Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-19-00507-CV

Patricio **HERNANDEZ** d/b/a Grande Garbage Collection Company,
Appellant

v.

County of **ZAPATA**,
Appellee

From the 49th Judicial District Court, Zapata County, Texas
Trial Court No. 9929
Honorable Jose A. Lopez, Judge Presiding

Opinion by: Rebeca C. Martinez, Justice

Sitting: Rebeca C. Martinez, Justice
Irene Rios, Justice
Beth Watkins, Justice

Delivered and Filed: July 8, 2020

AFFIRMED

The County of Zapata ("Zapata") sued Patricio Hernandez d/b/a Grande Garbage Collection Company ("Hernandez") for breach of contract. Zapata filed a traditional motion for summary judgment on its breach of contract claim, which the trial court granted. In four issues, Hernandez contends the trial court erred by (1) denying his motion for leave to file a late summary judgment response; (2) overruling his written objections to Zapata's summary judgment evidence; (3) granting Zapata's summary judgment motion; and (4) awarding Zapata its attorneys' fees. We affirm the trial court's judgment.

I. Background

On September 12, 2011, Zapata and Hernandez entered into a written contract, in which Zapata granted Hernandez an exclusive franchise to provide garbage collection services to Zapata County residents. The contract was for a term of one year, ending on September 30, 2012 and, after that date, was subject to renewal each year for an additional year up to four years. In consideration of the exclusive franchise, Hernandez agreed to pay Zapata a percentage of the sums he collected from Zapata County residents for his garbage collection services. The contract provided:

> 1. from October l, 2011 until September 30, 2012 a sum equal to six percent (6%) of gross receipts received;
>
> 2. from October 1, 2012 until September 30, 2013 a sum equal to seven percent (7%) of gross receipts received;
>
> 3. from October 1, 2013 until September 30, 2014 a sum equal to eight (8%) percent of gross receipts received;
>
> 4. from October 1, 2014 until September 30, 2015 a sum equal to nine percent (9%) of gross receipts received;
>
> 5. from October 1, 2015 until September 30, 2016 a sum equal to 10 percent (10%) of gross receipts received[.]

On July 10, 2017, Zapata sued Hernandez for breach of contract. According to Zapata, Hernandez has failed to pay it a percentage of the total gross receipts for the years 2011 to 2016 as set forth in the contract. Zapata moved for a traditional summary judgment on its breach of contract claim, which the trial court granted. This appeal ensued.

II. Motion for Leave to File a Late Response

In his first issue, Hernandez contends the trial court abused its discretion when it denied his motion for leave to file a late response to Zapata's motion for summary judgment.

STANDARD OF REVIEW & APPLICABLE LAW

A trial court's ruling denying a motion for leave to file a late summary judgment response is reviewed for an abuse of discretion. *Carpenter v. Cimarron Hydrocarbons Corp.*, 98 S.W.3d 682, 686–87 (Tex. 2002). A trial court abuses its discretion when it acts arbitrarily, unreasonably, or without reference to any guiding rules or principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985). "The mere fact that a trial judge may decide a matter within his discretionary authority in a different manner than an appellate judge in a similar circumstance does not demonstrate that an abuse of discretion has occurred." *Id.* at 242.

A party opposing a motion for summary judgment may file a response "not later than seven days prior to the day of" the summary judgment hearing. TEX. R. CIV. P. 166(a)(c). The nonmovant must obtain leave of court to file a response after the deadline. *See id.* A trial court should grant a motion for leave to file a late summary judgment response when the nonmovant "establishes good cause for failing to timely respond by showing that (1) the failure to respond was not intentional or the result of conscious indifference, but the result of accident or mistake, and (2) allowing the late response will occasion no undue delay or otherwise injure the party seeking summary judgment." *Carpenter*, 98 S.W.3d at 688.

DISCUSSION

Zapata's motion for summary judgment was filed on December 20, 2018. The summary judgment hearing was set for February 4, 2019. On January 31, 2019, the trial court granted the parties' agreed motion for continuance, resetting the summary judgment hearing to March 18, 2019. The deadline for filing a summary judgment response was March 11, 2019. *See* TEX. R. CIV. P. 166(a)(c). On March 18, 2019, the day of the summary judgment hearing, Hernandez filed a motion for leave to file a late summary judgment response.

