REVERSED and REMANDED and Opinion Filed March 15, 2023

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-21-01057-CV

SAMUEL ADAM AFLALO, Appellant
V.
DEVIN LAMAR HARRIS AND MEGHAN THERESA HARRIS, Appellees

On Appeal from the 95th District Court
Dallas County, Texas
Trial Court Cause No. DC-16-00247

MEMORANDUM OPINION

Before Justices Carlyle, Garcia, and Rosenberg[1]
Opinion by Justice Rosenberg

Samuel Adam Aflalo sued Devin Lamar Harris and Meghan Theresa Harris for breach of their contract to buy his home. In a previous appeal, this Court reversed the trial court's judgment in favor of the Harrises and remanded the case for further proceedings. *Aflalo v. Harris*, 583 S.W.3d 236 (Tex. App.—Dallas 2018, pet. denied) (en banc) (*Aflalo I*). On remand, the trial court rendered judgment for the Harrises, including an attorney's fee award of $260,977.50. Concluding that the trial court erred by striking Aflalo's summary judgment affidavit and that the Harrises

[1] The Hon. Barbara Rosenberg, Justice, Assigned

did not establish their right to judgment as a matter of law on Aflalo's breach of contract claim or on their affirmative defenses, we reverse the trial court's judgment and remand the case for further proceedings consistent with this opinion. Because all issues are settled in law, we issue this memorandum opinion. TEX. R. APP. P. 47.4.

BACKGROUND

The relevant facts detailed in our previous opinion are not disputed. *See Aflalo I*, 583 S.W.3d at 239–40. Aflalo and the Harrises executed a contract of sale for the Harrises to buy Aflalo's house for $1.45 million, escrowing $10,000 with a title company. *Id.* at 239. The Harrises delivered a letter terminating the contract after the contractual deadline for doing so had expired. *Id.* at 240. After the Harrises failed to pay and close, Aflalo sued for breach of contract. *Id.* The Harrises in turn filed a counterclaim alleging that Aflalo breached the contract. *Id.* The trial court rendered judgment for the Harrises. *Id.* On appeal, we reversed the trial court's judgment and remanded the case to the trial court for further proceedings. *Id.* at 250 (concluding that Aflalo did not breach the contract or violate the property code by failing to attach or deliver a Texas Association of Realtors Form TAR-1414 to his disclosures).

On remand, the key issues were the Harrises' other defenses to Aflalo's breach of contract claim, Aflalo's damages, and the parties' attorney's fees. Both sides moved for summary judgment. Aflalo's motion was supported by his own affidavit

testimony. In an original affidavit dated January 5, 2021, and an amended affidavit dated January 27, 2021, Aflalo testified about his efforts to market his home after the Harrises' breach and his opinion as to his home's value.

The trial court held several hearings on the parties' various motions for summary judgment, for new trial, and for modification of the judgment. In the course of these proceedings, the trial court sustained the Harrises' objections to Aflalo's affidavits. Consequently, the court did not consider Aflalo's opinion as to his home's value. The trial court rendered an amended final judgment on October 22, 2021, ruling that all of Aflalo's motions were denied and all of the Harrises' motions were granted. Although the trial court ruled that "Defendants' $10,000 earnest money shall be immediately released to Plaintiff as liquidated damages," the trial court also ruled that the Harrises were the prevailing parties under the contract and thus should be awarded $260,977.50 in attorney's fees, plus conditional amounts for appeal. This appeal followed.

ISSUES AND STANDARDS OF REVIEW

In two issues, Aflalo contends (1) the trial court erred by granting summary judgment for the Harrises because he conclusively proved his sales-price damages, or at least raised a genuine issue of material fact about them, and (2) the trial court erred by awarding attorney's fees to the Harrises when Aflalo prevailed on his claim for breach of contract and the contract allows the prevailing party in a legal proceeding to recover attorney's fees.

