REVERSE and REMAND; Opinion Filed January 15, 2016.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-00130-CV

TEMPAY, INC., Appellant
V.
TANINTCO, INC., Appellee

On Appeal from the 416th Judicial District Court
Collin County, Texas
Trial Court Cause No. 416-01537-2013

MEMORANDUM OPINION

Before Justices Francis, Evans, and Stoddart
Opinion by Justice Evans

This is a dispute between a factoring company[1] and an account debtor. For the reasons explained below, we conclude there is a genuine issue of material fact whether the factoring company's notice of assignment met the requirements of section 9.406 of the business and commerce code. *See* TEX. BUS. & COM. CODE ANN. § 9.406 (West Supp. 2015). We also conclude there is a genuine issue of material fact whether the assignment was in effect during the relevant time period. Consequently, we reverse the trial court's summary judgment for the account debtor and remand the cause.

[1] As explained in *Holloway-Houston, Inc. v. Gulf Coast Bank & Trust Co.*, 224 S.W.3d 353, 355 n.1 (Tex. App.—Houston [1st Dist.] 2006, no pet.), "Factoring is a process by which a business sells to another business, at a small discount, its right to collect money before the money is paid. [citation omitted] Factoring is a financing tool that reduces the amount of working capital a business needs by reducing the delay between the time of sale and the receipt of payment."

BACKGROUND

Appellant TemPay, Inc. is a factoring company. Under a 2011 agreement, TemPay provided payroll funding and factoring services to A-1 Source Group, Inc., a corporation that supplied temporary employees and contractors to its customers. Appellee Tanintco, Inc. was a customer of A-1 Source Group.

On March 11, 2011, TemPay sent the following notice letter to "Tangent" ("2011 notice letter"):

TEMPAY

March 11, 2011

Tangent,
Accounts Payable Manager
5700 Granite Pkwy Ste 200
Plano, TX 75024

Re: A-1 Source Group, LLC

Dear Accounts Payable Manager:

We are pleased to announce that, to better serve its customers due to rapid growth, A-1 Source Group, LLC has entered into an agreement with TemPay, Inc. Therefore, until further notice A-1 Source Group, LLC has assigned all its present and future accounts to us by means of a UCC-1 financing statement covering its accounts.

To the extent that you are now indebted or may become indebted in the future to A-1 Source Group, LLC on an account or general intangible, payment is to be made payable to A-1 Source Group, LLC at the following address or sent via ACH Payment to the information listed below.

JAF Station
PO Box 3249
New York, NY 10116-3249

OR

Sterling National Bank
ABA (Routing #) [redacted]
Account # [redacted]

Payment in any other way will not discharge this obligation.

This letter may only be revoked in writing by officers of both TemPay, Inc. and A-1 Source Group, LLC.

To assist us in applying payments properly, please supply your Federal Tax I. D. Number below and fax a copy of this letter to 216-283-6796.

Federal Tax I. D. Number _____

Thank you,

Sincerely,

Brian Keuper
Client Relations Manager

30600 Chagrin Blvd. • Suite 503 • Cleveland • Ohio 44122-5331
(216) 283 - 6666 • Fax (216) 283 - 6796

The 2011 notice letter instructs "Tangent" to make payment to "A-1 Source Group, LLC" by mail to the specified address or by "ACH Payment" to the specified bank account. The 2011 notice letter contains four errors. First, the letter is directed to "Tangent," not Tanintco, the account debtor. Second, the letter is directed to the "Accounts Payable Manager," and Tanintco does not have an employee with that title. Third, the letter instructs the account debtor to pay "A-1 Source Group, LLC," not TemPay. Fourth, it names A-1 Source Group, "LLC" as the assignor, when the correct corporate name, and the name on the UCC-1 financing statement provided to Tanintco, is A-1 Source Group, "Inc." Apart from these errors, the 2011 notice letter in its first paragraph instructs that A-1 Source Group has made the assignment "until further notice," without specifying any form of notice; and a later paragraph instructs that the letter "may only be revoked in writing by officers of both TemPay, Inc. and A-1 Source Group, L.L.C."

