**REVERSED and REMANDED and Opinion Filed June 23, 2020**

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

**No. 05-19-00348-CV**

**JOHN VANN, Appellant**
**V.**
**LEVEL FOUR GROUP, LLC, LEVEL FOUR ADVISORY SERVICES, LLC, AND CARR, RIGGS & INGRAM, LLC, Appellees**

**On Appeal from the 416th Judicial District Court**
**Collin County, Texas**
**Trial Court Cause No. 416-02965-2018**

# MEMORANDUM OPINION

Before Justices Partida-Kipness, Nowell, and Evans
Opinion by Justice Partida-Kipness

John Vann appeals an order granting summary judgment for appellee Level Four Advisory Services, LLC ("Advisory Services") on its claim against him for breach of a reimbursement agreement. Advisory Services asserted below that Vann failed to reimburse Advisory Services for amounts it paid as Vann's guarantor under a settlement agreement between Vann and his former employer, Boston Private Wealth (BPW). In one issue, Vann contends that Advisory Services failed to meet its summary judgment burden to produce conclusive evidence that he failed to pay BPW, as required to trigger Vann's obligation to reimburse Advisory Services for

sums paid on his behalf. We agree, reverse the trial court's judgment, and remand the case for further proceedings.

## BACKGROUND

Advisory Services is an investment firm, and Level Four Group, LLC (LFG) is its parent company. In 2015, LFG hired Vann as an investment advisor. Vann's former employer, BPW, then sued Vann for alleged wrongful solicitation of clients. Vann settled BPW's claims, agreeing to make a series of payments to BPW. Advisory Services guaranteed Vann's payments.

Advisory Services and Vann entered into a reimbursement agreement under which Vann would reimburse Advisory Services for any payment it had to make to BPW as guarantor. Specifically, Article I of the Reimbursement Agreement states:

> On each date that [Advisory Services] is required or requested to pay any amounts or perform any obligations under the Settlement Agreement and/or Guaranty (the "Obligations"), Vann acknowledges that he immediately becomes indebted to [Advisory Services] in the amount of such payment and Vann shall immediately reimburse [Advisory Services] by paying or causing to be paid to [Advisory Services] an amount equal to the amount of such Obligations.

Vann's failure "to make any payment on the Obligations, or any other payments or reimbursements due under this Agreement" constitutes a default under the agreement.

Vann later resigned from LFG to become an independent contractor with Advisory Services. In the underlying proceeding, Vann sued LFG for claims arising from LFG's alleged failure to compensate him for his share of LFG's revenue, as

required by his employment agreement with LFG. Advisory Services intervened, suing Vann for breach of the Reimbursement Agreement. Advisory Services alleged that Vann failed to make any payments to BPW, and that Advisory Services paid more than $1 million to BPW on Vann's behalf under its Guaranty.

Advisory Services moved for summary judgment on its claim against Vann, submitting the affidavit of its CEO, Jake Tomes, the Reimbursement Agreement, and the Settlement Agreement as evidence. Advisory Services and LFG also moved to dismiss Vann's claims based on his employment agreement's forum selection clause. The trial court granted Advisory Services's summary judgment motion and awarded Advisory Services actual damages of $1,173,022.00, interest, and attorney's fees. The trial court also granted Advisory Services's and LFG's motions to dismiss and entered final judgment. Vann appeals the trial court's summary judgment, arguing that Advisory Services failed to produce evidence conclusively establishing that Vann made no payments to BPW and that Advisory Services was "required or requested" to pay BPW on his behalf.

## STANDARD OF REVIEW

We review a trial court's summary judgment ruling *de novo*. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). We consider the evidence presented in the light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if a reasonable fact-finder could, and disregarding evidence contrary to the nonmovant unless a reasonable fact-finder could not. *Mann*

*Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). We indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *20801, Inc. v. Parker*, 249 S.W.3d 392, 399 (Tex. 2008).

A plaintiff is entitled to summary judgment on a cause of action if it conclusively proves all essential elements of the claim. *See* TEX. R. CIV. P. 166a(a), (c); *MMP, Ltd. v. Jones*, 710 S.W.2d 59, 60 (Tex. 1986); *Affordable Motor Co., Inc. v. LNA, LLC*, 351 S.W.3d 515, 519 (Tex. App.—Dallas 2011, pet. denied). To conclusively establish a fact, "the evidence must leave 'no room for ordinary minds to differ as to the conclusion to be drawn from it.'" *Int'l Bus. Machines Corp. v. Lufkin Indus., LLC*, 573 S.W.3d 224, 235 (Tex. 2019) (quoting *Triton Oil & Gas Corp. v. Marine Contractors & Supply, Inc.*, 644 S.W.2d 443, 446 (Tex. 1982)); *Affordable Motor Co.*, 351 S.W.3d at 519; *Acrey v. Kilgore & Kilgore, PLLC*, No. 05-15-01229-CV, 2017 WL 1173830, at *2 (Tex. App.—Dallas Mar. 30, 2017, no pet.) (mem. op.). If the plaintiff satisfies its burden, the burden shifts to the defendant to present evidence that raises a genuine issue of material fact. *Affordable Motor Co.*, 351 S.W.3d at 519; *Acrey*, 2017 WL 1173830, at *2.