We review a summary judgment de novo. *Aflalo I*, 583 S.W.3d at 240–41 (citing *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009)). The movant must prove that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *B.C. v. Steak N Shake Operations, Inc.*, 512 S.W.3d 276, 279 (Tex. 2017). "We review summary judgment evidence in the light most favorable to the party against whom the summary judgment was rendered, crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not." *B.C.*, 512 S.W.3d at 279 (internal quotations omitted).

"When . . . both parties file a motion for summary judgment with the trial court, and one is granted and one is denied, the reviewing court determines all questions presented and renders the judgment that should have been rendered by the trial court." *HCBeck, Ltd. v. Rice*, 284 S.W.3d 349, 352 (Tex. 2009); *accord Lawyers Title Co. v. J.G. Cooper Dev., Inc.*, 424 S.W.3d 713, 717 (Tex. App.—Dallas 2014, pet. denied). The appellate court can affirm, reverse and render for the appellant, or reverse and remand if neither party met its summary judgment burden. *Dallas Cent. Appraisal Dist. v. Mission Aire IV, L.P.*, 279 S.W.3d 471, 474 (Tex. App.—Dallas 2009, pet. denied).

We review the trial court's decision to exclude testimony for abuse of discretion. *Hlavinka v. HSC Pipeline P'ship, LLC*, 650 S.W.3d 483, 496 (Tex. 2022). A trial court's error in excluding evidence is reversible only if it probably caused the

rendition of an improper judgment. *JLG Trucking, LLC v. Garza*, 466 S.W.3d 157, 165 (Tex. 2015). If erroneously excluded evidence was crucial to a key issue, the error was likely harmful. *Id.* If the evidence was cumulative, or if the rest of the evidence was so one-sided that the error likely made no difference, the exclusion was likely harmless. *Id.* In making this determination, we review the entire record. *Id.*

DISCUSSION

Aflalo moved for summary judgment on his claim for breach of contract, arguing that the Harrises' undisputed failure to perform their contractual obligation to purchase the home established his right to judgment as a matter of law. The Harrises in turn moved for summary judgment on Aflalo's breach of contract claim on the ground that Aflalo had suffered no damages. We first consider whether Aflalo raised a genuine issue of material fact that he suffered damages as a result of the Harrises' breach.

1. Aflalo's proof of damages

The trial court's judgment resulted from its conclusion that Aflalo failed to offer any evidence of his damages. In his first issue, Aflalo challenges the trial court's ruling striking his amended affidavit—including all of his testimony about his efforts to market his home and his opinion of its value—in its entirety. He also argues that he "conclusively proved his sales-price damages, or at least raised a genuine issue of material fact about them."

Exclusion of affidavit. The Harrises objected to Aflalo's amended affidavit on several grounds. They first contended the amended affidavit was "inconsistent with and directly contradict[ed]" the statements Aflalo made in his initial affidavit. Aflalo's original statement was that the property's value "was at least" $1,130,000. His amended statement was that the property's value "was" $1,130,000. The Harrises objected that the amended affidavit did not comply with civil procedure rule 166a(c)'s requirement that the testimony of an interested witness must be "clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted."

Rule 166a(f) requires that summary judgment affidavits "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." TEX. R. CIV. P. 166a(f); *Kerlin v. Arias*, 274 S.W.3d 666, 668 (Tex. 2008) (per curiam). "Conclusions in an affidavit are insufficient either to support summary judgment or to raise a fact issue in response to a summary-judgment motion." *Holloway v. Dekkers*, 380 S.W.3d 315, 323 (Tex. App.—Dallas 2012, no pet.). "A conclusory statement is one that does not provide the underlying facts to support the statement." *Id.*

It is well-settled that a homeowner may testify to his opinion of his home's value. Under the "Property Owner Rule," "a property owner is qualified to testify to the value of her property even if she is not an expert and would not be qualified to

testify to the value of other property." *Reid Road Mun. Util. Dist. No. 2 v. Speedy Stop Food Stores, Ltd.*, 337 S.W.3d 846, 852–53 (Tex. 2011). "The rule is based on the presumption that an owner will be familiar with her own property and know its value." *Id.*

When the purchaser breaches a real estate contract, the measure of damages is the difference between the price the seller was to receive and the market value of the property at the date of the breach. *Goldman v. Olmstead*, 414 S.W.3d 346, 361 (Tex. App.—Dallas 2013, pet. denied) (citing, among other cases, *Kempner v. Heidenmeier*, 65 Tex. 587, 591 (1885)). "This value may be fixed by a fair resale . . . within a reasonable time after the breach." *Kempner*, 65 Tex. at 591. "What is a reasonable time is a question of fact, varied by the circumstances of each case." *Id*. Here, the contract price was $1,450,000 and the date of the breach was December 17, 2015.

