Vacate, in part, Affirm, in part, Dismiss, in part, and Reverse and Remand, in part, and Opinion Filed May 22, 2015.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-13-00506-CV

FITNESS EVOLUTION, L.P., JOSEPH S. MULROY, AND GLENEAGLES SHOPPING CENTER PLANO, TEXAS, L.P., THROUGH ITS ASSIGNEE, JOSEPH S. MULROY, Appellants
V.
HEADHUNTER FITNESS, L.L.C., JEFF KAYE, NICHOLAS L. TURNER, MICHAEL KITTLESON, JEFF WITTENBERG, BILL BAKER, WILLOW BEND FITNESS CLUB, KAYE/BASSMAN INTERNATIONAL CORPORATION, SAGEBRUSH PARTNERS, LTD., VAUGHN R. HEADY, JR., MARK W. LEWIS, JAMES DUGGAN, AND DUGGAN REALTY ADVISORS, L.L.C., Appellees

On Appeal from the 429th Judicial District Court
Collin County, Texas
Trial Court Cause No. 429-00529-2010

OPINION

Before Justices Bridges, Lang, and Evans
Opinion by Justice Lang

This case involves a complicated web of claims, counterclaims, and motions for summary judgment respecting space in a shopping center leased by a company that operated a fitness club and the alleged liability of those involved in securing that lease once the lease default had occurred. Appeals and cross-appeals were perfected as to sixteen of the original twenty-one parties from a trial court judgment that incorporated several interlocutory summary judgment orders, resulting in all parties taking nothing on the claims and counterclaims.

The claims we address below, to name a few, range from anticipatory repudiation of the lease,[1] tortious interference with an existing contract, rescission, fraud, fraudulent inducement, and misrepresentation. While the trial court's final judgment disposes of all claims on the merits, in order to evaluate the issues raised on appeal, we must address standing, which is a component of subject-matter jurisdiction, procedural issues, and then consider the merits of the various motions for summary judgment. Accordingly, we recount the extensive evidence in the record[2] and necessarily address the numerous arguments made by each party as to each issue.

All of the original twenty-one parties in the trial court filed several motions for summary judgment, addressing scores of claims, counterclaims, third-party claims,[3] and defenses. In the following preliminary paragraphs, we identify the parties and the particular issues raised by the sixteen parties on appeal.

First, we identify the appellants and the arguments they raise on appeal. Fitness Evolution, L.P., Joseph S. Mulroy, individually, and Gleneagles Shopping Center Plano, Texas, L.P., through its assignee, Joseph S. Mulroy (collectively the Fitness Evolution Group) appeal the trial court's final judgment in favor of Kaye/Bassman International Corporation (Kaye/Bassman), Sagebrush Partners, Ltd., Vaughn R. Heady, Jr., and Mark Lewis (collectively the Sagebrush Group), James Duggan and Duggan Realty Advisors, L.L.C., (collectively the Duggan Group), and Headhunter Fitness, L.L.C., Jeff Kaye, Nicholas L. Turner, Michael Kittleson, Jeff Wittenberg, Bill Baker, and Willow Bend Fitness Club (collectively the Headhunter Group) which incorporated several interlocutory orders.[4] The Fitness Evolution

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[1] *Infra* note 13.

[2] The record on appeal is comprised of approximately 8,000 pages.

[3] *Infra* note 16.

[4] Specifically, the Fitness Evolution Group appeals the following interlocutory orders: (1) the September 20, 2011 motion for no-evidence summary judgment of Kaye/Bassman, (2) the November 7, 2012 motion for traditional summary judgment of the Sagebrush Group, (3) the

Group raises three issues on appeal arguing the trial court erred when it granted summary judgment in favor of: (1) the Sagebrush Group; (2) the Headhunter Group; and (3) the Duggan Group. The Sagebrush Group, the Headhunter Group, and the Duggan Group each filed a separate brief on appeal.[5] Also, in the Fitness Evolution Group's notice of appeal, they list Kaye/Bassman as a party to the appeal. However, the Fitness Evolution Group raises no issues relating to their claims against Kaye/Bassman in their brief on appeal and Kaye/Bassman did not file a brief on appeal.

Next, we address the cross-appellants and the issue they raise on cross-appeal. The Headhunter Group and Kaye/Bassman filed a notice of cross-appeal. In the cross-appeal, the Headhunter Group raised one issue contending the trial court was in error when it rendered judgment concluding the Headhunter Group's counterclaims were barred by the settlement agreement with mutual releases and ordered a take-nothing judgment on all of the Headhunter Group's counterclaims. Although it filed a notice of cross-appeal, Kaye/Bassman did not file a brief on cross-appeal.

Our decision in this case is to vacate, in part, affirm, in part, dismiss, in part, and reverse and remand to the trial court, in part. In so doing, we make eight conclusions. First, we conclude Mulroy, individually, does not have standing to bring his tortious interference with an existing contract claims against the Sagebrush Group and the Duggan Group, or to bring his anticipatory repudiation of the lease claims against the Headhunter Group. Second, we conclude the Fitness Evolution Group has not shown the trial court erred when it granted Kaye/Bassman's September 20, 2011 motion for no-evidence summary judgment. Third, we conclude Mulroy,

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March 9, 2012 amended motion for summary judgment of the Duggan Group, and (4) the October 30, 2012 motion for traditional summary judgment on the remaining claims filed by the Headhunter Group on their affirmative defense of res judicata.

[5] The Sagebrush Group filed a thirty page brief that responded only to issue one of this appeal. The Headhunter Group filed a fifty page brief that responded only to issue two and raised one issue on cross-appeal. Also, the Headhunter Group filed a seven page reply brief. The Duggan Group filed a thirty-two page brief that responded only to issue three.

individually, has not shown the trial court erred when it granted Baker's portion of the October 20, 2012 motion for traditional summary judgment on the remaining claims. Fourth, we conclude the trial court erred when it granted the Sagebrush Group's November 7, 2012 motion for traditional summary judgment on the tortious interference with an existing contract claims of Fitness Evolution and Mulroy, as assignee of Gleneagles's claims. Fifth, we conclude the trial court erred when it granted the Duggan Group's March 9, 2012 amended motion for summary judgment and ordered a take-nothing judgment on the tortious interference with an existing contract claims of Fitness Evolution and Mulroy, as assignee of Gleneagles's claims. Sixth, we conclude the trial court erred when it granted the Headhunter Group's October 30, 2012 motion for traditional summary judgment on the remaining claims on their affirmative defense of res judicata. Seventh, we conclude the trial court erred when it concluded the Headhunter Group's counterclaims were barred by the December 4, 2009 settlement agreement with mutual releases and ordered a take-nothing judgment on all of the Headhunter Group's counterclaims. The final and eighth conclusion is, although Kaye/Bassman filed a notice of appeal, Kaye/Bassman has failed to file a brief or raise any issues in its cross-appeal of the trial court's final judgment.

Because we concluded Mulroy, individually, has no standing to bring his tortious interference with an existing contract claims against the Sagebrush Group and the Duggan Group, and anticipatory repudiation of the lease claims against the Headhunter Group, the portion of the trial court's final judgment ordering a take-nothing judgment on those claims is vacated and those claims are dismissed for want of jurisdiction. In addition, because Kaye/Bassman failed to file a brief or raise any issues in its cross-appeal, the portion of the cross-appeal brought by Kaye/Bassman is dismissed. Accordingly, as stated above, the trial court's final judgment is vacated, in part, affirmed, in part, dismissed, in part, and reversed and remanded, in part.

I. FACTUAL AND PROCEDURAL BACKGROUND

The factual and procedural background of this case is complicated and must be described at length in order to properly address the issues presented on appeal. Accordingly, we separate our description of the factual and procedural histories and describe them in detail for the most part in chronological sequence. The factual background in this opinion is merely a recitation of some of the statements and evidence contained in the extensive record on appeal.[6]

A. Factual Background

On July 20, 2001, Fitness Evolution leased space in the commercial shopping center known as Gleneagles Plaza from the owner, DDC/Gleneagles #1, L.P., for the purpose of operating a health and fitness club, spa, and sports training facility. The lease term was for ten years and the base rent was scheduled to increase during that period. Duggan signed the lease as president of the Duggan Development Corporation, which was the general partner of DDC/Gleneagles #1. Mulroy guaranteed the lease. Fitness Evolution's general partner was 588 Management, L.L.C., which held a one percent interest in the company. Sam Mulory, who is Mulroy's son, was a limited and managing partner with sixty-nine percent interest in Fitness Evolution, and Mulroy was a limited partner with a thirty percent interest in Fitness Evolution.

On July 1, 2005, DDC/Gleneagles #1 conveyed its interest in the lease to Gleneagles. After this conveyance, Duggan was no longer involved with the Gleneagles Plaza, except that he continued to conduct his personal exercise at Fitness Evolution. Duggan is the manager and a broker for Duggan Realty.

On December 1, 2006, Fitness Evolution, Sam Mulroy, and Headhunter Fitness, an entity created by Kaye, Turner, Kittleson, Wittenberg, and Baker, executed an asset purchase

[6] In light of the disposition remanding this case to the trial court, we want to assure the parties the recitation of the factual background does not constitute findings of fact by this Court. *See Brown v. Aetna Cas. & Sur. Co.*, 366 S.W.2d 673, 677 (Tex. App.—Dallas 1963, writ ref'd n.r.e.).

agreement. Turner signed the agreement on behalf of Headhunter Fitness. Pursuant to the asset purchase agreement, Headhunter Fitness purchased all of the physical assets, memberships, and the general operations of Fitness Evolution. Kaye, Turner, Kittleson, Wittenberg, and Baker were also shareholders of Kaye/Bassman, which owns other fitness clubs in the area.

On December 4, 2006, Fitness Evolution assigned its lease at the Gleneagles Plaza to Headhunter Fitness. Mulroy signed a guaranty in favor of Gleneagles, confirming that he remained fully liable for the lease. Kaye, Turner, Kittleson, and Wittenberg signed a separate lease guaranty in favor of Gleneagles in connection with the assignment. This guaranty limited their liability to three month's rent if the lease was not in default during the first twelve months of the assignment. Baker did not sign a guaranty.

Headhunter Fitness operated the fitness club under the name Next Level Fitness. However, Headhunter Fitness experienced financial difficulties. As a result, on August 23, 2007, Fitness Evolution filed its original petition in the 296th Judicial District Court, Collin County, Texas, (2007 Collin County Lawsuit) alleging claims for breach of the asset purchase agreement and business disparagement, and seeking a declaratory judgment and punitive damages against Headhunter Fitness and Kittleson, its managing partner. On October 31, 2007, Headhunter Fitness filed counterclaims against Fitness Evolution and third-party claims against Sam Mulroy, alleging common law fraud, fraudulent inducement, negligent misrepresentation, and breach of the asset purchase agreement. Mulroy was not a party to the 2007 Collin County Lawsuit.

In 2008, Headhunter Fitness unsuccessfully attempted to negotiate a rent reduction and lease extension with Gleneagles. Then, in the summer of 2008, Headhunter Fitness hired real estate broker, Tom Sutherland of GVA Cawley n/k/a CASE Commercial Real Estate Partners (collectively the Sutherland Group), to explore the possibility of Headhunter Fitness relocating. As a result, Headhunter Fitness received a lease proposal from the Greenway Investment

Company, which Headhunter Fitness showed to Gleneagles. In response, on January 21, 2009, legal counsel for Gleneagles sent a letter to Greenway advising, in part, that Greenway should stop interfering with its existing contractual relationships or Gleneagles will pursue legal action and Headhunter Fitness was attempting to use the Greenway lease proposal as leverage to force Gleneagles to renegotiate their existing lease. As a result, Kaye notified Sutherland that "the deal was dead."

Sagebrush Partners was formed as a single-asset entity to develop the building known as Parkway Centre V, which is located approximately a half mile from the Gleneagles Plaza. Heady is the president of BK Parkway Corporation, which is the general partner of Sagebrush Partners, and he owns Randy Heady & Company Realtors, Inc. Also, Heady has been continuously licensed as a real estate broker since 1992. In February 2009, Lewis, who had a business relationship with Randy Heady & Co. and was the independent leasing agent for Parkway Centre V, mentioned to Duggan that he was looking for tenants, including a fitness gym. Duggan told Lewis he had a potential gym prospect, Next Level Fitness.

On February 13, 2009, "Heady Investments" sent Duggan a first letter of intent or initial proposal for Next Level Fitness to lease space in the Parkway Centre V building. At that point, Kaye brought in Sutherland, Headhunter Fitness's original broker. Then, Duggan obtained the proposals from Sagebrush Partners, and Sutherland reviewed and advised Kaye on the terms of the proposals.

Shortly after the February 13, 2009 lease proposal was sent, Lewis, Sutherland, Duggan, and Kaye met at the offices of Kaye/Bassman to discuss the proposal. During that meeting, Kaye told them "it was a completely separate entity" and "don't worry about the current lease."

Kaye did not like the proposal so Heady, Lewis, and Duggan worked on amending the proposal.[7] The negotiations resulted in Sagebrush Partners offering nine months of abated rent during the first twelve months of the lease, the purchase of several memberships at the fitness club, finishing out of the space, and no requirement of a guaranty. During the negotiations, Kaye stated the lease would be with a new entity, not Next Level Fitness, and Kaye, Duggan, Sutherland, Heady, and Lewis, discussed the legal issues Headhunter Fitness might face. Also, in February 2009, Dave Greene, the general manager for Next Level Fitness, met with Lewis and looked at the Parkway Centre V building.

At the end of May 2009, Kaye contacted Gleneagles regarding Headhunter Fitness's financial problems and the possibility of renegotiating the lease or an early termination agreement. During those negotiations, Kaye indicated Mulroy did not have the means to honor his obligations under the guaranty. As a result, Gleneagles requested full financial disclosure from Mulroy. After reviewing Mulroy's financial information, Gleneagles decided not to enter into an early termination agreement and stated it would take legal action to enforce its rights under the lease, the guaranties, and the assignment of the lease, if necessary.

In spring 2009, after the proposed lease termination agreement with Gleneagles failed, Headhunter Fitness received bids for its assets from potential purchasers. Also, in late June or early July 2009, Kaye informed Turner, Kittleson, Wittenberg, and Baker, that he was starting a new fitness club, Willow Bend Fitness, and offered to purchase Headhunter Fitness's assets for $250,000.[8]

[7] According to Lewis, he drafted a series of approximately nine proposals for Duggan and Sutherland, with the ninth one dated April 26, 2009. According to Duggan, there were approximately twenty proposals.

[8] During his deposition, Baker stated the first time Kaye made the offer for Willow Bend Fitness to purchase the assets of Headhunter Fitness was two months before the actual purchase on November 21, 2009.

On July 16, 2009, Lewis sent the architect, Greene, and Kaye an e-mail stating "Can you change the name to Willow Bend Fitness, delete anything that says Next Level Fitness, we have never heard of those guys. I would like to use this exhibit to attach to the lease." On July 20, 2009, Sagebrush Partners executed a lease agreement with Willow Bend Fitness. Although Duggan did not have a contract with any of the parties, Sutherland gave Duggan half of the broker's commission.

Interspersed in this sequence is a critical event in the 2007 Collin County Lawsuit. On October 30, 2009, Fitness Evolution, Sam Mulroy, and Headhunter Fitness entered into an agreement to settle the lawsuit pursuant to Texas Rule of Civil Procedure 11 in the 2007 Collin County Lawsuit. Kittleson was not a party to this rule 11 agreement.

After paying its rent for November 2009 on time and in full, on November 21, 2009, Headhunter Fitness sold all of its assets to Willow Bend Fitness for $250,255.21. On November 23, 2009, Headhunter Fitness sent a letter via hand delivery and certified mail to Gleneagles and Fitness Evolution, stating Headhunter Fitness "has ceased doing business in the [Gleneagles Plaza] as of November 21, 2009" and intends to deliver the premises to Gleneagles in compliance with the lease before the end of November 2009. The assets of Headhunter Fitness that had been sold to Willow Bend Fitness were moved from Gleneagles Plaza to Parkway Centre V.[9]

Willow Bend Fitness began operating as a fitness club in late November 2009. On November 23, 2009, Kaye sent an e-mail to Sutherland and Duggan with the subject line, "The eagle has landed!" that also stated "Willow Bend Fitness is open!" On November 24, 2009, Sutherland responded to Kaye's e-mail stating, "That is great news. . . . I hope [Gleneagles's management company] eats a big one!"

[9] There was also evidence that the assets were moved out during the middle of the night.

On December 1, 2009, counsel for Headhunter Fitness in the 2007 Collin County Lawsuit advised counsel for Fitness Evolution that Headhunter Fitness went "insolvent" after they entered into the rule 11 agreement, economic conditions prevented the partners from being able to fund any additional capital call needed to pay the rent, and the only remaining option was to sell what little assets it had to pay off the secured creditor. On December 3, 2009, Kaye returned Headhunter Fitness's keys to Gleneagles's management company.

On December 4, 2009, Fitness Evolution, Sam Mulroy, Headhunter Fitness, and Kittleson executed a settlement agreement with mutual releases in the 2007 Collin County Lawsuit. Kaye executed the settlement agreement with mutual releases on behalf of Headhunter Fitness. The settlement agreement with mutual releases contained language releasing the following:

> causes of action of whatever nature that exist or may exist up to and including the date of [the settlement agreement with mutual releases], including, but not limited to, the date the [settlement agreement with mutual releases] is executed, including those relating to the allegations, claims, and causes of action giving rise to the [2007 Collin County Lawsuit].

On December 16, 2009, Gleneagles sent Headhunter Fitness a letter, noting that Headhunter Fitness had vacated the premises and delivered the keys to Gleneagles, and stating, in part, the abandonment of the premises prior to the expiration of the lease does not release Headhunter Fitness of its liability under the terms of the lease. Also, on December 16, 2009, the 296th Judicial District Court signed an agreed order in the 2007 Collin County Lawsuit that dismissed with prejudice (1) all of Fitness Evolution's claims against Headhunter Fitness and Kittleson, and (2) all of Headhunter Fitness's counterclaims against Fitness Evolution and third-party claims against Sam Mulroy.

On February 5, 2010, Gleneagles filed its verified complaint in the Supreme Court of the State of New York, Monroe County (the New York Lawsuit),[10] based on the lease of the Gleneagles Plaza, against Fitness Evolution, Mulroy, individually, Headhunter Fitness, Kaye, Turner, Kittleson, and Wittenberg. On April 2, 2010, Gleneagles filed its "Notice of Partial Discontinuance," seeking to nonsuit their claims against Kaye, Turner, Kittleson, and Wittenberg. Then, on September 30, 2010, the clerk entered a no-answer default judgment against Headhunter Fitness, awarding Gleneagles $120,670.83 plus costs.[11] Meanwhile, on September 28, 2010, Turner, Kittleson, Wittenberg, and Baker executed a stock liquidation agreement with Kaye/Bassman.

B. Procedural Background

The procedural background of this case is complicated as it involves jurisdictional challenges, claims, affirmative defenses, counterclaims, numerous motions and cross-motions for summary judgment, and several interlocutory orders, all of which overlap chronologically. Accordingly, we describe the procedural history of this case in terms of the claims asserted by the respective parties, instead of following a strict chronological order.