Robert Challis, Tanintco's operations manager, received the 2011 notice letter. On March 14, 2011, Renetta Jones, the president of A-1 Source Group, sent an email to Challis forwarding "A-1 Source Group/TemPay–Wire Instructions" and explaining "Hey Rob this is who is taking over for me see below." Two days later, Brian Keuper of TemPay sent an email to Challis regarding "A-1 Source Group Invoice #126-13545 dated 3/9/11 $5,460.00 (TANGENT)." Keuper stated that he had attached the specified invoice, and asked Challis to "see the attached UCC Notification Letter illustrating TemPay's funding relationship with A-1 Source Group, LLC." He also requested Keuper to "confirm via e-mail that your corporate office [in] the U.K. has changed remittance instructions to those I have attached and recently e-mailed to you." Between March 16 and March 24, 2011, Keuper and Challis exchanged emails regarding A-1 Source Group invoices and payment to TemPay. Each of Challis's emails identified him as "Operations Manager, Tanintco/Tangent." Challis requested revisions to the

form of the invoices as well as additional information to enable Tanintco to process the invoices for payment. On March 23, 2011, Keuper wrote Challis:

> You seem to be having issues with a supplier name change. I will need these issues resolved prior to funding additional hours for A-1 Source Group. TemPay has just entered into a payroll funding relationship with A-1 Source Group but there seems to be additional red tape that needs to be resolved first with billing issues and payments being processed for these invoices. . . . Please help me resolve this issue so we may continue funding A-1 Source Group with contractors placed at Tantico [sic]/Tangent. Please let me know what we can do to have invoicing done so there is a seamless transition to payment being processed in a timely manner.

Challis responded with "[a]pologies for the confusion," and assured Keuper that he would "now be making sure things run smoothly." He concluded: "I'm here to make things right and am confident once we get things going everything will run smoothly. I apologize once more for any confusion and extra work this is causing." Keuper responded with three revised invoices to be processed for payment. The record does not include any further correspondence between TemPay and Tanintco in 2011.

For a year, Tanintco made payment on its account by wire transfer in accordance with the 2011 notice letter. But in "early 2012," Jones "notified Tanintco to begin paying A-1 Source Group, Inc. directly, no longer through TemPay," according to Challis's summary judgment affidavit. For the next year, Tanintco paid its invoices as instructed by Jones. At all times, Tanintco paid in full for the services rendered to it by A-1 Source Group, Inc. Tanintco heard nothing from TemPay for another year during which Tanintco paid A-1 Source Group, Inc. at least $597,386.95.

On February 8, 2013, TemPay sent a second notice letter to "Tanintco/Tangent," ("2013 notice letter") this time instructing that "payment is to be made payable to TemPay, Inc." under an agreement between "A-1 Source Group" and TemPay. But because TemPay's suit does not

seek to recover from Tanintco any debts allegedly incurred after February 8, 2013,[2] the adequacy of the 2013 notice letter is not at issue. In late February 2013, Kenneth Wood of TemPay and Dan Pike of Tanintco exchanged emails about amounts TemPay alleged were due from Tanintco. Wood sent Pike a "statement of account" showing a total of $597,386.95 due from Tanintco for invoices dated October 4, 2012, through February 15, 2013. Because Tanintco had already paid A-1 Source Group for these invoices, it did not pay TemPay.

On April 19, 2013, TemPay filed suit against A-1 Source Group Inc. and Jones seeking injunctive relief. TemPay alleged that Jones "devised . . . a scheme to convert the accounts receivable due to [TemPay] for her own use and benefit by directing the customers to pay [A-1 Source Group] directly." TemPay further alleged that thirty days after A-1 Source Group and TemPay entered into the factoring agreement, "Jones was indicted on charges of conspiracy to commit money laundering in the United States District Court for the Eastern District of Texas." TemPay alleged that on January 30, 2013, Jones "entered a guilty plea on the charge of money laundering and was sentenced to serve eighteen (18) months in the federal penitentiary located in Fort Worth, Texas." TemPay further alleged that although it was unaware that Jones "was in any type of criminal trouble" when the factoring agreement was executed, Keuper learned of Jones's indictment in February 2012. Nevertheless, with reassurances from Jones and her attorney, and because the A-1 Source Group account was current, TemPay "decided to continue doing business with [A-1 Source Group and Jones] and monitor the account closely." TemPay alleged it was "shocked to learn in and around February 2013 that [Jones] pled guilty to said charges." There is nothing in the record showing that TemPay shared any information with Tanintco about Jones's indictment or that Tanintco had any knowledge of it.

