

Affirmed and Opinion Filed March 28, 2016



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

No. 05-14-01430-CV

**TOUR DE FORCE, LTD., Appellant
V.
GORDON BARR AND NINA BARR, Appellees**

**On Appeal from the 296th Judicial District Court
Collin County, Texas
Trial Court Cause No. 296-02028-2013**

MEMORANDUM OPINION

**Before Justices Bridges, Lang-Miers, and Schenck
Opinion by Justice Bridges**

Appellant Tour de Force, LTD. (“TdF”) sued appellees Gordon Barr and Nina Barr for breach of contract. After a bench trial, the trial court entered a take nothing judgment in favor of the Barrs. TdF raises four issues on appeal: (1) whether the trial court erred in its application of agency law as it applies to the personal liability of corporate agents; (2) whether the trial court erred by concluding Barr was not liable on the contract; (3) whether the trial court erred by failing to find Barr liable on the contract and by failing to award TdF damages; and (4) whether the trial court erred by failing to award TdF attorney’s fees as the prevailing party.¹ We affirm the trial court’s judgment.

¹ TdF’s appeal does not seek reversal of the trial court’s final judgment as to Nina Barr.

Background

TdF is a foreign entity that provides guided tours in Moscow, St. Petersburg, and other locations in Russia. Its services include booking guided excursions and placing tourists in hotels. In 2009, Roman Varakin, general director of TdF, began looking for American companies to partner with and to coordinate bringing American tourists groups to Russia. Gordon Barr (“Barr”) responded by email to an inquiry in June 2009 and signed the email as president and CEO of Port Promotions and Services, Inc.

Although the parties did not enter into a written contract, TdF and Port Promotions agreed on terms and prices for Port Promotions to provide tourists groups. Port Promotions sent orders for those tours, and TdF provided the services. Once TdF completed the tours, it invoiced Port Promotions. Port Promotions promptly paid TdF’s tour invoices in 2010 and 2011 from a “Port Promotions and Services, Inc.” bank account.

TdF continued to provide services to Port Promotions’s customers from May to September 2012. Port Promotions paid invoices for May and June 2012 but did not pay for July, August, or September 2012.

Varakin saw Barr in November 2012 at a London travel show. The men discussed the 2013 travel season, and Barr assured that TdF would be paid for the outstanding invoices. However, after Port Promotions did not pay invoices for August or September 2012, Varakin sent a demand letter on February 13, 2013. He addressed the letter to “Mr. Gordon Barr CEO Port Promotions and Services Inc.” The letter referenced the money “Port Promotions owes to Tour de Force for the travel services provided July, August, and September 2012.” The letter also discussed TdF’s attempts to reach “Nina Bar (VP of Finance for Port Promotions).” It requested “Port Promotions” pay the invoices, and if the debt was not settled in full, TdF threatened to “prosecut[e] Port Promotions legally”

An attorney for TdF sent a demand letter on March 18, 2013 to the Barrs for \$40,471 as the amount due and owing for tour services. Port Promotions did not pay. TdF then filed its original petition for breach of contract against the Barrs, individually. The Barrs answered and denied they entered into a contract with TdF. Citing Texas Rule of Civil Procedure 93(2), they further asserted “they are not liable in the capacity in which they have been sued.”

After a bench trial, the trial court entered a take-nothing judgment in favor of the Barrs because TdF did not prove “by a preponderance of the evidence that a contract existed with the Defendants in their individual capacity.” The trial court entered findings and concluded TdF entered into a contract with “Port Promotions,” which was the assumed name of Port Promotions and Services, Inc, and Port Promotions breached the agreement. It further concluded TdF failed to establish that the Barrs intended to enter into a contract with TdF in their individual capacities; therefore, they were not personally liable for Port Promotions corporate debt.

On appeal, TdF challenges the trial court’s findings and argues it erred in its application of agency law as it applies to the personal liability of corporate agents and by concluding Barr was not liable on the contract. TdF further argues the trial court erred by failing to award TdF damages and attorney’s fees as the prevailing party.

Standard of Review

A trial court’s findings in a nonjury trial carry the same force and dignity as a jury’s verdict on jury questions. *Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994). We apply the same standards in reviewing the legal and factual sufficiency of the evidence supporting the trial court’s fact findings as we do when reviewing the legal and factual sufficiency of the evidence supporting a jury’s answer to a jury question. *Kahn v. Imperial Airport, L.P.*, 308 S.W.3d 432, 437 (Tex. App.—Dallas 2010, no pet.).

In a legal sufficiency review, we consider evidence in the light most favorable to the finding and indulge every reasonable inference that would support it. *City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005); *Kahn*, 308 S.W.3d at 437.² In a bench trial, the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Kahn*, 308 S.W.3d at 437. We review the trial court’s conclusions of law de novo. *BMC Software Belgium, N.V. v. Merchand*, 83 S.W.3d 789, 794 (Tex. 2002).

Discussion

To prevail on its breach of contract claim, TdF must prove (1) the existence of a valid contract between TdF and Barr; (2) TdF performed or tendered performance according to the contract; (3) Barr breached the contract; and (4) TdF was damaged because of the breach. *See Gaspar v. Lawnpro, Inc.*, 372 S.W.3d 754, 757 (Tex. App.—Dallas 2012, no pet.). The threshold question in this case is whether TdF and Barr entered into a contract. For a contract to exist, there must be an offer, acceptance, and consideration. *Domingo v. Mitchell*, 257 S.W.3d 34, 39 (Tex. App.—Amarillo 2008, pet. denied). To determine whether there was an offer and acceptance, and therefore a “meeting of the minds,” courts use an objective standard, considering what the parties did and said, not their subjective states of mind. *Id.*

TdF’s theory of the case rests in agency. It asserts Barr acted as an undisclosed agent for “Port Promotions,” and because there was no assumed name filing for Port Promotions and Services, Inc. establishing an assumed name as “Port Promotions,” the trial court improperly concluded Barr was not personally liable for unpaid invoices under the contract. However, during closing arguments, the trial court asked Barr’s counsel, “You are not trying to argue agency, are you?,” and counsel answered, “No, your honor.”