1. Parties, Claims, Counterclaims, and Affirmative Defenses in the Trial Court

The original petition in this case was filed by Fitness Evolution and Mulroy, individually, on February 5, 2010, against Headhunter Fitness, Kaye, Turner, Kittleson, Wittenberg, Gleneagles, Willow Bend Fitness, and Sagebrush Partners. After that, several amended

[10] A provision in the assignment and amendment of the Gleneagles lease provides for jurisdiction in New York.

[11] *See* N.Y. CIV. PRAC. LAW & R. § 3215(a) ("When a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him. If the plaintiff's claim is for a sum certain or for a sum which can by computation be made certain, application may be made to the clerk within one year after the default. The clerk, upon submission of the requisite proof, shall enter judgment for the amount demanded in the complaint or stated in the notice served pursuant to subdivision (b) of rule 305, plus costs and interest. Upon entering a judgment against less than all defendants, the clerk shall also enter an order severing the action as to them. When a plaintiff has failed to proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the defendant may make application to the clerk within one year after the default and the clerk, upon submission of the requisite proof, shall enter judgment for costs. Where the case is not one in which the clerk can enter judgment, the plaintiff shall apply to the court for judgment.")

petitions, answers, and counterclaims were filed. Those various pleadings added and dropped parties, claims, and affirmative defenses. Many motions for summary judgment were filed pursuant to those pleadings. Those motions for summary judgment referenced, attached, and incorporated different evidence. When this suit commenced, Gleneagles was a defendant. However, after assigning its claims to Mulroy, Mulroy, as assignee of Gleneagles's claims, claimed status as a plaintiff.[12] In addition, some of the parties settled their disputes or dismissed their claims. In this subsection of the opinion, we refer only to the pleadings in effect on January 10, 2013, when the final judgment was orally rendered.

a. The Fitness Evolution Group's Claims

On September 16, 2011, Fitness Evolution and Mulroy, individually and as assignee of Gleneagles's claims, filed their eighth amended petition, the final and live petition in this case. In their eighth amended petition, they asserted at least seventeen claims.[13]

[12] On April 1, 2011, Fitness Evolution and Mulroy, individually, and Gleneagles filed a joint motion to dismiss. In that motion, Fitness Evolution and Mulroy, individually, stated they no longer wished to pursue their claims against Gleneagles and requested dismissal of their claims with prejudice. Also, Gleneagles stated it no longer wished to pursue its counterclaims against Fitness Evolution, Mulroy, individually, and third-party claims against 588 Management, and requested dismissal of its claims without prejudice. On April 4, 2011, the trial court signed an order dismissing (1) with prejudice the claims brought by Fitness Evolution and Mulroy, individually, against Gleneagles, and (2) without prejudice Gleneagles's counterclaims against Fitness Evolution and Mulroy, individually, and third-party claims against 588 Management.

After the rendition of the dismissal order, Gleneagles assigned its claims to Mulroy. Then, in the Fitness Evolution Group's eighth amended petition, Mulory, as assignee of Gleneagles's claims, brought the assigned claims against the Headhunter Group and Kaye/Bassman, the Sagebrush Group and Randy Heady & Co., the Duggan Group, and the Sutherland Group in this case. As a result, Gleneagles changed it status from defendant to plaintiff.

[13] The following claims were asserted in the eighth amended petition:

Claims	Plaintiffs	Defendants
Tortious Interference with an Existing Contract	Fitness Evolution and Mulroy, individually and as assignee of Gleneagles's claims	Sagebrush Partners, Heady, Lewis, Duggan, Duggan Realty, Sutherland, and CASE Commercial
Anticipatory Repudiation of the Lease (In the parties' pleadings, they refer to this as a claim for "breach of lease" or "breach of contract." However, the substance of the Fitness Evolution Group's eighth amended petition shows that it is more accurately identified as a claim for anticipatory repudiation of the lease because they state, "[s]uch actions . . . constitute anticipatory repudiation of the [] lease.")	Mulroy, as assignee of Gleneagles's claims	Kaye, Turner, Kittleson, Wittenberg, and Baker
Anticipatory Repudiation of the Lease (see prior notation)	Fitness Evolution and Mulroy, individually	Headhunter Fitness, Kaye, Turner, Kittleson, Wittenberg, and Baker

On September 26, 2011, the Duggan Group filed their second verified amended answer and affirmative defenses. The Duggan Group generally denied the allegations and asserted thirty-six affirmative defenses, including the following that are pertinent to our analysis: (a) the Fitness Evolution Group is not entitled to recover in the capacity in which they sue; (b) Mulroy, individually, lacks "standing" to assert his claims;[14] (c) Mulroy, as assignee of Gleneagles's

Anticipatory Repudiation of Mulroy's Personal Guaranty (In the parties' pleadings, they refer to this as a claim for "breach of guaranty". However, the substance of the Fitness Evolution Group's eighth amended petition shows that it is more accurately identified as a claim for anticipatory repudiation of the guaranty because they state, "[s]uch actions . . . constitute anticipatory repudiation of the personal guarantee [sic].")	Mulroy, as assignee of Glenagles's claims	Kaye, Turner, Kittleson, Wittenberg, and Baker
Civil Conspiracy	Fitness Evolution and Mulroy, individually and as assignee of Gleneagles's claims	Headhunter Fitness, Kaye, Turner, Kittleson, Wittenberg, Baker, Willow Bend Fitness, Sagebrush Partners, Duggan, Duggan Realty, Sutherland, CASE Commercial, Heady, Lewis, Randy Heady & Co., and Kaye/Bassman
Indemnity	Fitness Evolution and Mulroy, individually	Headhunter Fitness
Contribution	Fitness Evolution and Mulroy, individually and as assignee of Gleneagles's claims	Kaye, Turner, Kittleson, Wittenberg, and Baker
Fraudulent Transfer of Assets	Fitness Evolution and Mulroy, individually and as assignee of Gleneagles's claims	Headhunter Fitness, Kaye, Turner, Kittleson, Wittenberg, and Baker
Vicarious Liability for Fraudulent Transfer of Assets	Fitness Evolution and Mulroy, individually and as assignee of Gleneagles's claims	Sagebrush Partners, Lewis, Heady, Randy Heady & Co., Duggan, Duggan Realty, and Sutherland
Pierce Corporate Veil	Fitness Evolution and Mulroy, individually and as assignee of Gleneagles's claims	Headhunter Fitness, Willow Bend Fitness, and Kaye/Bassman
Texas Real Estate Commission Violations	Fitness Evolution and Mulroy, individually and as assignee of Gleneagles's claims	Lewis and Heady
Breach of Fiduciary Duty	Mulroy, individually and as assignee of Gleneagles's claims	Headhunter Fitness, Kaye, Turner, Kittleson, Wittenberg, Baker, and Willow Bend Fitness
Breach of Fiduciary Duty	Mulroy, individually and as assignee of Gleneagles's claims	Sagebrush Partners, Lewis, Heady, Randy Heady & Co., Duggan, Duggan Realty, and Sutherland
Constructive Trust	Fitness Evolution and Mulroy, individually and as assignee of Gleneagles's claims	Willow Bend Fitness
Fraudulent Inducement	Fitness Evolution	Headhunter Fitness
Negligent Misrepresentation	Fitness Evolution	Headhunter Fitness
Rescission of December 4, 2009 Settlement Agreement with Mutual Releases	Fitness Evolution	Headhunter Fitness

[14] Standing, a component of a court's subject-matter jurisdiction, cannot be conceded or waived and therefore, it is not an affirmative defense. *See Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993) (standing component of court's subject-matter jurisdiction); *In re E.C.*, No. 02-13-00413-CV, 2014 WL 3891641, *1 (Tex. App.—Fort Worth Aug. 7, 2014, no pet.) (mem. op.) (standing cannot be conferred by consent or waiver); *see also Compass Bank v. MFP Fin. Servs., Inc.*, 152 S.W.3d 844, 851 (Tex. App.—Dallas 2005, pet. denied) (affirmative defenses not pleaded or tried by consent are waived). *But see, e.g., Rentfro v. Cavazos*, No. 04-10-00617-CV, 2012 WL 566364, *7 (Tex. App.—San Antonio Sept. 21, 2012, pet. denied) (mem. op.); *Fallis v. River Mountain Prop. Owners Ass'n, Inc.*, No. 04-09-00256-CV, 2010 WL 2679997, *11 (Tex. App.—San Antonio Sept. 1, 2010, no pet.) (mem. op.) (concluding appellee "failed to establish affirmative defense of lack of standing . . . therefore the trial court erred in granting [appellee's] motion for partial summary judgment."); *Faulkner v. Bost*, 137 S.W.3d 254, 259 (Tex. App.—Tyler 2004, no pet.) ("Lack of standing is an affirmative defense.").

claims, lacks "standing" to assert his claims; (d) Gleneagles lacks "standing" to assert its claims; (e) the Fitness Evolution Group's tortious interference with an existing contract claim is barred pursuant to Texas law, citing the law related to the affirmative defense of agency.

On September 30, 2011, in a single pleading, the Headhunter Group and Kaye/Bassman filed their eighth amended answer and affirmative defenses with the Headhunter Group's eighth amended counterclaims. The Headhunter Group and Kaye/Bassman generally denied the allegations and asserted forty-seven affirmative defenses, including the following that are pertinent to our analysis: (a) res judicata or collateral estoppel; (b) Mulroy, individually and as assignee of Gleneagles's claims, lacks "standing"; (c) limitation or bar of liability and damages due to judgment or settlements in a prior New York judgment in a lawsuit styled "*Gleneagles Shopping Center Plano, Tx. Limited Partnership v. Fitness Evolution, L.P. et al.*, Index No. 2010-1596, in the State of New York Supreme Court, County of Monroe"; (d) Fitness Evolution lacks "standing" to assert claims as an assignee of Gleneagles; (e) Gleneagles lacks "standing" to assert claims for civil conspiracy, fraudulent transfer, breach of fiduciary duty, and imposition of a constructive trust or the trust fund doctrine; and (f) Mulroy and Gleneagles lack "standing" to pursue a derivative action on behalf of Headhunter Fitness.

On April 23, 2012, the Sagebrush Group and Randy Heady & Co. filed their second amended answer and affirmative defenses. The Sagebrush Group and Randy Heady & Co. generally denied the allegations and asserted twenty-four affirmative defenses, including the following that are pertinent to our analysis: (a) waiver, ratification, and estoppel; (b) the Fitness Evolution Group is without "standing" to assert their claims against the Sagebrush Group for tortious interference with an existing contract; (c) the Fitness Evolution Group cannot recover from the Sagebrush Group because any interference was justified or excused; (d) res judicata and

collateral estoppel; and (e) the Fitness Evolution Group's tortious interference with an existing contract claim is barred by Texas law, citing the law related to the affirmative defense of agency.

b. The Headhunter Group's Counterclaims

On September 30, 2011, the Headhunter Group filed their eighth amended counterclaims, asserting eleven counterclaims[15] against Fitness Evolution, Mulroy, individually, and Sam Mulroy.[16] The motions for summary judgment address all of these counterclaims.

On September 26, 2011, Fitness Evolution and Mulroy, individually, filed their fourth amended answer to the counterclaims.[17] Fitness Evolution and Mulroy, individually, generally denied the allegations in the counterclaims and asserted seven affirmative defenses: (1) "doctrine of unclean hands"; (2) failure of consideration of the assignment, assumption and amendment of

[15] The following counterclaims were asserted in the Headhunter Group's eighth amended counterclaims:

Counterclaims	Counter-Plaintiffs	Counter-Defendants
Fraud as to the Asset Purchase Agreement	Headhunter Fitness	Fitness Evolution, Mulroy, individually, and Sam Mulroy
Fraudulent Inducement as to the Asset Purchase Agreement	Headhunter Fitness	Fitness Evolution, Mulroy, individually, and Sam Mulroy
Negligent Misrepresentation as to the Asset Purchase Agreement	Headhunter Fitness	Fitness Evolution, Mulroy, individually, and Sam Mulroy
Breach of Asset Purchase Agreement	Headhunter Fitness	Fitness Evolution, Mulroy, individually, and Sam Mulroy
Contribution and Indemnity	Headhunter Fitness, Kaye, Turner, Wittenberg, and Baker	Fitness Evolution, Mulroy, individually, and Sam Mulroy
Breach of the Settlement Agreement	Headhunter Fitness, Kaye, Turner, Kittleson, Wittenberg, Baker and Willow Bend Fitness	Fitness Evolution, and Mulroy, individually
Fraud as to the Settlement Agreement	Headhunter Fitness, Kaye, Turner, Kittleson, Wittenberg, Baker, and Willow Bend Fitness	Fitness Evolution, Mulroy, individually, and Sam Mulroy
Fraudulent Inducement as to the Settlement Agreement	Headhunter Fitness, Kaye, Turner, Kittleson, Wittenberg, Baker, and Willow Bend Fitness	Fitness Evolution, Mulroy, individually, and Sam Mulroy
Negligent Misrepresentation as to the Settlement Agreement	Headhunter Fitness, Kaye, Turner, Kittleson, Wittenberg, Baker, and Willow Bend Fitness	Fitness Evolution, Mulroy, individually, and Sam Mulroy
Promissory Estoppel	Headhunter Fitness, Kaye, Turner, Kittleson, Wittenberg, Baker, and Willow Bend Fitness	Fitness Evolution, Mulroy, individually, and Sam Mulroy
Pierce Corporate Veil	Headhunter Fitness, Kaye, Turner, Kittleson, Wittenberg, Baker, and Willow Bend Fitness	Fitness Evolution

[16] Sam Mulroy is not a party to this appeal. Further, although the Headhunter Group appears to characterize Sam Mulory as a counter-defendant in the trial court and never listed him in the style of the case, he was a third-party defendant. *See* TEX. R. CIV. P. 38.

[17] The fourth amended answer of Fitness Evolution and Mulroy, individually, was filed in response to the Headhunter Group and Kaye/Bassman's seventh amended counterclaims. The clerk's record does not contain an amended answer filed after the Headhunter Group and Kaye/Bassman filed their eighth amended counterclaims.

the lease; (3) estoppel; (4) fraud; (5) ambiguity of the December 4, 2009 settlement agreement with mutual releases; (6) res judicata; and (7) collateral estoppel.[18]

2. Motions for Summary Judgment on the Fitness Evolution Group's Claims

In the trial court, the defendants formed themselves into four groups for purposes of filing their motions for summary judgment, i.e., (1) the Sagebrush Group and Randy Heady & Co., (2) the Duggan Group, (3) the Headhunter Group and Kaye/Bassman, and (4) the Sutherland Group. All of the parties filed several motions for summary judgment on the claims and counter-claims, culminating in the final judgment where all parties take nothing.[19]

Further, although no motions for reconsideration of the orders disposing of the motions for summary judgment were filed, the final judgment states that, during the pre-trial conference on January 10, 2012, the trial court "heard additional arguments on the Headhunter [Group's] motion for summary judgment on the affirmative defense[s] of res judicata and release of 12/4/09." At the conclusion of the pre-trial conference, the trial court orally pronounced, "So I'm going to grant the res judicata summary judgment issue, which I think will do away with the [Fitness Evolution Group's] claims," but later, during the pre-trial conference, added, "As to [Kaye, Turner, Kittleson, and Wittenberg] and the guarantee [sic], there couldn't be res judicata as to [Kaye, Turner, Kittleson, and Wittenberg] because they were non-suited. There couldn't be res judicata." On January 16, 2013, the trial court signed the final judgment, which states, "The [trial court] grants the Headhunter [Group's] motion on the res judicata argument, ruling that the

[18] The fourth amended answer to the counterclaims of Fitness Evolution and Mulroy, individually, actually lists eight affirmative defenses, but fraud is listed twice.

[19] The trial court's final judgment incorporated the following interlocutory orders: (1) the May 11, 2012 interlocutory order, granting Randy Heady & Co.'s portion of the February 3, 2012 motion for traditional summary judgment; (2) the April 17, 2012 interlocutory order granting the traditional portion of the Duggan Group's March 9, 2012 amended motion for summary judgment; (3) the December 9, 2011 interlocutory order granting Kaye/Bassman's portion of the September 20, 2011 motion for summary judgment; and (4) the April 17, 2012 agreed order granting the request of the Fitness Evolution Group to dismiss with prejudice all of their claims against the Sutherland Group. However, the trial court's final judgment does not expressly incorporate its December 14, 2012 order that granted the Sagebrush Group's November 7, 2012 motion for traditional summary judgment.

lawsuit filed by Gleneagles Shopping Center Plano, Texas[,] Limited Partnership[,] in 2010 in New York State bars all of [the Fitness Evolution Group's] claims."[20]

Also, like the rendition of summary judgment on res judicata grounds against the Fitness Evolution Group on its claims, although no motions for reconsideration of orders disposing of the motions for summary judgment on the Headhunter Group's counterclaims were filed, during the pre-trial conference on January 10, 2012, the trial court reconsidered its previous rulings on the Headhunter Group's counterclaims. At the conclusion of the hearing, the trial court orally pronounced the following: "So . . . I'm also going to do away with [the Headhunter Group's] [counter]claims as well." On January 16, 2013, the trial court signed the final judgment and without referencing any motions for summary judgment or reconsideration, stated "The [Trial] Court also considered the Headhunter [Group's] remaining counterclaims and rendered judgment that they are barred by the Settlement Agreement with Mutual Releases signed on December 4, 2009, thus the Headhunter [Group] take[s] nothing against [Fitness Evolution, Mulroy, individually, and Sam Mulroy]."[21]

3. Parties, Claims, and Counterclaims on Appeal

In their brief on appeal, the Fitness Evolution Group expressly states that, as to their claims against the Sagebrush Group and the Duggan Group, they appeal only the portion of the trial court's final judgment granting summary judgment against them on their claims for tortious interference with an existing contract. Also, on appeal, the Fitness Evolution Group expressly states that they are not appealing the trial court's granting of summary judgment against them

[20] This superseded the trial court's September 24, 2012 order, which granted, in part, the March 7, 2012 motion for no-evidence summary judgment of Fitness Evolution and Mulroy, individually, concluding there was no evidence to support the Headhunter Group's affirmative defense of res judicata as to Mulroy, individually. It also superseded the trial court's January 2, 2013 order, which denied in its entirety the Headhunter Group's October 30, 2012 motion for traditional summary judgment on the remaining claims.

[21] This superseded the trial court's September 29, 2012 order, which granted the March 7, 2012 motion for partial traditional summary judgment filed by Mulroy, individually.

with regard to these claims against the Headhunter Group and Kaye/Bassman: civil conspiracy, fraudulent transfer of assets, and veil piercing against Headhunter Fitness and Kaye/Bassman.

Accordingly, for the purpose of determining whether the trial court erred when it granted summary judgment, the only claims before us on appeal are (1) the Fitness Evolution Group's claims for tortious interference with an existing contract against the Sagebrush Group; (2) the Fitness Evolution Group's claims for tortious interference with an existing contract against the Duggan Group; and (3) the Headhunter Group's affirmative defense that res judicata barred the following claims: (a) anticipatory repudiation of the lease asserted by Mulroy, as assignee of Gleneagles's claims, against Kaye, Turner, Kittleson, Wittenberg, and Baker, (b) anticipatory repudiation of the lease asserted by Fitness Evolution and Mulroy, individually, against Headhunter Fitness, Kaye, Turner, Kittleson, Wittenberg, and Baker, (c) anticipatory repudiation of Mulroy's personal guaranty brought by Mulroy, as assignee of Gleneagles's claims, against Kaye, Turner, Kittleson, Wittenberg, and Baker, (d) indemnity brought by Fitness Evolution and Mulroy, individually, against Headhunter Fitness, (e) contribution brought by the Fitness Evolution Group against Kay, Turner, Kittleson, Wittenberg, and Baker, (f) the Fitness Evolution Group's claim to pierce the corporate veil of Willow Bend Fitness, (g) breach of fiduciary duty asserted by Mulroy, individually and as assignee of Gleneagles's claims, against the Headhunter Group, (h) the Fitness Evolution Group's claims seeking a constructive trust against Willow Bend Fitness, and (i) fraudulent inducement, negligent misrepresentation, and rescission of the December 4, 2009 settlement agreement with mutual releases brought by Fitness Evolution against Headhunter Fitness.