The Harrises argue Aflalo's statements about the property's value were in fatal conflict. Citing a federal patent law decision,[2] the Harrises contend "at least" means that the home's value could be more than $1,130,000, in fatal conflict with Aflalo's later statement that the home's value "was" $1,130,000. Apparently because the home's value was Aflalo's ultimate conclusion, the trial court struck all

[2] *See Typemock, Ltd. v. Telerik, Inc.*, Civ. Action No. 17-10274-RGS, 2018 WL 4189692, at *10 (D. Mass. Aug. 31, 2018) (mem. and order on claim construction) ("In ordinary English usage, 'at least' signals 'a range within a defined lower limit,' and Telerik does not offer evidence to the contrary." [citation omitted]).

of the supporting testimony as well, including evidence of Aflalo's efforts to market and sell the property after the Harrises' breach.

Summary judgment may be based on uncontroverted testimonial evidence of an interested witness "if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted." TEX. R. CIV. P. 166a(c). "The kind of inconsistency prohibited by the rule is an affiant's stating equivocating positions which do not serve to clarify the pertinent issues in the case for which the affidavit is being offered." *Hernandez v. Lukefahr*, 879 S.W.2d 137, 143 (Tex. App.—Houston [14th Dist.] 1994, no writ). The supreme court has explained,

> We believe that "could have been readily controverted" does not simply mean that the movant's summary judgment proof could have been easily and conveniently rebutted. Rather, it means that testimony at issue is of a nature which can be effectively countered by opposing evidence. If the credibility of the affiant or deponent is likely to be a dispositive factor in the resolution of the case, then summary judgment is inappropriate. On the other hand, if the non-movant must, in all likelihood, come forth with independent evidence to prevail, then summary judgment may well be proper in the absence of such controverting proof.

Casso v. Brand, 776 S.W.2d 551, 558 (Tex. 1989) (footnote omitted).

Here, Aflalo's affidavit was offered to establish the amount of damages he incurred by the Harrises' admitted breach of contract. He testified unequivocally in both affidavits—regardless of any inconsistency in his word choice about the property's value—that the difference between the contract price and the ultimate sales price was $320,000. Although Aflalo's testimony about the home's value was

his opinion, it was an opinion he was qualified to give. *See Reid Road Mun. Util. Dist. No. 2*, 337 S.W.3d at 852–53. It was supported by his testimony about the efforts he made to market and sell the home. The testimony could have been readily controverted by evidence that other similar properties sold more quickly and at their initial asking price during the same time period. The Harrises did not "come forth with independent evidence" on the subject. *See Casso*, 776 S.W.2d at 558. They argue that the burden of proof was Aflalo's; nonetheless, if Aflalo established his right to judgment as a matter of law, the Harrises were required to come forward with evidence to raise a genuine issue of material fact. *See* TEX. R. CIV. P. 166a(c). And in any event, the Harrises, too, had moved for summary judgment on the ground that Aflalo suffered no damages, and bore the burden of establishing their right to judgment on their own motion. *See id.*

We conclude that Aflalo's omission of the words "at least" in his amended affidavit when stating the property's value did not result in a fatal conflict warranting the exclusion of his testimony. Further, the erroneously excluded evidence was crucial to a key issue, the property's value. Consequently, the trial court abused its discretion by striking the affidavit in its entirety, and the error was harmful unless the exclusion was warranted in response to one or more of the Harrises' remaining objections. *See JLG Trucking, LLC*, 466 S.W.3d at 165.

