to deliver excess sales proceeds to David Brandon unless Brandon executed a release to Wells Fargo Bank and Midland Loan Services, employees and agents and attorneys regarding the late-discovered April, 2012 note payment.

25. The Court Finds that by March 1, 2013 there had been more than enough time for the Receiver and Wells Fargo Bank and Midland Loan Services to wind up any matters after sale of the subject property.

26. The Court Finds that Wells Fargo Bank and Midland Loan Services unreasonably delayed delivery of the excess sales proceeds to David Brandon, and subjected Brandon to additional charges and fees without substantial foundation.

27. The Court Finds that no reasonable or supportable legal fees, expenses or charges due to [Wells Fargo] accrued related to this property and the sale of this property after March 1, 2013.

28. The Court Finds that at the time of his Motion to Terminate Receivership and distribute sales proceeds, David Brandon was entitled to all excess proceeds that had not otherwise been properly applied by Wells Fargo Bank and Midland Loan Services.

29. The Court Finds that after sale of the Sun Valley Apartments, Wells Fargo Bank and Midland Loan Services wrongfully retained and withheld escrow funds in the amount of $56,531.34 which belonged to David Brandon and which had not been properly delivered to him. Said escrow funds were held and wrongfully retained by Midland Loan Services and Wells Fargo Bank, having been (1) delivered for safekeeping; (2) intended to be kept segregated; (3) an intact fund; and (4) not the subject of a title claim by either Midland Loan Services or Wells Fargo Bank.

30. The Court Finds that after March 1, 2013, Wells Fargo Bank and Midland Loan Services wrongfully retained and withheld excess sales proceeds in the amount of $188,577.86 in addition to the wrongfully withheld escrow funds. Said excess sales proceeds were held and wrongfully retained by Midland Loan Services and Wells Fargo Bank, having been (1) delivered for safekeeping; (2) intended to be kept segregated; (3) an intact fund; and (4) not the subject of a title claim by either Midland Loan Services or Wells Fargo Bank.

. . . .

32. The Court finds that David Brandon has not suffered compensable damages related to his claimed loss of purchase of the property in Inglewood, California.

. . . .

36. The Court Finds that in all matters relevant to this lawsuit, Wells Fargo Bank and Midland Loan Services were essentially alter egos of the other.

. . . .

CONCLUSIONS OF LAW:

1. When Wells Fargo received the assignment of the notes, it was granted the rights of the creditor and it assumed the creditor's obligations under the Deed of Trust.

2. Neither the filing of the lawsuit nor the appointment of the Receiver divested David Brandon of his ownership interest in the Sun Valley Apartments.

3. The title company forwarding the net sales proceeds to Midland Loan Services was not a transfer of title to or ownership of the excess proceeds to either Midland Loan Services or Wells Fargo Bank. Transfer of the net sales proceeds—including escrow balance—was a transfer of specific chattel.

4. The Court determines that the appointment of a Receiver and the sale of Sun Valley Apartments resulted in satisfaction of loans secured by the Apartment property, and that the relief sought by Wells Fargo Bank and Midland Loan Services has been achieved so that there is no further relief to which those parties are entitled.

. . . .

9. The Court determines that the wrongful actions of Wells Fargo Bank and Midland Loan Services constitute breaches of tort and breaches of contract.

10. The Court concludes that the conduct of Wells Fargo Bank and Midland Loan Services is sufficiently egregious that exemplary damages should be awarded to David Brandon in the amount of $245,109.20 against Wells Fargo Bank and $245,109.20 against Midland Loan Services. Exemplary damages award for harm to David Brandon by Wells Fargo Bank and Midland Loan Services based on:

> a. Failing to properly apply the April, 2012 note payment and failing to locate such payment for over five (5) years—gross negligence: tort and contract breach, including specific tort of conversion.
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> b. Intentionally failing to deliver to David Brandon the escrow funds wired to Midland Loan Services after sale of the property—gross negligence and malice: tort and contract breach, including specific tort of conversion.
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> c. Refusing to deliver excess sales proceeds to David Brandon unless Brandon executed a release to Wells Fargo Bank and Midland Loan Services, employees and agents and attorneys—malice: tort and contract breach, including specific tort of conversion.
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> d. Delaying final disposition of the excess sale proceeds for months while additional expenses costs and fees were assessed—malice: tort and contract breach, including specific tort of conversion.
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> e. Taking no action to safeguard the excess sales proceeds which were the funds due to David Brandon under the notes and deeds of trust; continued to assess fees and costs and charges and Receivership expenses long after any reasonable need for same had ended—gross negligence and malice: tort and contract breach, including specific torts of conversion.