All of the Headhunter Group's counterclaims against Fitness Evolution and Mulroy, individually, are before us on cross-appeal.

II. THE FITNESS EVOLUTION GROUP'S "STANDING"

In issues one and three on appeal, the Fitness Evolution Group argues, in part, the trial court erred when it granted the Sagebrush Group's November 7, 2012 motion for traditional summary judgment and the Duggan Group's March 9, 2012 amended motion for summary judgment on the affirmative defense of standing. All of the parties arguments relating to standing on appeal stem from the Fitness Evolution Group's arguments in issues one and three. However, standing is not an affirmative defense.[22] Rather, it is a component of a court's subject-matter jurisdiction. *See Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993); *Nauslar v. Coors Brewing Co.*, 170 S.W.3d 242, 248 (Tex. App.—Dallas 2005, no pet.). Further, the denial of a claim on the merits is different from the dismissal of a claim for want of jurisdiction. *See DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 307 (Tex. 2008).

Nevertheless, throughout this case, in the trial court,[23] on appeal, or both, the Headhunter Group,[24] the Sagebrush Group, and the Duggan Group have alleged that the Fitness Evolution Group lacks "standing" to bring their claims. We are obligated to review these "standing" arguments because standing is a component of a court's subject-matter jurisdiction. *See Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851 (Tex. 2000); *Tex. Air Control Bd.*, 852 S.W.2d at 446. However, we note that all of the parties on appeal did not distinguish the separate, but similar, doctrines of standing and capacity, often using only the term "standing" to argue both doctrines. We will determine the substance of the parties' challenges to standing and capacity, and address them accordingly.

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[22] *Supra* note 14.

[23] Without expressly addressing standing, the trial court in this case granted and denied numerous motions for summary judgment on the merits. *See DaimlerChrysler*, 252 S.W.3d at 307 (denial of claim on merits different from dismissal for want of jurisdiction).

[24] The Headhunter Group does not argue the issue of standing on appeal or cross-appeal. Also, at trial, Kaye/Bassman joined the Headhunter Group's pleadings. However, as previously noted, they did not file a brief on appeal or cross-appeal.

A. Standard of Review

The question of standing is a legal question regarding subject-matter jurisdiction, so an appellate court conducts a de novo review of a trial court's ruling. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998); *Mazon Assocs., Inc. v. Comerica Bank*, 195 S.W.3d 800, 803 (Tex. App.—Dallas 2006, no pet.); *Nauslar*, 170 S.W.3d at 256. If the record presents a standing issue the parties have failed to raise, courts must do so sua sponte. *Fin. Comm'n of Tex. v. Norwood*, 418 S.W.3d 566, 591 (Tex. 2013); *Tex. Air Control Bd.*, 852 S.W.2d at 445–46. When an appellate court reviews the standing of a party sua sponte, it must construe the petition in favor of the party, and if necessary, review the entire record to determine if any evidence supports standing. *Tex. Air Control Bd.*, 852 S.W.2d at 446.

Likewise, issues of capacity to sue, a similar, but distinct doctrine that does not implicate a court's subject-matter jurisdiction, are also questions of law, which are reviewed de novo. *See generally, Byrd v. Estate of Nelms*, 154 S.W.3d 149, 160–61 (Tex. App.—Waco 2004, pet denied) (citing *Mayhew*, 964 S.W.2d at 928–29).

B. Applicable Law

To bring suit and recover on a cause of action, a plaintiff must have both standing and capacity. *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 848 (Tex. 2005); *Flagstar Bank, FSB v. Walker*, 451 S.W.3d 490, 497 (Tex. App.—Dallas 2014, no pet.); *John C. Flood of DC, Inc. v. SuperMedia, L.L.C.*, 408 S.W.3d 645, 650 (Tex. App.—Dallas 2013, pet. denied); *Nauslar*, 170 S.W.3d at 256. Texas courts have had considerable difficulty in defining the relationship between the similar, but distinct, doctrines of capacity and standing. *Austin Nursing Ctr.*, 171 S.W.3d at 848 n.1; *John C. Flood*, 408 S.W.3d at 650.

1. Standing

Standing is a component of a court's subject-matter jurisdiction. *Tex. Air Control Bd.*, 852 S.W.2d at 446; *Nauslar*, 170 S.W.3d at 248. Standing to sue can be predicated upon either statutory or common-law authority. *See Williams v. Lara*, 52 S.W.3d 171, 178–79 (Tex. 2001); *Nauslar*, 170 S.W.3d at 252. The general rules of standing apply unless statutory authority for standing exists. *Williams*, 52 S.W.3d at 178; *Nauslar*, 170 S.W.3d at 252. As a necessary component of a court's subject-matter jurisdiction, standing cannot be waived and can be raised for the first time on appeal. *Tex. Air Control Bd.*, 852 S.W.2d at 445–46; *Mazon*, 195 S.W.3d at 803.

To have standing, the pleader bears the burden of alleging facts that affirmatively demonstrate the court's jurisdiction to hear the case. *Tex. Air Control Bd.*, 852 S.W.2d at 446; *Mazon*, 195 S.W.3d at 803. When the issue of standing is unchallenged, a trial court looks solely at the plaintiff's pleadings. *See Aguirre v. Bosquez*, No. 04-06-00068-CV, 2006 WL 2871339, *2 (Tex. App.—San Antonio Oct. 11, 2006, no pet.) (mem. op.). However, when standing is challenged, the burden of proof is on the person whose interest is challenged to present sufficient evidence to prove that he is an interested person. *See Aguirre*, 2006 WL 2871339, at *2.

Standing pertains to a person's justiciable interest in a suit. *See Tex. Air Control Bd.*, 852 S.W.2d at 445–46; *Nauslar*, 170 S.W.3d at 255. The issue of standing focuses on whether a party has a sufficient relationship with the lawsuit so as to have a justiciable interest in its outcome. *Austin Nursing Ctr.*, 171 S.W.3d at 849; *John C. Flood*, 408 S.W.3d at 650. Under Texas law, the standing inquiry requires examination of the following: (1) the plaintiff must be personally injured—he must plead facts demonstrating that he (rather than a third party) suffered the injury—and the injury must be concrete and particularized, actual or imminent, not hypothetical; (2) the plaintiff's alleged injury is fairly traceable to the defendant's conduct; and

(3) the plaintiff's alleged injury is likely to be redressed by each form of requested relief. *Heckman v. Williamson County*, 369 S.W.3d 137, 155 (Tex. 2012); *see also Nauslar*, 170 S.W.3d at 249 (dividing the standing inquiry into five elements); *Precision Sheet Metal Mfg. Co., Inc. v. Yates*, 794 S.W.2d 545, 552 (Tex. App.—Dallas 1990, writ denied). A plaintiff has standing when he is personally aggrieved, regardless of whether he has the legal authority to act. *Austin Nursing Ctr.*, 171 S.W.3d at 849; *John C. Flood*, 408 S.W.3d at 650.

Whether considering the standing of one plaintiff or many, with the notable exception of class actions, the court must analyze the standing of each individual plaintiff to bring each individual claim he alleges. *Heckman*, 369 S.W.3d at 152. This principle flows from two sources. *Heckman*, 369 S.W.3d at 152.

First, a plaintiff must demonstrate that the court has jurisdiction over and the plaintiff has standing to bring each of his claims. *Heckman*, 369 S.W.3d at 152–53. The court must dismiss only those claims over which it lacks jurisdiction. *Heckman*, 369 S.W.3d at 153. Second, a plaintiff must demonstrate that he, himself, has standing to present his claims. *Heckman*, 369 S.W.3d at 153. This means the court must assess standing plaintiff-by-plaintiff, claim-by-claim. *Heckman*, 369 S.W.3d at 153.

Guarantors, individually, may not recover affirmatively on the debtor's claims because in the absence of damages that are independent from those suffered by the principal debtor, they lack standing. *See ITT Commercial Fin. Corp. v. Riehn*, 796 S.W.2d 248, 255 (Tex. App.—Dallas 1990, writ ref'd)("Being as they were guarantors and not principals, [guarantors] had no standing to bring an action, either independently or by way of counterclaim, for value in excess of the indebtedness, if any."); *Hart v. First Fed. Sav. & Loan Ass'n of Esterville & Emmettsburg, Iowa*, 727 S.W.2d 723, 725 (Tex. App.—Austin 1987, no writ)(guarantor not entitled to seek

affirmative recovery based on principal debtor's statutory cause of action where cause of action not assigned to guarantor).

A party's lack of standing deprives the court of subject-matter jurisdiction and renders any trial court action void. *In re Russell*, 321 S.W.3d 846, 856 (Tex. App.—Fort Worth 2010, orig. proceeding [mand. denied]). The court must dismiss a plaintiff who lacks standing. *Heckman*, 369 S.W.3d at 153. A court does not render judgment that plaintiffs take nothing, as it would if the plaintiffs' claims failed on the merits. *DaimlerChrysler*, 252 S.W.3d at 307. Instead, courts dismiss for want of jurisdiction. *DaimlerChrysler*, 252 S.W.3d at 307. A court that decides a claim over which it lacks jurisdiction violates the constitutional limitations on its authority, even if the claim is denied. *DaimlerChrysler*, 252 S.W.3d at 307. The denial of a claim on the merits is not an alternative to dismissal for want of jurisdiction merely because the ultimate result is the same. *DaimlerChrysler*, 252 S.W.3d at 307. This is because "the assertion of jurisdiction 'carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers.'" *DaimlerChrysler*, 252 S.W.3d at 307 (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998)).

2. Capacity

Capacity is a party's legal authority to go into court to prosecute or defend a suit. *Nauslar*, 170 S.W.3d at 255; *El T. Mexican Rests., Inc. v. Bacon*, 921 S.W.2d 247, 249 (Tex. App.—Houston [1st Dist.] 1995, writ denied). A party has capacity to sue when it has legal authority to act, regardless of whether it has a justiciable interest in the controversy. *Austin Nursing Ctr.*, 171 S.W.3d at 849; *Nootsie Ltd. v. Williamson County Appraisal Dist.*, 925 S.W.2d 659, 661 (Tex. 1996); *John C. Flood*, 408 S.W.3d at 650; *Nauslar*, 170 S.W.3d at 255. Capacity is conceived of as a procedural issue dealing with the personal qualifications of a party to proceed with litigation. *Austin Nursing Ctr.*, 171 S.W.3d at 849; *John C. Flood*, 408 S.W.3d

at 650. Unlike standing, which is jurisdictional, a challenge to a party's capacity to participate in a suit can be waived. *Nootsie*, 925 S.W.2d at 662 (citing TEX. R. CIV. P. 93); *Highland Credit Opportunities CDO, L.P. v. UBS AG*, 451 S.W.3d 508, 516 (Tex. App.—Dallas 2014, no pet.); *John C. Flood*, 408 S.W.3d at 650.

Texas law is clear that a challenge to a party's privity of contract is a challenge to capacity, not standing. *E.g.*, *Highland Credit*, 451 S.W.3d at 515–16; *Transcon. Realty Investors, Inc. v. Wicks*, 442 S.W.3d 676, 679 (Tex. App.—Dallas 2014, pet. denied); *Nat'l Health Res. Corp. v. TBF Fin., LLC*, 429 S.W.3d 125, 129 (Tex. App.—Dallas 2014, no pet.); *John C. Flood*, 408 S.W.3d at 651; *Landry's Seafood House-Addison, Inc. v. Snadon*, 233 S.W.3d 430, 433 (Tex. App.—Dallas 2007, pet. denied); *King-Mays v. Nationwide Mut. Ins.Co.*, 194 S.W.3d 143, 145 (Tex. App.—Dallas 2006, pet. denied); *cf. OAIC Commercial Assets, L.L.C. v. Stonegate Village, L.P.*, 234 S.W.3d 726, 738 (Tex. App.—Dallas 2007, pet. denied). Whether a party is entitled to sue on a contract is not truly a standing issue because it does not affect the jurisdiction of the court. *Transcon. Realty*, 442 S.W.3d at 679; *Nat'l Health Res. Corp. v. TBF Fin., L.L.C.*, 429 S.W.3d at 129. Rather, it is a decision on the merits. *Transcon. Realty*, 442 S.W.3d at 679; *Nat'l Health Res.*, 429 S.W.3d at 129. While the question of whether a party is entitled to sue on a contract is often informally referred to as a question of "standing," it is not truly a standing issue because it does not affect jurisdiction. *Transcon. Realty*, 442 S.W.3d at 679; *Nat'l Health Res.*, 429 S.W.3d at 129.

Absent specific circumstances, causes of action in Texas are freely assignable. *See State Farm Fire & Cas. Co., v. Gandy*, 925 S.W.2d 696, 705–07 (Tex. 1996); *see also PPG Indus., Inc. v. JMB/Houston Ctrs. Partners Ltd. P'ship*, 146 S.W.3d 79, 92 (Tex. 2004) (recognizing a few exceptions to this general rule). When a cause of action is assigned or transferred, the assignee becomes the real party in interest with the authority to prosecute the suit to judgment.

Tex. Mach. & Equip. Co. v. Gordon Knox Oil & Exploration Co., 442 S.W.2d 315, 317 (Tex. 1969); *Hunter v. B.E. Porter, Inc.*, 81 S.W.2d 774, 774 (Tex. Civ. App.—Dallas 1935, no writ); *see also S. County Mut. Ins. Co. v. Ochoa*, 19 S.W.3d 452 (Tex. App.—Corpus Christi 2000, no pet.).

To recover on an assigned cause of action, an assignee must prove: (1) a cause of action existed; (2) the claim was capable of assignment; and (3) the cause was in fact assigned to the party seeking recovery. *See Tex. Farmers Ins. Co. v. Gerdes by and through Griffin Chiropractic Clinic*, 880 S.W.2d 215, 217 (Tex. App.—Fort Worth 1994, writ denied) (discussing validity of assignment on merits); *see also Delaney v. Davis*, 81 S.W.3d 445, 448–49 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (discussing validity on merits). An assignee may file suit and recover either in his own name or in the name of the assignor. *Kerlin v. Sauceda*, 263 S.W.3d 920, 932 (Tex. 2008); *Gordon Knox*, 442 S.W.2d at 317; *see also Flagstar*, 451 S.W.3d at 497. Accordingly, the assignee being the real party in interest and in control of the lawsuit, he is also in privity with the nominal party such that the judgment therein will bind him as a party. *See HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 890 (Tex. 1998); *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 653 (Tex. 1996) ("People can be in privity in three ways: (1) they can control an action even if they are not parties to the action; (2) their interests can be represented by a party to the action; and (3) they can be successors in interest, deriving their claims through a party to the prior action."). Further, longstanding Texas precedent has held that a guarantor may pay off a debt and stand in the shoes of the creditor. *See Fox v. Kroeger*, 119 Tex. 511, 35 S.W.2d 679, 681 (1931); *see also Highlands Cable Television, Inc. v. Wong*, 547 S.W.2d 324, 328 (Tex. App.—Austin 1977, writ ref'd n.r.e.).

When a lease is assigned, the assignment destroys privity of estate between the lessor and the original lessee, but privity of contract between them remains. *See Amco Trust, Inc. v. Naylor*,

159 Tex. 146, 317 S.W.2d 47, 50 (1958); *718 Assocs., Ltd. v. Sunwest N.O.P., Inc.*, 1 S.W.3d 355, 361 (Tex. App.—Waco 1999, pet. denied); *Twelve Oaks Tower I, Ltd. v. Premier Allergy, Inc.*, 938 S.W.2d 102, 114 (Tex. App.—Houston [14th Dist.] 1996, no pet.). The assignee of the lease becomes the tenant in place of the original lessee and is in privity of estate with the lessor. *See Amco Trust*, 317 S.W.2d at 50; *718 Assocs.*, 1 S.W.3d at 361; *Twelve Oaks Tower*, 938 S.W.2d at 114.

C. Fitness Evolution's "Standing"

On appeal, the parties do not challenge Fitness Evolution's standing to bring its claims. However, the record shows that the Sagebrush Group and Randy Heady & Co., the Headhunter Group and Kaye/Bassman, and the Sutherland Group challenged Fitness Evolution's "standing" in the trial court. Accordingly, because standing is a component of a court's subject-matter jurisdiction and appellate courts are obligated to review, sua sponte, issues affecting jurisdiction, we must review the Sagebrush Group's and the Headhunter Group's challenges to Fitness Evolution's "standing" to bring their claims. *See Norwood*, 418 S.W.3d at 591; *Tex. Air Control Bd.*, 852 S.W.3d at 446.

In the trial court, the Sagebrush Group challenged Fitness Evolution's "standing" to bring its tortious interference with an existing contract claims, arguing Fitness Evolution was neither a party to the Gleneagles lease as a result of the assignment of the lease to Headhunter Fitness or the guaranty.[25] However, according to case law, when Fitness Evolution assigned its lease to the Headhunter Fitness, that assignment destroyed the privity of estate between Gleneagles and Fitness Evolution, but privity of contract remained. *See Amco Trust*, 317 S.W.2d at 50; *718 Assocs.*, 1 S.W.3d at 361; *Twelve Oaks Tower*, 938 S.W.2d at 114. Headhunter

[25] The Sagebrush Group challenged Fitness Evolution's "standing" to bring its tortious interference with an existing contract claims in their February 3, 2012 motion for traditional summary judgment. In that motion for traditional summary judgment, the Sagebrush Group also incorporated the argument of the Sutherland Group that Fitness Evolution lacked "standing" to pursue their tortious interference with an existing contract claims, which was contained in the Sutherland Group's January 30, 2012 motion for traditional summary judgment.

Fitness, the assignee of the lease, became the tenant in place of Fitness Evolution and was in privity of estate with Gleneagles. *See Amco Trust*, 317 S.W.2d at 50; *718 Assocs.*, 1 S.W.3d at 361; *Twelve Oaks Tower*, 938 S.W.2d at 114. In the trial court, the Headhunter Group and Kaye/Bassman challenged Fitness Evolution's "standing," arguing Fitness Evolution did not have "standing to assert claims on behalf of Gleneagles."[26] However, Fitness Evolution did not bring claims on behalf of Gleneagles. Although the Sagebrush Group and the Headhunter Group referred to this as an issue of "standing," it is actually a challenge to Fitness Evolution's privity of contract, which is a challenge to a party's capacity to sue. *E.g.*, *Transcon. Realty*, 442 S.W.3d at 679; *Nat'l Health Res. Corp.*, 429 S.W.3d at 129; *John C. Flood*, 408 S.W.3d at 651; *Landry's Seafood*, 233 S.W.3d at 433; *King-Mays*, 194 S.W.3d at 145; The Sagebrush Group and the Headhunter Group do not argue on appeal that Fitness Evolution lacks the capacity to sue. *See* TEX. R. APP. P. 38.1(f); *see also* TEX. R. CIV. P. 93(1), (2); *Coastal Liquids Transp., L.P. v. Harris Cnty. Appraisal Dist.*, 46 S.W.3d 880, 884–85 (Tex. 2001). Accordingly, we do not reach the merits of the capacity argument.