[2] Although TemPay alleges in its operative petition that "Defendant TANINTCO continued to pay Defendant A-1 directly until approximately April or May 2013," its summary judgment proof contains only invoices for services rendered between October 12, 2012 to February 8, 2013.

On September 26, 2013, TemPay filed its first amended original petition adding Tanintco as a defendant, alleging "wrongful payment" by Tanintco to A-1 Source Group. TemPay then moved for summary judgment against A-1 Source Group, Jones, and Tanintco. Against Tanintco, TemPay alleged that because the assignment was effective as a matter of law, Tanintco was liable for all payments it made on the account to A-1 Source Group.

Tanintco filed a cross-motion for summary judgment against TemPay. Tanintco sought summary judgment on grounds that (1) TemPay's notice of assignment was ineffective as a matter of law, and (2) in the alternative, the assignment was not in effect during the period for which TemPay sought damages.

The trial court granted TemPay's motion on its claims against A-1 Source Group and Jones, and rendered judgment for TemPay against those parties in the principal sum of $526,333.53, plus attorney's fees, interest, and costs. This portion of the trial court's judgment is not challenged in this appeal.

The trial court denied TemPay's motion for summary judgment on its claims against Tanintco, granted Tanintco's cross-motion for summary judgment, and rendered a take-nothing judgment on TemPay's claims against Tanintco. On appeal, TemPay seeks reversal of the trial court's order granting Tanintco's motion and remand to the trial court for further proceedings.[3]

STANDARD OF REVIEW

We review a trial court's summary judgment de novo. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). The summary judgment 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." *Nixon v. Mr. Property Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985). In deciding whether there

[3] TemPay does not assign error to the trial court's denial of its summary judgment motion against Tanintco and does not request that we render judgment in its favor.

is a disputed fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true, and "every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor." *Id.* at 558–59; *see also Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 222–23 (Tex. 1999) (party moving for summary judgment carries burden of establishing that no material fact exists and that it is entitled to judgment as a matter of law; nonmovant has no burden to respond unless movant conclusively establishes cause of action or defense).

When, as here, the trial court does not specify the basis for its summary judgment, we affirm the summary judgment if any of the theories presented to the trial court and preserved for appellate review are meritorious. *See Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001); *Shaw v. Trinity Highway Prods., LLC*, 329 S.W.3d 914, 917 (Tex. App.—Dallas 2010, no pet.). But we may not affirm or reverse a summary judgment on grounds that were not raised in the motion or response. *See* TEX. R. APP. P. 166a(c); *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 341 (Tex. 1993) ("A motion [for summary judgment] must stand or fall on the grounds expressly presented in the motion.").

APPLICABLE LAW

Section 9.406 of the business and commerce code governs notice to an account debtor that its account has been assigned. *See* TEX. BUS. & COM. CODE ANN. § 9.406 (West Supp. 2015); *see also Holloway-Houston, Inc. v. Gulf Coast Bank & Trust Co.*, 224 S.W.3d 353, 358 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (applying section 9.406 to assignment of accounts receivable). Section 9.406 provides in relevant part:

> (a) Subject to Subsections (b)–(i), an account debtor on an account . . . may discharge its obligation by paying the assignor until, but not after, the account debtor receives a notification, authenticated by the assignor or the assignee, that the amount due or to become due has been assigned and that payment is to be made to the assignee. After receipt of the notification, the

> account debtor may discharge its obligation by paying the assignee and may not discharge the obligation by paying the assignor.
>
> (b) . . . [N]otification is ineffective under Subsection (a):
>
> (1) if it does not reasonably identify the rights assigned; . . . .
>
> (c) . . . [I]f requested by the account debtor, an assignee shall seasonably furnish reasonable proof that the assignment has been made. Unless the assignee complies, the account debtor may discharge its obligation by paying the assignor, even if the account debtor has received a notification under Subsection (a). . . .

TEX. BUS. & COM. CODE ANN. § 9.406(a), (b)(1), (c).

Section 9.406(b)(1) expressly provides that notice is "ineffective" if it "does not reasonably identify the rights assigned." TEX. BUS. & COM. CODE ANN. § 9.406(b)(1). Further, the notification must be "authenticated by the assignor or the assignee." TEX. BUS. & COM. CODE ANN. § 9.406(a).