Regarding good cause, the motion for leave provides that Hernandez's counsel:

> mistakenly and accidentally improperly calendared the date for the setting for the Summary Judgment hearing. Specifically, [counsel] was embroiled in another litigation which was ongoing simultaneously as this case. [Counsel] inadvertently confused the cases and mistakenly calendared in the wrong information. Further, scheduling conflicts prevented [counsel] from filing its Response. Additionally, because of the scheduling conflicts, [counsel] mistakenly believed that a previous filing of a Response to Summary Judgment in this very case was the response for this current Motion for Summary Judgment.

Attached to the motion for leave is an unsworn declaration by Hernandez's counsel. The declaration states that Hernandez's failure to timely file his response was not intentional or the result of conscious indifference, but the result of accident or mistake.

On this record, we cannot say that the trial court abused its discretion in denying Hernandez leave to file a late summary judgment response. Hernandez's motion is unsupported by any probative evidence establishing good cause. *See Carpenter*, 98 S.W.3d at 688 (concluding the trial court did not abuse its discretion by denying a motion for leave to file a late response when the motion offered no explanation for its failure to timely respond and was not accompanied by any supporting affidavits or other evidence). The only evidence Hernandez presented to the trial court to support his motion for leave is counsel's unsworn declaration that the failure to timely respond was not intentional or the result of conscious indifference, but the result of accident or mistake. This statement is "conclusory and do[es] not give the facts as to 'accident or mistake.'" *See El Dorado Motors, Inc. v. Koch*, 168 S.W.3d 360, 369–70 (Tex. App.—Dallas 2005, no pet.); *see also Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 84 (Tex. 1992) ("[C]onclusory allegations are insufficient."). While counsel argued at the summary judgment hearing that the failure to timely respond was because counsel confused two of their cases and, therefore, incorrectly calendared the date of the summary judgment hearing, "the trial court was entitled to overlook these unsworn statements in determining whether to grant or deny leave." *See Duchene*

v. Hernandez, 535 S.W.3d 251, 256–57 (Tex. App.—El Paso 2017, no pet.) (citing *Carpenter*, 98 S.W.3d at 688); *Marquez v. Providence Mem'l Hosp.*, 57 S.W.3d 585, 593 (Tex. App.—El Paso 2001, pet. denied) ("Normally, an attorney's statements must be under oath to be considered evidence." (citing *Banda v. Garcia*, 955 S.W.2d 270, 272 (Tex. 1997))).

In considering the motion's contents, as an initial matter, we note the motion is unverified, and the motion itself is not evidence. *See Ramey v. Bank of Am., N.A.*, No. 14-11-01109-CV, 2013 WL 84922, at *2 (Tex. App.—Houston [14th Dist.] Jan. 8, 2013, no pet.) (mem. op.). Moreover, the motion fails to describe what scheduling conflicts existed and fails to provide any explanation as to why and how these scheduling conflicts resulted both in counsel's failure to timely respond and in counsel's mistaken belief that a previously filed response was the current response to Zapata's motion for summary judgment. *Cf. AutoSource Dallas, LLC v. Addison Aeronautics, LLC*, No. 05-16-00838-CV, 2017 WL 2492787, at *4 (Tex. App.—Dallas June 9, 2017, no pet.) ("A statement that a delay in responding was due to the attorney's busy schedule, without more, is not sufficient to show good cause for permitting the late filing of a response to a summary-judgment motion."). Likewise, although the motion provides that counsel incorrectly calendared the date of the summary judgment hearing because counsel confused two of their cases, this statement alone does not explain how and why that calendaring error caused counsel to miss the filing deadline. *See Carpenter*, 98 S.W.3d at 688.

The lack of factual support and explanation regarding counsel's alleged mistakes, "leav[es] the trial court without any means of determining whether an excusable accident or mistake had in fact occurred." *See Duchene*, 535 S.W.3d at 257. Based on this record, we cannot conclude the trial court abused its discretion in finding that Hernandez failed to establish good cause for failing to timely respond by showing that his failure to respond was not intentional or the result of conscious indifference, but the result of accident or mistake. *See Carpenter*, 98 S.W.3d at 688.

