**Affirm in part; Reverse and Render in part; Remand in part; Opinion Filed February 10, 2016.**

**In The**
# Court of Appeals
# Fifth District of Texas at Dallas

**No. 05-14-01624-CV**

**WILLIAM S. BANOWSKY, JR., Appellant**
**V.**
**BRIAN SCHULTZ, Appellee**

**On Appeal from the 191st Judicial District Court**
**Dallas County, Texas**
**Trial Court Cause No. DC-12-05686**

## MEMORANDUM OPINION

Before Justices Fillmore, Myers, and Whitehill
Opinion by Justice Myers

Appellant William S. Banowsky, Jr. appeals from a summary judgment granted in favor of appellee Brian Schultz, and the denial of Banowsky's summary judgment motion. In three issues, Banowsky argues that (1) the provisions of the Real Estate License Act (RELA) are inapplicable to individuals licensed to practice law in the state of Texas; (2) the trial court erred by granting Schultz's motion for summary judgment; (3) the trial court erred by denying Banowsky's summary judgment motion. We affirm in part, reverse and render in part, and remand in part.

## BACKGROUND[1]

Banowsky, an attorney licensed to practice law in the state of Texas, is the founder and CEO of Magnolia Pictures and the former CEO of Landmark Theaters. Schultz is the majority owner of a chain of movie theaters operating under the common brand Studio Movie Grill (SMG).

At all times relevant to this dispute, Banowsky was a part-time employee of Landmark Theaters responsible for overseeing potential real estate acquisitions. He also had significant relationships with the employees of Regal Theaters responsible for divesting Regal of certain movie theater real estate properties. As a result of his experience and relationships, Banowsky had particular expertise in connection with the acquisition of movie theater real estate, and especially in connection with the acquisition of properties being sold by Regal.

In early 2008, Banowsky and Schultz began discussing the idea of Banowsky assisting Schultz in locating sites for SMG theaters. A letter agreement between the parties was executed on February 13, 2008. The agreement, which was drafted by Banowsky, is one page and reads in its entirety as follows:

> Mr. Brian Schultz
> Studio Movie Grill
> 15400 Knoll Trail Drive, Suite 112
> Dallas, Texas 75248
>
> Dear Brian,
>
> You have asked me to lend my expertise and relationships to help Studio Movie Grill ("SMG") expand. Your stated goal for 2008-2009 is six new locations. In consideration for my efforts on SMG's behalf, you have agreed to pay me $100,000 for each location I identify that becomes an SMG facility ("Advisory Fee"). The Advisory Fee will be payable upon execution of a lease, or similar agreement, or upon acquisition of the real estate. It is understood I am not acting as a real estate broker in my efforts on behalf of SMG.

[1] This factual summary is based on the factual stipulation entered into by the parties as part of their cross-motions for summary judgment.

As you know, I am a part-time employee of Landmark Theaters, and my primary role at Landmark is to oversee real estate opportunities. You understand that any location I identify will first be viewed as a potential Landmark site. To the extent Landmark determines a site is not appropriate for its purposes, I will bring the opportunity to SMG.

When I identify a potential site for SMG, I will notify you. If you advise me you are not interested in the site, I will cease further assistance. If you advise me you wish to pursue the site, I will do so on SMG's behalf. Any site I identify that becomes an SMG Facility will result in an Advisory Fee payable to me.

SMG will promptly reimburse me for pre-approved reasonable travel expenses associated with my efforts on its behalf.

This agreement may be canceled at any time by SMG or me upon written notice. Any site I identify prior to cancellation will result in an Advisory Fee payable to me if the site becomes an SMG facility.

If this letter accurately reflects your understanding of our agreement, kindly execute in the space provided below.

Very truly yours,

/s/ Bill Banowsky/
Bill Banowsky
February 13, 2008

AGREED AND ACCEPTED THIS 13 DAY OF FEBRUARY, 2008

/s/Brian Schultz/
Brian Schultz

Banowsky identified and pursued a number of potential theater sites under the terms of the agreement. One of those sites was in Arizona and is referred to as Sonora Village, and there was a Regal 10 Cinema operating at the Sonora site. Regal had a current lease with the landlord. Taking over the Sonora site would have required obtaining an assignment of the Regal lease.

By May of 2008, after investigating the conditions associated with the Sonora site, Schultz determined the site was not a viable opportunity for a SMG theater at that time because, among other reasons, it would require taking over the Regal lease.