The Harrises objected to Aflalo's affidavit on three additional grounds:

- The affidavit contained an improper legal conclusion, specifically Aflalo's opinion that his "damages" resulting from the Harrises' breach were $320,000;
- The affidavit lacked documentation supporting Aflalo's opinions, violating the best evidence rule; and
- Aflalo's testimony that he did not believe he could have sold his home for a price greater than $1,130,000 was "speculative, vague, and ambiguous."

We conclude these objections were not grounds for striking Aflalo's affidavits. Aflalo's use of the word "damages" to describe the difference between the contract price and the ultimate sales price was not a "legal conclusion" that Aflalo was unqualified to render; it was his statement of how much money he lost, supported by his testimony of the contract price, his efforts to sell the property, and the ultimate selling price. These were matters he was qualified to address. *See Reid Road Mun. Util. Dist. No. 2*, 337 S.W.3d at 852–53. He explained the facts supporting his calculation, and the trial court could apply the law to those facts.

Next, the Harrises objected that the documentation supporting the ultimate sale of the property was not attached to the affidavit, violating the best evidence rule. We disagree. The best evidence rule provides that "[a]n original writing, recording, or photograph is required in order to prove its content unless these rules or other law provides otherwise." TEX. R. EVID. 1002. The rule does not apply unless a party is attempting to prove a document's content. *DeSoto Wildwood Dev., Inc. v. City of Lewisville*, 184 S.W.3d 814, 828 (Tex. App.—Fort Worth 2006, no pet.). When the

document and its contents are only collaterally related to the issues in the case, the best evidence rule does not apply. *White v. Bath*, 825 S.W.2d 227, 231 (Tex. App.—Houston [14th Dist.] 1992, writ denied). Here, Aflalo was not seeking to prove the contents of any document; instead, the controlling issue was the value of the property at the time of the Harrises' breach. *See id.* (best evidence rule did not require admission of deposition and its contents into evidence where they were only collaterally related to the controlling issue of whether a party violated the discovery rules).

Last, the Harrises objected to Aflalo's testimony that he did not believe he could have sold his home for a price greater than $1,130,000 as "speculative, vague, and ambiguous" because it was "not limited in time or scope." Again, we disagree. Aflalo testified about the dates he re-listed the property, the dates he reduced the price after he did not receive any offers, the date he received an offer, the result of the negotiations following the offer, and the date of the ultimate sale.

We conclude the trial court erred by sustaining the Harrises' objections to Aflalo's testimony and by striking Aflalo's affidavit in its entirety. We also conclude the error was harmful because it precluded Aflalo from offering any evidence to support his motion for summary judgment or to controvert the Harrises' motion. *See JLG Trucking, LLC*, 466 S.W.3d at 165.

Evidence of damages. Aflalo next argues that summary judgment was not proper because the Harrises' expert testimony was not conclusive on the issue of

damages. The Harrises offered an expert report from a real estate appraiser, Mark V. Millilorn, who opined that the home was worth $1,570,000 on December 10, 2015. Millilorn conducted a "sales comparison approach," analyzing five other sales of property in the area. Millilorn did not, however, offer any opinion about Aflalo's efforts to market and sell the property after the Harrises' breach. Based on Millilorn's report, the Harrises argued that Aflalo suffered no damages because the property was worth more than the contract price on the date of the breach. They contended that Millilorn's opinion was conclusive and Aflalo's opinion was based only on the property's resale price in September 2016.

We disagree that Milliorn's opinion was conclusive evidence of the home's market value on the date of the breach. The Harrises' own offer for the property in November 2015 was lower, and Aflalo offered evidence that the property failed to sell at $1,595,000 later in December, at $1,495,000 in January, at $1,450,000 or $1,395,000 in February, at $1,350,000 or $1,325,000 in April, at $1,250,000 in May, or at $1,195,000 in June. Aflalo finally received an offer of $1,090,000 in July, which after negotiation was increased to $1,130,000. The actual sales price of property provides some evidence of fair market value. *Edlund v. Bounds*, 842 S.W.2d 719, 728 (Tex. App.—Dallas 1992, writ denied).