**ANALYSIS**

In one issue, Vann contends the trial court erred by granting summary judgment on Advisory Services's claim because Advisory Services failed to produce evidence that it was "requested or required to" pay BPW on his behalf and, as such, failed to establish as a matter of law that the Guaranty was triggered and that Vann

breached the Reimbursement Agreement. Advisory Services argues that the affidavit testimony of Tomes showed that Vann did not pay BPW, and this is all that was needed to trigger its obligation to pay BPW on Vann's behalf. According to Advisory Services, Vann's narrow interpretation would require a demand from BPW, but the Reimbursement Agreement contains no such requirement. On the record before us, we conclude Advisory Services presented no evidence that Vann failed to pay BPW and was, therefore, not entitled to summary judgment on its breach of contract claim.

"A party breaches a contract by failing to perform when that party's performance is due." *Hoss v. Alardin*, 338 S.W.3d 635, 650 (Tex. App.—Dallas 2011, no pet.) (internal citation omitted). Thus, as the movant for summary judgment on its own claim, Advisory Services had the burden of presenting evidence conclusively establishing that Vann's performance was due under the Reimbursement Agreement and that Vann failed to perform. *See MMP, Ltd.*, 710 S.W.2d at 60.

The Reimbursement Agreement states that Vann's obligation to reimburse Advisory Services accrues on the "date that [Advisory Services] is required or requested to pay any amounts or perform any obligations under the Settlement Agreement and/or Guaranty." On that date, "Vann shall immediately reimburse [Advisory Services]" for payments made on his behalf. Regarding Advisory Services's Guaranty, the Settlement Agreement states:

> On the Effective Date hereof, [Advisory Services] shall execute a guarantee with [BPW] (the "Guarantee") pursuant to which payments due hereunder to [BPW] by Mr. Vann will be paid by [Advisory Services] in the event that Mr. Vann fails to make any payments within five (5) business days after they become due under this Section 2. The Guarantee is attached hereto as Exhibit D.

It is undisputed that Advisory Services executed the Guaranty. Thus, the summary judgment evidence reflects, and the parties do not contest, that Vann's performance under the Reimbursement Agreement did not accrue until he failed to make payment to BPW under the Settlement Agreement.

Advisory Services did not argue below that it was requested to pay any amounts under the Settlement Agreement or the Guaranty. Rather, Advisory Services argued only that it was required to pay under the Guaranty because Vann failed to make his required payments to BPW under the Settlement Agreement. To prove that Vann failed to perform under the Reimbursement Agreement, therefore, Advisory Services had to first produce evidence that Vann failed to fulfill the terms of the Settlement Agreement, thus triggering Advisory Services's Guaranty. *See Hoss*, 338 S.W.3d at 65. To prove that Vann failed to fulfill the terms of the Settlement Agreement, Advisory Services had to produce evidence that Vann failed to make any payment to BPW within five business days after it became due.

On this point, Advisory Services offered only the Tomes affidavit. In his affidavit, Tomes provides background information regarding his position with Advisory Services and the parties' relationship, Advisory Services's alleged

payment history, and excerpts from the reimbursement agreement. Regarding Vann's alleged breach, Tomes states:

- Under the Settlement Agreement, Vann was obligated to make certain payments, and Advisory Services was obligated to guarantee the obligations of Vann to make such payments (the "Guaranty").
- To date, Advisory Services has paid amounts under the Settlement Agreement and Guaranty on behalf of Vann in the amount of $1,137,371.42.
- Pursuant to the Reimbursement Agreement, Vann is obligated to immediately reimburse Advisory Services for those payments. Vann has not done so, and he is in default.
- Advisory Services has performed in accordance with the terms and conditions of the Reimbursement Agreement. Namely, Advisory Services paid amounts under the Settlement Agreement and/or Guaranty on behalf of Vann.
- Vann breached the Reimbursement Agreement by failing to make any payment on the Obligations or other payments or reimbursements due to Advisory Services under the Reimbursement Agreement.

The Tomes affidavit did not establish that Vann failed to pay BPW, only that Advisory Services made certain payments to BPW "on behalf of Vann." Although this statement implies that Vann failed to pay BPW, thus triggering Advisory Services's Guaranty, such an implication will not support summary judgment on a movant's claim. *See MMP, Ltd.*, 710 S.W.2d at 60; *20801, Inc.*, 249 S.W.3d at 399.