Banowsky took no further action to procure a lease at the Sonora site after May 2008, with the exception that Banowsky and Schultz drove by the Sonora site during a trip to Phoenix in March of 2009.

Banowsky terminated the agreement on April 23, 2009. After April 23, 2009, Banowsky ceased his efforts to identify and pursue new SMG locations and had no further involvement with any leases or leasing opportunities related to potential SMG theater sites.

In 2010, Schultz engaged Andy Crimmins, a commercial real estate broker, to assist in the location of potential SMG theater sites. Crimmins has worked in commercial real estate for approximately 21 years. He lived in Phoenix, Arizona for 22 years. For 10 of those years, 1994 through 2004, Crimmins brokered commercial real estate transactions on a strictly commission basis, primarily involving retail development of shopping centers throughout the Phoenix area, and was involved in developing shopping centers and handling the landlord side of leasing. Crimmins was particularly familiar with the Sonora site as he had lived within a few miles of that shopping center for six years.

During the spring of 2010, after being contacted by a friend and broker for the landlord, Zach Pace, Crimmins presented the Sonora site, among other potential sites, to Schultz. During a subsequent review of the Sonora site, it was determined that the conditions associated with the site had changed materially and that the site was a viable opportunity for an SMG theater as a result of such changed conditions, which included the fact that Regal had abandoned the site and a new lease could be negotiated directly with the landlord.

Lease negotiations on the Sonora site occurred between June and December of 2010. Banowsky did not participate in any of these negotiations.

Movie Grill Concepts X, LLC executed a lease on the Sonora site in December of 2010, and now operates a SMG branded theater there. Movie Grill Concepts X, LLC did not exist

prior to November 10, 2010. Schultz is the sole owner of Movie Grill Concepts X, LLC. Schultz did not individually lease space at the Sonora site.

Banowsky was not involved in any way in the negotiations that occurred in 2010 related to the Sonora site. He received no compensation under the agreement for any of the services he provided.

## PROCEDURAL HISTORY

Banowsky subsequently sued Schultz for breach of contract and fraud based on Schultz's failure to pay Banowsky the $100,000 advisory fee for services he allegedly provided under the agreement. Schultz counterclaimed for legal malpractice, breach of fiduciary duty, breach of contract, and attorneys' fees. Movie Grill Concepts Trademark Holdings, LLC was also a defendant and counterclaimant, but it was dismissed as a party to this action by agreement of the parties, and all claims asserted by or against it were dismissed without prejudice. Banowsky nonsuited his claim for fraud.

Both parties filed cross-motions for summary judgment and stipulated to certain facts in connection with the pending cross-motions for summary judgment. The trial court granted Schultz's motion for summary judgment on Banowsky's breach of contract claim, denied Banowsky's summary judgment motion on that claim, granted Banowsky's motion for summary judgment on Schultz's counterclaims, and entered a take-nothing judgment as to all parties. Banowsky then filed this appeal.

## STANDARD OF REVIEW

The standard of review for a traditional summary judgment is well known. *See* TEX. R. CIV. P. 166a(c); *Nixon v. Mr. Prop. Mgmt. Co*., 690 S.W.2d 546, 548 (Tex. 1985). We review a

trial court's decision to grant or deny a motion for summary judgment de novo. *See Tex. Mun. Power Agency v. Pub. Util. Comm'n*, 253 S.W.3d 184, 192 (Tex. 2007) (citing standard for appellate review of grant of summary judgment and denial of cross-motion for summary judgment). We must determine whether the movant demonstrated that no genuine issues of material fact existed and it was entitled to judgment as a matter of law. *See Nixon*, 690 S.W.2d at 548–49. Although a denial of summary judgment normally is not reviewable, we may review such a denial when, as in this case, both parties moved for summary judgment and the trial court granted one motion and denied the other. *See Tex. Mun. Power Agency*, 253 S.W.3d at 192. In our review of the cross-motions, we review the summary judgment evidence presented by each party, determine all questions presented, and render the judgment that the trial court should have rendered. *Id*.

## DISCUSSION

### The Parties' Contentions

In three related issues, Banowsky asserts that the provisions of the Real Estate License Act (RELA) do not apply to individuals like him who are licensed to practice law in the state of Texas (issue one), and that the trial court erred by granting Schultz's motion for summary judgment (issue two) and denying Banowsky's motion for summary judgment (issue three). Banowsky argues that the basis for Schultz's summary judgment motion was that his claims were barred by RELA, yet the statute, according to its plain language, exempts licensed Texas attorneys. *See* TEX. OCC. CODE ANN. § 1101.005(1) (West 2012). Banowsky contends that, other than RELA, Schultz has no defense to the payment of the advisory fee called for in the agreement between the parties.