III. OBJECTIONS TO ZAPATA'S SUMMARY JUDGMENT EVIDENCE

At the summary judgment hearing, Hernandez submitted written objections to an affidavit by Joe Rathmell, Zapata County Judge; an affidavit by Triunfo Gonzalez, Zapata County Auditor; and bank statements from Hernandez's business bank account. The trial court considered and overruled Hernandez's written objections to this evidence. On appeal, Hernandez contends the trial court erred in overruling his objections to Zapata's improper summary judgment evidence.

STANDARD OF REVIEW

A trial court's decision to admit or exclude summary judgment evidence is reviewed for an abuse of discretion. *Owens–Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998). A trial court abuses its discretion when it acts arbitrarily, unreasonably, or without reference to any guiding rules or principles. *Downer*, 701 S.W.2d at 241–42. We "must uphold the trial court's evidentiary ruling if there is any legitimate basis for the ruling." *Owens–Corning Fiberglas Corp.*, 972 S.W.2d at 43. Additionally, "we will not reverse a trial court for an erroneous evidentiary ruling unless the error probably caused the rendition of an improper judgment." *Id.*

DISCUSSION

a. OBJECTIONS TO JUDGE RATHMELL'S AFFIDAVIT

Hernandez objected to Judge Rathmell's statements that Zapata County "performed all relevant terms, conditions, and covenants required under the terms of the Contract" and that Hernandez "accepted all the rights and benefits under the Contract." Hernandez contends these assertions are conclusory statements, unsupported by underlying facts and, thus, should have been excluded from Judge Rathmell's affidavit. We conclude the trial court did not abuse its discretion in overruling Hernandez's objection to these statements.

Texas Rule of Civil Procedure 166a(f) provides that affidavits supporting or opposing a motion for summary judgment "shall be made on personal knowledge, shall set forth such facts as

would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." TEX. R. CIV. P. 166a(f). "A conclusory statement is one that does not provide the underlying facts to support the conclusion. Conclusory statements in affidavits are not proper as summary judgment proof if there are no facts to support the conclusions." *Rizkallah v. Conner*, 952 S.W.2d 580, 587 (Tex. App.—Houston [1st Dist.] 1997, no writ.). However, "logical conclusions based on stated underlying facts within the affidavit or attachments thereto are not improper conclusions and are probative." *Rodriguez v. Citibank, N.A.*, No. 04-12-00777-CV, 2013 WL 4682194, at *3 (Tex. App.—San Antonio Aug. 30, 2013, no pet.) (mem. op.).

Here, Judge Rathmell's statements are sufficiently supported by underlying facts to show that Zapata County performed under the contract and that Hernandez accepted the rights and benefits under the contract. Judge Rathmell averred that, as County Judge of Zapata County, he is the chief officer of the county, represents the county both ceremonially and contractually, and presides over a five-member Commissioner's Court, which has budgetary and administrative authority over county government operations. He stated that, on September 12, 2011, Hernandez and Zapata entered into a written contract, in which Hernandez was granted an exclusive franchise to provide garbage collection services to the residents of Zapata County and exclusive use of Zapata's streets, roads, alleys, and rights-of-ways for Hernandez to carry out his garbage collection services. Zapata also permitted Hernandez to charge Zapata County residents for his garbage collection services. In consideration of the exclusive franchise granted to Hernandez, Hernandez agreed to pay Zapata each year a percentage of the sums he collected from the residents of Zapata County. The contract was attached as an exhibit to Judge Rathmell's affidavit. Judge Rathmell also referenced a cease and desist letter, dated May 13, 2013, that was authored by Hernandez's attorney and sent to a company called "Southern Sanitation." The letter was attached to the

affidavit. In the letter, Hernandez demanded that Southern Sanitation cease and desist all operations in Zapata County because Hernandez "has and continues to operate in Zapata County under an exclusive franchise agreement with the County of Zapata to provide all refuse and garbage services for the County." Judge Rathmell further averred that, from 2011 to 2016, Hernandez was the exclusive garbage service provider to the residents of Zapata County, that Hernandez used Zapata County's streets, alleys, and rights-of-ways to carry out his services, and that Hernandez collected payment for his garbage collection services from Zapata County residents. We conclude that the challenged statements are not conclusory, but are logical conclusions based on the underlying facts stated within the affidavit and the attachments thereto. *See Rodriguez v. Citibank, N.A.*, 2013 WL 4682194, at *3.