Moreover, affidavits in support of summary judgment must set forth such facts as would be admissible in evidence at trial. *See United Blood Servs. v. Longoria*, 938 S.W.2d 29, 30 (Tex. 1997); *Allbritton v. Gillespie, Rozen, Tanner &*

*Watsky, P.C.*, 180 S.W.3d 889, 892 (Tex. App.—Dallas 2005, pet. denied); TEX. R. CIV. P. 166a(f). For an affidavit to have probative value, the affiant must swear the facts stated therein reflect his personal knowledge. *Kerlin v. Arias*, 274 S.W.3d 666, 668 (Tex. 2009). An affidavit showing no basis for personal knowledge is legally insufficient. *Id.*

The Tomes affidavit contains no basis for any contention that Vann did not pay BPW. Specifically, Tomes does not claim Vann failed to pay BPW or to have personal knowledge of Vann's alleged failure to pay, and the affidavit contains no reference to any admissible record or document reflecting the same. Accordingly, the Tomes affidavit is legally insufficient to establish that Vann failed to pay BPW. *See id.*; *MMP, Ltd.*, 710 S.W.2d at 60. Given Advisory Services's evidence is insufficient to prove that Vann breached the Settlement Agreement, it is also insufficient to prove that Advisory Services was "required or requested" to pay BPM on Vann's behalf.

In its response brief, Advisory Services maintains that its evidence shows Vann did not pay BPW and complains that "Vann does not even attempt to argue otherwise." However, it was not Vann's burden to present argument or evidence of payment. Rather, as movant on its own claim, Advisory Services had to conclusively prove that Vann did not pay BPW. *See MMP, Ltd.*, 710 S.W.2d at 60. We conclude that Advisory Services failed to do so here.

Advisory Services also argues that Article I's "required or requested" provision is not the only trigger for Vann's obligations under the Reimbursement Agreement. According to Advisory Services, the agreement's recitals separately trigger Vann's obligation by stating that "in the event [Advisory Services] makes any payments under the Guaranty, Vann will reimburse [Advisory Services] for all such payments." The language of this recital does not affect our analysis for three reasons.

First, recitals "are not strictly part of the contract, and they will not control the operative phrases of the contract unless those phrases are ambiguous." *Furmanite Worldwide, Inc. v. NextCorp, Ltd.*, 339 S.W.3d 326, 336 (Tex. App.—Dallas 2011, no pet.). Although the parties disagree on the meaning of the "required or requested" provision, a provision is not ambiguous because it lacks clarity or is given to different interpretations. *See DeWitt County Elec. Co-op., Inc. v. Parks*, 1 S.W.3d 96, 100 (Tex. 1999); *Nexstar Broad., Inc. v. Fid. Communications Co.*, 376 S.W.3d 377, 382 (Tex. App.—Dallas 2012, no pet.). Advisory Services does not argue that the provision is ambiguous but merely disagrees with Vann's interpretation. Second, the recital's broad reference to "any payments [made] under the Guaranty" cannot extend Article I's more restrictive provision. *Furmanite Worldwide, Inc.*, 339 S.W.3d at 336 ("[W]here the recitals are broader than the contract stipulations, the former will not extend the latter." *Gardner v. Smith*, 168 S.W.2d 278, 280 (Tex. Civ. App.—Beaumont 1942, no writ)). Finally, both the recital and Article I require that

Advisory Services make payments under its Guaranty. In other words, both require Vann's failure to pay BPW under the terms of the Settlement Agreement. Thus, even if the recital was an enforceable term of the Reimbursement Agreement, Advisory Services would still have to produce evidence of Vann's failure to pay BPW. As noted, Advisory Services's evidence raises only an inference that Vann failed to pay BPW, which is insufficient to support summary judgment for Advisory Services on its claim that Vann breached the Reimbursement Agreement. *See Affordable Motor Co.*, 351 S.W.3d at 519.

Given Advisory Services failed to produce conclusive evidence that Vann failed to pay BPW, thus invoking Advisory Services's Guaranty, we sustain Vann's sole issue. Vann argues in the alternative that the trial court should have offset the damages award with money Advisory Services allegedly owed him under his employment contract. Having sustained his contention that the trial court erred in granting summary judgment to Advisory Services, we need not address Vann's alternative issue.

The trial court also awarded Advisory Services attorney's fees for prevailing on its breach of contract claim. *See* TEX. CIV. PRAC. & REM. CODE 38.001. Because summary judgment in Advisory Services's favor was improper, it was likewise improper to award Advisory Services attorney's fees. *See Sharifi v. Steen Auto., L.L.C.*, 370 S.W.3d 126, 152 (Tex. App.—Dallas 2012, no pet.) (to recover

attorney's fees a party must prevail on its cause of action). Accordingly, we also reverse the trial court's award of attorney's fees.

## CONCLUSION

Having sustained Vann's sole issue, we reverse the trial court's judgment granting summary judgment on Advisory Services's breach of contract claim, and remand the case for further proceedings consistent with this opinion.

/Robbie Partida-Kipness/
ROBBIE PARTIDA-KIPNESS
JUSTICE

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# Court of Appeals
# Fifth District of Texas at Dallas

## JUDGMENT

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| JOHN VANN, Appellant | On Appeal from the 416th Judicial District Court, Collin County, Texas |
| No. 05-19-00348-CV V. | Trial Court Cause No. 416-02965-2018. |
| LEVEL FOUR GROUP, LLC, LEVEL FOUR ADVISORY SERVICES, LLC, AND CARR, RIGGS & INGRAM, LLC, Appellee | Opinion delivered by Justice Partida-Kipness. Justices Nowell and Evans 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 this opinion.

Judgment entered this 23rd day of June, 2020.