Schultz, however, maintains that RELA prohibits Banowsky from collecting any commission as a matter of law. Although a licensed Texas attorney, Banowsky has not pleaded

or provided any evidence he provided legal services to Schultz or formed an attorney-client relationship with Schultz at any time—either regarding the lease at issue or otherwise. And although RELA permits licensed attorneys to pursue claims for payment of a real estate commission, it cannot be interpreted to permit such a claim in the absence of an attorney-client relationship and where no legal services were provided. Further, the agreement failed to satisfy RELA's statute of frauds because it did not identify the property at issue or describe the party to be charged with the commission. *See id.*§ 1101.806(c) ("A person may not maintain an action in this state to recover a commission for the sale or purchase of real estate unless the promise or agreement on which the action is based, or a memorandum, is in writing and signed by the party against whom the action is brought or by a person authorized by that party to sign the document."). In addition to RELA, Schultz argues that Banowsky's breach of contract claim fails because he did not earn a commission as a matter of law and, alternatively, fact issues exist as to whether Banowsky earned a fee.

**The Real Estate License Act**

Schultz asserted two grounds in his motion for summary judgment, both of them based on RELA. First, he argued that Banowsky's claims were barred by RELA because Banowsky did not fall within either of the two categories of people who may maintain an action to recover a real estate commission under RELA. Schultz also argued that, as a matter of law, Banowsky's claims to recover a real estate commission were illegal under RELA.

RELA is the codification in the Texas Occupations Code of former Article 6573a of the Texas Revised Civil Statutes. Schultz's motion cited section 1101.806(b) of the Occupations Code, which expressly limits who may file suit to collect a real estate commission under RELA:

> A person may not maintain an action to collect compensation for an act as a broker or salesperson that is performed in this state unless the person alleges and proves that the person was:

(1) a license holder at the time the act was commenced; or

(2) an attorney licensed in any state.

*Id*. § 1101.806(b). It is undisputed that, at all times relevant to this case, Banowsky was not a licensed real estate broker. He was an attorney licensed to practice law in the state of Texas, but, as Schultz points out, he did not form an attorney-client relationship with Schultz or any SMG entity, or provide them with any services as a licensed attorney. Schultz also cited section 1101.758(a), which provides that "[a] person commits an offense if the person acts as a broker or salesperson without holding a license under this chapter or engages in an activity for which a certificate of registration is required under this chapter without holding a certificate." *Id*. § 1101.758(a).

Relying on our opinion in *Sherman v. Burton*, 497 S.W.2d 316 (Tex. Civ. App.—Dallas 1973, no writ), Schultz argues that in order for the "attorney exception" to apply to Banowsky, it would be necessary that he perform legal services for Schultz—something the parties have stipulated he did not do. In *Sherman*, we concluded that under the 1973 version of RELA an attorney was not exempted from RELA's licensing requirements merely because he was an attorney licensed to practice law in the state of Texas. *Id*. at 321. We relied on changes to RELA (then codified under Article 6573a of the Revised Civil Statutes) enacted in 1955 to determine that the attorney exemption was limited to situations in which those attorneys were providing legal services:

> Plaintiff argues that he was exempt from the provisions of article 6573a because of the following provision of § 6(3):
>
> > 'The provisions of this Act shall not apply . . . nor shall this Act be construed to include in any way services rendered by an attorney at law . . . .'
>
> We do not understand this language to mean that an attorney, solely by virtue of his license to practice law, is authorized to engage generally in the business of a real estate broker. Neither do we construe it as meaning that a licensed attorney,