11. The Court concludes that Wells Fargo Bank and Midland Loan Services both authorized and ratified the actions of their agents and vice principals, and the actions of their agents and vice principals—for which they are jointly and severally liable.

The lenders and Brandon appeal the trial court's judgment.

II. STANDARD OF REVIEW

In an appeal from a judgment rendered after a bench trial, the trial court's findings of fact have the same weight as a jury's verdict. *Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994). A legal sufficiency challenge will be sustained only if the record shows (1) a complete absence of evidence of a vital fact, (2) the court is barred by the rules of law or evidence from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a mere scintilla, or (4) the evidence conclusively establishes the opposite of a vital fact. *City of Keller v. Wilson*, 168 S.W.3d 802, 810 (Tex. 2005). Evidence is more than a scintilla if it "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Serv. Corp. Int'l v. Guerra*, 348 S.W.3d 221, 228 (Tex. 2011). Evidence is less than a scintilla if it is "so weak as to do no more than create a mere surmise or suspicion that the fact exists." *Regal Fin. Co. v. Tex. Star Motors, Inc.*, 355 S.W.3d 595, 603 (Tex. 2010). The final test is whether the evidence would enable reasonable and fair-minded people to make the finding. *City of Keller*, 168 S.W.3d at 822.

When a party challenges the legal sufficiency of an adverse finding for which it did not have the burden of proof, it must demonstrate there is no evidence to support the adverse finding. *Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983); *Doyle v. Kontemporary Builders, Inc.*, 370 S.W.3d 448, 453 (Tex. App.—Dallas 2012, pet. denied). When a party challenges the legal sufficiency of an adverse finding on an issue on which it had the burden of proof, it must demonstrate the evidence conclusively established all vital facts in support of the issue. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex.

2001); *Doyle*, 370 S.W.3d at 453. We first examine the record for evidence supporting the finding. *Id*. If there is no evidence to support the finding, we then examine the entire record to determine if the contrary proposition is established as a matter of law. *Doyle*, 370 S.W.3d at 453.

The fact finder is the sole judge of the weight and credibility of the evidence. *City of Keller*, 168 S.W.3d at 819. When the evidence is conflicting, we must presume that the fact finder resolved the inconsistency in favor of the challenged finding if a reasonable person could do so. *Id*. at 821. We do not substitute our judgment for that of the fact finder if the evidence falls within this zone of reasonable disagreement. *Id*. at 822. In an appeal from a bench trial, we review a trial court's conclusions of law de novo, and we will uphold them on appeal if the judgment can be sustained on any legal theory supported by the evidence. *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002); *Miranda v. Byles*, 390 S.W.3d 543, 553 (Tex. App.—Houston [1st Dist.] 2012, pet. denied).

III. THE LENDERS' AFFIRMATIVE CLAIMS

In his first issue, Brandon argues that there is legally insufficient evidence to support the lenders' recovery of any outstanding amounts on the notes. Specifically, Brandon argues that: "(1) the payoff amounts were incorrect, (2) [the lenders] did not prove the loan balances, and (3) Wells Fargo did not own the B-Note."

The trial court issued the following pertinent conclusion of law concerning the lenders' affirmative claims:

> The Court determines that the appointment of a Receiver and the sale of Sun Valley Apartments resulted in satisfaction of loans secured by the

> Apartment property, and that the relief sought by [the lenders] has been achieved so that there is no further relief to which those parties are entitled.

We agree with the trial court's conclusion that, at the time of trial, the lenders' claims were no longer at issue. It is undisputed that the balance on the notes was paid through the application of the sale proceeds. The appointment of the receiver and the sale of the collateral were both accomplished by the parties' agreement. The parties further agreed that the sale proceeds would be delivered by the receiver to the lenders. Having already received all the funds to which they were entitled, the lenders did not pursue any affirmative relief at trial. For instance, the lenders did not assert at trial that a deficiency remained following the sale of the collateral. *See Marhaba Partners Ltd. P'ship v. Kindron Holdings, LLC*, 457 S.W.3d 208, 215 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) ("When a loan is secured by a single piece of real estate collateral, a deficiency judgment will impose personal liability upon the debtor for the unpaid amount of a debt after the foreclosure sale.").