b. OBJECTIONS TO GONZALEZ'S AFFIDAVIT

Hernandez contends Zapata did not properly designate Gonzalez as an expert witness; thus, Gonzalez's testimony on Zapata's damages should have been excluded by the trial court. *See Reid Rd. Mun. Util. Dist. No. 2 v. Speedy Stop Food Stores, Ltd.*, 337 S.W.3d 846, 851 (Tex. 2011) (providing that a witness who gives expert testimony must first be properly disclosed and designated as an expert witness). Zapata argues Gonzalez was competent as a lay witness to testify about Zapata's damages. We conclude the trial court did not abuse its discretion in overruling Gonzalez's objection regarding Zapata's alleged failure to properly designate Gonzalez as an expert witness.

The Texas Rules of Evidence allow opinion testimony from lay witnesses and from expert witnesses. *See* TEX. R. EVID. 701, 702. Under Rule 702 of the Texas Rules of Evidence, a witness testifies as an expert witness when the witness's opinion is substantively based on his specialized knowledge, skill, experience, training, or education in a particular subject. *Reid Rd. Mun. Util. Dist. No. 2*, 337 S.W.3d at 850. However, "[a] witness may have special knowledge, skill,

experience, training, or education in a particular subject, but testify only to matters based on personal perception and opinions." *Id.* If that is the case, "the witness's testimony is not expert testimony for purposes of Rule 702, and the witness need not be designated or identified as such." *Id.* at 851.

A lay witness may testify to opinions rationally based on that witness's perception and helpful to a clear understanding of the witness's testimony or the determination of a fact in issue. TEX. R. EVID. 701. "The personal experience and knowledge of a lay witness may establish that the witness is capable, without qualification as an expert, of expressing an opinion on a subject outside the realm of common knowledge." *Health Care Serv. Corp. v. E. Tex. Med. Ctr.*, 495 S.W.3d 333, 338 (Tex. App.—Tyler 2016, no pet.). For instance, "Texas courts regularly allow business owners and company officers to testify as lay witnesses, based on knowledge derived from their positions and any other relevant experience." *Id.*

Here, Gonzalez averred that the facts stated in his affidavit are within his personal knowledge, that he is authorized to represent Zapata County for purposes of the affidavit, and that he has served as Zapata County's auditor since 2011. As county auditor, his primary duties are to oversee financial record-keeping for the county and to assure that all expenditures comply with the county budget. He has continuous access to all county books and financial records and conducts a detailed review of all county financial operations. He has general oversight of all books and records of all county officials and is charged with strictly enforcing laws governing county finances. He further averred that, after reviewing bank statements from Hernandez's business bank account that provide the total gross receipts collected by Hernandez for the applicable years, reviewing county records to determine what payments Hernandez had made, and the corresponding franchise fee percentage owed by Hernandez pursuant to the contract, that the amount Hernandez owed Zapata was $361,439.07.

Gonzalez's affidavit shows that his damages opinion was derived from his position as Zapata County's auditor and from his knowledge of Zapata County's finances and financial records, rather than his specialized knowledge, skill, experience, training, or education. Because Gonzalez's testimony was based on his personal knowledge and experience in handling Zapata County's finances as the county auditor, we conclude that Gonzalez testified as a lay witness. *See, e.g.*, *Health Care Serv. Corp.*, 495 S.W.3d at 338 (concluding that testimony from the hospital's chief financial officer and the chairman of the hospital's board of directors was lay opinion testimony because it concerned their knowledge of the hospital's operations and financial condition rather than their specialized knowledge, skill, experience, training, or education). As such, Zapata was not required to designate Gonzalez as an expert witness. *See Reid Rd. Mun. Util. Dist. No. 2*, 337 S.W.3d at 851.

Hernandez also contends the trial court erred in overruling his objection to Gonzalez's statements that Zapata County "performed all relevant terms, conditions, and covenants required under the terms of the Contract" and that Hernandez "accepted all the rights and benefits under the Contract." Hernandez contends these statements are conclusory and, thus, should have been excluded. We conclude the trial court did not abuse its discretion in overruling Hernandez's objection to these statements because the facts and evidence set forth in Gonzalez's affidavit mirror Judge Rathmell's affidavit, and, for the same reasons set forth above, these statements are not conclusory. *See Rodriguez v. Citibank, N.A.*, 2013 WL 4682194, at *3.