> employed as a real estate broker to procure a sale or lease, may recover compensation which a licensed broker could not recover in absence of a memorandum in writing, as required by § 28. We interpret the expression 'services rendered by an attorney at law' to mean services rendered by a licensed attorney whose engagement for legal services has created the relationship of attorney and client. *Tobin v. Courshon*, 155 So.2d 785, 99 A.L.R.2d 1149 (Fla. 1963); *Krause v. Boraks*, 341 Mich. 149, 67 N.W.2d 202 (1954). If a lawyer is employed to render legal services, § 6(3) exempts him from the requirements of article 6573a, even though some of the services he renders as an attorney, such as negotiations for a sale or lease, would fall within the function of a real estate broker, as defined in § 4 of that article.
>
> We think this interpretation is required by the language of the Real Estate License Act as it now stands, but if any doubt remains, the history of the act makes the legislative intent abundantly clear. The language of § 6(3) above quoted carries forward § 3(b) of the original act, but that act also contained another and broader exemption for lawyers. Section 2(a)(1) of the original act excluded 'licensed and registered attorneys' from the definition of 'real estate dealer.' Tex. Laws 1939 ch. 1, §§ 2(a)(1), 3(b), at 561, 562. In *Burchfield v. Markham*, 156 Tex. 329, 294 S.W.2d 795 (1956), the Supreme Court considered the question of whether under the original act, an attorney was exempt only if he acted in his capacity as an attorney. The court said that although that construction seemed correct under § 3(b) (now § 6(3)), the exemption under § 2(a)(1) of the original act was broader. Since the amendment of 1955 eliminated this broader exemption (Tex. Laws 1955 ch. 383, § 4 at 988), we conclude that the legislature intended by that amendment to restrict the exemption to services rendered by an attorney in the course of an attorney-and-client relationship.

*Id*. at 321–22.

However, the statute changed significantly after our decision in *Sherman*. During the 1975 legislative session, less than two years after we issued *Sherman*, the Texas Legislature amended RELA. The 1975 amendment revised section 3 of Article 6573a to remove any reference to *services rendered by an attorney*, which was the basis for our decision in *Sherman*. *See Sherman*, 497 S.W.2d at 321–22. As amended, the provision read as follows:

> Section 3. The provisions of this Act shall not apply to any of the following persons and transactions, and each and all of the following persons and transactions are hereby exempted from the provisions of this Act, to wit:
>
> > (a) *an attorney at law licensed in this state or in any other state* [emphasis added].

*See* Act of May 19, 1975, 64th Leg., R.S., ch. 216, § 3(a), 1975 Tex. Gen. Laws 535 (current version at TEX. OCC. CODE ANN. § 1101.005(1)). The statute was further revised in 2001, when Article 6573a was codified in Chapter 1101 of the Texas Occupations Code. As originally codified, section 1101.005(1) provided: "This chapter does not apply to: (1) an attorney licensed *in any state* [emphasis added]." *See* Act of May 22, 2001, 77th Leg., R.S., ch. 1421, § 2, 2001 Tex. Gen. Laws 4657 (effective June 1, 2003). In 2011, the statute changed yet again when section 1101.005(1) was amended to its current form: "This chapter does not apply to: (1) an attorney licensed *in this state* [emphasis added]." *See* Act of June 17, 2011, 82nd Leg., R.S., ch. 1064, § 2, 2011 Tex. Sess. Law Serv. 2741 (effective Sept. 1, 2011). Because our *Sherman* decision construed substantially different statutory language than we face here, it is readily distinguishable from this case.

A more persuasive decision is *Elin v. Neal*, 720 S.W.2d 224 (Tex. App. 1986), where an attorney-plaintiff sought to obtain a commission from a disputed real estate transaction. *Id*. Decided after the 1975 amendment to the statute, the case involved a purported oral agreement for a $195,000 real estate commission. *Id*. The attorney relied on what he believed were the plain terms of the attorney exemption in section 3(a) to argue that RELA's statute of frauds provision, section 20(b), was inapplicable to attorneys, thus exempting him from any and all provisions of the Act. *Id*. at 225. The defendant contended that the attorney was only exempt from the licensing provision, not the entire act. *Id*. The court, however, agreed with the attorney's contention that the "plain meaning" of the statutory exemption should be followed. *Id*. at 226. The court cited a previous decision, *Young v. Del Mar Homes, Inc*., 608 S.W.2d 804, 807 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.), in which the court found that a real estate salesman was exempted from the same statute of frauds provision by virtue of the exemption found in section 3(f) of RELA for "'a salesperson employed by an owner in the sale

of structures and land on which said structures are situated provided such structures are erected by the owner in the due course of his business.'" *Id*. at 226 n.3. The *Elin* court noted that "[s]ection 3 specifically and unequivocally states, 'The provisions of this Act shall not apply to any of the following persons and transactions,'" and that "[a]mong ten listed exemptions are included a licensed attorney at law and an on-site real estate salesperson." *Id*. "We thus have no alternative but to find, as did the court in *Young*, that '[n]othing in this language indicates that the legislature intended anything less than total, absolute exemption for the persons listed.'" *Id*. The court further explained its reasoning as follows:

> Our holding is reinforced by a fundamental principle of statutory construction. It is well established that a court should seek out the intent of a statute in construing it. However, such intent must be found in the language of the statute and not elsewhere. It is of course appropriate for a court to reach beyond statutory language in an ambiguous statute by reviewing the legislative history to ascertain intent. *Brazos River Authority v. City of Graham*, 163 Tex. 167, 354 S.W.2d 99, 109 (1961). However, a court may not look to extraneous reasons merely to justify its own interpretation of legislative intent not expressed in the statute. *Seay v. Hall*, 677 S.W.2d 19, 25 (Tex. 1984); *Government Personnel Mut. Life Ins. Co. v. Wear*, 151 Tex. 454, 251 S.W.2d 525, 529 (1952). When legislative intent is as unambiguous and clearly expressed in a statute as it is in the Act we now consider, we will not attempt to interpret or construe the law beyond the language of the statute. *Lumbermen's Underwriters v. State Bd. of Insurance*, 502 S.W.2d 217, 219 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.).
>
> Appellee argues forcefully the illogicality of presuming the legislature intended to create a super class of attorneys. Also impressive is his public policy argument: Why would the legislature intend to defeat the Act's purpose of protecting the public from potential fraud? To these arguments, and to appellee's compelling interpretation of the related provisions of the Act, we reply simply with the plain language of the Act itself and with precedent.
>
> We are well aware that appellee's position merits serious consideration. However, this court will not usurp a legislative function by interpreting legislation to achieve what may be perceived as a more logical result. Any defects or deficiencies in the Real Estate License Act must be corrected by the legislature and not by this or any other court. *Armstrong v. Harris County*, 669 S.W.2d 323, 328 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.).

*Id*. at 226–27.

We reach the same conclusion in this case. Schultz argues that the purpose of RELA is to eliminate or reduce fraud which might be inflicted on the public by unlicensed, unscrupulous, or unqualified persons, and that the exemption of attorneys licensed to practice law in the state of Texas frustrates that purpose. He also argues that Banowsky's construction of the Act is both unreasonable and favors the individual interest of an attorney over the interest in protecting the public from unlicensed, unscrupulous, or unqualified persons. But the fact remains that the plain language of the statute exempts attorneys from all requirements of the Act. And "our practice when construing a statute is to recognize that 'the words [the Legislature] chooses should be the surest guide to legislative intent.'" *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009) (quoting *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 866 (Tex. 1999)). There is no ambiguity in section 1101.005: The language used indicates that the legislature intended nothing less than a "'total, absolute exemption for the persons listed.'" *Elin*, 720 S.W.2d at 226 (quoting *Young*, 608 S.W.2d at 807). Additionally, the administrative rules of the Texas Real Estate Commission (TREC) support Banowsky's interpretation of the attorney exemption. Section 535.31 of the Texas Administrative Code provides:

> An attorney licensed and eligible to practice law in Texas *is exempt from the requirements of the Act* but cannot sponsor real estate salespersons or act as the designated broker for a licensed business entity unless the attorney is also licensed as a real estate broker. This provision does not waive the standards of eligibility and qualification elsewhere established in the Act.

TEX. ADMIN. CODE § 535.31 (emphasis added). The "Act" is defined in the TREC rules as "Texas Occupations Code, Chapter 1101." *Id.* at 535.1(1).[2] Accordingly, we conclude that

[2] We also note that the Frequently Asked Questions on the TREC's website include the following information, which further supports Banowsky's argument:

> Q: Is a licensed attorney required to hold a real estate license to act as a broker?
>
> A: Generally no. As long as the attorney is licensed in Texas, they are exempt from the licensure requirements. [TRELA §1101.005(1)] The Texas licensed attorney can do everything a broker can do except sponsor sales agents, share compensation with an agent, or act as the designated broker for a business entity licensed by TREC. [TRELA §1101.355(b)].

Banowsky, as an attorney licensed in the state of Texas, did not need to comply with the provisions of the Real Estate License Act. *See Elin*, 720 S.W.2d at 227.