D. Mulroy's Individual Standing

In issues one and three on appeal, Mulroy, individually, argues the trial court erred when it granted the Sagebrush Group's November 7, 2012 motion for traditional summary judgment and the Duggan Group's March 9, 2012 amended motion for summary judgment on the affirmative defense of standing because he has individual standing to bring his tortious interference with an existing contract claims as a party to the assignment of Fitness Evolution's lease to Headhunter Fitness "because the guaranty was incorporated into the Original Lease and

[26] The Headhunter Group and Kaye/Bassman's challenge to Fitness Evolution's "standing" is found only in its eighth amended answer. Headhunter Fitness, Kaye, Turner, Kittleson, Wittenberg, and Willow Bend Fitness did not challenge Fitness Evolution's "standing" in their October 21, 2011 motion for summary judgment. Nor did the Headhunter Group and Kaye/Bassman challenge Fitness Evolution's "standing" in their September 20, 2011 motion for no-evidence summary judgment. In the Headhunter Groups' October 30, 2012 motion for traditional summary judgment on the remaining claims, they challenged only Fitness Evolution's "standing" to bring its anticipatory repudiation of the lease claim.

it was incorporated into the Lease Assignment." However, as we previously noted, standing is not an affirmative defense.[27] Rather, it is a component of a court's subject-matter jurisdiction. *See Tex. Air Control Bd.*, 852 S.W.2d at 446; *Nauslar*, 170 S.W.3d at 248. Further, the denial of a claim on the merits is different from the dismissal of a claim for want of jurisdiction. *See DaimlerChrysler*, 252 S.W.3d at 307. Nevertheless, in the trial court, Mulroy's individual standing was challenged to bring his tortious interference with an existing contract claims against the Sagebrush Group and the Duggan Group, and all of his claims against the Headhunter Group and Kaye/Bassman. We address the positions of those parties in turn.

On appeal, the Sagebrush Group does not argue Mulroy, individually, lacked standing to bring his tortious interference with an existing contract claims. However, in the Sagebrush Group's second amended answer, they challenged the standing of Mulroy, individually, to bring his tortious interference with an existing contract claims. Also, in the Sagebrush Group's February 3, 2012 motion for traditional summary judgment, the Sagebrush Group argued Mulroy, individually, lacked standing to bring his tortious interference with an existing contract claims because "Mulroy is not a party to the Gleneagles Lease or the Assignment [of the lease], the second of which is the contract which the [Fitness Evolution Group] assert[s] that the Sagebrush [Group] interfered." In the Sagebrush Group's November 7, 2012 motion for traditional summary judgment, the Sagebrush Group argued Mulroy, individually, lacked standing because

> Mulroy's only connection to the Gleneagles Lease and the assignment to that lease, the contract at issue, relates to his execution of his personal guaranty to secure performance of the Gleneagles Lease[,] which he agreed remained in full force and effect after the assignment of the lease. Merely having a secondary obligation in no way constitutes a particularized interest in the subject matter so as to import the standing to assert claims based upon the principal contract, mu[ch] less against third parties.

[27] *Supra* note 14.

On appeal, the Duggan Group argues Mulroy, individually, does not have standing to pursue any claim against the Duggan Group because Mulroy, individually, is not a party to the very contracts he purports the Duggan Group interfered. The Duggan Group contends that "Mulroy's assertions sound in indemnification and contribution . . . and not in a direct claim." In the trial court, in the Duggan Group's verified second amended answer, they challenged the standing of Mulroy, individually, to bring his claims. Also, in the Duggan Group's March 9, 2012 amended motion for summary judgment, the Duggan Group again challenged the standing of Mulroy, individually, to bring his tortious interference with an existing contract claims.

On appeal, the Headhunter Group does not argue Mulroy, individually, lacked standing to bring his claims against them. However, in the Headhunter Group and Kaye/Bassman's eighth amended answer and their October 21, 2010 motion for summary judgment, they challenged his standing to bring all of his claims against them.[28] In particular, we note Mulroy, individually, brought claims against the Headhunter Group for anticipatory repudiation of the lease.

Mulroy sued the Sagebrush Group and the Duggan Group for tortious interference with an existing contract, seeking actual, consequential, and exemplary damages. Also, Mulroy, individually, sued the Headhunter Group for anticipatory repudiation of the lease, seeking past due rent and the present value of future rentals. To the extent Mulroy, individually, as guarantor of the Gleneagles lease has sued for tortious interference with an existing contract and anticipatory repudiation of the lease, he lacks standing to affirmatively recover because he has no damages that are independent from those suffered by Fitness Evolution, the principal debtor, and

[28] During the pre-trial conference, the trial court reconsidered and granted, on the merits, the portion of the Headhunter Group's October 30, 2012 motion for traditional summary judgment on the remaining claims, seeking summary judgment on their affirmative defense of res judicata. During the pre-trial conference, the trial court questioned, "So how is [Mulroy] suing them? How does [Mulroy] have standing?" However, despite the trial court's jurisdictional concerns, the trial court did not request additional briefing, a separate hearing on the issue of standing, or expressly rule on the issue. *See DaimlerChrysler*, 252 S.W.3d at 307 (denial of claims on merits is not alternative to dismissal for want of jurisdiction merely because ultimate result is same).

seeks damages in excess of his indebtedness. *See ITT Commercial* , 796 S.W.2d at 255; *Hart*, 727 S.W.2d at 725.

We conclude Mulroy, in his individual capacity, lacks standing to bring his tortious interference with an existing contract and anticipatory repudiation of the lease claims. As a result, the trial court erred when it ruled on the merits of the portions of the Sagebrush Group's February 3, 2012 and November 7, 2013 motions for traditional summary judgment and the Duggan Group's March 9, 2012 amended motion for summary judgment with respect to Mulroy's individual claims for tortious interference with an existing contract. *See DaimlerChrysler*, 252 S.W.3d at 307; *Heckman*, 369 S.W.3d at 153. Accordingly, those claims must be dismissed for want of jurisdiction. *See DaimlerChrysler*, 252 S.W.3d at 307 (court must dismiss plaintiff who lacks standing since denial of claims on merits is not alternative to dismissal for want of jurisdiction merely because ultimate result is same). In addition, we conclude the trial court erred when it ruled on the merits of the portions of the Headhunter Group's October 21, 2010 motion for summary judgment, September 20, 2011 no-evidence motion for summary judgment, and October 30, 2012 motion for traditional summary judgment on the remaining claims with respect to Mulroy's individual claims for anticipatory repudiation of the lease. Accordingly, those claims must also be dismissed for want of jurisdiction. *See DaimlerChrysler*, 252 S.W.3d at 307.

E. Mulroy's "Standing" to Bring Suit as an Assignee of Gleneagles's Claims

On appeal, the Sagebrush Group argues: (1) Mulroy cannot obtain a tortious interference with an existing contract claim through an assignment of claims secured after the alleged interference with the lease; (2) the assignment of claims is void because it goes against public policy; and (3) the assignment of claims is unenforceable because it does not specifically assign a tortious interference with an existing contract claim and name certain parties. In the trial court,

the Duggan Group challenged the standing of Gleneagles and Mulroy, as assignee of Gleneagles's claims, only in their verified second amended answer. However, on appeal, the Duggan Group does not argue that Mulroy, as assignee of Gleneagles's claims, lacks standing to bring his tortious interference with an existing contract claims.

1. Timing of Gleneagles's Assignment to Mulroy of Tortious Interference with an Existing Contract Claims

First, we address the Sagebrush Group's contention that Mulroy cannot obtain a tortious interference with an existing contract claim through an assignment of claims secured after the alleged interference with the lease. This contention challenges whether Mulroy, as assignee of Gleneagles's claims, can recover on the assigned causes of action because Gleneagles's tortious interference with an existing contract claims were not capable of assignment due to the timing of the assignment. *See Tex. Farmers Ins.*, 880 S.W.3d at 217 (to recover on assigned cause of action, assignee must prove claim capable of assignment).

Although the Sagebrush Group referred to this as an issue of "standing," it is actually a challenge to whether Mulroy, as assignee of Gleneagles's claims, can recover in the capacity in which he sued. *See John C. Flood*, 408 S.W.3d at 650 (capacity conceived of as procedural issue dealing with personal qualifications of party to litigate); *see generally AMX Enterprises, Inc. v. Bank One, N.A.*, 196 S.W.3d 202 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) (after AMX settled claims with Willies and non-suited them, Willies assigned their tortious interference with contract claims against CIT Group and Bank One to AMX). The Sagebrush Group did not file a verified pleading challenging the capacity of Mulroy, as assignee of Gleneagles's claims, to sue on this basis, nor do they brief the lack of capacity on appeal.[29] *See* TEX. R. APP. P. 38.1(f); *see also* TEX. R. CIV. P. 93(1), (2); *Pledger v. Schoelkopf*, 762 S.W.2d 145, 145–46 (Tex. 1988).

[29] Although the Duggan Group raised the issue of capacity as to Mulroy, as assignee of Gleneagles's claims, in its verified second amended answer, the Duggan Group does not raise the issue of capacity on appeal. *See* TEX. R. APP. P. 38.1(f); *see also* EX. R. CIV. P. 93(1), (2); *Pledger v. Schoelkopf*, 762 S.W.2d 145, 145–46 (Tex. 1988).

This issue was not preserved in the trial court. TEX. R. APP. P. 33.1. Because the Sagebrush Group actively raises, in substance, capacity, we do not reach the merits of this argument.

2. Public Policy of Gleneagles's Assignment to Mulroy of Tortious Interference with an Existing Contract Claims

Second, we address the Sagebrush Group's contention that the assignment of Gleneagles's claims is void because it goes against public policy. They claim public policy prohibits Mulroy, as assignee of Gleneagles's claims, from recovering on the assigned causes of action because Gleneagles's tortious interference with an existing contract claims were not capable of assignment due to the fact that Mulroy, individually, was also the guarantor of the lease.[30] *See Tex. Farmers Ins.*, 880 S.W.3d at 217 (to recover on assigned cause of action, assignee must prove claim capable of assignment). This argument challenges the qualifications of Mulroy, as assignee of Gleneagles's claim, to litigate Gleneagles's claims. *See generally*, *Wilman v. Tomaszewicz*, No. 05-95-01570-CV, 1997 WL 459084 (Tex. App.—Dallas Aug. 13, 1997, pet. denied) (not designated for publication) (co-guarantor can purchase underlying debt and then sue on debt as an assignee); *Byrd v. Estate of Nelms*, 154 S.W.3d 149, 163 (Tex. App.—Waco 2004, pet. denied) (concluding *Wilman* opinion persuasive). Although the Sagebrush Group referred to this as an issue of "standing," it is actually a challenge to whether Mulroy, as assignee of Gleneagles's claims, can recover in the capacity in which he sued. *See John C. Flood*, 408 S.W.3d at 650 (capacity conceived of as procedural issue dealing with personal qualifications of party to litigate). As indicated above, the Sagebrush Group did not file a verified pleading challenging the capacity of Mulroy, as assignee of Gleneagles's claims, to sue on this basis, nor do they brief the lack of capacity on appeal.[31] *See* TEX. R. APP. P. 38.1(f); *see*

[30] The Sagebrush Group made this argument on appeal and in their November 7, 2012 motion for traditional summary judgment and in the Sagebrush Group's reply to the response to their November 7, 2012 motion for traditional summary judgment.

[31] *Supra* note 29.

also TEX. R. CIV. P. 93(1), (2); *Pledger*, 762 S.W.2d at 145–46. This issue was not preserved in the trial court. TEX. R. APP. P. 33.1. Accordingly, we do not reach the merits of this argument that the Sagebrush Group labels as "standing."

3. Scope of Gleneagles's Assignment to Mulroy of Tortious Interference with an Existing Contract Claims

Third, we address the Sagebrush Group's contention that the assignment of claims is unenforceable because it does not specifically assign tortious interference with an existing contract claims and name certain parties. However, we note the Sagebrush Group does not dispute that Gleneagles was entitled to pursue tortious interference with an existing contract claims against them. Also, there is no dispute that Gleneagles assigned its claims to Mulroy. The dispute is whether that assignment of claims gave Mulroy, as assignee of Gleneagles's claims, the legal authority to go into court to prosecute Gleneagles's tortious interference with an existing contract claims and to bring those claims against Heady, Lewis, and Sagebrush Partners. *See Tex. Farmers Ins.*, 880 S.W.3d at 217 (to recover on assigned cause of action, cause was in fact assigned). This argument challenges the qualifications of Mulroy, as assignee of Gleneagles's claims, to litigate Gleneagles's claims. Although the Sagebrush Group referred to this as an issue of "standing," it is actually a challenge to whether Mulroy, as assignee of Gleneagles's claims, can recover in the capacity in which he sued. *See John C. Flood*, 408 S.W.3d at 650 (capacity conceived of as procedural issue dealing with personal qualifications of party to litigate). Once again, the Sagebrush Group did not file a verified pleading challenging the capacity of Mulroy, as assignee of Gleneagles's claims, to sue on this basis, nor do they brief the lack of capacity on appeal.[32] *See* TEX. R. APP. P. 38.1(f); *see also* TEX. R. CIV. P. 93(1), (2);

[32] *Supra* note 29.

Pledger, 762 S.W.2d at 145–46. This issue was not preserved in the trial court. TEX. R. APP. P. 33.1. Accordingly, we do not address the merits of this argument.

F. Conclusions Relating to Standing

We vacate the portion of the trial court's final judgment ordering a take-nothing judgment on the claims brought by Mulroy, individually, against the Sagebrush Group and the Duggan Group for tortious interference with an existing contract and against the Headhunter Group for anticipatory repudiation of the lease. Those claims are dismissed for want of jurisdiction. Accordingly, we address the merits of issues one and three, which argue the trial court erred when it granted summary judgment in favor of the Sagebrush Group and the Duggan Group, only as to Fitness Evolution and Mulroy, as assignee of Gleneagles's claims. Further, we address the merits of issue two, which argues the trial court erred when it granted summary judgment in favor of the Headhunter Group, as to the specific claims raised on appeal by the Fitness Evolution Group against the Headhunter Group, except that we review the anticipatory repudiation of the lease claim only as to Fitness Evolution and Mulroy, as assignee of Gleneagles's claims.

III. TAKE-NOTHING SUMMARY JUDGMENTS ON THE FITNESS EVOLUTION GROUP'S CLAIMS

In issues one, two, and three, the Fitness Evolution Group argues the trial court erred when it granted summary judgment in favor of (1) the Sagebrush Group, (2) the Headhunter Group, and (3) the Duggan Group. At the outset, we note that each group filed separate motions for summary judgment that referenced, attached, and incorporated different summary judgment evidence. As a result, although the claims on which summary judgment was sought may be the same, the parties' summary judgment arguments and evidence are different. Hence, our application of the law to the facts is different for each. In addition, in the Fitness Evolution Group's notice of appeal, they list Kaye/Bassman as a party to the appeal.

A. Standard of Review and Summary Judgment Law

The standard for reviewing a traditional summary judgment is well-established. *See Sysco Food Servs. v. Trapnell*, 890 S.W.2d 796, 800 (Tex. 1994); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985); *Tex. Integrated Conveyor Sys., Inc. v. Innovative Conveyor Concepts, Inc.*, 300 S.W.3d 348, 365 (Tex. App.—Dallas 2009, pet. denied). An appellate court reviews a summary judgment de novo to determine whether a party's right to prevail is established as a matter of law. *Provident Life & Acc. Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003); *Tex. Integrated*, 300 S.W.3d at 365. When reviewing a motion for summary judgment, the appellate court takes the nonmovant's evidence as true, indulges every reasonable inference in favor of the nonmovant, and resolves all doubts in favor of the nonmovant. *Provident Life*, 128 S.W.3d at 215; *Tex. Integrated*, 300 S.W.3d at 365. When a trial court's order does not specify the grounds for its summary judgment, an appellate court must affirm the summary judgment if any of the theories presented to the trial court and preserved for appellate review are meritorious. *Provident Life*, 128 S.W.3d at 216; *Tex. Integrated*, 300 S.W.3d at 365. However, ordinarily, when a trial court grants summary judgment on specific grounds, appellate courts limit their consideration on appeal to the grounds upon which the trial court granted summary judgment. *Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 625–26 (Tex. 1996).

The grounds for summary judgment must be "expressly set out in the [summary judgment] motion or in an answer or any other response." TEX. R. CIV. P. 166a(c). The summary judgment record includes evidence attached to either the motion or response. *See Wilson v. Burford*, 904 S.W.2d 628, 629 (Tex. 1995) (per curiam) (discussing Texas Rule of Civil Procedure 166a(c)); *Worldwide Asset Purchasing, L.L.C. v. Rent-A-Center East, Inc.*, 290 S.W.3d 554, 560 (Tex. App.—Dallas 2009, no pet.). In a traditional motion for summary

judgment, the movant 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. *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997). To be entitled to traditional summary judgment, a defendant must conclusively negate at least one essential element of each of the plaintiff's causes of action or conclusively establish each element of an affirmative defense. *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997). Evidence is conclusive only if reasonable people could not differ in their conclusions. *City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005). In a traditional summary judgment, the burden of proof does not shift to the nonmovant unless and until the movant has conclusively established his entitlement to summary judgment as a matter of law. *See Casso v. Brand*, 776 S.W.2d 551, 556 (Tex. 1989). The nonmovant has no burden to respond to a motion for traditional summary judgment unless the movant conclusively establishes its cause of action or defense. *Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 222–23 (Tex. 1999). However, once the movant proves a right to summary judgment, the burden shifts to the nonmovant to raise a genuine issue of material fact sufficient to defeat summary judgment. *See M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000).

B. The Fitness Evolution Group's Claims Against Kaye/Bassman

In the Fitness Evolution Group's notice of appeal, they list Kaye/Bassman as a party and state that they are appealing the trial court's final judgment and "all other orders of the [trial court] made final by that judgment." However, the Fitness Evolution Group raises no issues arguing the trial court erred as to its rulings on the Fitness Evolution Group's claims against Kaye/Bassman. In their eighth amended petition, the only claims the Fitness Evolution Group brought against Kaye/Bassman were for conspiracy and seeking to pierce Kaye/Bassman's corporate veil. In the Fitness Evolution Group's brief on appeal, they expressly state they are not challenging the trial court's ruling as to those claims. Accordingly, we conclude the Fitness

Evolution Group has not shown the trial court erred when it granted Kaye/Bassman's portion of the September 20, 2011 motion for no-evidence summary judgment. The portion of the trial court's final judgment granting Kaye/Bassman's portion of the September 20, 2011 motion for no-evidence summary judgment and ordering a take-nothing judgment on the Fitness Evolution Group's claims against Kaye/Bassman is affirmed.