Hernandez contends the trial court erred in overruling his objection to the statement in Gonzalez's affidavit that "Defendant did not pay Plaintiff the percentages . . . of the gross receipts for the years 2011 through 2016." Hernandez asserts Gonzalez failed to establish his personal knowledge regarding what percentages were owed under the contract. We conclude the trial court did not abuse its discretion in overruling Gonzalez's objection to this statement.

Affidavits offered in support of a summary judgment motion must be based on personal knowledge. TEX. R. CIV. P. 166a(f). Further, the affidavit must show how the affiant obtained personal knowledge of the facts in the affidavit. *See Radio Station KSCS v. Jennings*, 750 S.W.2d 760, 761–62 (Tex. 1988). Here, Gonzalez's affidavit affirmatively sets out that he has personal knowledge of the facts stated in the affidavit, and that such facts are true and correct. Gonzalez also stated that he has held the position of county auditor since 2011; that he has access to and oversees the county's and county officials' financial records; that he reviews all county financial operations; and that he enforces laws governing the county's finances. "The requirement of personal knowledge is satisfied when an affiant identifies the position he holds and describes his job responsibilities so that one can reasonably assume he would be particularly situated to have personal knowledge of the facts within his affidavit." *Rodriguez*, 2013 WL 4682194, at *2. Gonzalez's assertions regarding his position as county auditor and corresponding job responsibilities are sufficient to demonstrate his personal knowledge, and the basis thereof, regarding the debt owed to Zapata County under the contract with Hernandez. *See, e.g.*, *Miller v. Raytheon Aircraft Co.*, 229 S.W.3d 358, 366 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (holding affiant established personal knowledge through his position as the vice president of finance); *Bosque Asset Corp. v. Greenberg*, 19 S.W.3d 514, 519 (Tex. App.—Eastland 2000, pet. denied) ("Salmon's employment as a program manager with the FDIC, in connection with his affidavit, furnished a basis for finding that he had personal knowledge of the statement in question."); *Jackson T. Fulgham Co. v. Stewart Title Guar. Co.*, 649 S.W.2d 128, 130 (Tex. App.—Dallas 1983, writ ref'd n.r.e.) ("The unchallenged averment that Kirkland is the vice-president and agent of Stewart Title Guaranty shows how affiant learned or knew of the facts and thus satisfies the [personal knowledge] requirement.").

Finally, Hernandez contends the trial court erred in overruling his objection to Gonzalez's assertion that he "reviewed the County records to determine what payments Defendant made, if any." Gonzalez averred Hernandez paid Zapata $37,353.37 in franchise fees during the first year of the contract. Because these county records were not attached to Gonzalez's affidavit, Hernandez argues the payment amount derived from these county records is based on hearsay and in contravention of Texas Rule of Civil Procedure 166a(f). *See* TEX. R. CIV. P. 166a(f) (requiring that certified or sworn copies of all records or papers referred to in a supporting or opposing affidavit "shall be attached thereto or served therewith").

Even assuming the trial court erred in admitting the challenged statement, we conclude that any such error was harmless. *See Owens–Corning Fiberglas Corp.*, 972 S.W.2d at 43 ("[W]e will not reverse a trial court for an erroneous evidentiary ruling unless the error probably caused the rendition of an improper judgment."). Error in the admission of evidence is harmless if the challenged evidence is merely cumulative of other properly admitted evidence. *See Mancorp, Inc. v. Culpepper*, 802 S.W.2d 226, 230 (Tex. 1990). Zapata offered Hernandez's responses to its requests for admissions as summary judgment evidence. *See Willowbrook Foods, Inc. v. Grinnell Corp.*, 147 S.W.3d 492, 502 (Tex. App.—San Antonio 2004, pet. denied) ("Deemed admissions are competent summary judgment evidence."). In response to a request for admission, Hernandez admitted that the total amount he had paid Zapata County in franchise fees was $37,353.37. "Any matter established by way of a request for admissions is conclusively established as to the party making the admission, unless on motion, it is withdrawn or amended with the permission of the court." *Id.* at 502–03. Because Zapata presented unchallenged evidence conclusively establishing that Hernandez paid Zapata County $37,353.37 in franchise fees, Gonzalez's testimony regarding this amount was entirely cumulative; therefore, any error, if any, in admitting Gonzalez's challenged statement was harmless. *See Mancorp, Inc. v. Culpepper*, 802 S.W.2d at 230.

c. OBJECTIONS TO BANK STATEMENTS

As summary judgment evidence, Zapata presented Hernandez's business bank account statements to show the total gross receipts Hernandez collected each year from 2011 to 2016. Hernandez argues that the bank statements and testimony relating to the bank statements should have been excluded because the bank statements are inadmissible hearsay. We conclude the trial court did not abuse its discretion in admitting the bank statements into evidence.