But section 9.406 does not "describe[ ] with specificity the requisites of notice." *See John Deere Co. v. Neal*, 544 S.W.2d 514, 516 (Tex. Civ. App.—Texarkana 1976, no writ) (discussing predecessor statute with same language). Actual notice may be sufficient. *See, e.g.*, *Manes Constr. Co., Inc. v. Wallboard Coatings Co., Inc.*, 497 S.W.2d 334, 336–37 (Tex. App.—Houston [14th Dist.] 1973, no writ) (account debtor received actual notice by telephone and by letter that assignment had been made, and therefore subjected itself to double liability for accounts paid directly to the assignor after notice to pay assignee). But "bare actual notice" is not sufficient. *See John Deere Co.*, 544 S.W.2d at 516. The account debtor must be notified that (1) "the amount due or to become due has been assigned," and (2) payment is to be made to the assignee. *Estate of Haas v. Metro-Goldwyn-Mayer, Inc.*, 617 F.2d 1136, 1139 (5th Cir. 1980)[4];

[4] Although the court in *Estate of Haas* was construing Article 9 of the Uniform Commercial Code under California law, *see Estate of Haas* , 617 F.2d at 1139 n.1, the Texas Supreme Court has explained that the Uniform Commercial Code must be "construed to effect its general purpose to make uniform the law of those states that enact it." *Southwest Bank v. Info. Support Concepts, Inc.*, 149 S.W.3d 104, 110 (Tex. 2004) (quoting TEX. GOV'T CODE

see also John Deere Co., 544 S.W.2d at 516 (assignee must "mak[e] its rights clear to a debtor," by providing knowledge of facts from which the account debtor should conclude that assignee has "a right to collect the indebtedness in question because of some arrangement" with the assignor).

When notice has been given, the account debtor "may not discharge the obligation by paying the assignor." TEX. BUS. & COM. CODE ANN. § 9.406(a). But the account debtor may request "reasonable proof that the assignment has been made." TEX. BUS. & COM. CODE ANN. § 9.406(c). If requested, the assignee "shall seasonably furnish reasonable proof that the assignment has been made." *Id.* And "[u]nless the assignee complies, the account debtor may discharge its obligation by paying the assignor, even if the account debtor has received a notification under Subsection (a)." *Id.*

Comments 3 and 4 to section 9.406 explain the application of subsections (b) and (c):

> Subsection (b)(1) . . . mak[es] ineffective a notification that does not reasonably identify the rights assigned. A reasonable identification need not identify the right to payment with specificity, but what is reasonable is also not left to the arbitrary decision of the account debtor. If an account debtor has doubt as to the adequacy of a notification, it may not be safe in disregarding the notification unless it notifies the assignee with reasonable promptness as to the respects in which the account debtor considers the notification defective. . . .
>
> An account debtor that questions the adequacy of proof submitted by an assignee would be well advised to promptly inform the assignee of the defects.

TEX. BUS. & COM. CODE ANN. § 9.406 cmts. 3, 4 (West 2011). But if the assignee provides "reasonable proof" of the assignment, the account debtor may discharge the debt only by paying

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§ 311.028). Thus, we may consider decisions from other jurisdictions in construing provisions of the UCC. *See, e.g., Fin. Universal Corp. v. Mercantile Nat. Bank at Dallas*, 683 S.W.2d 815, 817 (Tex. App.—Dallas 1984, writ ref'd n.r.e.) (following "majority rule" from other states' application of UCC provision because "the Texas Uniform Commercial Code obliges us to strive to make the interpretation of the UCC as uniform as possible among the states").

the assignee directly. *Wyatt v. Capital One Fin.*, No. 03-08-00019-CV, 71 UCC Rep. Serv. 2d 8, 2010 WL 323124, at *6 (Tex. App.—Austin 2010, no pet.) (mem. op.).