C. The Claims Brought by Mulroy, Individually, Against Baker

In the Fitness Evolution Group's brief on appeal, they list Baker as a party and include him in their argument in issue two, claiming the trial court erred when it granted summary judgment in favor of the Headhunter Group. However, in the Fitness Evolution Group's reply brief, they state, "Mulroy[, individually,] does not appeal the summary judgment on his claims against Baker." We have already concluded that Mulroy, individually, lacks standing to bring his claim for anticipatory repudiation of the lease. Further, the Fitness Evolution Group has already expressly stated they are not appealing the trial court's granting of summary judgment on their claims for civil conspiracy and fraudulent inducement. Accordingly, we conclude Mulroy, individually, has not shown the trial court erred when it granted Baker's portion of the October 30, 2012 motion for traditional summary judgment on the remaining claims. The portion of the trial court's final judgment granting Baker's portion of the October 30, 2012 motion for traditional summary judgment on the remaining claims and ordering a take-nothing judgment on the claims brought by Mulroy, individually, against Baker is affirmed.

D. The Fitness Evolution Group's Claims Against the Sagebrush Group and the Duggan Group

In issues one and three, Fitness Evolution and Mulroy, as assignee of Gleneagles's claims,[33] challenge the portion of the trial court's final judgment granting the Sagebrush Group's

[33] Because we have already determined that Mulroy, individually, lacks standing to bring his tortious interference with an existing contract claims, we review issues one and three only as to Fitness Evolution and Mulroy, as assignee of Gleneagles's claims.

November 7, 2012 motion for traditional summary judgment and the Duggan Group's March 9, 2012 amended motion for summary judgment, seeking traditional and no-evidence summary judgment on their claims for tortious interference with an existing contract.[34]

1. Applicable Law

a. Tortious Interference With an Existing Contract

A defendant may defeat a tortious interference with an existing contract claim on summary judgment by disproving one element of the claim as a matter of law. *Powell Indus., Inc. v. Allen*, 985 S.W.2d 455, 456 (Tex. 1998). The elements of tortious interference with an existing contract are: (1) the existence of a contract subject to interference; (2) willful and intentional interference; (3) interference that proximately caused damage; and (4) actual damage or loss. *Powell*, 985 S.W.2d at 456; *ACS Investors, Inc. v. McLaughlin*, 943 S.W.2d 426, 430 (Tex. 1997).

The focus in evaluating a tortious interference with an existing contract claim begins with whether the contract is subject to the alleged interference. *ACS Investors*, 943 S.W.2d at 430. When a dispute arises from the terms of a contract, and the contract is not ambiguous, a court can determine the parties' rights and obligations under the agreement as a matter of law. *ACS Investors*, 943 S.W.2d at 430; *Friendswood Dev. Co. v. McDade + Co.*, 926 S.W.2d 280, 282 (Tex. 1996) (per curiam); *Westwind Exploration, Inc. v. Homestate Sav. Ass'n*, 696 S.W.2d 378, 381 (Tex. 1985). If the evidence and express terms of the contract reveal that the contract is not subject to the tortious interference allegations, there was no interference as a matter of law, and

[34] We note that both the Sagebrush Group and the Duggan Group sought summary judgment on the claims brought by Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, for tortious interference with an existing contract. However, the respective arguments of the Sagebrush Group and the Duggan Group and evidence affixed by each are not identical. As a result, the summary judgment evidence used to analyze the propriety of summary judgment as to one party may not be discussed as to another party. Accordingly, our analysis focuses separately on the summary judgment arguments and evidence raised by each discrete motion for summary judgment.

the defendant need not prove legal justification or excuse to avoid liability. *See ACS Investors*, 943 S.W.2d at 431.

The second element requires that there be some direct evidence of a willful act of interference. *Browning-Ferris, Inc. v. Reyna*, 865 S.W.2d 925, 927 (Tex. 1993). To establish an actionable "willful and intentional act," the evidence must show the defendant's "knowing inducement" of the contract obligor's wrongful action. *Browning-Ferris*, 865 S.W.2d at 927; *COC Servs., Ltd. v. CompUSA, Inc.*, 150 S.W.3d 654, 671 (Tex. App.—Dallas 2004, pet. denied). The defendant's intent must be to effect a breach of contract, i.e., it must knowingly induce one of the contracting parties to breach its obligations. *Fluor Enters., Inc. v. Conex Int'l Corp.*, 273 S.W.3d 426, 443 (Tex. App.—Beaumont 2008, pet. denied); *John Paul Mitchell Sys. v. Randall's Food Mkts.*, 17 S.W.3d 721, 730 (Tex. App.—Austin 2000, pet. denied). The defendant's intentional making of a contract with a party and proceeding to carry out such contract, knowing that the party's performance of its contract with the defendant would be contrary to and in violation of the party's contract with the plaintiff, is enough to show the defendant's inducement of the breach. *Robey v. Sun Record Co.*, 242 F.2d 684, 689 (5th Cir. 1957) (applying Texas law); *see also Browning-Ferris*, 865 S.W.2d at 927 (generally citing *Robey*). However, evidence showing that the defendant was a mere "willing participant" does not suffice. *Browning-Ferris*, 865 S.W.2d at 927; *COC Servs.*, 150 S.W.3d at 671.

The third element requires a showing that the defendant took an active part in persuading a party to a contract to breach it. *See Dibon Solutions, Inc. v. Nanda*, No. 05-12-01112-CV, 2013 WL 3947195, *3 (Tex. App.—Dallas July 29, 2013, no pet.) (mem. op.); *see John Paul Mitchell*, 17 S.W.3d at 731 (citing *Davis v. HydPro, Inc.*, 839 S.W.2d 137, 139 (Tex. App.—Eastland 1992, writ denied)). The "active part in persuading a party to a contract to breach it" is a part of the proximate cause element. *Davis*, 839 S.W.2d at 139. Ordinarily, merely inducing a

contract obligor to do what it has a right to do under the subject contract is not actionable interference. *ACS Investors*, 943 S.W.2d at 430; *COC Servs.*, 150 S.W.3d at 670. It is necessary that there be some act of interference or of persuading a party to breach, e.g., by offering better terms or other incentives, for tort liability to arise. *Dibon Solutions*, 2013 WL 3947195, at *3; *see John Paul Mitchell Sys.*, 17 S.W.3d at 731.

The basic measure of actual damages for tortious interference with an existing contract is the same as the measure of damages for breach of the contract interfered with, i.e., to put the plaintiff in the same economic position he would have been in had the contract been performed. *Am. Nat'l Petroleum Co. v. Transcon. Gas Pipe Line Corp.*, 798 S.W.2d 274, 278 (Tex. 1990); *Palla v. Bio-One, Inc.*, 424 S.W.3d 722, 726 (Tex. App.—Dallas 2014, no pet.); *Fluor*, 273 S.W.3d at 446. To recover on a suit for tortious interference with an existing contract, the contract need not have been breached so long as the plaintiff incurred damages. *Fluor*, 273 S.W.3d at 446. Although breach of the interfered-with contract is probably the most common measure of damage, it is not limited to those damages. *Palla*, 424 S.W.3d at 726; *Fluor*, 273 S.W.3d at 446; *Fridl v. Cook*, 908 S.W.2d 507, 513 (Tex. App.—El Paso 1995, writ dism'd w.o.j.).

b. Affirmative Defense of Justification

Justification is an affirmative defense to tortious interference with an existing contract. *Prudential Ins. Co. of Am. v. Fin. Review Servs., Inc.*, 29 S.W.3d 74, 80 (Tex. 2000); *Calvilli v. Gonzales*, 922 S.W.2d 928, 929 (Tex. 1996); *Sterner v. Marathon*, 767 S.W.2d 686, 690 (Tex. 1989). An affirmative defense is a matter asserted by a party, which, assuming the complaint to be true, constitutes a defense to it. *See Hodgkins v. Bryan*, 99 S.W.3d 669, 675 (Tex. App.—Houston [14th Dist.] 2003, no pet.); *RRR Farms, Ltd. v. Am. Horse Protection Ass'n, Inc.*, 957 S.W.2d 121, 129–30 (Tex. App.—Houston [14th Dist.] pet denied) (citing Black's Law

Dictionary). The party asserting justification does not deny the interference, but rather seeks to avoid liability based upon a claimed interest that is being impaired or destroyed by the plaintiff's contract. *Sterner*, 767 S.W.2d at 689–90.

The justification defense can be based on the exercise of either (1) one's own legal rights, or (2) a good-faith claim to a colorable legal right, even though that claim ultimately proves to be mistaken. *Prudential Ins.*, 29 S.W.3d at 80; *Tex. Beef Cattle Co. v. Green*, 921 S.W.2d 203, 211 (Tex. 1996). If a trial court finds, as a matter of law, that the defendant had a legal right to interfere with a contract, the defendant has conclusively established the justification defense and the motive is irrelevant. *Prudential Ins.*, 29 S.W.3d at 80; *Tex. Beef Cattle*, 921 S.W.2d at 211. Justification is established as a matter of law when the defendant's acts, which the plaintiff claims constitute tortious interference with the existing contract, are merely done in the defendant's exercise of its own contractual rights. *Baty v. Protech Ins. Agency*, 63 S.W.3d 841, 857 (Tex. App.—Houston [14th Dist.] 2001, pet denied) (citing *Tex. Beef Cattle*, 921 S.W.2d at 211). Alternatively, if the defendant cannot prove justification as a matter of law, it can still establish the affirmative defense if the trial court determines the defendant interfered while exercising a colorable right, and the jury finds that, although mistaken, the defendant exercised that colorable right in good faith. *Prudential Ins.*, 29 S.W.3d at 80; *Tex. Beef Cattle*, 921 S.W.2d at 211.

c. Affirmative Defense of Res Judicata

Res judicata prevents parties and those in privity with them from relitigating a case that a competent tribunal has adjudicated to finality. *Ingersoll–Rand Co. v. Valero Energy Corp.*, 997 S.W.2d 203, 206 (Tex. 1999). Res judicata generally bars claims or defenses that, through diligence, could have been litigated in the earlier suit, but were not. *Ingersoll–Rand Co.*, 997 S.W.2d. at 206–07; *Getty Oil v. Insurance Co. of N. Am.*, 845 S.W.2d 794, 798 (Tex. 1992). A

party relying on the affirmative defense of res judicata must prove the following elements: (1) a prior final judgment on the merits by a court of competent jurisdiction; (2) identity of parties in privity with them; and (3) a second action based on the same claims that were raised or could have been raised in the first action. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010); *see also* TEX. R. CIV. P. 94 (identifying res judicata as an affirmative defense). A final judgment is one that disposes of all pending parties and claims. *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001).

If a New York judgment is a valid, final judgment that would have had preclusive effect on a suit had the suit been brought in New York, then it bars the suit in Texas as well. *Purcell v. Bellinger*, 940 S.W.2d 599, 601 (Tex. 1997). Under New York law, "a 'final' order or judgment is one that disposes of all of the causes of action between the parties in the action or proceeding and leaves nothing for further judicial action apart from mere ministerial matters." *Burke v. Crosson*, 647 N.E.2d 736, 739 (N.Y. 1995). A limited exception to this rule is the "implied severance" doctrine where an order that disposes of some, but not all, of the causes of action asserted in a litigation between parties may be deemed final only if the causes of action it resolves do not arise out of the same transaction or continuum of facts, or out of the same legal relationship as the unresolved causes of action. *Burke*, 647 N.E.2d at 740.

2. The Sagebrush Group's Motion for Traditional Summary Judgment

In issue one, Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, appeal the portion of the trial court's final judgment granting the Sagebrush Group's November 7, 2012 motion for traditional summary judgment on its tortious interference with an existing contract claim.[35] Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, generally argue

[35] On appeal, Mulroy, individually, argues the Sagebrush Group failed to conclusively establish their affirmative defense of estoppel. However, we have already concluded that Mulroy, individually, lacks standing to bring his tortious interference with an existing contract claims against the Sagebrush Group. Accordingly, we need not address this argument. To the extent the Sagebrush Group argues they should prevail on their

"[t]he Sagebrush Group's claim to have negated each element of tortious interference [with an existing contract] as a matter of law cannot support the summary judgment." They also argue that they raised an issue of material fact precluding summary judgment as to each element of their tortious interference with an existing contract claims. Also, Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, argue that the Sagebrush Group failed to conclusively establish their affirmative defense of commercial justification. Further, Mulroy, as assignee of Gleneagles's claims, argues the Sagebrush Group failed to conclusively establish their affirmative defense of res judicata. The Sagebrush Group responds that Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, cannot establish any elements of their claims for tortious interference with an existing contract. Also, they argue the tortious interference with an existing contract claims of (1) Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, are barred by the their affirmative defense of justification, and (2) Mulroy, as assignee of Gleneagles's claims, are barred by their affirmative defense of res judicata.

a. Summary Judgment on the Fitness Evolution Group's Claims for Tortious Interference with an Existing Contract

Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, argue they raised an issue of material fact as to each element of their tortious interference with an existing contract claims against the Sagebrush Group, precluding summary judgment. The Sagebrush Group responds that, in their November 7, 2012 motion for traditional summary judgment, they conclusively negated at least one element of the tortious interference with an existing contract claims brought by Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, because they did not induce or cause any interference with Gleneagles's lease, and Fitness Evolution and

affirmative defense of legal estoppel because "Mulroy[, individually,] attempts to use an assignment of Gleneagles'[s] claims to avoid his personal guaranty obligations under the Gleneagles Lease," we have already addressed this issue and concluded it is actually a challenge to whether Mulroy, as assignee of Gleneagles's claims, can recover in the capacity in which he sued.

Mulroy, as assignee of Gleneagles's claims, have already fully recovered their damages and are not entitled to exemplary damages.[36]

In order to prevail, the Sagebrush Group had to present summary judgment evidence that there are no genuine issues of material fact on the challenged elements of tortious interference with an existing contract claims by conclusively negating an essential element of the tortious interference with an existing contract claims. *See Powell Indus.*, 985 S.W.2d at 456; *Sci. Spectrum*, 941 S.W.2d at 911. In their November 7, 2012 motion for traditional summary judgment, the Sagebrush Group incorporated by reference some of the summary judgment evidence attached to their prior summary judgment motions as well as those of the Duggan Group, the Headhunter Group, and the Sutherland Group.

To support their claim, Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, incorporated by reference some of the summary judgment evidence attached to the Headhunter Group's October 30, 2012 motion for traditional summary judgment on the remaining claims and the Fitness Evolution Group's response to that motion, and relied on several additional exhibits attached to their response as well as some of the summary judgment evidence relied on by the Sagebrush Group in their November 7, 2012 motion for traditional summary judgment. We agree with Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, that fact issues were raised.

First, Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, raised an issue of material fact as to the second element of a claim for tortious interference with an existing contract, requiring willful and intentional interference. Fitness Evolution and Mulroy, as

[36] With respect to the first element, requiring the existence of a contract subject to interference, the Sagebrush Group argued, both in the trial court and on appeal, that "[Fitness Evolution and Mulroy, as assignee of Gleneagles's claims,] cannot prove this element of tortious interference with [an existing] contract by way of an assignment—particularly an assignment that does not even identify the claim or any of the Sagebrush [Group]." We have already addressed this issue and concluded it is actually a challenge to whether Mulroy, as assignee of Gleneagles's claims, can recover in the capacity in which he sued.

assignee of Gleneagles's claims, raised an issue of material fact as to whether the Sagebrush Group knew of the existence of the lease between Gleneagles and Headhunter Fitness by offering evidence of the initial February 13, 2009 lease proposal and excerpts from the depositions of Lewis and Heady. The February 13, 2009 lease proposal from "Heady Investments," which was signed by Lewis, was sent to Duggan and hand delivered to Next Level Fitness with a courtesy copy sent to Heady. That letter stated, "We would be honored to have Next Level Fitness in our new building; we consider their level of service and clientele to be an amenity to the building." Also, in his deposition, Lewis stated,

> Early on [when Duggan, Sutherland, and Greene initially started interacting with Lewis in the spring of 2009, Lewis and Heady] were under the impression that they ha[d] an existing business that was going to relocate, [the existing business] w[as] going to make peace with their existing landlord. That's why [Lewis and Heady] initially started making proposals to [Next Level Fitness].

Lewis stated that because Next Level Fitness was in a shopping center, he assumed they had a lease, but Duggan and Sutherland told him not to worry about it. Lewis stated that it is normal to inquire as to when a prospective tenant's lease expires so they can time the relocation because there are usually consequences if the existing lease has not expired or been terminated. Further, Lewis stated the Sagebrush Group was not provided with documents relating to the formation of Willow Bend Fitness. In addition, Heady stated that after he heard about Next Level Fitness, he visited the gym because if "[Next Level Fitness] w[as] going to be a prospect for our office building, I just wanted to go take a quick look and see what kind of[—]what it looked like, what the feel of it was, and make sure it looked like a first-class type of facility." Also, Heady stated that "[he] was told [Next Level Fitness] w[as] looking for a new location."

Further, Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, raised an issue of material fact as to whether the Sagebrush Group knowingly induced Headhunter Fitness's alleged breach of the lease through an e-mail chain beginning on March 31, 2009,

between Kaye, Duggan, and Sutherland showing the Sagebrush Group was aware of the legal issues Headhunter Fitness faced if it left Gleneagles Plaza and relocated to Parkway Centre V. *See Robey*, 242 F.2d at 689 (defendant's intentional making of contract with party and proceeding to carry out contract, knowing party's performance of contract with defendant would be contrary to and in violation of party's contract with plaintiff is enough to show inducement of breach). This e-mail chain culminated in Sutherland sending an e-mail on April 1, 2009, stating the Sagebrush Group was comfortable with the legal situation. Also, on July 16, 2009, Lewis sent an e-mail to the architect, Greene, and Kaye, stating "Can you please change the name to Willow Bend Fitness, delete anything that says Next Level Fitness, we have never heard of those guys." *See Browning-Ferris*, 865 S.W.2d at 927; *COC Servs.*, 150 S.W.3d at 671.

Second, Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, raised an issue of material fact as to the third element, requiring interference with the contract that proximately caused damage. Specifically, Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, raised an issue of material fact as to whether the Sagebrush Group devised better lease terms or other incentives to persuade Headhunter Fitness to breach its lease with Gleneagles by incorporating into their response documents and the excerpts from Kaye's deposition. On March 10, 2009, Heady sent Kaye, Lewis, and Sutherland an e-mail with a courtesy copy to Duggan with the subject line "Next Level Fitness - Proposal," that stated, in part, "Let's go back to our five months free and $23.75 psf minimum base rate and we will escalate the # of memberships from 50 to 100." Also, revised proposal letters dated March 13, 2009 and March 30, 2009, which were sent from "Heady Investments" to Kaye and Duggan referenced Next Level Fitness and offered better terms or incentives to persuade Headhunter Fitness to relocate to Parkway Centre V. On April 1, 2009, Sutherland sent Kaye and Duggan an e-mail stating:

> I spoke with [Lewis] this morning. A revised proposal is coming shortly. . . . In [Lewis and Heady's] view, they feel like they have made a very strong concession with the combo free rent and membership subsidy. . . . They are comfortable with the legal situation . . . I think.

(Last ellipsis in orig.). Further, during his deposition, Kaye stated that approximately $350,000 was spent on finishing out the space at Parkway Centre V in September, October, and November 2009, and Sagebrush Partners paid a portion of those costs. *See Dibon Solutions,* 2013 WL 3947195, at *3 (necessary that there be some act of interference or of persuading party to breach, e.g., by offering better terms or other incentives); *John Paul Mitchell Sys.*, 17 S.W.3d at 731.