**Breach of Contract**

Schultz also argues Banowsky cannot establish one or more elements of his breach of contract claim as a matter of law. The elements of a breach of contract claim are well known: (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages to the plaintiff resulting from that breach. *See Woodhaven Partners, Ltd. v. Shamoun & Norman, L.L.P.*, 422 S.W.3d 821, 837 (Tex. App.—Dallas 2014, no pet.).

Pursuant to their agreement, the parties agreed Banowsky would be paid "$100,000 for each location I identify that becomes an SMG facility ('Advisory Fee')." The fee was "payable upon execution of a lease, or similar agreement, or upon written acquisition of the real estate." Banowsky was required to "identify" potential sites for SMG locations and to "pursue" those sites in which SMG indicated an interest:

> When I identify a potential site for SMG, I will notify you. If you advise me you are not interested in the site, I will cease further assistance. If you advise me you wish to pursue the site, I will do so on SMG's behalf. Any site I identify that becomes an SMG Facility will result in an Advisory Fee payable to me.

The agreement, which could be canceled by either party at any time upon written notice, also provided: "Any site I identity prior to cancellation will result in an Advisory Fee payable to me if the site becomes an SMG facility."

Based on the parties' factual stipulations, Banowsky fulfilled the terms of the agreement. The parties stipulated that Banowsky "identified" and "pursued" the Sonora site, and that it became an SMG facility:

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*See* Texas Real Estate Commission, http://www.trec.state.tx.us/faq/faq-enf.asp#Cat3

> Banowsky identified and pursued a number of potential theater sites under the terms of the Agreement. One of the sites pursued by Banowsky was in Arizona and is referred to as Sonora Village ("Sonora").
>
> Movie Grill Concepts X, LLC executed a lease on the Sonora site in December 2010 and now operates a SMG branded theater there.
>
> The parties disagree as to who first mentioned the Sonora site to the other. Nevertheless, the parties agree that, solely for the purposes of resolving the pending motions for summary judgment, the Court should assume that Banowsky "identified" the Sonora site.

Rather than showing Banowsky is not entitled to the recovery of a $100,000 fee under the agreement, these stipulated facts establish his entitlement to judgment as a matter of law.

Schultz offers several arguments in support of his contention that Banowsky did not earn a commission as a matter of law, none of them persuasive. First, he argues that there is no valid contract between himself and Banowsky because the only parties to the agreement were Banowsky and SMG. However, the parties stipulated that "Brian Schultz, at all relevant times hereto, was the majority owner of a chain of movie theaters operating under the common brand Studio Movie Grill ('SMG')." The parties also stipulated that "[t]here is no legal entity named 'Studio Movie Grill' and no legal entity operates under the registered name 'Studio Movie Grill,'" and that Schultz is the sole owner of "Movie Grill Concepts X, LLC," which executed the lease on the Sonora site in December 2010 and now operates the SMG branded theater at that location. Based on these stipulated facts, Schutz is a party to the agreement. *See generally A to Z Rental Ctr. v. Burris*, 714 S.W.2d 433, 436 (Tex. App.—Austin 1986, writ ref'd n.r.e.) ("[O]ne who contracts as an agent in the name of a nonexistent or fictitious principal, or a principal without legal status or existence, renders himself personally liable on those contracts."); *Patel v. Whiteco Indus., Inc.*, No. 05–90–01419–CV, 1991 WL 134576, at *4 (Tex. App.—Dallas July 23, 1991, no pet.) (not designated for publication) (same).

Schultz next argues Banowsky failed to present competent summary judgment evidence

to prove performance of the agreement as a matter of law. But the parties stipulated that "Banowsky identified and pursued a number of potential sites under the terms of the agreement," one of which was the Sonora Village site in Arizona. The parties further stipulated that Movie Grill Concepts "executed a lease on the Sonora site in December 2010 and now operates a SMG branded theater there." Schultz does not address any of these stipulations, which are binding on the parties, the trial court, and this Court. *See, e.g., Perry v. Brooks*, 808 S.W.2d 227, 229 (Tex. App.—Houston [14th Dist.] 1991, no writ) (stating that "[s]tipulations are conclusive as to the facts stipulated and to all matters necessarily included therein. . . . As such, stipulations enjoy equal dignity with judicial admissions, which eliminate an adversary's necessity of proof and establish the admitted elements as a matter of law"); *M.J.R.'s Fare of Dallas, Inc. v. Permit and License Appeal Bd. of Dallas*, 823 S.W.2d 327, 330–31 (Tex. App.—Dallas 1991, writ denied) (when parties stipulate to facts and documentary evidence, "[t]hese stipulations are binding upon the parties, the trial court, and the reviewing court").