To the extent Brandon's issue can be construed as a challenge to the propriety of the receiver's actions in delivering the sale proceeds to the lenders, his issue is foreclosed under the invited error doctrine. *See Sentinel Integrity Sols., Inc. v. Mistras Grp., Inc.*, 414 S.W.3d 911, 919–20 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (concluding that the invited error doctrine prevented a party who agreed that the trial court should enter an order from complaining about the order on appeal); *Keith v. Keith*, 221 S.W.3d 156, 164 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (concluding that a party who asked the trial court to take a certain action could not complain on appeal that the action was wrong); *see also I-10 Colony, Inc. v. Lee*, No. 01-14-00465-CV, 2015 WL 1869467, at *4 (Tex.

App.—Houston [1st Dist.] Apr. 23, 2015, no pet.) (mem. op.) (concluding that a party waived its complaint regarding the appointment of a receiver and the scope of the receiver's authority when the receiver's appointment was by agreement).

For the foregoing reasons, we overrule Brandon's first issue.

IV. ECONOMIC LOSS RULE AND CONVERSION

By their first issue, the lenders argue there is legally insufficient evidence supporting the trial court's conversion findings. Specifically, the lenders argue: (1) they conclusively established a good-faith basis for a qualified refusal of Brandon's demand for payment of the proceeds of the sale; (2) the funds at issue were not "specific chattel" subject to a conversion claim; and (3) the conversion claim is barred by the economic loss rule. Because it is dispositive of the issue, we focus our discussion solely on the application of the economic loss rule.

A. Applicable Law

"The economic loss rule generally precludes recovery in tort for economic losses resulting from a party's failure to perform under a contract when the harm consists only of the economic loss of a contractual expectancy." *Chapman Custom Homes, Inc. v. Dall. Plumbing Co.*, 445 S.W.3d 716, 718 (Tex. 2014) (per curiam); *see also Sw. Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 495 (Tex. 1991) (same); *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986) (same). However, the rule does not prevent economic losses from being recoverable under a variety of intentional tort theories absent a contractual obligation. *Dixie Carpet Installations, Inc. v. Residences at Riverdale, LP*, ___ S.W.3d ___, __, No. 05-18-01479-CV, 2020 WL 1547139, at *11 (Tex. App.—Dallas Apr.

1, 2020, no pet. h.); *Eagle Oil & Gas Co. v. Shale Expl., LLC*, 549 S.W.3d 256, 268 (Tex. App.—Houston [1st Dist.] 2018, pet. dism'd). If the matter in dispute is the subject of a contract, a party may elect a recovery in tort if the duty breached stands independent from the contractual undertaking and the alleged damages are not solely the result of a bargained-for contractual benefit. *Shale Expl.*, 549 S.W.3d at 268.

Although the rule is inapplicable in certain cases involving intentional torts, the emphasis is not on the tort alleged, but whether the duty breached is independent from the underlying contractual undertaking and the harm suffered is not merely the lost contract economic benefit. *See Chapman*, 445 S.W.3d at 718; *Dixie Carpet*, 2020 WL 1547139, at *11. For instance, the rule does not apply if a person negligently performs a contract duty in a way that injures property or persons incidental to the contract work being done. *Dixie Carpet*, 2020 WL 1547139, at *11; *see Chapman*, 445 S.W.3d at 718–719 (plumber hired to install a hot water heater negligently flooded the house). However, the rule bars tort recovery where the defendant negligently performed or failed to perform a contractual duty resulting in the plaintiff losing the benefit of the contract consideration. *Dixie Carpet*, 2020 WL 1547139, at *11; *see Crawford v. Ace Sign, Inc.*, 917 S.W.2d 12, 13–14 (Tex. 1996) (per curiam) (DTPA inapplicable to claim that a publisher omitted promised advertising); *DeLanney*, 809 S.W.2d at 495 (negligent failure to publish a promised advertising sounds only in contract); *Jim Walter Homes*, 711 S.W.2d at 618 (negligent poor home construction sounds only in contract). The application of the economic loss rule is a legal conclusion which we review de novo. *James J. Flanagan Shipping Corp. v. Del Monte Fresh Produce N.A., Inc.*, 403 S.W.3d 360, 365 (Tex. App.—

Houston [1st Dist.] 2013, no pet.).