"[A]ctual notice" of an assignment "embraces those things that a reasonably diligent inquiry and exercise of the means of information at hand would have disclosed." *Robert Parker's Truck & Trailer Repair, Inc. v. Speer*, 722 S.W.2d 45, 48 (Tex. App.—Houston [1st Dist.] 1986, no writ). In *Speer*, the court explained that "[i]f an obligor has such knowledge of facts as is sufficient to put him on inquiry about an assignment, he is not entitled to rely only on statements made to him by the assignor after receiving such information." *Id.* The court concluded that "a reasonably diligent inquiry would have fairly included an attempt to contact" the assignee, so that sufficient evidence supported the trial court's finding that the account debtor had actual notice of the assignment. *Id.* Similarly, in *In re Apex Oil Co.* the court explained,

> At the very least, the notice should have raised a question in the mind of Apex [the account debtor], causing it to inquire about the security interest before setting off its account. *Robert Parker's Truck & Trailer Repair, Inc. v. Speer*, [citation omitted], held that notice under § 9.318 [predecessor to § 9.406] "embraces those things that a reasonably diligent inquiry and exercise of the means of information at hand *would have* disclosed." If Apex was unsure about the significance of the stamped notice, it had a duty to inquire before exercising any right it might otherwise have had to set off. At least where millions of dollars are at stake, as was the case here, a company acts unreasonably if it sets off a debt to it from another transaction, after being given notice of another's security interest in the amount due.

975 F.2d 1365, 1370 (8th Cir. 1992) (applying Texas law).

Many of the Texas cases interpreting section 9.406, including *Speer*, were decided before the addition of the requirement in subsection (a) that the notice be "authenticated by the assignor or the assignee."[5] Comment 2 to section 9.406 explains that "[t]his requirement normally could be satisfied by sending notification on the notifying person's letterhead or on a form on which

[5] Section 9.406 was rewritten in 1999, including addition of this language in subsection (a). *See* Act of May 12, 1999, 76th Leg., R.S., ch. 414, § 1.01, 1999 TEX. GEN. LAWS 2697, 2692.

the notifying person's name appears," in accordance with the definition of "authenticate" given in section 9.102.[6] TEX. BUS. & COM. CODE ANN. § 9.406, cmt. 2. Although Tanintco argues that because of this difference, *Speer* is inapplicable, both the current comments to 9.406 quoted above and subsequent case law indicate that an account debtor who doubts the adequacy of a notification should make an inquiry, as the court in *Speer* concluded. *See* TEX. BUS. & COM. CODE ANN. § 9.406 cmts. 3, 4; *Greenfield Com'l Credit, L.L.C. v. Catlettsburg Ref., L.L.C.*, No. 03-3391, 61 UCC Rep. Serv. 2d 775, 2007 WL 97068, at *3 (E.D. La. Jan. 9, 2007) (order and opinion) (citing *Speer* for proposition that current section 9.406 "embraces those things that a reasonably diligent inquiry and exercise of the information at hand *would have* disclosed").

ISSUES

In its first issue, TemPay contends a genuine issue of material fact exists "as to whether A-1's attempted unilateral and oral revocation" of the assignment was effective.

In its second issue, TemPay contends that because Tanintco complied with the notice of assignment for over a year, there is a genuine issue of material fact whether TemPay's notice reasonably identified the rights assigned.

In its third issue, TemPay contends that summary judgment for Tanintco was not proper because each invoice sent to Tanintco "contained its own independent and facially valid and enforceable 9-406 notice of assignment language in favor of TemPay."

ANALYSIS

Summary judgment for Tanintco was proper if Tanintco established there was no genuine issue of material fact and, as a matter of law, either (1) that TemPay's notice of assignment was insufficient, or (2) that the assignment was not in effect during the time period for which

[6] Section 9.102(a)(7) provides, "'Authenticate' means: (A) to sign; or (B) with present intent to adopt or accept a record, to attach to or logically associate with the record an electronic sound, symbol, or process." TEX. BUS. & COM. CODE ANN. § 9.102(a)(7) (West Supp. 2015).

TemPay seeks damages. *See* TEX. R. CIV. P. 166a(c). The second question arises only if TemPay's notice of assignment met the requirements of section 9.406. If the notice was insufficient, then Tanintco could discharge its obligation by paying A-1 Source Group as it did. *See* TEX. BUS. & COM. CODE ANN. § 9.406(a).

A. Did Tanintco establish as a matter of law that TemPay's 2011 notice letter did not "reasonably identify the rights assigned"?