² Although TdF briefly discusses the standard for conducting a factual sufficiency review of the trial court’s findings, it asks this Court to reverse and render judgment in its favor. We conclude TdF is challenging only the legal sufficiency of the evidence to support the trial court’s judgment.

Despite Barr's counsel's unequivocal statement he was not raising an agency defense, TdF argues Barr urged the agency defense, "whether they acknowledged it to the trial court or not," so it was Barr's burden to establish the defense. *See, e.g., Wright Grp. Architects-Planners, P.L.L.C. v. Pierce*, 343 S.W.3d 196, 200 (Tex. App.—Dallas 2011, no pet.) (stating that in order for an agent to avoid personal liability on a contract, he has a duty to disclose not only that he is acting in a representative capacity but also the identity of his principal; the inference that the agent is a party to the contract exists until the agent gives such complete information concerning the principle's identity so that the principal can be readily distinguished). We do not agree. Barr denied relying on agency; therefore, he did not have any burden to establish the affirmative defense. Rather, the burden remained squarely with TdF to prove a "meeting of the minds" between it and Barr to enter into a contract. *See Domingo*, 257 S.W.3d at 39. This it failed to do.

The evidence at trial repeatedly showed that email communications between TdF and Barr were signed by Barr as CEO of Port Promotions and Services, Inc. When the corporation underwent a rebranding in 2011, it shortened Port Promotions and Services, Inc. to "Shore Excursions by Portpromotions.com" because Barr felt it made sense "from a marketing perspective." However, Barr's email never changed during the time it conducted business with TdF.³ Barr further explained the corporation was known as Shore Excursions by Port Promotions, Port Promotions Services, Inc., PP, and PPI. He testified that "depending on who I dealt with, those names were all commonly used. Some people just called us Port."

Despite TdF's claim it contracted with Barr individually, Varakin admitted TdF invoices from July, August, and September 2012 were directed to Port Promotions. The record included documentation establishing Port Promotions and Services, Inc. had a checking account from

³ The record reflects Barr's email address from 2009 through the filing of the lawsuit was gbarr@portpromotions.com.

which it had issued prior payments to TdF. Account reports showed deposits from an account in the name of Port Promotions and Services, Inc. Varakin admitted the report did not reflect any receipt of funds from the Barrs individually. Moreover, Barr testified he never personally issued a payment to TdF.

In a December 4, 2012 email, Varakin expressed his frustration with the lack of payment by stating, “We never had such an issue with Port Promotions before that we have to chase our money for a month after month.” A February 13, 2013 email from Varakin again stated, “Port Promotions didn’t pay us for July, August, and September 2012.” The demand letter Varakin sent was directed to “Mr. Gordon Barr CEO Port Promotions and Services Inc.” and referenced the money “Port Promotions owes to Tour de Force”

Accordingly, the evidence presented by TdF does not show that it entered into a contract with Barr individually. In fact, it was not until TdF’s lawyer sent a demand letter addressed to Gordon and Nina Barr, did TdF insinuate the Barrs personally owed TdF for the outstanding payment.

Rather, the evidence established TdF contracted with a corporate entity regardless of whether the entity operated under a trade name. Varakin’s subjective belief, based on his admitted misunderstanding of the law that he was contracting with an individual,⁴ does not negate his burden to prove a “meeting of the minds” between TdF and Barr to enter into a contract. *See Domingo*, 257 S.W.3d at 39.

As such, the record supports the trial court’s conclusion the Barrs did not enter into an agreement with TdF in their individual capacities and therefore the Barrs are not liable for any damages under any alleged contract between TdF and Port Promotions. Thus, we overrule TdF’s

⁴ Varakin repeatedly testified he did not believe TdF was dealing with a corporation from 2010 to 2012 but rather the Barrs individually. He explained this belief was based on the fact that in Russia, a person who works from his home can only do so privately and not as a corporate entity. The Barrs ran the corporation from their home.

first and second issues in which it complains the trial court misapplied the law as it relates to agency and Barr failed to establish an agency defense. Because the trial court correctly entered a take-nothing judgment in favor of Barr, we need not reach TdF's third and fourth issues asking this Court to award its actual damages and remand to the trial court for a determination of attorney's fees. TEX. R. APP. P. 47.1.

Conclusion

The judgment of the trial court is affirmed.

/David L. Bridges/
DAVID L. BRIDGES
JUSTICE

141430F.P05



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

JUDGMENT

TOUR DE FORCE, LTD., Appellant

No. 05-14-01430-CV V.

GORDON BARR AND NINA BARR,
Appellees

On Appeal from the 296th Judicial District
Court, Collin County, Texas
Trial Court Cause No. 296-02028-2013.
Opinion delivered by Justice Bridges.
Justices Lang-Miers and Schenck
participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee GORDON BARR AND NINA BARR recover their costs of this appeal from appellant TOUR DE FORCE, LTD.

Judgment entered March 28, 2016.