Schultz suggests there is an insufficient nexus between the work done by Banowsky and the eventual execution of the lease at the Sonora site. Schultz asserts that (1) the last time Banowsky and Schultz discussed the Sonora Village site was in April or May of 2008; (2) the agreement was terminated a year later in April of 2009; and (3) the Sonora Village lease was executed in December of 2010, "more than two and one half years after SMG rejected Sonora Village." Without citation to legal authority, Schultz argues that even if Banowsky "pursued" the Sonora site, "there must still be a reasonable post-termination tail placed on the life of the agreement." Schultz again fails, however, to address the stipulated facts. Contrary to Schultz's contention that the last Sonora-related activity was April or May of 2008, the parties stipulated that they drove by the Sonora site on a visit to the Phoenix area in March of 2009, just weeks before the termination of the agreement. Furthermore, parties stipulated that the Sonora site,

among other potential sites, was "presented" to Schultz by a broker in the spring of 2010. Rather than a lapse of over two and one half years, as suggested by Schultz, the stipulations establish that Schultz pursued the Sonora site approximately one year after the cessation of activity related thereto and the termination of the agreement and, within a few months thereafter, consummated a lease on the site.

Schultz also contends there is a fact question regarding whether the fee Banowsky seeks to collect is unconscionable. Schultz's assertion of unconscionability is an affirmative defense on which he had the burden of proof. *See* TEX. R. CIV. P. 94; *Sweeney v. Taco Bell, Inc*., 824 S.W.2d 289, 291 (Tex. App.—Fort Worth 1992, writ denied); *Saenz v. Martinez*, No. 04–07–00399, 2008 WL 4809217, at *8 (Tex. App.—San Antonio Nov. 5, 2008, no pet.) (mem. op.). If the party opposing a summary judgment relies on an affirmative defense, he must come forward with summary judgment evidence sufficient to raise an issue of fact on each element of the defense to avoid summary judgment. *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984); *see also Anglo-Dutch Petroleum Int'l, Inc. v. Haskell*, 193 S.W.3d 87, 95 (Tex. App.—Houston [1st Dist.] 2006, pet. denied); *Compass Bank v. MFP Fin. Servs., Inc*., 152 S.W.3d 844, 851 (Tex. App.—Dallas 2005, pet. denied). But Schultz fails to cite any summary judgment evidence to support his position, and our review of the summary judgment record finds no such evidence.

We therefore conclude the trial court erred by granting Schultz's summary judgment motion and denying Banowsky's motion for summary judgment, and we sustain Banowsky's first, second, and third issues.

**Conclusion**

We reverse the trial court's summary judgment in favor of Schultz on Banowsky's breach of contract claim, reverse the trial court's denial of Banowsky's summary judgment motion, and

render judgment for Banowsky for $100,000. We remand this case to the trial court for a determination of Banowsky's reasonable attorneys' fees. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 38.001(8) (West 2015); *Haden v. David J. Sacks, P.C.*, 332 S.W.3d 503, 510 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (prevailing party in breach of contract suit entitled to attorneys' fees). The portion of the judgment ordering that Schultz take nothing on his counterclaims is affirmed.

141654F.P05

/Lana Myers/
LANA MYERS
JUSTICE

# Court of Appeals
# Fifth District of Texas at Dallas

## JUDGMENT

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|---|---|
| WILLIAM S. BANOWSKY, JR., Appellant | On Appeal from the 191st Judicial District Court, Dallas County, Texas |
| No. 05-14-01624-CV V. | Trial Court Cause No. DC-12-05686. |
| BRIAN SCHULTZ, Appellee | Opinion delivered by Justice Myers. Justices Fillmore and Whitehill participating. |

In accordance with this Court's opinion of this date, we **REVERSE** the trial court's summary judgment in favor of appellee on appellant's breach of contract claim, **REVERSE** the trial court's denial of appellant's summary judgment motion, and we **RENDER** judgment for appellant for $100,000. We **REMAND** this case to the trial court for a determination of appellant's reasonable attorneys' fees. The portion of the judgment ordering that appellee take nothing on his counterclaims is **AFFIRMED**. It is **ORDERED** that appellant **WILLIAM S. BANOWSKY, JR**. recover his costs of this appeal from appellee **BRIAN SCHULTZ**.

Judgment entered this 10th day of February, 2016.