The Harrises also argue that even if Aflalo's affidavit had been admitted, it was insufficient to raise a fact issue regarding the value of his property at the time of the Harrises' breach. They rely on *Barry v. Jackson*, 309 S.W.3d 135 (Tex.

App.—Austin 2010, no pet.), in support of their argument that the ultimate sale price of $1,130,000 was not evidence of the home's market value at the time of their breach. In *Barry*, the court held that the Jacksons failed to meet their burden to establish that the ultimate sale of the property was within a reasonable amount of time after Barry's breach. *Id.* at 141–42. "Because the Jacksons did not present any evidence that would support reasonable inferences either that the [ultimate] sale occurred within a 'reasonable time' or that the [ultimate] sales price reflected the property's value at the time of Barry's breach more than a year earlier, the trial court erred in awarding them the difference between the two contract prices." *Id.* at 142.

Aflalo argues that here, there are numerous and significant distinctions from the facts in *Barry*. First, the property in *Barry* was taken off the market "for a number of months." *Id.* at 141. Second, it was listed for sale by the owner. *Id.* Third, it was not listed continuously on the MLS (Multiple Listing Service) system. *Id.* Fourth, more than a year had elapsed between the breach and the ultimate sale. *Id.* Based on these facts, the court held the Jacksons did not meet their burden "to establish that the later sale was within a reasonable amount of time." *Id.*

Here, the property was on the market continuously from December 21, 2015 until the eventual sale on September 1, 2016. Aflalo listed the property on that date at $1,595,000, the same price of his initial listing that led to the Harrises' offer. His re-listing was made through realtors who kept the property continuously on the open market through the MLS system. He reduced the price in January and February, in

consultation with his realtors, when he did not receive any offers. He hired a new realtor in February 2016. He reduced the price further in April and May, again after consultation with his realtors, when he did not receive any offers in response to continuous marketing of the property. Through his realtors, he showed the property to prospective purchasers on numerous occasions. He negotiated with the ultimate buyer for a price higher than the buyer's initial offer. He testified that neither he nor his realtors could obtain a higher price for the property than the ultimate sales price, $1,130,000. In contrast to *Barry*, Aflalo provided detailed evidence of his uninterrupted efforts to sell his home, with professional advice and market information through the MLS listing, in the months between December 2015 and September 2016.

The Harrises also rely on *Barry* in support of their argument that Aflalo was required to proffer expert testimony on the state of the real estate market in the months between the breach and the property's ultimate sale. *See Barry*, 309 S.W.3d at 141. The court did not opine, however, that expert testimony was required in every case. *See id.* Instead, the court's discussion came after its conclusion that "the Jacksons provided no evidence related to whether thirteen months was a reasonable time, especially considering that they took the house off the market for a number of months and had the property listed for sale by owner, rather than through a realtor who could list it in the MLS system, for a time." *Id.* The court continued, "[f]or example, they did not present testimony by an appraiser or realtor" regarding

conditions in the market during the interim. *Id.* Here, where the house was continuously listed on MLS, by Aflalo's realtors, at asking prices based on his realtors' advice, there was evidence from which a fact finder could conclude that "the eventual sales price [was] a fair market value for the property at the time of the breach." *Cf. id.*

Under the property owner rule, an owner is qualified to testify to the value of his property if his testimony meets the same requirements as any other opinion evidence. *Nat. Gas Pipeline Co. of Am. v. Justiss*, 397 S.W.3d 150, 155–56 (Tex. 2012). The owner must provide the factual basis on which the opinion rests. *Id.* at 159. This burden, however, "is not onerous, particularly in light of the resources available today." *Id.* Here, Aflalo relied on market information, notably placing the property on the market through MLS and relying on the advice of real estate brokers in pricing the property, reducing the price when he received no offers, and negotiating the final sale.

Further, Aflalo offered evidence that he resold the property at arms-length within a reasonable time after the breach. *See Kempner*, 65 Tex. at 591 (market value may be calculated using a fair resale within a reasonable time after the breach). As detailed above, he continuously marketed the property with reference to MLS and with the assistance of brokers until he received an offer. The Harrises' expert did not offer an opinion on this subject.