Finally, the Sagebrush Group failed to conclusively negate the fourth element of a claim for tortious interference with an existing contract, requiring actual damage or loss. In the Sagebrush Group's November 7, 2012 motion for traditional summary judgment, they argued "[Fitness Evolution and Mulroy, as assignee of Gleneagles's claims,] suffered no actual damages as a result of any tortious interference by the Sagebrush [Group] which were not satisfied by the [New York] judgment recovered by Gleneagles and the monies personally paid by [Kaye, Turner, Kittleson, and Wittenberg] under the guaranty of the [lease] [a]ssignment." In support of their November 7, 2012 motion for traditional summary judgment, the Sagebrush Group relied on summary judgment evidence showing that Gleneagles obtained a judgment in the New York Lawsuit against Headhunter Fitness and executed that judgment in Texas. Also, they relied on evidence that, as a result of the New York Lawsuit, Gleneagles reached a settlement with Kaye, Turner, Kittleson, and Wittenberg where they agreed to and did pay Gleneagles $120,851.13, the equivalent of three month's rent under the lease, in satisfaction of their guaranty. However, the Sagebrush Group did not attach to their November 7, 2012 motion for traditional summary judgment or include in the record evidence conclusively showing that the damages awarded as a result of the New York default judgment against Headhunter Fitness were actually paid or that the monies received as a result of the settlement with Kaye, Turner, Kittleson, and Wittenberg in

the New York Lawsuit constitute the full amount of damages. As a result, even though they produced evidence they claim defeated summary judgment, the burden did not shift to Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, to raise an issue of material fact. *See Casso*, 776 S.W.2d at 556 (burden of proof never shifts to nonmovant unless and until movant has conclusively established entitlement to summary judgment as a matter of law).

Accordingly, we conclude the trial court erred to the extent it granted the portion of the Sagebrush Group's November 7, 2012 motion for traditional summary judgment on the claims for tortious interference with an existing contract brought by Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, against the Sagebrush Group. The portion of issue one that relates to the trial court's granting of traditional summary judgment on the claims for tortious interference with an existing contract brought by Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, against the Sagebrush Group is decided in favor of Fitness Evolution and Mulroy, as assignee of Gleneagles's claims. As a result, we review the parties' arguments relating to the portion of the Sagebrush Group's November 7, 2012 motion for traditional summary judgment seeking judgment, as a matter of law, on the Sagebrush Group's affirmative defenses of justification and res judicata.

b. Summary Judgment on the Sagebrush Group's Affirmative Defense of Justification

Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, argue the Sagebrush Group did not conclusively establish they were entitled to traditional summary judgment on the Sagebrush Group's affirmative defense of justification. The Sagebrush Group responds that "[n]o acts by the Sagebrush [Group] affected Headhunter[] [Fitness's] inability to perform financially for the entire term of the Gleneagles lease," "[t]he Sagebrush [Group's] right to deal with a new entity, Willow Bend [Fitness] was commercially justified and cannot be the subject of a tortious interference with [an existing] contract claim," "[Fitness Evolution and Muroy, as

assignee of Gleneagles's claims] have no legal authority to suggest such conduct by Duggan and the Sagebrush [Group] can result in tortious interference with [an existing] contract and to make such a claim is nonsensical," "the Sagebrush [Group's] conduct, as a result, cannot be considered tortious interference with [an existing] contract," and "[Fitness Evolution and Mulroy's, as assignee of Gleneagles's claims,] theory of tortious interference unreasonably restricts justified commercial activity."

In the Sagebrush Group's November 7, 2012 motion for traditional summary judgment, they argued as follows, contending they were entitled to summary judgment on their affirmative defense of justification:

> Prior to any involvement by the Sagebrush [Group], Headhunter[] [Fitness] determined that the Gleneagles Lease was not financially viable. As a result, after attempts to renegotiate the lease failed, Headhunter[] [Fitness] considered other options. Those options included vacating the premises, selling its assets, or ceasing operations, all of which [Fitness Evolution and Mulroy, as assignee of Gleneagles's lease,] contend constitutes a breach of the Gleneagles Lease. Accordingly, Headhunter[] [Fitness's] ultimate inability to continue to meet its financial obligations caused it to cease operations, thereby breaching the Gleneagles Lease. No acts by the Sagebrush [Group] affected Headhunter[] [Fitness's] inability to perform financially for the entire term of the Gleneagles Lease. Due to Headhunter[] [Fitness's] inability to continue to meet its financial obligations during the remaining term of the Gleneagles Lease, Duggan assisted a completely separate entity, Willow Bend [Fitness] to obtain a lease at [Parkway Centre V]. The Sagebrush [Group's] lease with the new entity, Willow Bend [Fitness] was commercially justified and cannot be the subject of a tortious interference with [an existing] contract claim.

(Citations omitted).

The Sagebrush Group's arguments in the trial court and on appeal address the elements of the underlying cause of action for tortious interference with an existing contract, rather than their affirmative defense of justification. The Sagebrush Group's contention that their conduct did not affect Headhunter Fitness's inability to perform on the Gleneagles lease and that Headhunter Fitness would have breached the Gleneagles lease anyway go to the causation element of the tortious interference with an existing contract claim. Similarly, the Sagebrush Group's argument

that they contracted with Willow Bend Fitness, which they allege was a completely separate entity from Headhunter Fitness and did not have a lease with Gleneagles, addresses the element requiring the existence of a contract subject to interference. *See ACS Investors*, 943 S.W.2d at 431 (if evidence and express terms of contract reveal contract not subject to tortious interference allegations, then no interference as matter of law, and defendant need not prove justification to avoid liability). The Sagebrush Group does not specify or discuss the legal right they claim that they were exercising. Instead they generally state that their lease with Willow Bend Fitness was "commercially justified" and Fitness Evolution and Mulroy's, as assignee of Gleneagles's claims, theory of tortious interference unreasonably restricts justified "commercial activity."

Accordingly, we conclude the trial court erred when it granted the Sagebrush Group's November 7, 2012 motion for traditional summary judgment on their affirmative defense of justification as to Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, because the Sagebrush Group did not conclusively establish their affirmative defense of justification. *See Am. Tobacco*, 951 S.W.2d at 425 (trial court properly grants summary judgment on affirmative defense when movant establishes all elements of affirmative defense); *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995) (to obtain summary judgment on affirmative defense, movant must plead and conclusively establish each element of affirmative defense). As a result, even though they produced evidence they claim defeats summary judgment, the burden never shifted to Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, to raise an issue of material fact. *See Casso*, 776 S.W.2d at 556 (burden of proof did not shift to nonmovant unless and until movant has conclusively established entitlement to summary judgment as a matter of law).

c. Summary Judgment on the Sagebrush Group's Affirmative Defense of Res Judicata

Mulroy, as assignee of Gleneagles's claims, argues the Sagebrush Group did not establish they were entitled to traditional summary judgment, as a matter of law, on the Sagebrush Group's affirmative defense of res judicata. He claims the Sagebrush Group did not conclusively establish all three elements of res judicata. In particular, he argues "there was no final judgment on the merits . . . in New York." The Sagebrush Group responds that "[b]ecause Gleneagles brought a lawsuit [in New York] involving the same transaction, seeking the same recovery, and obtained a final judgment, Gleneagles'[s] tortious interference with [an existing] contract claim is barred by res judicata."[37]

On February 5, 2010, Gleneagles filed its verified complaint in New York against Fitness Evolution, Mulroy, individually, Headhunter Fitness, Kaye, Turner, Kittleson, and Wittenberg. On March 2, 20120, Gleneagles filed a notice of partial discontinuance of the New York Lawsuit with respect to Kaye, Turner, Kittleson, and Wittenberg. On April 2, 2010, in accordance with New York procedure, the clerk entered a no-answer default judgment against Headhunter Fitness. On appeal, the parties do not point us to, nor could we find in this extensive record, anything showing a disposition in the New York Lawsuit of the claims against Fitness Evolution and Mulroy, individually. *See Purcell*, 940 S.W.2d at 601 (if New York judgment valid, final judgment that would have had preclusive effect on suit had suit been brought in New York, then it bars suit in Texas). Nor do the parties point us to evidence or argue that there was an actual or implied severance. *See Burke*, 647 N.E.2d at 739-40 (under New York law, final judgment disposes of all causes of action between parties with limited exception, under implied severance

[37] We note that the Sagebrush Group and the Headhunter Group sought summary judgment on their affirmative defenses of res judicata. However, the Sagebrush Group's and the Headhunter Group's arguments and evidence are not identical. Accordingly, our analysis focuses separately on the summary judgment arguments and evidence raised by each respective motion for summary judgment. As a result, the summary judgment evidence used to analyze the propriety of summary judgment as to one party may not be used or even discussed as to another party.

doctrine, where litigation between parties deemed final when causes of action do not arise out of same transaction or continuum of facts, or same legal relationship).

We conclude the trial court erred when it granted the Sagebrush Group's November 7, 2012 motion for traditional summary judgment on their affirmative defense of res judicata as to Mulroy, as assignee of Gleneagles's claims, because the Sagebrush Group did not conclusively establish the existence of a prior final judgment on the merits. *See Am. Tobacco*, 951 S.W.2d at 425 (trial court properly grants summary judgment on affirmative defense when movant establishes all elements of affirmative defense); *Centeq Realty*, 899 S.W.2d at 197 (to obtain summary judgment on affirmative defense, movant must plead and conclusively establish each element of affirmative defense). As a result, even though he produced evidence he claims defeats summary judgment, the burden did not shift to Mulroy, as assignee of Gleneagles's claims, to raise an issue of material fact. *See Casso*, 776 S.W.2d at 556 (burden of proof does not shift to nonmovant unless and until movant has conclusively established entitlement to summary judgment as a matter of law). The portion of issue one that relates to the trial court's granting of traditional summary judgment on the Sagebrush Group's affirmative defense of res judicata and precluding the tortious interference with an existing contract claims brought by Mulroy, as assignee of Gleneagles's claims, is decided in favor of Mulroy, as assignee of Gleneagles's claims.

d. Conclusions Relating to the Sagebrush Group's November 7, 2012 Motion for Traditional Summary judgment

We conclude the trial court erred when it granted the Sagebrush Group's November 7, 2012 motion for traditional summary judgment, seeking traditional summary judgment on the claims for tortious interference with an existing contract brought by Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, against the Sagebrush Group and on the Sagebrush Group's affirmative defenses of justification and res judicata. Issue one is decided in favor of

Fitness Evolution and Mulroy, as assignee of Gleneagles's claims. The portion of the trial court's final judgment granting the Sagebrush Group's November 7, 2012 motion for traditional summary judgment on the claims for tortious interference with an existing contract brought by Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, against the Sagebrush Group is reversed and remanded for further proceedings consistent with this opinion.

3. The Duggan Group's Motion for Traditional and No-Evidence Summary Judgment

In issue three, Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, argue the trial court erred when it granted the Duggan Group's March 9, 2012 amended motion for traditional and no-evidence summary judgment on their tortious interference with an existing contract claims or, in the alternative, traditional summary judgment on the Duggan Group's affirmative defenses asserting that the tortious interference with an existing contract claims are barred by the principal of agency because an agent cannot tortiously interfere with the principal's contract or conspire with the principal.[38] We note that, although Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, argue the trial court erred when it granted both the traditional and no-evidence portions of Duggan Group's March 9, 2012 amended motion for summary judgment on their tortious interference with an existing contract claims, the trial court's order grants only the traditional portion of the motion. Specifically, the trial court's order states, "It is therefore hereby ordered, adjudged[,] and decreed that [] Duggan and Duggan Realty['s] [] Amended Traditional Motion for Summary Judgment is hereby granted in its entirety." (Emphasis omitted). There is no interlocutory order expressly disposing of the no-evidence portion of the March 9, 2012 amended motion for summary judgment. Accordingly, on appeal,

[38] We have already concluded that Mulroy, individually, lacks standing to bring his tortious interference with an existing contract claims against the Duggan Group.

we address only the portions of the parties arguments pertaining to the traditional portion of the March 9, 2012 amended motion for summary judgment.

a. Summary Judgment on the Fitness Evolution Group's Claims for Tortious Interference with an Existing Contract

Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, argue they raised an issue of material fact as to each element of their tortious interference with an existing contract claims against the Duggan Group. The Duggan Group responds that in their March 9, 2012 amended motion for summary judgment, they conclusively negated at least one element of the tortious interference with an existing contract claims brought by Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, because Duggan had limited involvement in the negotiations for leasing space at Parkway Centre V and Duggan had no knowledge regarding the terms of Headhunter Fitness's lease with Gleneagles.

In order for the Duggan Group to prevail, they had to present summary-judgment evidence that there are no genuine issues of material fact on the challenged elements of tortious interference with an existing contract claims and that they were entitled to judgment as a matter of law. The Duggan Group could do this by conclusively negating an essential element of the tortious interference with an existing contract claims. *See Powell Indus.*, 985 S.W.2d at 456; *Sci. Spectrum*, 941 S.W.2d at 911. In their March 9, 2012 amended motion for summary judgment, the Duggan Group argued they conclusively negated the following three elements of a tortious interference with an existing contract claim: (1) willful and intentional interference; (2) interference that proximately caused damage; and (3) actual damage or loss.

Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, attached several exhibits to their response that they claimed raised a fact issue as to whether the Duggan Group willfully and intentionally interfered with the Gleneagles lease proximately causing actual

damages and loss to Fitness Evolution and Gleneagles. We agree with Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, that fact issues were raised.

First, Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, raised an issue of material fact as to the second element of a claim for tortious interference with an existing contract, requiring willful and intentional interference. Specifically, Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, raised issues of material fact as to whether the Duggan Group knew of the existence of the lease between Gleneagles and Headhunter Fitness and knowingly induced Headhunter Fitness's alleged breach of the lease.

Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, raised issues of material fact as to whether the Duggan Group knew of the existence of the lease between Gleneagles and Headhunter Fitness by offering excerpts from Kaye's, Duggan's, and Lewis's depositions, which were attached to the response filed by Fitness Evolution and Mulroy, as assignee of Gleneagles's claims. In Kaye's deposition, he stated that when he first met with Duggan, he told Duggan that Headhunter Fitness was "investigating a lot of different options," including "remaining with [Mulroy] subventing [sic] a significant portion of the remainder of our lease" and "the possibility that it would be worked out in a way with Gleneagles and [Mulroy] that [Headhunter Fitness] would end under [] amicable legal settlement terms and there would be no issue with the ability to move the facility." Also, Kaye stated that he did not discuss the terms of the Gleneagles lease with Duggan because Duggan signed the original lease, so he knew the terms. In Duggan's deposition, he stated that, after Greene looked at the building and spoke with Kaye, Greene told him

> [T]hey were looking at moving. [Greene] said there was a possibility that they would move. That they were in the—you know, working on their lease at the [Gleneagles Plaza], but may move, and had an offer at [the Greenway] building across the Tollway. And that Greene brought [Kaye] over and they looked at it, and then he said that they might be interested in moving to the [Parkway Centre V] building.

In Lewis's deposition, he stated that Duggan and Sutherland told him not "to worry about [Next Level Fitness's lease]." Also, Lewis stated that it is normal to inquire about a prospective tenant's existing lease because "that's when we try to time the relocation" as there are usually consequences if the existing lease has not expired or been terminated.

Further, Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, raised issues of material fact as to whether the Duggan Group knowingly induced Headhunter Fitness's alleged breach of the lease through e-mails exchanged between Kaye, Duggan, and Sutherland, which were attached to the response filed by Fitness Evolution and Mulroy, as assignee of Gleneagles's claims. These e-mails show that the Duggan Group was aware of the legal issues Headhunter Fitness faced if it left Gleneagles Plaza and relocated to Parkway Centre V. In an e-mail chain dated March 31, 2009, with the subject line "follow up," Kaye stated, in part, to Sutherland and Duggan, "Perhaps [Lewis] was tired/sick but I heard the voice of a defeated man that sounded like a guy who knew a deal was being lost. It all changed once the club legal issues were discussed." Sutherland responded to Kaye and Duggan, stating

> I agree with you in the change in [h]is demeanor but it wasn't as much that he is just now understanding the ownership structure. It is the fact, [sic] that he brought up the point (out of nowhere) about the threat of being sued by [Gleneagles's management company] for tortious interference. . . . It is the threat of a lawsuit and I'm not sure where that concern came from. It is as if he had been coached from our situation with Greenway.

Then, Duggan replied to Sutherland and Kaye, stating, in part, "I agree." On April 1, 2009, that e-mail chain continued with an e-mail from Sutherland to Duggan and Kaye, stating, in part, "[Heady and Lewis] are comfortable with the legal situation . . . I think." (Ellipsis in orig.) *See Browning-Ferris*, 865 S.W.2d at 927; *COC Servs.*, 150 S.W.3d at 671.

Second, excerpts from Lewis's deposition, which were attached to the response filed by Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, raised an issue of material fact as to whether Duggan helped Sagebrush devise better lease terms or other incentives to persuade

Headhunter Fitness to breach its lease with Gleneagles. Lewis stated that the February 13, 2009 lease proposal was addressed to Duggan who gave him the information needed to prepare the lease proposal, e.g., the "range" and "location." Also, Duggan provided Lewis with the name "Next Level Fitness." Lewis stated that in response to the February 13, 2009 lease proposal, Duggan told him that Kaye "said it was the worst proposal they had ever seen." Once Lewis heard from Duggan that Next Level Fitness was not pleased with the February 13, 2009 lease proposal, Heady, Duggan, and Lewis "talked and tried to sharpen [their] pencil a little bit." Lewis and Duggan worked together to improve the proposal, then Lewis would update Heady as to their progress. Duggan and Lewis knew "[Next Level Fitness] would need a certain period of time to get up and running once they moved in, so [Sagebrush Partners] agreed to purchase a certain amount of memberships from them." Duggan and Lewis also discussed "[s]ome rental concessions on the front end, the length of term." Further, Lewis stated he never saw a copy of Next Level Fitness's lease, but "[t]hey were obviously in a shopping center, so [he] assume[d] they had a lease." *See Dibon Solutions*, 2013 WL 3947195, at *3 (necessary that there be some act of interference or of persuading party to breach, e.g., by offering better terms or other incentives); *John Paul Mitchell Sys.*, 17 S.W.3d at 731.

Finally, the Duggan Group failed to meet its burden to conclusively negate the fourth element of a claim for tortious interference with an existing contract; that is actual damage or loss. In the Duggan Group's March 9, 2012 amended motion for summary judgment, they argued that Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, "suffered no actual damages as a result of any alleged tortious interference by [the Duggan Group] which were not satisfied by the judgment received by Gleneagles and the monies personally paid by [Kaye, Turner, Kittleson, and Wittenberg]." In essence, they argued any damages for tortious interference with an existing contract in the instant lawsuit would constitute a double recovery.

In their response to the Duggan Group's March 9, 2012 amended motion for summary judgment, Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, argued, in part, "[the Duggan Group] are unable to meet [their] burden in establishing that [they] are entitled to summary judgment as a matter of law for tortious interference [with an existing contract]."