The 2011 notice letter contained the errors described above. TemPay conceded the errors in its summary judgment response but offered little or no summary judgment evidence to explain them. TemPay did, however, produce summary judgment evidence that (1) Challis, the person at Tanintco with responsibility for responding to the notice, received the 2011 notice letter on or about March 14, 2011; (2) Challis had received a previous email from Jones of A-1 Source Group identifying TemPay as "who is taking over for me"; (3) Challis repeatedly corresponded with Keuper, TemPay's contact person, in efforts to comply with the notice; and (4) Tanintco complied with the notice for a year.

Courts interpreting section 9.406 have looked to surrounding circumstances, in addition to the actual text of a notice, to determine if a notice "reasonably identif[ies] the rights assigned." In *Municipal Trust & Savings Bank v. Grant Park Community District No. 6*, the Illinois appellate court explained:

> [W]e have been provided no authority which holds that notices sent under section [9.406] require "magic words" to be effective. In fact, the only requirement is that the notice reasonably identify the rights of the assignee and reasonably demands payment to the assignee. What is "reasonable" must be determined by the particular facts of each case.

525 N.E.2d 255, 258 (Ill. App. Ct. 1988); *see also Taubenhaus v. Jung Factors, Inc.*, 478 S.W.2d 149, 151 (Tex. Civ. App.—Houston [14th Dist.] 1972, no writ)[7] (court discussed evidence of communications between parties to determine question whether notice of assignment was received by account debtor prior to payments made to assignor); *Greenfield Com'l Credit, L.L.C.*, 2007 WL 97068, at *3–4 ("[u]nder the facts of this case," notice reasonably identified rights assigned even though particular account not specified in notice).

In some cases, courts have granted summary judgment on the issue whether there was reasonable notice of an assignment. *Compare Wyatt*, 2010 WL 323124, at *7 (summary judgment for assignee, holding notice reasonable), *with First-Citizens Bank & Trust Co. v. American Constructors, Inc.*, No. 03-09-00186-CV, 2010 WL 2010802, at *7–8 (Tex. App.—Austin May 21, 2010, no pet.) (mem. op.) (summary judgment for debtor, no evidence of reasonable notice). In *Wyatt*, the court affirmed a summary judgment for the assignee, concluding that the assignee supplied the account debtor with "reasonable proof" of the assignment as a matter of law. *Id.* Despite errors in the contract assignment form, the account debtor received other forms of proof including a payment coupon book and checks returned by the assignor with instructions to pay the assignee. *Wyatt*, 2010 WL 323124, at *6. In *First-Citizens Bank & Trust Co.*, the only evidence of notice was a certified mail "green card" signed by the debtor, without proof of what was included in the mailing. The court concluded the evidence did not raise a fact issue whether the assignee gave notice of the assignment, and affirmed summary judgment for the account debtor. *First-Citizens Bank & Trust Co.*, 2010 WL 2010802, at *7; *see also Citizens State Bank of Corrigan v. J.M. Jackson Corp.*, 537 S.W.2d 120,

[7] Although *Taubenhaus* preceded the adoption of UCC Article 9 in Texas, the court explained that the prior law regarding notice of an assignment to a debtor "was substantially similar; the debtor was entitled to continue payments to his creditor until notice was received by the debtor of the assignment from the creditor to the assignee." *Taubenhaus*, 478 S.W.2d at 152 (on motion for rehearing).

120 (Tex. Civ. App.—Houston [14th Dist.] 1976, no writ) (summary judgment for debtor affirmed; notation on invoices did not reasonably identify the rights assigned).

But in other cases, the question has been resolved by the finder of fact. *See Manes Constr. Co. v. Wallboard Coatings Co., Inc.*, 497 S.W.2d 334, 336 (Tex. App.—Houston [14th Dist.] 1973, no writ) (bench trial; account debtor "subjected itself to double liability" by paying assignor directly after receiving notice of assignment); *Holloway-Houston, Inc.*, 224 S.W.3d at 357–58 (bench trial; notice sufficient under § 9.406 in light of evidence including debtor's signed verification of every invoice in question); *Speer*, 722 S.W.2d at 48 (bench trial; account debtor had enough information to cause it to make "reasonably diligent inquiry").