Hearsay is defined as an out-of-court statement that a party offers into evidence to prove the truth of the matter asserted. TEX. R. EVID. 801(d). However, Texas Rule of Evidence 801(e)(2) provides that a statement by an opposing party is not hearsay if the statement is offered against the opposing party and "is one the party manifested that it adopted or believed to be true." *Id.* R. 801(e)(2)(B). Here, in response to requests for admissions, Hernandez admitted that he produced the bank statements to Zapata and that the bank statements attached to Zapata's motion for summary judgment were his. By producing the bank statements and by adopting the bank statements as his own, Hernandez manifested an adoption or belief in their truth. *See id.*; *see also Reid Rd. Mun. Util. Dist. No. 2*, 337 S.W.3d at 856 ("[W]here a party has used a document made by a third party in such way as amounts to an approval of its contents, such statement may be received against him as an admission by adoption." (internal quotations omitted)). Therefore, the bank statements are not hearsay and were admissible as statements by a party opponent. *See* TEX. R. EVID. 801(e)(2); *see also Fetter v. Brown*, No. 10-13-00392-CV, 2014 WL 5094080, at *5 (Tex. App.—Waco Oct. 9, 2014, pet. denied) (mem. op.) (concluding bank statements constituted statements by a party opponent where appellant testified that he produced the bank statements to appellees in discovery); *In re A.J.J.*, No. 2-04-265-CV, 2005 WL 914493, at *5 (Tex. App.—Fort Worth Apr. 21, 2005, no pet.) (mem. op.), *disapproved of in part on other grounds by Iliff v. Iliff*, 339 S.W.3d 74, 83 n.8 (Tex. 2011).

IV. ORDER GRANTING ZAPATA'S SUMMARY JUDGMENT MOTION

Having concluded the trial court did not abuse its discretion in admitting the challenged evidence, we now consider whether the trial court erred in granting Zapata's motion for summary judgment. Hernandez argues Zapata's summary judgment evidence did not establish that it was entitled to judgment as a matter of law on its breach of contract claim. We disagree.

STANDARD OF REVIEW & APPLICABLE LAW

We review a trial court's order granting a summary judgment motion de novo. *Traveler's Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). The party moving for a traditional summary judgment has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). "Summary judgments must stand on their own merits." *Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999). "Accordingly, on appeal, the nonmovant need not have answered or responded to the motion to contend that the movant's summary judgment proof is insufficient as a matter of law to support summary judgment." *Id.* When reviewing a summary judgment, we take all evidence favorable to the nonmovant as true and indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Id.*

To prevail on a breach of contract claim, Zapata must prove (1) the existence of a valid contract; (2) that it performed under the contract; (3) that Hernandez breached the contract; and (4) that Zapata suffered damages as a result of Hernandez's breach. *See Frost Nat'l Bank v. Burge*, 29 S.W.3d 580, 593 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

DISCUSSION

The evidence is sufficient to conclusively establish the existence of a valid contract and that Zapata performed under the contract. The written contract between Zapata and Hernandez was admitted as summary judgment evidence. The contract was for a term of one year, ending on

September 30, 2012 and, after that date, was subject to one-year renewals by Zapata for up to four years. Under the contract, Zapata granted Hernandez an exclusive franchise to provide garbage collection services to the residents of Zapata County and granted Hernandez exclusive use of its streets, roads, alleys, and rights-of-ways for Hernandez to carry out his garbage collection services. Zapata also granted Hernandez the right to charge Zapata County residents for his garbage collection services. In accordance with Zapata's guarantees to Hernandez under the contract, it is undisputed that from 2011 to 2016, Hernandez was the exclusive garbage service provider to the residents of Zapata County, Hernandez used Zapata County's streets, alleys, and rights-of-ways to carry out his garbage collection services, and Hernandez collected payment for his garbage collection services from Zapata County residents. As further evidence of an existing contract, in a cease and desist letter Hernandez sent to a competitor company in 2013, he acknowledged the existence of the contract and affirmatively used it as the basis for his demand. *Cf. Hay v. Citibank (S. D.) N.A.*, No. 14-04-01131-CV, 2006 WL 2620089, at *3 (Tex. App.—Houston [14th Dist.] Sept. 14, 2006, no pet.) (op. on reh'g) (finding the parties' written agreement and the parties' conduct demonstrated the existence of a contract).