For these reasons, we conclude the trial court abused its discretion by striking Aflalo's affidavit testimony. We further conclude that Aflalo raised a genuine issue of material fact regarding the amount of his sales-price damages. Accordingly, we sustain the portion of Aflalo's first issue challenging the exclusion of his summary judgment affidavit.

2. Breach of contract

The Harrises also sought summary judgment on the ground that their affirmative defenses of (1) election of remedies, (2) failure to satisfy a condition precedent, and (3) waiver barred Aflalo's claims as a matter of law. Summary judgment for a defendant is proper when the summary judgment evidence negates an essential element of the plaintiff's cause of action as a matter of law or establishes all elements of an affirmative defense as a matter of law. *Waddell v. Kaiser Found. Health Plan of Tex.*, 877 S.W.2d 341, 344 (Tex. App.—Dallas 1994, writ denied). Consequently, we next consider whether one or more of the Harrises' affirmative defenses negates an essential element of Aflalo's breach of contract claim.

Election of remedies. The Harrises contend that the contract required Aflalo to elect either liquidated damages (the earnest money) or actual damages. Section 15 of the parties' contract provided:

> 15. DEFAULT: If Buyer fails to comply with this contract, Buyer will be in default, and Seller may (a) enforce specific performance, seek such other relief as may be provided by law, or both, or (b) terminate this contract and receive the earnest money as liquidated damages, thereby releasing both parties from this contract. . . .

The Harrises argue that because Aflalo failed to release their earnest money to them, he was limited to recovery from those funds and could not seek further damages from them. Quoting *Bocanegra v. Aetna Life Insurance Co.*, 605 S.W.2d 848, 851 (Tex. 1980), they argue that the election of remedies doctrine bars recovery when "(1) one successfully exercises an informed choice (2) between two or more remedies, rights, or states of facts (3) which are so inconsistent as to (4) constitute manifest injustice." They rely on an email from Aflalo's counsel stating, "Mr. Aflalo neither accepts your clients' offer, nor does he authorize release of the escrowed funds." They conclude that Aflalo pursued "mutually exclusive remedies simultaneously," resulting in manifest injustice to them.

Citing *Martin v. Birenbaum*, 193 S.W.3d 677, 683–84 (Tex. App.—Dallas 2006, pet. denied), Aflalo responds that even if he prevented the return of the earnest money, his pursuit of litigation defeats the claim that he elected some other remedy. The dispute in *Martin* also arose from a breached contract of sale for a home. *Id.* at 680–81. We concluded there was evidence to support the jury's finding that Martin did not waive his right to sue for damages. *Id.* at 683. Although Martin admitted on cross-examination that he prevented return of the earnest money to Birenbaum, he also testified that his actions were efforts to induce Birenbaum to comply with the contract. *Id.* He testified that he did not want the earnest money, the earnest money was insufficient, and he had no choice but to sue because Birenbaum had not performed the contract. *Id.* Martin demanded specific performance of the contract,

did not give Birenbaum any express notice of intent to accept the earnest money as liquidated damages, and filed a lawsuit seeking specific performance and damages. *Id.* We concluded there was legally sufficient evidence to support the jury's finding that there was no waiver. *Id.* Similarly here, Aflalo refused to accept the earnest money and filed a lawsuit seeking specific performance and damages.

Aflalo also argues that there is no evidence he received the earnest money. The contract provided that the earnest money would be deposited with the title company, and the only evidence is that the funds remained there. The Notice of Buyer's Termination provided that release of the earnest money was governed by the terms of the parties' contract. Only the Harrises pleaded for release of the funds. Aflalo never did so, and he argued in his response to the Harrises' summary judgment motion that "it is abundantly clear that Plaintiff has chosen [to enforce specific performance] by suing Defendants for breach of contract," not retention of the earnest money. The trial court's judgment provides that "Defendants' $10,000 earnest money shall be immediately released to Plaintiff as liquidated damages," and there is no evidence showing any prior acceptance of the funds by Aflalo.