Here, each party offered summary judgment evidence to support its contentions. Tanintco offered evidence that the notice contained multiple errors, but did not dispute TemPay's evidence that Tanintco received some information regarding the assignment and complied with the notice for a year. And although Tanintco relied on TemPay's failure to make any complaint about Tanintco's payments for over a year, as well as TemPay's failure to inform Tanintco of Jones's criminal indictment, Tanintco did not plead any affirmative defenses such as waiver or estoppel in its answer or seek summary judgment on those grounds. *See McConnell*, 858 S.W.2d at 341 (motion for summary judgment must "stand or fall" on grounds expressly presented in motion).

We conclude TemPay's evidence raises a genuine issue of material fact as to whether its notice reasonably identified the rights assigned. We sustain TemPay's second issue.

B. Did Tanintco establish as a matter of law that the assignment was not effective during the relevant time period?

TemPay argues that language in the 2011 notice letter that "[t]his letter may only be revoked in writing by officers of both Tempay, Inc. and A-1 Source Group, LLC," precludes summary judgment in Tanintco's favor, because Tanintco is relying on a telephone call to render

the assignment ineffective. But Tanintco relies on other language in the 2011 notice letter that A-1 Source Group's assignment of its accounts was only "until further notice," and Jones's telephone call constituted "further notice." Tanintco therefore sought summary judgment on the ground that the assignment was no longer effective "during the alleged period of loss," October 2012 to February 2013.

In the alternative, Tanintco disputes that Jones's telephone call constituted a "revocation" of the assignment requiring a writing. The 2011 notice letter, drafted by TemPay, did not require a writing for changes to the assignment such as changes to the parties, the method of payment, the address for payment, or the designated bank account. And the 2011 notice letter already directed Tanintco to pay A-1 Source Group. After Jones's telephone call, Tanintco continued to pay A-1 Source Group. Tanintco argues that the only change made was where payment was to be sent, not to whom payment was made.

Section 9.406 does not specifically address "revocation" or designate a specific ending date for an assignment. Subsection (a), however, provides that "[a]fter receipt of the notification, the account debtor may discharge its obligation by paying the assignee and may not discharge the obligation by paying the assignor." TEX. BUS. & COM. CODE ANN. § 9.406(a). Citing *America First Credit Union v. First Security Bank of Utah, N.A.*, 930 P.2d 1198, 1201–02 (Utah 1997) ("*AFCU*"), TemPay argues the notice of assignment could only be revoked in writing and that Tanintco breached its statutory duty by paying the assignor based solely on a telephone call.

In *AFCU*, the president and sole shareholder of the assignor represented to the account debtor that the assignment had been released. *Id.* at 1200. The account debtor, a bank, permitted the assignor to withdraw the proceeds of a certificate of deposit that had been assigned to the assignee. *Id.* The trial court "concluded that the 'totality of circumstances' gave [the bank] actual knowledge of the assignment which fulfilled the 'reasonable notice' requirement" of the

UCC. *Id.* at 1201. The court of appeals concluded the bank "had not shown the factual findings of the trial court to be clearly erroneous," and affirmed the trial court's judgment. *Id.* The supreme court agreed, stating,

> Thus we affirm the finding of the trial court, upheld by the court of appeals, that First Security [account debtor] received "reasonable notice." By releasing the account proceeds to Renaissance [assignor] while on notice of the unretracted assignment of the account as collateral for the AFCU loan, First Security breached its statutory duty to AFCU [assignee].

Id. at 1202.

But in *AFCU*, the "totality of the circumstances" included more than the assignor's representation that the assignment had been released. The supreme court also cited the bank's "unilateral actions taken after the notice was complete," including the bank's erroneous removal of a computer "red flag" on the account, and the bank's failure to notify the assignee of a change in policy allowing payment of proceeds without presentation and endorsement of the certificate of deposit. *See id.* Here, there is nothing in the record suggesting that Tanintco was responsible for any error other than heeding the instruction of its service provider, which on this record there is no indication Tanintco had any reason to distrust. The 2011 notice letter provides at least some support for Tanintco's actions by its statement that the assignment is "until further notice." Further, the "totality of the circumstances" includes TemPay's failure to notify Tanintco of any problem with the account for over a year after Tanintco resumed paying its bills to A-1 Source Group instead of TemPay, even though an alleged balance of over $500,000 accrued and was past due, and even though TemPay was aware that Jones had been indicted under the federal racketeering statute.