The evidence is also sufficient to conclusively establish that Hernandez breached the contract. Under the contract, Hernandez agreed to pay Zapata a percentage of his total gross receipts for each year of the contract. Aside from the $37,353.37 that Hernandez paid during the first year of the contract, it is undisputed that Hernandez did not pay Zapata the contracted percentages of the total gross receipts for the years 2011 to 2016. The evidence also clearly demonstrates Zapata suffered damages as a result of Hernandez's breach. According to Gonzalez's affidavit, he calculated the total amount owed to Zapata by first determining the total gross receipts collected by Hernandez for the years 2011 to 2016, then by multiplying those amounts by the corresponding franchise fee percentage set out in the contract. Based on these

calculations, the uncontroverted evidence shows the total amount owed to Zapata was $361,439.07.[1]

Because Zapata conclusively established each element of its breach of contract claim, it was entitled to judgment as a matter of law. Accordingly, the trial court did not err in granting Zapata's motion for summary judgment.

V. ATTORNEYS' FEES

In his final issue, Hernandez challenges the sufficiency of the evidence in support of the trial court's attorneys' fees award. Hernandez also contends the trial court's appellate attorneys' fees award must be reformed because the award is not contingent upon a successful appeal.

STANDARD OF REVIEW & APPLICABLE LAW

We review a trial court's award of attorneys' fees for an abuse of discretion. *Lancer Corp. v. Murillo*, 909 S.W.2d 122, 125–26 (Tex. App.—San Antonio 1995, no writ). A trial court abuses its discretion when it acts arbitrarily, unreasonably, or without reference to any guiding rules or principles. *Id.* at 126.

[1] Gonzalez's affidavit included the following table:

Time Period	Franchise Royalty %	Total Gross Receipts	Franchise Fee Calculated	Franchise Fee Paid	Balance of Franchise Fee Owed
Oct 2011–Sept 2012	6%	$892,165.36	$53,529.92	$37,353.37	$16,176.55
Oct 2012–Sept 2013	7%	$1,000,699.74	$70,048.98	$0	$70,048.98
Oct 2013–Sept 2014	8%	$1,001,549.63	$80,123.97	$0	$80,123.97
Oct 2014–Sept 2015	9%	$1,017,516.65	$91,576.50	$0	$91,576.50
Oct 2015–Sept 2016	10%	$1,035,130.68	$103,513.07	$0	$103,513.07
TOTAL		$4,947,062.06	$398,792.44	$37,353.37	$361,439.07

Here, the trial court awarded attorneys' fees under chapter 38 of the Texas Civil Practice and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 38.001. Section 38.001 provides that the prevailing party in a suit on an oral or written contract may recover its reasonable attorney's fees. *See id.* § 38.001(8). The party seeking to recover its attorney's fees from the opposing party "must prove that the requested fees are both reasonable and necessary." *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 489 (Tex. 2019). However, in proceedings before the court, chapter 38 of the Texas Civil Practice and Remedies Code permits the trial court to take "judicial notice of the usual and customary fees and of the contents of the case file, presume that the usual and customary charges for the work performed are reasonable, and set the fees based on such judicial notice without receiving further evidence." *Scott Pelley P.C. v. Wynne*, 578 S.W.3d 694, 705 (Tex. App.—Dallas 2019, no pet.) (citing TEX. CIV. PRAC. & REM. CODE ANN. §§ 38.003–.004). The presumption that the usual and customary attorney's fees are reasonable may be rebutted. *Rohrmoos Venture*, 578 S.W.3d at 490 n.9 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 38.003).