Aflalo further argues that §15 of the contract gave him the option to (1) sue for specific performance or damages, or (2) terminate the contract and retain the earnest money. In *Barry*, the court considered a similar issue. *Barry*, 309 S.W.3d at 139–40. Barry signed a contract to purchase the Jacksons' home but later informed the Jacksons that he would not be going through with the purchase. *Id.* at 137–38.

The Jacksons sued Barry for breach of contract, the case proceeded to a bench trial, and the court awarded damages to the Jacksons. *Id.* at 138–39. On appeal, the court rejected Barry's argument that the Jacksons elected to receive the earnest money in the court's registry and were barred from seeking damages for breach of contract. *Id.* at 139–40. The court explained:

> Shortly after Barry announced his intention to breach his contract, the Jacksons refused to sign a form that would have given them the earnest money and released Barry from further liability. In their amended petition, the [Jacksons] were very clear in seeking damages for breach of contract, which their contract with Barry allowed. There is sufficient evidence to show that the Jacksons did not elect to receive liquidated damages, relinquish their right to sue, or engage in conduct inconsistent with that right. *See Martin v. Birenbaum,* 193 S.W.3d 677, 683–84 (Tex. App.—Dallas 2006, pet. denied). We overrule Barry's complaints related to the Jacksons' purported election of remedies.

Id. at 140 (footnote omitted). Similarly here, the record reflects that Aflalo specifically refused to accept the earnest money, responding through his attorney that he did not authorize release of the escrowed funds and contending that the funds "need to stay where [they have] been for the last five years of litigation, until the suit is over." We conclude that the Harrises did not establish their right to judgment as a matter of law on their affirmative defense of election of remedies.

Condition precedent. The Harrises sought summary judgment on the ground that Aflalo failed to comply with the contract's requirement to attend mediation before seeking monetary damages. Section 16 of the contract provided:

> 16. MEDIATION: It is the policy of the State of Texas to encourage resolution of disputes through alternative dispute resolution procedures such as mediation. Any dispute between Seller and Buyer related to this

> contract which is not resolved through informal discussion will be submitted to a mutually acceptable mediation service or provider. The parties to the mediation shall bear the mediation costs equally. This paragraph does not preclude a party from seeking equitable relief from a Court of competent jurisdiction.

"'A condition precedent is an event that must happen or be performed before a right can accrue to enforce an obligation.'" *Anderson v. Lonestar Patent Servs., Inc.*, No. 05-18-00510-CV, 2020 WL 6018710, at *4 (Tex. App.—Dallas Oct. 12, 2020, no pet.) (mem. op.) (quoting *Centex Corp. v. Walton*, 840 S.W.2d 952, 956 (Tex. 1992)). "'In construing a contract, forfeiture by finding a condition precedent is to be avoided when another reasonable reading of the contract is possible.'" *Id.* (quoting *Criswell v. Eur. Crossroads Shopping Ctr., Ltd.*, 792 S.W.2d 945, 948 (Tex. 1990)). Aflalo argues that the provision neither requires mediation before filing suit nor prohibits mediation once suit has been filed.

Reading the provision as a whole, a party may, as Aflalo did, "seek[ ] equitable relief from a court of competent jurisdiction" without first submitting the dispute to mediation. Aflalo pleaded for specific performance of the contract. *See Stafford v. S. Vanity Magazine, Inc.*, 231 S.W.3d 530, 535 (Tex. App.—Dallas 2007, pet. denied) ("Specific performance is an equitable remedy that may be awarded upon a showing of breach of contract."). He also proffered a copy of his counsel's December 22, 2015 letter to the Harrises demanding performance of the contract, or in the alternative, submitting to mediation. In an affidavit supporting Aflalo's motions for summary judgment, Aflalo's counsel testified that the Harrises did not

respond to the letter "at any time prior to the filing of this lawsuit on January 11, 2016." On this record, we cannot conclude that the Harrises established as a matter of law that Aflalo forfeited his right to sue by failing to perform a condition precedent. Summary judgment for the Harrises was not proper on this ground.