B. Analysis

The parties' respective obligations and duties were contractual in nature, deriving from the loan documents—the deed of trust and promissory note. *See Hinton v. Nationstar Mortg. LLC*, 533 S.W.3d 44, 48 (Tex. App.—San Antonio 2017, no pet.) ("A promissory note is a contract evincing an obligation to pay money."); *Adams v. First Nat'l Bank of Bells/Savoy*, 154 S.W.3d 859, 867 (Tex. App.—Dallas 2005, no pet.) (explaining that a deed of trust is subject to the same rules of interpretation that apply to contracts); *see also Miller v. CitiMortgage, Inc.*, 970 F. Supp. 2d 568, 583 (N.D. Tex. 2013) (applying the economic loss rule to plaintiff's allegations regarding servicing of a loan which was governed by a promissory note and deed of trust). The lenders asserted in their pleadings and argued to the trial court that Brandon's only possible injury was the economic loss of the value of the contract. *See Equistar Chems. L.P. v. Dresser-Rand Co.*, 240 S.W.3d 864, 868 (Tex. 2007) (applying traditional notions of error preservation in considering an argument concerning the economic loss rule). The trial court concluded otherwise and found the lenders liable for conversion. Specifically, the trial court found that the lenders wrongfully withheld excess sale proceeds in the amount of $188,577.86 and escrow funds in the amount of $56,531.34, and that the lenders failed to properly apply the April 2012 payment in the amount of $24,787.41. The trial court found that these actions all amounted to conversion of Brandon's property.

The losses identified by the trial court all arise from the lenders' purported failure to fulfill their contractual obligations concerning proper accounting for and application of

payments, sale proceeds, and escrow funds. These are economic injuries based on the contract between the parties. Brandon presented no evidence of an independent injury outside the economic loss associated with the contract. Therefore, the economic loss rule bars recovery for conversion. *See Chapman*, 445 S.W.3d at 718; *ConocoPhillips Co. v. Koopmann*, 542 S.W.3d 643, 666–67 (Tex. App.—Corpus Christi–Edinburg 2016), *aff'd on other grounds*, 547 S.W.3d 858 (Tex. 2018); *see also Rodriguez v. Wells Fargo Bank, N.A.*, No. 7:18-CV-109, 2019 WL 528719, at *6 (S.D. Tex. Feb. 11, 2019) (concluding that the economic loss rule precluded the plaintiff from recovering in tort where the only loss was the economic injury based on the loan agreement between the parties); *Dhanani v. Giles*, No. 10-07-00144-CV, 2008 WL 2210004, at *4 (Tex. App.—Waco May 28, 2008, pet. denied) (mem. op.) (rejecting conversion claim where the defendant's dominion and control over the plaintiff's property was tantamount to a breach of the governing contract); *Castle Tex. Prod. Ltd. P'ship v. Long Trusts*, 134 S.W.3d 267, 275 (Tex. App.—Tyler 2003, pet. denied) (rejecting conversion claim where the only loss alleged was the economic loss to the subject matter of the contract); *Harrison v. Bass Enters. Prod. Co*., 888 S.W.2d 532, 536 (Tex. App.—Corpus Christi–Edinburg 1994, no writ) (rejecting negligence and negligence per se claims because the plaintiff's only damage was unpaid royalties under a contract). Conducting a de novo review, we hold the trial court erred in implicitly concluding that the economic loss rule did not bar Brandon's conversion claims. *See Marchand*, 83 S.W.3d at 794; *Del Monte*, 403 S.W.3d at 365. We sustain the lenders' first issue.

V. EXEMPLARY DAMAGES

In its sixth issue, the lenders contend that Brandon cannot recover exemplary damages because there is no independent tort to support the award. In his fourth issue, Brandon argues that the exemplary damage award is insufficient.

Our resolution of the lenders' first issue controls our disposition of the parties' exemplary damages issues. When the injury is only the economic loss associated with the contract itself, the action sounds in contract alone. *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors*, 960 S.W.2d 41, 45 (Tex. 1998); *Jim Walter Homes*, 711 S.W.2d at 618. A mere breach of contract cannot support recovery of exemplary damages, even if the contract is intentionally breached. *See Formosa Plastics*, 960 S.W.2d at 45; *Jim Walter Homes*, 711 S.W. at 618; *see also AVCO Corp., Textron Lycoming Reciprocating Engine Div. of AVCO Corp. v. Interstate Sw., Ltd*., 251 S.W.3d 632, 662 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) ("Exemplary damages are not available unless the plaintiff establishes that it sustained actual loss or injury as the result of an underlying tort."); *UMLIC VP LLC v. T & M Sales & Envt'l Sys., Inc.*, 176 S.W.3d 595, 616 (Tex. App.—Corpus Christi–Edinburg 2005, pet. denied) (explaining that absent an independent cause of action in tort the appellees could not recover exemplary damages based on a wrongful foreclosure, even with a finding of malice). Because Brandon did not prove a distinct tortious injury with actual damages, we conclude that the trial court erred in awarding exemplary damages. We sustain the lenders' sixth issue. We overrule Brandon's fourth issue.