DISCUSSION

Here, the trial court's order provides that the trial court "examined the file, took [j]udicial notice of the usual and customary attorney[s'] fees," and determined that $50,000 in trial attorneys' fees and $30,000 in appellate attorneys' fees were reasonable and necessary. Judicial notice of the usual and customary fees constitutes some evidence in support of the attorneys' fees award. *See Wynne*, 578 S.W.3d at 705. Further, Hernandez did not file a controverting affidavit or present other evidence rebutting the presumption that the usual and customary attorneys' fees are reasonable. *See Vaughn v. Tex. Emp't Comm'n*, 792 S.W.2d 139, 144 (Tex. App.—Houston [1st Dist.] 1990, no writ) (concluding no further evidence was required to establish the reasonableness of the attorneys' fees where the trial court "took judicial notice of the usual and customary

attorney's fees, as well as the contents of the case file, in making its award to appellees' attorneys" and nothing in the record rebutted that presumption).

Additionally, the record included an affidavit by Zapata's counsel. "An attorney's affidavit constitutes expert testimony that will support an award of attorney's fees in a summary judgment proceeding." *Roth v. JPMorgan Chase Bank, N.A.*, 439 S.W.3d 508, 514 (Tex. App.—El Paso 2014, no pet.). In his affidavit, counsel averred that he has practiced law for over twenty-three years and that he was familiar with the rates and expenses charged in breach of contract cases, as well as the rates and expenses charged in civil cases in Webb and Zapata County. Counsel attached to his affidavit his resume, which set forth his experience and expertise in this area of law within this geographic area, as well as his experience in handling appeals. Counsel testified that he charged $200 per hour and his co-counsel charged $175 per hour. He also testified that his retention by Zapata precluded his co-counsel and him from accepting other employment. Counsel stated he performed the following legal services for Zapata:

> drafting pleadings; engaging in discovery including taking and defending depositions and preparing for said depositions as well; conferring with opposing counsel, co-counsel, client representatives and witnesses; drafting summary judgment papers; performing legal research, including reading applicable case law; drafting affidavits and organizing summary judgment evidence; drafting the jury charge; travel time from his office to Zapata County to attend client conferences, depositions, mediation, and hearings; and preparing for and attending hearings.

His co-counsel performed the following legal services: "drafting pleadings; engaging in discovery including taking and defending depositions and preparing for said depositions as well; conferring with opposing counsel, co-counsel, client representatives and witnesses." Counsel stated the claim made the basis of the suit was presented to Hernandez by letter dated October 7, 2016, and payment for that claim has not been tendered.

In his opinion, counsel stated the reasonable and necessary attorneys' fees incurred by Zapata were $50,000 for representing Zapata in trial and through entry of judgment; $15,000 for

representing Zapata on appeal to the Fourth Court of Appeals; and $15,000 for representing Zapata on appeal to the Texas Supreme Court. Counsel averred that attorneys' fees that are less than 1/7 of the total recovery in a case such as this one constitutes reasonable attorneys' fees. In his opinion, the requested fees were usual and customary for a suit "such as this one in this area for the same or similar services for an attorney with [his] experience, reputation, and ability, considering the type of case, the amount in controversy, the time limitations imposed, the number of defenses and efforts to avoid payment by [Hernandez], and the results obtained."

In light of the judicial notice taken by the trial court pursuant to section 38.004 and the uncontroverted evidence presented in counsel's supporting affidavit, we conclude there was sufficient evidence to support the attorneys' fees awarded by the trial court. Accordingly, the trial court did not abuse its discretion in awarding Zapata its requested attorneys' fees.

Finally, Hernandez contends the trial court's appellate attorneys' fees award should be reformed because the award is not contingent upon a successful appeal. In its order, the trial court awarded $15,000 in the event the case was appealed to the Fourth Court of Appeals and $15,000 in the event the case was appealed to the Texas Supreme Court. "It is implicit in a court's judgment . . . that the award of appellate attorney fees is conditioned on a successful appeal." *Spiller v. Spiller*, 901 S.W.2d 553, 560 (Tex. App.—San Antonio 1995, writ denied). Thus, "[i]t is not necessary to modify the judgment to make this [condition] explicit." *Burns v. Dimmit County*, No. 04-16-00593-CV, 2019 WL 2110710, at *27 (Tex. App.—San Antonio May 15, 2019, pet. denied) (mem. op.).

VI. CONCLUSION

The trial court's judgment is affirmed.

Rebeca C. Martinez, Justice