Section 9.406(a) "protects account debtors who have already paid from having to pay twice on the same debt." *See Apex Oil Co.*, 975 F.2d at 1368 (discussing former UCC section 9.318(c)). On the other hand, "after a debtor receives notice of a valid assignment, payment

made by the debtor to the assignor or to any person other than the assignee is made at the debtor's peril and does not discharge the debtor from liability to the assignee." *Holloway-Houston, Inc.*, 224 S.W.3d at 361 (quoting *Buffalo Pipeline Co. v. Bell,*, 694 S.W.2d 592, 596 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.)). In both *Holloway-Houston, Inc.* and *AFCU*, account debtors were required to pay the same debt twice after relying on a request from the assignor to no longer make payments in accordance with the notice from the assignee but instead to make payments directly to the assignor. *See Holloway-Houston, Inc.*, 224 S.W.3d at 355, 362–63; *AFCU*, 930 P.2d at 1202. But in both cases, the trial courts made findings of fact after bench trials in which the totality of the circumstances were presented, including the adequacy of the initial notice. *See Holloway-Houston, Inc.*, 224 S.W.3d at 357–363 (findings made after bench trial); *AFCU*, 930 P.2d at 1201; *Am. First Credit Union v. First Sec. Bank of Utah, N.A.*, 896 P.2d 25, 27 n.4 (Utah Ct. App. 1995) (noting, "All actions were . . . tried in a bench trial"), *aff'd* 930 P.2d 1198 (Utah 1997).

In this case, TemPay raised a genuine issue of material fact that any notice to redirect payments to A-1 Source Group had to be in writing. Tanintco did not conclusively show that an oral communication was sufficient under the facts presented on summary judgment. Because Tanintco did not establish its right to judgment as a matter of law regarding whether the 2011 notice of assignment was effective during the relevant time period, we sustain TemPay's first issue.

C. Did TemPay preserve its complaint that the invoices contained enforceable notices of assignment?

In its third issue, TemPay contends each invoice sent to Tanintco "contained its own independent and facially valid and enforceable 9-406 notice of assignment language in favor of

TemPay."[8] Tanintco responds that TemPay did not raise this issue in the trial court. TemPay replies that it attached the invoices themselves to its summary judgment proof. But TemPay did not bring the trial court's attention to the language on the invoices, and did not argue that the invoices themselves were sufficient notice of assignment in compliance with section 9.406. Because TemPay did not raise this argument in the trial court, we do not consider it further. *See* TEX. R. APP. P. 166a(c) (issues not expressly presented to trial court "shall not be considered on appeal as grounds for reversal"); *see also Reeder v. Curry*, 426 S.W.3d 352, 362 (Tex. App.—Dallas 2014, no pet.) (because appellant did not "expressly present" doctrine of law of the case in summary judgment response, it would not be considered on appeal as grounds for reversal).

CONCLUSION

We sustain TemPay's first and second issues. We overrule TemPay's third issue. We reverse the trial court's summary judgment in favor of Tanintco and remand the cause to the trial court for further proceedings.

/David W. Evans/
DAVID EVANS
JUSTICE

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[8] The invoices in the record bear, in small print at the bottom of the page, the statement, "All proceeds of this invoice have been assigned to and are property of TemPay, Inc, Cleveland, Ohio. A UCC-1 financing statement has been filed to perfect this secured interest." Two additional lines follow, in all capital letters: "PLEASE NOTE NEW REMITTANCE ADDRESS/TO ENSURE PROPER CREDIT, PLEASE MAIL PAYMENTS TO: JAF Station, PO Box 3249 NEW YORK NY 10116-3240." This is the mailing address for payment given on the March 11, 2011 notice letter. But as in the March 11, 2011 notice letter, the invoices also list A-1 Source Group, Inc. as the proper payee.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

TEMPAY, INC., Appellant

No. 05-15-00130-CV V.

TANINTCO, INC., Appellee

On Appeal from the 416th Judicial District Court, Collin County, Texas
Trial Court Cause No. 416-01537-2013.
Opinion delivered by Justice Evans;
Justices Francis and Stoddart participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** and this cause is **REMANDED** to the trial court for further proceedings.

It is **ORDERED** that appellant TemPay, Inc. recover its costs of this appeal from appellee Tanintco, Inc.

Judgment entered this 15th day of January, 2016.