VI. BRANDON'S BREACH OF CONTRACT CLAIM

In its second issue, the lenders argue there is legally insufficient evidence supporting the trial court's breach of contract findings. Specifically, the lenders argue that: (1) there is no evidence that the lenders breached the contract; and (2) Midland, in particular, was not a party to the contract.

A. Breach

The essential elements of a breach of contract claim are (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages sustained as a result of the breach. *Schlumberger Ltd. v. Rutherford*, 472 S.W.3d 881, 892 (Tex. App.—Houston [1st Dist.] 2015, no pet.). The lenders argue there is no evidence that the lenders breached any term of the contract with Brandon. Specifically, the lenders argue that "all of the interest, fees, and charges to the loan account were permissible under the terms of the promissory notes and deed of trust."

Brandon's theory at trial was that the lenders breached the contract between the parties by failing to promptly deliver the excess sale proceeds and deducting fees and expenses that were not authorized by the contract. The lenders do not independently challenge findings 21 through 29, which support the trial court's breach of contract award. *See supra* part I.E.

We conclude that there is more than a scintilla of evidence to support these findings. *See City of Keller*, 168 S.W.3d at 810, 822. For instance, the lenders maintained that they were entitled to charge Brandon special servicing and liquidation fees totaling

$61,739.22. While this might represent charges that Wells Fargo agreed to pay Midland, there is no provision in the loan documents requiring Brandon to pay these fees to Wells Fargo. The trial court also found incredible the lenders' explanation for not crediting Brandon's 2012 payment until five years after it was received by Wells Fargo. Finally, the trial court evidently found incredible the lenders' explanation for assessing fees, charges, and attorney's fees months after the notes were paid. The trial court's finding that Brandon was entitled to excess sale proceeds in the amount of $245,109.20 is supported by the lenders' own accounting records which established that this amount was attributable to Brandon's account almost five months after the property was sold and the notes were paid.

We must defer to the trial court as the sole judge of the weight and credibility of the evidence, while presuming that it resolved conflicting evidence in favor of its findings. *See id.* at 819, 821. Affording the trial court proper deference, we conclude that there is more than a scintilla of evidence supporting its breach of contract findings. *See id*. at 822. For the foregoing reasons, we hold that Brandon established his breach of contract claim by legally sufficient evidence.

B. No Contract with Midland

Next, the lenders assert that to the extent the judgment "purport[s] to grant Brandon a recovery against Midland for breach of contract, the judgment must be reversed." The lenders argue that there exists no contract between Brandon and Midland; therefore, Brandon has failed to meet an essential element of his contract claim.

Midland was a party to the Servicing Agreement with Wells Fargo, which obligated

Midland to serve as an agent for Wells Fargo with respect to its obligations on the loan. However, Midland was not a party to the promissory note or deed of trust. *See Conder v. Home Sav. of Am.*, 680 F. Supp. 2d 1168, 1174 (C.D. Cal. 2010) (collecting cases from several jurisdictions for the proposition that a loan servicer is generally not a contractual party to a mortgage); *see also Perron v. JP Morgan Chase Bank, N.A.*, No. 12–CV–01853, 2014 WL 931897, at *4 (S.D. Ind. Mar. 10, 2014) (explaining that contractual privity between the borrower and the holder of a note is not imputed to the loan servicer); *Howard v. First Horizon Home Loan Corp.*, No. 12–CV–05735, 2013 WL 3146792, at *2 (N.D. Cal. June 18, 2013) (same); *Pereira v. Ocwen Loan Servicing, LLC*, No. 11–CV–2672, 2012 WL 1381193, at *3 (E.D.N.Y. Apr.18, 2012) (same); *James v. Litton Loan Servicing, L.P.*, No. 09–CV–147, 2011 WL 59737, at *11 (M.D. Ga. Jan. 4, 2011) (same); *Kehoe v. Aurora Loan Servs. LLC*, No. 10–CV–00256, 2010 WL 4286331, at *8 (D. Nev. Oct. 20, 2010) (same); *Sanders v. Am. Home Mortg. Servicing, Inc.*, No. 04-13-00845-CV, 2015 WL 794494, at *4 (Tex. App.—San Antonio Feb. 25, 2015, no pet.) (mem. op.) (same). Further, as an agent for Wells Fargo, a disclosed principal on the contract, Midland is not liable for breach of contract. *See Hull v. S. Coast Catamarans, L.P.*, 365 S.W.3d 35, 45 (Tex. App.—Houston [1st Dist.] 2011, pet. denied). We conclude there is no evidence of a contract between Brandon and Midland. *See Rutherford*, 472 S.W.3d at 892. Therefore, Brandon's breach of contract claim against Midland is not supported by legally sufficient evidence.[4] *See City of Keller*, 168 S.W.3d at 810.