Specifically, their March 9, 2012 amended motion for summary judgment, the Duggan Group argued "It is undisputed that Kaye[, Turner, Kittleson, and Wittenberg] paid three months [sic] rent to Gleneagles pursuant to the personal guaranties they signed in connection with the [assignment of the lease]," resulting in Gleneagles's nonsuit of them in the New York Lawsuit. In support of this argument, the Duggan Group attached the affidavit of Nicholas Vasello, the director of collections for Gleneagles, which states, in part, "Gleneagles collected the equivalent of three months' rent and a sum sufficient to remove the Exercise Fixtures from the Premises from Headhunter[] [Fitness] and the Second Guarantors." In addition, the Duggan Group asserted "It is undisputed that on September 30, 2012, Gleneagles recovered a judgment against Next Level Fitness for breach of the [o]riginal [l]ease and the [a]ssignment of the lease." In support of this, the Duggan Group attached a writ of execution for the New York default judgment and points to Vasello's affidavit, which also states Gleneagles obtained a judgment against Headhunter Fitness for breach of lease in the New York Lawsuit. However, we can find nothing in the record showing the actual default judgment nor is there proof in the record showing that any such default judgment was paid. Further, the Duggan Group's own argument and evidence shows more may be owed on the lease obligations: "To date, neither Fitness Evolution nor Mulroy has paid any rent or related charges due and owing under the [o]riginal [l]ease since December 2009." In support of this argument, the Duggan Group attached Vasello's affidavit which states, "Fitness Evolution and Mulroy currently owe Gleneagles past due rent and related charges from March 2009 to date."

Although Vassello stated the equivalent of three month's rent was "collected" from Headhunter Fitness, Kaye, Turner, Kittleson, and Wittenberg, the Duggan Group did not conclusively show that the three month's rent allegedly received as a result of the settlement with Kaye, Turner, Kittleson, and Wittenberg, precipitating the nonsuit in the New York Lawsuit, constitute the full amount of damages. Also, the Duggan Group did not conclusively show that the damages awarded as a result of the New York default judgment against Headhunter Fitness were actually paid. As a result, even though Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, produced some evidence they claim defeats summary judgment, the burden did not shift to them, to raise an issue of material fact. *See Casso*, 776 S.W.2d at 556 (burden of proof does not shift to nonmovant unless and until movant has conclusively established entitlement to summary judgment as a matter of law).

Accordingly, we conclude the trial court erred to the extent it granted the portion of the Duggan Group's March 9, 2012 amended motion for summary judgment on the claims for tortious interference with an existing contract brought by Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, against the Duggan Group. The portion of issue three that relates to the trial court's granting of traditional summary judgment on the claims for tortious interference with an existing contract brought by Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, against the Duggan Group is decided in favor of Fitness Evolution and Mulroy, as assignee of Gleneagles's claims. As a result, we review the parties' arguments relating to the portion of the Duggan Group's March 9, 2012 amended motion for summary judgment seeking judgment, as a matter of law, on the Duggan Group's affirmative defense of agency.

b. Summary Judgment on the Duggan Group's Affirmative Defense of Agency

Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, contend the Duggan Group did not conclusively establish their affirmative defense of agency because "[t]he Duggan Group declined to present any evidence or argument on its pleaded affirmative defense." Also, Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, argue that they raised an issue of material fact as to this affirmative defense.

The basis of the Duggan Group's affirmative defense of agency was their position that Duggan was a co-broker with Sutherland and, as an agent, he could not interfere or conspire with the principal. In order for the Duggan Group to prevail, they had to conclusively establish each element of their affirmative defense. *See Powell Indus.*, 985 S.W.2d at 456; *Sci. Spectrum*, 941 S.W.2d at 911. It is well settled that the law makes no presumption of agency. *Sw. Bell Media, Inc. v. Trepper*, 784 S.W.2d 68, 71 (Tex. App.—Dallas 1989, no writ). An agent seeking to avoid personal liability on a contract must plead and prove that the true name of the principal was fully disclosed to the other contracting party at the time the parties entered into the contract. *John C. Flood*, 408 S.W.at 657; *Trepper*, 784 S.W.2d at 71. Therefore, in order to avoid personal liability, an agent must prove he: (1) disclosed his representative capacity to the other contracting party, and (2) identified the true principal for whom he was acting. *See DiGiammatteo v. Olney*, 794 S.W.2d 103, 104 (Tex. App.—Dallas 1990, no writ); *Trepper*, 784 S.W.2d at 71, 72.

The parties dispute whether, under the law, the Duggan Group were agents, and if they were, whether they were general or specific agents. Regardless, attached to the Duggan Group's March 9, 2012 amended motion for summary judgment was an excerpt from Duggan's deposition. In that excerpt, Duggan testified that Duggan Realty was not employed as a broker for Headhunter Fitness or Next Level Fitness. Also, Duggan stated he was not a broker for "the

deal between [Willow Bend Fitness] and Park[way] Centre V." Further, Duggan stated that the $20,000 received by Duggan Realty was not a commission, but was better characterized as "a finder's fee, a referral fee, a gift." The Duggan Group did not conclusively show they were entitled to judgment as a matter of law on their affirmative defense of agency. As a result, the burden did not shift to Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, to raise an issue of material fact. *See Casso*, 776 S.W.2d at 556 (burden of proof never shifts to nonmovant unless and until movant has conclusively established entitlement to summary judgment as a matter of law).

Accordingly, we conclude the trial court erred when it granted the portion of the Duggan Group's March 9, 2012 amended motion for summary judgment on the Duggan Group's affirmative defense of agency. The portion of issue three that relates to the trial court's granting of traditional summary judgment on the Duggan Group's affirmative defense of agency is decided in favor of Fitness Evolution and Mulroy, as assignee of Gleneagles's claims.

c. Conclusions Relating to the Duggan Group's March 9, 2012 Amended Motion for Summary Judgment

We conclude the trial court erred when it granted the Duggan Group's March 9, 2012 amended motion for summary judgment, seeking traditional summary judgment on the claims for tortious interference with an existing contract brought by Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, against the Duggan Group and on the Duggan Group's affirmative defense of agency. Issue three is decided in favor of the Fitness Evolution and Mulroy, as assignee of Gleneagles's claims. The portion of the trial court's final judgment granting the Duggan Group's March 9, 2012 amended motion for summary judgment on the claims for tortious interference with an existing contract brought by Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, against the Duggan Group is reversed and remanded for further proceedings consistent with this opinion.

E. Summary Judgment on the Headhunter Group's Affirmative Defense of Res Judicata

In issue two, the Fitness Evolution Group appeals the portion of the trial court's judgment, granting traditional summary judgment in favor of the Headhunter Group on their affirmative defense of res judicata as to all of the Fitness Evolution Group's claims against the Headhunter Group.[39]

1. Res Judicata as to Mulroy, Individually

Mulory, individually, appeals the portion of the trial court's judgment, granting traditional summary judgment in favor of Headhunter Fitness, Kaye, Turner, Kittleson, Wittenberg, and Willow Bend Fitness on their affirmative defense of res judicata as to his claims for (1) anticipatory repudiation of the guaranty against Kaye, Turner, Kittleson, and Wittenberg, (2) indemnity against Headhunter Fitness, (3) contribution against Kaye, Turner, Kittleson, and Wittenberg, (4) piercing the corporate veil of Willow Bend Fitness, (5) breach of fiduciary duty against Headhunter Fitness, Kaye, Turner, Kittleson, Wittenberg, and Willow Bend Fitness, and (6) the imposition of a constructive trust on Willow Bend Fitness.[40]

a. Applicable Law

Trial courts may not grant a summary judgment on grounds not presented. *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 204 (Tex. 2002); *Santander Consumer USA, Inc. v. Palisades Collection, L.L.C.*, 447 S.W.3d 902, 910 (Tex. App.—Dallas 2014, pet. denied); *Plunkett v. Conn. Gen. Life Ins. Co.*, 285 S.W.3d 106, 122 (Tex. App.–Dallas 2009, pet. denied); *Tex. Integrated*, 300 S.W.3d at 365. This is a notice requirement, intended to notify the claimant and the trial court of those claims or elements of claims the opponent is challenging. *Tex. Integrated*, 300 S.W.3d at 365.

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[39] *Supra* note 37.

[40] We do not address the arguments raised by Mulroy, individually, as to his claims for anticipatory repudiation of the lease because we have already concluded that he lacked standing to bring those claims. Further, we have already noted that Mulroy, individually, abandoned his appeal of the trial court's final judgment as to Baker.

Further, an appellate court may not affirm a summary judgment on grounds not expressly set out in the motion or response. *Santander*, 447 S.W.3d at 910; *Plunkett*, 285 S.W.3d at 122. Therefore, a summary judgment that grants more relief than requested should be reversed and remanded. *Santander*, 447 S.W.3d at 910; *Plunkett*, 285 S.W.3d at 122.

b. Application of the Law to the Facts

Headhunter Fitness, Kaye, Turner, Kittleson, Wittenberg, and Willow Bend Fitness did not seek traditional summary judgment on their affirmative defense of res judicata in their October 21, 2010 motion for summary judgment. In its September 24, 2012 order, the trial court granted the portion of the Fitness Evolution Group's March 7, 2012 motion for partial no-evidence summary judgment on the Headhunter Group's affirmative defense of res judicata as to Mulroy, individually. Afterward, in the Headhunter Group's October 30, 2012 motion for traditional summary judgment on the remaining claims, they sought traditional summary judgment on their affirmative defense of res judicata only as to Fitness Evolution and Mulroy, as assignee of Gleneagles's claims. On January 2, 2013, the trial court signed an order denying the Headhunter Group's October 30, 2012 motion for traditional summary judgment on the remaining claims in its entirety.

However, during the January 10, 2013 pre-trial conference, the trial court sua sponte reconsidered the Headhunter Group's affirmative defense of res judicata. During the hearing, the trial court stated, "So I'm going to grant the res judicata summary judgment issue, which I think will do away with the [Fitness Evolution Group's] claims." On January 16, 2013, the trial court signed an order that "granted the Headhunter [Group's] motion on the res judicata argument, ruling that the lawsuit filed by Gleneagles Shopping Center Plano, Texas[,] Limited Partnership[,] in 2010 in New York State bars all of [the Fitness Evolution Group's] claims," superseding its September 24, 2012 order, which had previously granted no-evidence summary

judgment on the Headhunter Group's affirmative defense of res judicata as to Mulroy, individually.

The record shows that the Headhunter Group did not move for traditional summary judgment on its affirmative defense of res judicata as to the claims brought by Mulroy, individually. Accordingly, we conclude the trial court's final judgment grants more relief than requested. *See Santander*, 447 S.W.3d at 910; *Plunkett*, 285 S.W.3d at 122. The portion of the trial court's final judgment granting a take-nothing judgment on the following claims brought by Mulroy, individually, is reversed and remanded for further proceedings consistent with this opinion: (1) indemnity against Headhunter Fitness, (2) contribution against Kaye, Turner, Kittleson, and Wittenberg, (3) piercing the corporate veil of Willow Bend Fitness, (4) breach of fiduciary duty against Headhunter Fitness, Kaye, Turner, Kittleson, Wittenberg, and Willow Bend Fitness, and (5) the imposition of a constructive trust on Willow Bend Fitness.

The portion of issue two that relates to Mulroy, individually, is decided in his favor.

2. Res Judicata as to Fitness Evolution and Mulroy, as Assignee of Gleneagles's Claims

Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, argue the Headhunter Group did not establish they were entitled to traditional summary judgment, as a matter of law, on the Headhunter Group's affirmative defense of res judicata.[41] They claim the Headhunter Group did not conclusively establish all three elements of res judicata. In particular, they argue "the New York case was not brought to a final conclusion." The Headhunter Group responds that the claims are based on the same transactions and events that formed the basis of the New York Lawsuit, the claims could have been raised in the New York Lawsuit, Gleneagles fully participated in the New York Lawsuit and the Fitness Evolution Group is in privity with

[41] We have already determined that the Headhunter Group did not move for traditional summary judgment on its affirmative defense of res judicata as to Mulroy, individually. Accordingly, we do not address the arguments raised by Mulroy, individually.

Gleneagles, and the New York default judgment, which was "entered" on September 30, 2010, is a final judgment in the merits.[42]

a. Applicable Law

If a New York judgment is a valid, final judgment that would have had preclusive effect on a suit had the suit been brought in New York, then it bars the suit in Texas as well. *Purcell*, 940 S.W.2d at 601. Under New York law, a party seeking to assert res judicata must show the existence of a prior judgment on the merits. *Miller Mfg. Co., Inc. v. Zeiler*, 383 N.E.2d 1152, 1153 (N.Y. 1978). Under New York law, "a 'final' order or judgment is one that disposes of all of the causes of action between the parties in the action or proceeding and leaves nothing for further judicial action apart from mere ministerial matters."[43] *Burke*, 647 N.E.2d at 739. A limited exception to this rule is the "implied severance" doctrine where an order that disposes of some, but not all, of the causes of action asserted in a litigation between parties may be deemed final only if the causes of action it resolves do not arise out of the same transaction or continuum of facts, or out of the same legal relationship as the unresolved causes of action. *Burke*, 647 N.E.2d at 740.

Pursuant to rule 5013 of the New York Civil Practice Law and Rules, "A judgment dismissing a cause of action before the close of the proponent's evidence is not a dismissal on the merits unless it specifies otherwise, but a judgment dismissing a cause of action after the close of the proponent's evidence is a dismissal on the merits unless it specifies otherwise." N.Y. CIV. PRAC. LAW & R. 5013. As a result, pursuant to New York law, a dismissal "without

[42] The Headhunter Group also argues that Fitness Evolution's claims are barred pursuant to res judicata by the 296th Judicial District Court's order of dismissal with prejudice in the prior 2007 Collin County Lawsuit. However, the trial court's final judgment specifies that "The [Trial] Court granted the Headhunter [Group's] motion on the res judicata argument, ruling that the lawsuit filed by Gleneagles Shopping Center Plano, Texas Limited Partnership[,] in 2010 in New York State bars all of [the Fitness Evolution Group's] claims." Accordingly, we do not address this argument.

[43] Under Texas law, a final judgment is one that disposes of all pending parties and claims. *See Lehmann*, 39 S.W.3d at 195.

prejudice" is not a judgment on the merits for purposes of res judicata. *Landau v. LaRosa, Mitchell & Ross*, 892 N.E.2d 380, 383 (N.Y. 2008); *Miller Mfg.*, 383 N.E.2d at 1153.

Under New York law, a default judgment is conclusive for res judicata purposes. *Silverman v. Leucadia, Inc.*, 548 N.Y.S.2d 720, 721 (1989). However, under New York law, the doctrine of res judicata does not operate to bar an action which solely involves subsequent defaults in payments due under the terms of a fee agreement when such issues had not matured at the time of and were never litigated in the prior action. *See Sannon Stamm Assocs. Inc. v. Keefe, Bruyette & Woods, Inc.*, 890 N.Y.S.2d 828 (N.Y. App. Div. 2009) (discussing placement fees); *Gelb v. Hatton*, 512 N.Y.S.2d 431 (N.Y. App. Div. 1987) (discussing mortgage payments).

b. Application of the Law to the Facts

Headhunter Fitness ceased doing business at Gleneagles Plaza on November 21, 2009, and returned the keys on December 3, 2009. Paragraph 17(b) of the July 20, 2001 lease between Gleneagles and Fitness Evolution provides that on termination of possession, "[Gleneagles] may, from time to time, bring an action against Tenant to collect amounts due by Tenant, without the necessity of [Gleneagles] waiting until the expiration of the Term." On February 5, 2010, Gleneagles filed its verified complaint in the Supreme Court of the State of New York, Monroe County, against Fitness Evolution, Mulroy, individually, Headhunter Fitness, Kaye, Turner, Kittleson, and Wittenberg.[44] In that New York lawsuit, Gleneagles brought claims against Fitness Evolution, Mulroy, individually, and Headhunter Fitness for breach of the lease, the amendment to the lease, and the guaranty. Gleneagles alleged damages in the amount of $120,670.83, the rent owed from December 2009 to February 5, 2009, the date of the complaint, and stated "it will continue to incur damages to the extent [Fitness Evolution, Mulroy, individually, and Headhunter Fitness] continue to fail and/or refuse to pay the agreed upon

[44] On February 5, 2010, Fitness Evolution and Mulroy, individually, filed their original petition in this case, in Texas.

minimum rent and related charges due." Also, Gleneagles brought claims against Kaye, Turner, Kittleson, and Wittenberg for breach of the lease, the amendment to the lease, and the guaranty, alleging damages in the amount of $120,670.83, representing the three months of unpaid minimum rent. On April 2, 2010, Gleneagles filed its "Notice of Partial Discontinuance," seeking to nonsuit their claims against Kaye, Turner, Kittleson, and Wittenberg. Then, on September 30, 2010, the clerk entered a no-answer default judgment against Headhunter Fitness, awarding Gleneagles $120,670.83 plus costs.

i. Nonsuit of Kaye, Turner, Kittleson, and Wittenberg in the New York Lawsuit

First, we address the argument of Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, that the Headhunter Group failed to conclusively establish a prior final judgment on the merits because the claims brought by Gleneagles against Kaye, Turner, Kittleson, and Wittenberg in the New York Lawsuit were nonsuited. In the Headhunter Group's October 30, 2012 motion for traditional summary judgment on the remaining claims, they conceded that Gleneagles "nonsuited its claim for breach of the guaranty in the New York Lawsuit against Kaye, Turner, Kittleson, and Wittenberg." Also, attached to that motion was the affidavit of Kaye, which states, "I know, based upon my business responsibilities with Headhunters, that on March 2, 2010, Gleneagles filed a Notice of Partial Discontinuance of the New York Lawsuit with respect to Turner, Kittelson, Wittenberg, and me." The April 2, 2010 "Notice of Partial Discontinuance" filed by Gleneagles in the Supreme Court of the State of New York, Monroe County, seeking to nonsuit their claims against Kaye, Turner, Kittleson, and Wittenberg was attached to Headhunter Fitness, Kaye, Turner, Kittleson, Wittenberg, and Baker's June 1, 2012 response to Mulroy's March 7, 2012 motion for partial traditional summary

judgment.[45] Important to this analysis is the fact that the notice of partial discontinuance seeks to discontinue the action against Kaye, Turner, Kittleson, and Wittenberg "without prejudice."

During the January 10, 2013 pre-trial conference, as noted above, the trial court stated, "As to the individuals and the guarantee [sic], there couldn't be res judicata as to the individuals because they were non-suited. There couldn't be res judicata." Nevertheless, the trial court's final judgment "granted the Headhunter [Group's] motion on the res judicata argument, ruling that the lawsuit filed by Gleaneagles Shopping Center Plano, Texas[,] Limited Partnership[,] in 2010 in New York State bars all of the [Fitness Evolution Group's] claims." However, pursuant to New York law, the nonsuit of Kaye, Turner, Kittleson, and Wittenberg "without prejudice" is not a judgment on the merits for purposes of res judicata. *See Landau*, 892 N.E.2d at 383 (dismissal "without prejudice" is not a judgment on merits for purposes of res judicata).