Waiver. The Harrises contended Aflalo waived his right to recover damages because he filed a separate lawsuit against his realtor for the same damages based on the same facts, claiming that the realtor caused the harm.[3] Waiver—the "intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right"—is a question of law. *LaLonde v. Gosnell*, 593 S.W.3d 212, 218–20 (Tex. 2019). A party's intent to waive a right by litigation conduct must be "clearly demonstrate[d]." *Id.* at 219–20. "This is a high standard." *Id.* at 220. In our review, we consider the totality of the circumstances. *Id.*

In their summary judgment motion, the Harrises compared the factual allegations in this lawsuit to the allegations in the lawsuit against the realtor, arguing that Aflalo pleaded "the same purported damages" arose from "the same set of facts and circumstances." On appeal, they rely on *Tenneco Inc. v. Enterprise Products Co.*, 925 S.W.2d 640, 643 (Tex. 1996), *Maryland Casualty Co. v. Palestine Fashions, Inc.*, 402 S.W.2d 883, 888 (Tex. 1966), and *Murphy v. Gutierrez*, 374

[3] The Harrises also argue that Aflalo waived his right to recover damages because he accepted the earnest money. We have already addressed the Harrises' arguments about the earnest money and do not discuss them further.

S.W.3d 627, 630 (Tex. App.—Fort Worth 2012, pet. denied), in support of their argument. None of these cases addresses the Harrises' complaint here, that Aflalo has adopted inconsistent positions in two different lawsuits. *See Tenneco Inc.*, 925 S.W.2d at 643 (waiver established as matter of law where complaining parties failed to enforce their contractual rights for three years after learning of breach); *Maryland Cas. Co.*, 402 S.W.2d at 885, 888 (no waiver of insurance policy provision requiring written approval of an assignment where agent did nothing inconsistent with intention to rely on the right); *Murphy*, 374 S.W.3d at 628–29 (engineer waived statutory right to dismissal for failure to file certificate of merit after substantially invoking litigation process for more than three years).

In our previous opinion, we concluded that Aflalo performed under the contract by giving the Harrises the required disclosure. *Aflalo I*, 583 S.W.3d at 248–49. He then sued to enforce the contract, one of the remedies provided in paragraph 15. There is nothing in the record to indicate that Aflalo has "successfully maintain[ed] a position" in another lawsuit or has intentionally relinquished any right to assert his claims against the Harrises. Summary judgment was not proper for the Harrises on this ground.

Conclusion. We conclude that summary judgment was not proper on the Harrises' affirmative defenses. We sustain the remainder of Aflalo's first issue challenging the trial court's summary judgment for the Harrises.

3. Attorney's fee award

In his second issue, Aflalo contends the trial court erred by awarding attorney's fees to the Harrises. The trial court awarded attorney's fees to the Harrises based on its finding that they were the prevailing parties under the contract. We have concluded, however, that the trial court erred by excluding Aflalo's entire affidavit, and that remand for further proceedings is necessary. Consequently, we sustain Aflalo's second issue challenging the award of attorney's fees to the Harrises. The issues of the parties' entitlement to attorney's fees and the amount of any such fees are remanded for the trial court's determination after resolving the parties' dispute under the contract.

CONCLUSION

The trial court's judgment is reversed and the case is remanded to the trial court for further proceedings consistent with this opinion.

/Barbara Rosenberg/
BARBARA ROSENBERG
JUSTICE, ASSIGNED

211057F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

SAMUEL ADAM AFLALO,
Appellant

No. 05-21-01057-CV V.

DEVIN LAMAR HARRIS AND
MEGHAN THERESA HARRIS,
Appellees

On Appeal from the 95th District Court, Dallas County, Texas
Trial Court Cause No. DC-16-00247.
Opinion delivered by Justice Rosenberg. Justices Carlyle and Garcia 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 consistent with the Court's opinion.

It is **ORDERED** that appellant Samuel Adam Aflalo recover his costs of this appeal from appellees Devin Lamar Harris and Meghan Theresa Harris.

Judgment entered March 15, 2023