[4] The fact that there is no contract between Brandon and Midland does not alter our earlier conclusion that Brandon's conversion claim against Midland is barred by the economic loss rule. The economic-loss rule, when applicable, not only bars claims against those in a direct contractual relationship but also precludes tort claims between parties who are not in contractual privity. *See Sharyland Water*

C. Summary

We overrule the lenders' second issue to the extent that it argues there is legally insufficient evidence that Wells Fargo breached its contract with Brandon. However, we sustain that part of the lenders' second issue challenging Brandon's breach of contract claim against Midland.

VII. BRANDON'S DAMAGES

A. Excess Sale Proceeds

In his third issue, Brandon argues that the trial court's actual damages award was insufficient because the excess sale proceeds exceeded the amount found by the trial court. Brandon bore the burden of proof at trial to establish the amount of damages. Therefore, in order to successfully challenge the legal sufficiency of the evidence regarding the trial court's damages calculation, Brandon must demonstrate that the evidence conclusively established all vital facts in support of his requested damages amount. *See Dow Chem. Co.*, 46 S.W.3d at 241; *Doyle*, 370 S.W.3d at 453.

For the reasons we discuss in part VI.A of this opinion, we conclude that there is more than a scintilla of evidence supporting the trial court's conclusion that Brandon suffered actual damages in the amount of $245,109.20. This amount, which was established by the lenders' internal accounting records, represents the excess funds

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Supply Corp. v. City of Alton, 354 S.W.3d 407, 419 (Tex. 2011); *Clark v. PFPP Ltd. P'ship*, 455 S.W.3d 283, 289 (Tex. App.—Dallas 2015, no pet.); *Pugh v. Gen. Terrazzo Supplies, Inc.*, 243 S.W.3d 84, 94 (Tex. App.—Houston [1st Dist.] 2007, pet. denied); *Trans–Gulf Corp. v. Performance Aircraft Servs., Inc.*, 82 S.W.3d 691, 695 (Tex. App.—Eastland 2002, no pet.); *Bass v. City of Dallas*, 34 S.W.3d 1, 8–9 (Tex. App.—Amarillo 2000, no pet.); *Hou–Tex, Inc. v. Landmark Graphics*, 26 S.W.3d 103, 106–07 (Tex. App.—Houston [14th Dist.] 2000, no pet.); *see also Bowman v. CitiMortgage Inc.*, No. 3:14-CV-4036-B, 2015 WL 4867746, at *4 (N.D. Tex. Aug. 12, 2015) (applying the economic loss rule to bar tort claims by borrower against a loan servicer who was not in contractual privity with the borrower).

attributable to Brandon's account five months after the collateral was sold and the notes were paid. Because no additional amount was conclusively established by the evidence, we overrule Brandon's third issue. *See Dow Chem. Co.*, 46 S.W.3d at 241; *Doyle*, 370 S.W.3d at 453.

B. Consequential Damages

In his second issue, Brandon argues there was legally insufficient evidence supporting the trial court's findings that Brandon did not suffer consequential damages. Brandon argues that the evidence establishes that he intended to purchase another investment property using the proceeds from the sale of the collateral, and that he was unable to do so due to the lenders' failure to promptly deliver the funds he was due.

Like his third issue, Brandon bore the burden of proof at trial to establish consequential damages. To successfully challenge the trial court's finding, Brandon must demonstrate that the evidence conclusively established all vital facts in support of his claim for consequential damages. *See Dow Chem. Co.*, 46 S.W.3d at 241; *Doyle*, 370 S.W.3d at 453. The trial court concluded that Brandon "has not suffered compensable damages related to his claimed loss of purchase of the property in Inglewood, California." The trial court further found that Brandon's purchase contract had a thirty-day window for Brandon to secure financing, yet Brandon did not apply for a loan until three months later. The trial court also found that Brandon never re-applied for financing after his loan application was denied due to insufficient cash. These findings, which Brandon does not independently challenge, support the trial court's conclusion that Brandon did not suffer compensable damages relating to his inability to purchase the California property. *See*

AZZ Inc. v. Morgan, 462 S.W.3d 284, 289 (Tex. App.—Fort Worth 2015, no pet.) ("To be recoverable, consequential damages must be foreseeable and directly traceable to the wrongful act and result from it."). Because consequential damages were not conclusively established by the evidence, we overrule Brandon's second issue. *See Dow Chem. Co.*, 46 S.W.3d at 241; *Doyle*, 370 S.W.3d at 453.