We conclude the trial court erred when it granted the portion of the Headhunter Group's October 30, 2010 motion for traditional summary judgment on the remaining claims on their affirmative defense of res judicata to the extent it was based on the nonsuit of Kaye, Turner, Kittleson, and Wittenberg because the Headhunter Group did not conclusively establish the existence of a prior final judgment on the merits. As a result, the burden did not shift to Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, to raise an issue of material fact. *See Casso*, 776 S.W.2d at 556 (burden of proof does not shift to nonmovant unless and until movant has conclusively established entitlement to summary judgment as a matter of law).

ii. Default Judgment Against Headhunter Fitness in the New York Lawsuit

Next, we address the argument of Fitness Evolution and Mulory, as assignee of Gleneagles's claims, that the Headhunter Group did not conclusively establish a prior final

[45] The Headhunter Group's October 30, 2012 motion for traditional summary judgment on the remaining claims incorporated "all pleadings and orders on file with the [trial] [c]ourt."

judgment on the merits because the default judgment against Headhunter Fitness in the New York Lawsuit "[was] not a final judgment on the merits." On February 5, 2010, Gleneagles filed its verified complaint in New York against Fitness Evolution, Mulroy, individually, Headhunter Fitness, Kaye, Turner, Kittleson, and Wittenberg. On April 2, 2010, after Kaye, Turner, Kittleson, and Wittenberg were nonsuited, the clerk entered a no-answer default judgment against Headhunter Fitness. As indicated in our earlier analysis of the Sagebrush Group's claimed defense of res judicata,[46] the parties do not point us to, nor could we find in this extensive record, a disposition in the New York Lawsuit of Fitness Evolution and Mulroy, individually. *See Purcell*, 940 S.W.2d at 601 (if New York judgment valid, final judgment that would have had preclusive effect on suit had suit been brought in New York, then it bars suit in Texas). Further, the Headhunter Group does not argue the default judgment was actually or impliedly severed. *See Burke*, 647 N.E.2d at 740.

We conclude the trial court erred when it granted the Headhunter Group's portion of the October 30, 2010 motion for traditional summary judgment on the remaining claims on Headhunter Fitness's affirmative defense of res judicata to the extent it was based on the default judgment against Headhunter Fitness in the New York Lawsuit because the Headhunter Group did not conclusively establish the existence of a prior final judgment on the merits. *See Am. Tobacco*, 951 S.W.2d at 425 (trial court properly grants summary judgment on affirmative defense when movant establishes all elements of affirmative defense); *Centeq Realty*, 899 S.W.2d at 197 (to obtain summary judgment on affirmative defense, movant must plead and conclusively establish each element of affirmative defense). As a result, the burden did not shift to Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, to raise an issue of material

[46] *Supra* section III(D)(2)(c) of this opinion.

fact. *See Casso*, 776 S.W.2d at 556 (burden of proof does not shift to nonmovant unless and until movant has conclusively established entitlement to summary judgment as a matter of law).

c. Conclusions Relating to the Headhunter Group's October 30, 2010 Motion for Summary Judgment on the Remaining Claims

The portion of the trial court's final judgment that granted traditional summary judgment on the Headhunter Group's affirmative defense of res judicata and ordered a take-nothing judgment on the claims brought by Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, against the Headhunter Group is reversed and remanded for further proceedings consistent with this opinion. The portion of issue two that relates to Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, is decided in their favor.

IV. TAKE-NOTHING SUMMARY JUDGMENT ON THE HEADHUNTER GROUP'S COUNTERCLAIMS

In their sole issue on cross-appeal, the Headhunter Group argues the trial court erred when it concluded their counterclaims were barred by the settlement agreement with mutual releases. In part, the Headhunter Group argues, "[this] argument [was] not raised by [Fitness Evolution or Mulroy, individually,] in any of their motions for summary judgment."

A. Applicable Law

As we previously stated, an appellate court may not affirm a summary judgment on grounds not expressly set out in the motion or response.[47] *Santander*, 447 S.W.3d at 910; *Plunkett*, 285 S.W.3d at 122. Therefore, a summary judgment that grants more relief than requested should be reversed and remanded. *Santander*, 447 S.W.3d at 910; *Plunkett*, 285 S.W.3d at 122.

[47] *Supra* subsection III(E)(1)(a) of this opinion.

B. Application of the Law to the Facts

The trial court's final judgment states the following with respect to the Headhunter Group's counterclaims: "The [Trial] Court also considered the Headhunter [Group's] remaining counterclaims and rendered judgment that they are barred by the Settlement Agreement with Mutual releases signed on December 4, 2009, thus the Headhunter [Group] take[s] nothing against [Fitness Evolution, Mulroy, individually, and Sam Mulroy]."

On appeal, according to the argument of the parties in their briefs, they appear to understand the trial court's final judgment to grant summary judgment against the Headhunter Group on the affirmative defense of release. However, the record shows that Fitness Evolution and Mulroy, individually, did not assert the affirmative defense of release. The only affirmative defense that addresses the December 4, 2009 settlement agreement with mutual releases was raised by Fitness Evolution and Mulroy, individually, in their fourth amended answer to the counterclaims and states, "[T]he [Headhunter Group's] [counter]claims are barred in whole or in part by ambiguity to the [December 4, 2009] [s]ettlement [a]greement [and mutual releases]." The record does not contain an answer filed by Sam Mulroy.[48] Ambiguity is an affirmative defense that is distinct from release.[49]

In addition, in their September 21, 2010 motion for partial traditional summary judgment, Fitness Evolution and Sam Mulroy asserted only that they were entitled to traditional summary judgment on their affirmative defenses of res judicata and collateral estoppel as to the counterclaims and third-party claims of Headhunter Fitness, Kaye, Turner, Kittleson,

[48] The Headhunter Group does not appeal the portion of the trial court's final judgment granting a take-nothing judgment on the Headhunter Group's counterclaims against Sam Mulroy.

[49] "Where a writing is incomplete or ambiguous, parol evidence is admissible to explain the writing or to assist in the ascertainment of the true intention of the parties insofar as the parol evidence does not alter or contradict any part of the written memorandum in question." *Berthelot v. Brinkmann*, 322 S.W.3d 365, 372–73 (Tex. App.—Dallas 2010, pet. denied) (quoting *Warren Bros. Co. v. A.A.A. Pipe Cleaning Co.*, 601 S.W.2d 436, 439–40 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.)).

Wittenberg, and Baker. They did not seek traditional summary judgment as to Willow Bend Fitness.

In his March 7, 2012 motion for partial traditional summary judgment, Mulroy, individually, asserted he was entitled to summary judgment on Headhunter Fitness, Kaye, Turner, Kittleson, Wittenberg, and Baker's counterclaims for fraud as to the asset purchase agreement, fraudulent inducement as to the asset purchase agreement, negligent misrepresentation as to the asset purchase agreement, breach of the asset purchase agreement, fraudulent inducement as to the December 4, 2009 settlement agreement with mutual releases, negligent misrepresentation as to the December 4, 2009 settlement agreement with mutual releases, promissory estoppel, and piercing the corporate veil of Fitness Evolution. Mulroy, individually, did not move for summary judgment on his affirmative defenses to the Headhunter Group's counterclaims. Also, Mulroy, individually, did not move for traditional summary judgment on the counterclaims of contribution and indemnity, breach of the December 4, 2009 settlement agreement with mutual releases, fraud as to the December 4, 2009 settlement agreement with mutual releases, or any of the counterclaims asserted by Willow Bend Fitness. In the March 7, 2012 motion for partial no-evidence summary judgment filed by Fitness Evolution and Mulroy, individually, they sought a no-evidence summary judgment on the Headhunter Group's counterclaim seeking to pierce the corporate veil as to Fitness Evolution.

Accordingly, because the record shows that Fitness Evolution, and Mulroy, individually, did not assert the affirmative defense of release or move for summary judgment on that basis, we conclude the trial court's final judgment grants more relief than requested. *See Santander*, 447 S.W.3d at 910; *Plunkett*, 285 S.W.3d at 122. The portion of the trial court's final judgment granting a take-nothing judgment on the Headhunter Group's counterclaims against Fitness Evolution and Mulroy, individually, is reversed and remanded for further proceedings consistent

with this opinion. Sam Mulroy is not a party to this appeal, so we express no opinion as to the propriety of the trial court's final judgment granting a take-nothing judgment on the Headhunter Group's third-party claims against him.

Issue one of the Headhunter Group's cross-appeal is decided in their favor.

V. KAYE/BASSMAN'S CROSS-APPEAL

The Headhunter Group and Kaye/Bassman filed a joint notice of cross-appeal that states

> Pursuant to Texas Rules of Appellate Procedure 25.1 and 26.1, [the Headhunter Group] and Kaye[/]Bassman [] hereby state their intent to challenge on appeal any ruling adverse to [the Headhunter Group and Kaye/Bassman] that is contained in or made final by the Final Judgment or that is material to any issue raised or relief sought by [the Fitness Evolution Group] on appeal, including but not limited to the denial or partial denial of [the Fitness Evolution Group's] motion for summary judgment on [the Headhunter Group's] counterclaims.

The Headhunter Group and Kaye/Bassman were represented by the same legal counsel at trial and in their notice of cross-appeal. However, Kaye/Bassman did not file a brief in order to raise any issues in its cross-appeal. Accordingly, we dismiss Kaye/Bassman's cross-appeal. *See* TEX. R. APP. P. 43.2(f).

V. CONCLUSION

First, Mulroy, individually, does not have standing to bring his tortious interference with an existing contract claims against the Sagebrush Group and the Duggan Group, or to bring his anticipatory repudiation of the lease claims against the Headhunter Group. Accordingly, we vacate the portion of the trial court's final judgment ordering a take-nothing judgment on the following claims brought by Mulroy, individually: (1) tortious interference with an existing contract against the Sagebrush Group and the Duggan Group; and (2) anticipatory repudiation of the lease against the Headhunter Group. Those claims are dismissed for want of jurisdiction. *See* TEX. R. APP. P. 43.2(e).

Second, the Fitness Evolution Group has not shown the trial court erred when it granted Kaye/Bassman's September 20, 2011 motion for no-evidence summary judgment. The portion of the trial court's final judgment that granted Kaye/Bassman's September 20, 2011 motion for no-evidence summary judgment and ordered a take-nothing judgment on the Fitness Evolution Group's claims against Kaye/Bassman is affirmed. *See* TEX. R. APP. P. 43.2(a).

Third, Mulroy, individually, has not shown the trial court erred when it granted Baker's portion of the October 30, 2012 motion for traditional summary judgment on the remaining claims. The portion of the trial court's final judgment granting Baker's portion of the October 30, 2012 motion for traditional summary judgment on the remaining claims and ordering a take-nothing judgment on the claims brought by Mulroy, individually, against Baker is affirmed. *See* TEX. R. APP. P. 43.2(a).

Fourth, the trial court erred when it granted the Sagebrush Group's November 7, 2012 motion for traditional summary judgment on the tortious interference with an existing contract claims of Fitness Evolution and Mulroy, as assignee of Gleneagles's claims. The portion of the trial court's final judgment granting the Sagebrush Group's November 7, 2012 motion for traditional summary judgment and ordering a take-nothing judgment on the tortious interference with an existing contract claims of Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, is reversed and remanded for further proceedings consistent with this opinion. *See* TEX. R. APP. P. 43.2(d).

Fifth, the trial court erred when it granted the traditional portion of the Duggan Group's March 9, 2012 amended motion for summary judgment and ordered a take-nothing judgment on the tortious interference with an existing contract claims of Fitness Evolution and Mulroy, as assignee of Gleneagles's claims. The portion of the trial court's final judgment granting the Duggan Group's March 9, 2012 amended motion for summary judgment and ordering a take-

nothing judgment on the tortious interference with an existing contract claims of Fitness Evolution and Mulroy, as assignee of Gleneagles's claims, is reversed and remanded for further proceedings consistent with this opinion. *See* TEX. R. APP. P. 43.2(d).

Sixth, the trial court erred when it granted the Headhunter Group's October 30, 2012 motion for traditional summary judgment on the remaining claims on their affirmative defense of res judicata. The portion of the trial court's final judgment granting the Headhunter Group's motion for traditional summary judgment on the remaining claims and ordering a take-nothing judgment on the following claims is reversed and remanded for further proceedings consistent with this opinion:

Claims	Plaintiffs	Defendants
Anticipatory Repudiation of the Lease	Mulroy, as assignee of Gleneagles's claims	Kaye, Turner, Kittleson, Wittenberg, and Baker
Anticipatory Repudiation of the Lease	Fitness Evolution	Headhunter Fitness, Kaye, Turner, Kittleson, Wittenberg, and Baker
Anticipatory Repudiation of Mulroy's Personal Guaranty	Mulroy, as assignee of Gleneagles's claims	Kaye, Turner, Kittleson, Wittenberg, and Baker
Indemnity	Fitness Evolution and Mulroy, individually	Headhunter Fitness
Contribution	Fitness Evolution and Mulroy, as assignee of Gleneagles's claims	Kaye, Turner, Kittleson, Wittenberg, and Baker
Contribution	Mulroy, individually	Kaye, Turner, Kittleson, and Wittenberg
Pierce Corporate Veil	Fitness Evolution and Mulroy, individually and as assignee of Gleneagles's claims	Willow Bend Fitness
Breach of Fiduciary Duty	Mulroy, as assignee of Gleneagles's claims	Headhunter Fitness, Kaye, Turner, Kittleson, Wittenberg, Baker, and Willow Bend Fitness
Breach of Fiduciary Duty	Mulroy, individually	Headhunter Fitness, Kaye, Turner, Kittleson, Wittenberg, and Willow Bend Fitness
Constructive Trust	Fitness Evolution and Mulroy, individually and as assignee of Gleneagles's claims	Willow Bend Fitness

Fraudulent Inducement	Fitness Evolution	Headhunter Fitness
Negligent Misrepresentation	Fitness Evolution	Headhunter Fitness
Rescission of December 4, 2009 Settlement Agreement with Mutual Releases	Fitness Evolution	Headhunter Fitness

See TEX. R. APP. P. 43.2(d).

Seventh, the trial court erred when it concluded the Headhunter Group's counterclaims were barred by the December 4, 2009 settlement agreement with mutual releases and ordered a take-nothing judgment on all of the Headhunter Group's counterclaims. That portion of the trial court's final judgment is reversed and remanded for further proceedings consistent with this opinion. *See* TEX. R. APP. P. 43.2(d).

Finally, Kaye/Bassman has failed to file a brief or raise any issues in its cross-appeal of the trial court's final judgment. Accordingly, Kaye/Bassman's cross-appeal is dismissed. *See* TEX. R. APP. P. 43.2(f).

/Douglas S. Lang/
DOUGLAS S. LANG
JUSTICE

130506F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

FITNESS EVOLUTION, L.P., JOSEPH S. MULROY, AND GLENEAGLES SHOPPING CENTER PLANO, TEXAS, L.P., THROUGH ITS ASSIGNEE, JOSEPH S. MULROY, Appellants

No. 05-13-00506-CV V.

HEADHUNTER FITNESS, L.L.C., JEFF KAYE, NICHOLAS L. TURNER, MICHAEL KITTLESON, JEFF WITTENBERG, BILL BAKER, WILLOW BEND FITNESS CLUB, KAYE/BASSMAN INTERNATIONAL CORPORATION, SAGEBRUSH PARTNERS, LTD., VAUGHN R. HEADY, JR., MARK W. LEWIS, JAMES DUGGAN, AND DUGGAN REALTY ADVISORS, L.L.C., Appellees

On Appeal from the 429th Judicial District Court, Collin County, Texas
Trial Court Cause No. 429-00529-2010.
Opinion delivered by Justice Lang. Justices Bridges and Evans participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **VACATED**, in part, **AFFIRMED,** in part, **DISMISSED**, in part, and **REVERSED** and **REMANDED,** in part.

We **VACATE** that portion of the trial court's judgment ordering a take-nothing judgment on the following claims brought by appellant Joseph S. Mulroy, individually: (1) tortious interference with an existing contract against appellees Sagebrush Partners, Ltd., Vaughn R. Heady, Jr., Mark W. Lewis, James Duggan, and Duggan Realty Advisors, L.L.C.; and (2) anticipatory repudiation of the lease against appellees Headhunter Fitness, L.L.C., Jeff Kaye, Nicholas L. Turner, Michael Kittleson, Jeff Wittenberg, Bill Baker, and Willow Bend Fitness Club. We **DISMISS** those claims for want of jurisdiction.

We **AFFIRM** that portion of the trial court's judgment that ordered a take-nothing judgment on the claims brought by appellants Fitness Evolution, L.P., Joseph S. Mulroy,

individually, and Gleneagles Shopping Center Plano, Texas, L.P., through its assignee, Joseph S. Mulroy, against appellee Kaye/Bassman International Corporation.

We **AFFIRM** that portion of the trial court's judgment that ordered a take-nothing judgment on the claims brought by appellant Joseph S. Mulroy, individually, against appellee Bill Baker.

We **DISMISS** the cross-appeal brought by cross-appellant Kaye/Bassman International Corporation.

In all other respects, the trial court's judgment is **REVERSED**. We **REMAND** this cause to the trial court for further proceedings consistent with this opinion.

Appellants Fitness Evolution, L.P., Joseph S. Mulroy, individually, and Gleneagles Shopping Center Plano, Texas, L.P., through its assignee, Joseph S. Mulroy, have raised no issues on appeal relating to their claims against appellee Kaye/Bassman International Corporation. Also, although cross-appellant Kaye/Bassman International Corporation filed a notice of appeal, it did not file a brief on cross-appeal. Therefore, it is **ORDERED** that appellee and cross-appellant Kaye/Bassman International Corporation bear no costs of this appeal.

Because the remaining parties (i.e., (1) appellants and cross-appellees Fitness Evolution, L.P., and Joseph S. Mulroy, individually, (2) appellant Gleneagles Shopping Center Plano, Texas, L.P., through its assignee, Joseph S. Mulroy, (3) appellees and cross-appellants Headhunter Fitness, L.L.C., Jeff Kaye, Nicholas L. Turner, Michael Kittleson, Jeff Wittenberg, Bill Baker, and Willow Bend Fitness Club, and (4) appellees Sagebrush Partners, Ltd., Vaughn R. Heady, Jr., Mark W. Lewis, James Duggan, and Duggan Realty Advisors, L.L.C.) have not prevailed on all issues, we have determined that each of the remaining parties will be severally liable for one-fifteen (1/15) of the total costs of the clerk's and reporter's records filed in this appeal.

Accordingly, we **ORDER** that appellants and cross-appellees Fitness Evolution, L.P., and Joseph S. Mulroy, individually, and appellant Gleneagles Shopping Center Plano, Texas, L.P., through its assignee, Joseph S. Mulroy, recover and divide equally among themselves, a total of twelve-fifteenths (12/15) of the total cost of the clerk's and reporter's records filed in this appeal as follows:

(1) one-fifteenth (1/15) from appellee and cross-appellant Headhunter Fitness, L.L.C.;

(2) one-fifteenth (1/15) from appellee and cross-appellant Jeff Kaye;

(3) one-fifteenth (1/15) from appellee and cross-appellant Nicholas L. Turner;

(4) one-fifteenth (1/15) from appellee and cross-appellant Michael Kittleson;

(5) one-fifteenth (1/15) from appellee and cross-appellant Jeff Wittenberg;

(6) one-fifteenth (1/15) from appellee and cross-appellant Bill Baker;

(7) one-fifteenth (1/15) from appellee and cross-appellant Willow Bend Fitness Club;

(8) one-fifteenth (1/15) from appellee Sagebrush Partners, Ltd.;

(9) one-fifteenth (1/15) from appellee Vaughn R. Heady, Jr.;

(10) one-fifteenth (1/15) from appellee Mark W. Lewis;

(11) one-fifteenth (1/15) from appellee James Duggan; and

(12) one-fifteenth (1/15) from appellee Duggan Realty Advisors, L.L.C.

In all other respects, we **ORDER** that the parties bear their own costs of this appeal.

Judgment entered this 22nd day of May, 2015.