VIII. OFFSET

In their fourth issue, the lenders argue that "the trial court's damages award must be reversed because it gives Brandon an impermissible double recovery." Specifically, the lenders maintain that the damages award should be reduced by the amount the lenders paid to Brandon prior to trial. We construe the lenders' argument as challenging the legal sufficiency of the evidence supporting the trial court's implicit finding that the lenders failed to establish its right to an offset.

The right to an offset is an affirmative defense. *Mays v. Bank One, N.A.*, 150 S.W.3d 897, 899 (Tex. App.—Dallas 2004, no pet.). The burden of pleading and proving facts necessary to support an affirmative defense of offset rests on the party making the assertion. *Id*. Although the lenders pleaded offset as an affirmative defense, there is no mention of the defense in the trial court's findings of fact. A party must request findings in support of an affirmative defense to avoid waiver. *See Trelltex, Inc. v. Intecx, LLC*, 494 S.W.3d 781, 785 (Tex. App.—Houston [14th Dist.] 2016, no pet.); *Cooper v. Cochran*, 288 S.W.3d 522, 531 (Tex. App.—Dallas 2009, no pet.*); Alma Invs., Inc. v. Bahia Mar Co-Owners Ass'n*, 999 S.W.2d 820, 822 (Tex. App.—Corpus Christi–Edinburg 1999, pet. denied). If the trial court's findings do not include any of the elements of the defense

asserted, the party must specifically request additional findings relevant to the defense. *See Trelltex*, 494 S.W.3d at 785; *Cochran*, 288 S.W.3d at 531. The lenders requested additional findings of fact and conclusions of law concerning several issues. However, they did not specifically request findings relevant to their offset defense. Therefore, we conclude that the lenders have waived any complaint concerning their affirmative defense of offset. *See Trelltex*, 494 S.W.3d at 785; *Cochran*, 288 S.W.3d at 531. We overrule the lenders' fourth issue.

IX. ATTORNEY'S FEES

In their fifth issue, the lenders argue there is no basis for the trial court's award of attorney's fees. Specifically, the lenders argue that neither entity constitutes "an individual or corporation" as required for recovery of attorney's fees for breach of contract. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 38.001.

Under the "American Rule," "litigants may recover attorney's fees only if specifically provided for by statute or contract." *Epps v. Fowler*, 351 S.W.3d 862, 865 (Tex. 2011); *Alta Mesa Holdings, L.P. v. Ives*, 488 S.W.3d 438, 452 (Tex. App.—Houston [14th Dist.] 2016, pet. denied). The parties agree that Chapter 38 of the Texas Civil Practice and Remedies Code is the sole basis for Brandon's recovery of attorney's fees. *See* TEX. CIV. PRAC. & REM. CODE ANN. ch. 38. Section 38.001 provides that "[a] person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for: . . . (8) an oral or written contract." *Id*. § 38.001(8). The availability of attorney's fees under a particular statute is a question of law for the court. *Holland v. Wal–Mart Stores, Inc.*, 1 S.W.3d 91, 94 (Tex. 1999); *Ives*,

488 S.W.3d at 453.

As a prerequisite to presenting a complaint for appellate review, a party generally must have presented its complaint to the trial court by timely request, objection, or motion with sufficient specificity to make the trial court aware of the complaint. *See* TEX. R. APP. P. 33.1(a); *Gipson-Jelks v. Gipson*, 468 S.W.3d 600, 604 (Tex. App.—Houston [14th Dist.] 2015, no pet.). While a party appealing from a bench trial may raise a complaint regarding the sufficiency of the evidence for the first time on appeal, a complaint that attorney's fees are not recoverable under a statute must be raised in the trial court to preserve error. *See Holland,* 1 S.W.3d at 94; *Gipson*, 468 S.W.3d at 604; *Tex. Dep't of Pub. Safety v. Burrows*, 976 S.W.2d 304, 307 (Tex. App.—Corpus Christi–Edinburg 1998, no pet.); *see also Jimoh v. Nwogo*, No. 01-13-00675-CV, 2014 WL 7335158, at *4 (Tex. App.—Houston [1st Dist.] Dec. 23, 2014, no pet.) (mem. op.).

The lenders never argued in the trial court that Brandon could not recover attorney's fees because neither entity was "an individual or corporation." *See* TEX. CIV. PRAC. & REM. CODE ANN. § 38.001. Therefore, they have not preserved error regarding their complaint that there is no statutory basis for the award. *See* TEX. R. APP. P. 33.1(a); *Holland,* 1 S.W.3d at 94, *Gipson*, 468 S.W.3d at 604; *Burrows*, 976 S.W.2d at 307; *see also Nwogo*, 2014 WL 7335158, at *4.

X. JOINT & SEVERAL LIABILITY AS ALTER EGOS

The trial court found that "in all matters relevant to this lawsuit, Wells Fargo Bank and Midland Loan Services were essentially alter egos of the other." In its third issue, the lenders argue that "[t]he trial court's alter-ego finding must be reversed" because Brandon

did not plead that Midland and Wells Fargo were alter egos and the trial court's findings do not sufficiently establish that the two were alter egos. The lenders further maintain that without such a finding, the trial court's finding that Midland and Wells Fargo were jointly and severally liable also fails. We agree that the trial court's alter-ego finding is not supported by the pleadings.

The trial court's judgment must conform to the pleadings or it is erroneous. TEX. R. CIV. P. 301; *Cunningham v. Parkdale Bank*, 660 S.W.2d 810, 813 (Tex. 1983); *Schlueter v. Carey*, 112 S.W.3d 164, 168 (Tex. App.—Fort Worth 2003, pet. denied). Texas law presumes that separate corporations are distinct entities. *Marchand*, 83 S.W.3d at 798. However, the alter ego doctrine provides a basis for disregarding the corporate fiction. *Wilson v. Davis*, 305 S.W.3d 57, 69 (Tex. App.—Houston [1st Dist.] 2009, no pet.). Nevertheless, "[a]lter ego must be specifically pleaded or it is waived, unless tried by consent." *Richard Nugent & CAO, Inc. v. Estate of Ellickson*, 543 S.W.3d 243, 264 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

Texas follows a fair notice pleading standard, which looks to whether the opposing party can ascertain from the pleadings the nature and basic issues of the controversy and what testimony will be relevant at trial. *See Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 896 (Tex. 2000); *Reaves v. City of Corpus Christi*, 518 S.W.3d 594, 599 (Tex. App.—Corpus Christi–Edinburg 2017, no pet.). "A petition is sufficient if it gives fair and adequate notice of the facts upon which the pleader bases his claim." *Auld*, 34 S.W.3d at 897 (quoting *Roark v. Allen*, 633 S.W.2d 804, 810 (Tex. 1982)). Brandon's pleadings demonstrate that he was alleging an agency relationship between Wells Fargo

and Midland. However, such allegations are insufficient to put the lenders on notice of any intent to seek alter ego liability. *See Ellickson*, 543 S.W.3d at 264. Furthermore, we find no support in the record that the alter ego issue was tried by consent. Because the trial court's alter ego finding is not supported by the pleadings, it is void. *See In re Estate of Gaines*, 262 S.W.3d 50, 60 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

Due to our resolution of the lenders' first issue, we have concluded that the lenders are not liable to Brandon in tort. Further, in the absence of an alter ego finding, joint and several liability has not been established for Brandon's breach of contract action. *See CTTI Priesmeyer, Inc. v. K & O Ltd. P'ship*, 164 S.W.3d 675, 685 (Tex. App.—Austin 2005, no pet.) ("[T]ortfeasors cannot be jointly and severally liable for contract damages and contract defendants are only jointly and severally liable for breaches of contracts to which they are a party or that promise the same performance."), *disavowed on other grounds by Elness Swenson Graham Architects, Inc. v. RLJ II-C Austin Air, LP*, 520 S.W.3d 145 (Tex. App.—Austin 2017, pet. denied); *see also LJ Charter, LLC. v. Air Am. Jet Charter, Inc.*, No. 14-08-00534-CV, 2009 WL 4794242, at *9 (Tex. App.—Houston [14th Dist.] Dec. 15, 2009, pet. denied) (mem. op.). Brandon identifies no other basis for joint and several liability that is supported by the evidence, and, having examined the record, we find no basis that would support joint and several liability. Therefore, we hold that the trial court's joint and several liability conclusion is erroneous. *See Marchand*, 83 S.W.3d at 794. We sustain the lenders' third issue.

XI. CONCLUSION

We reverse the trial court's judgment against Midland in its entirety and render

judgment that Brandon take nothing on his claims against Midland. We reverse the trial court's award of exemplary damages and render judgment that Brandon recover no exemplary damages. We affirm the remainder of the trial court's judgment.

LETICIA HINOJOSA
Justice

Delivered and filed the
28th day of May, 2020.