Reverse and Render in part; Affirmed in part and Opinion Filed August 24, 2017

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00193-CV

701 KATY BUILDING, L.P., Appellant
V.
JOHN WHEAT GIBSON, P.C., Appellee

On Appeal from the 134th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-15-06152

MEMORANDUM OPINION

Before Justices Francis, Lang-Miers, and Whitehill
Opinion by Justice Whitehill

This is a landlord–tenant dispute. The tenant, appellee John Wheat Gibson, P.C. ("the law firm"), moved out of the premises when the lease ended. The landlord, appellant 701 Katy Building, L.P. ("Katy"), sued the law firm for unpaid rent. The law firm counterclaimed for breach of lease and constructive eviction. After a nonjury trial, the trial court ruled in the law firm's favor. Katy appeals the resulting judgment, raising eight issues.

We conclude that (i) the law firm was not entitled to any recovery because it adduced no evidence that its expenses allegedly caused by Katy were reasonable, and (ii) Katy is not entitled to recover the unpaid rent because sufficient evidence supports implied findings that Katy committed a prior material breach. Thus, we reverse the judgment awarding damages to the law

firm, render judgment that the law firm take nothing, and affirm the judgment awarding no recovery to Katy.

I. BACKGROUND

A. Facts

The following facts are drawn from the evidence viewed in the light most favorable to the judgment.

The Katy Building is an eight-story office building in downtown Dallas. Attorney John Wheat Gibson moved into the building in 1988.

Katy bought the building in 2006.

The law firm and Katy executed a five-year lease commencing March 1, 2007 (the "initial lease"). The law firm rented office space on the Katy Building's eighth floor. The rent was $1,250 per month for the first two years and $1,350 per month thereafter. Paragraph 4.02 of the lease provided, "Lessor shall furnish reasonably adequate water, heating, air conditioning, and automatically operated elevator service on business days during the hours [of 8 A.M. to 6 P.M.]"

In 2011, Katy started to let the building deteriorate and there were air-conditioning problems.

When the initial lease expired February 29, 2012, the law firm held over for five months and continued to pay rent of $1,350 per month.

In July 2012, Katy and the law firm executed a second lease that largely continued the initial lease's terms. The new lease had a two-year term starting August 1, 2012. The monthly rent was again $1,350. Problems with the building continued.

At the end of January 2013, the law firm notified Katy by letter that it was withholding February's rent until the thermostats were repaired. The law firm caught up on its unpaid rent in March 2013.

There were more problems during that summer. In June 2013, malfunctioning thermostats made the law firm's offices too cold. There was also a flea infestation in the law firm's premises. The law firm told Roxy Robinson, Katy's local manager, about the fleas but she did nothing about them. So the law firm bought flea powder and deducted the cost, $95.02, from its August 2013 rent payment. Gibson testified that he later had his staff pay that amount to Katy, but Katy's records did not reflect such a payment.

Also during the summer of 2013, a tenant called Integrated Psychotherapeutic Services ("IPS") began leasing space on the seventh floor. There was evidence that many of IPS's invitees were convicted criminals and that their clients "created havoc" in the building. There were complaints that IPS's invitees loitered shirtless around the building, entered other offices in the building without permission, harassed other tenants, and stole supplies from the restrooms. There was evidence of other burglaries and break-ins in the building.

Air conditioning problems led the law firm to withhold its rent payments from October 2013 through March 2014. Each month, the law firm sent a letter to Katy complaining about the air conditioning and stating that the rent would be paid when the heating and cooling systems started working. In April 2014, the law firm paid the unpaid rent along with the April rent, and it sent Katy a letter stating, "We appreciate your apparent efforts to make the temperature in our offices somewhat responsive to the thermostat settings."

Matters came to a head in the summer of 2014, as the second lease's July 31 termination date approached.

By the beginning of May 2014, the law firm's premises were uncomfortably warm, and the law firm did not pay its May, June, or July rent. Again the law firm sent Katy a letter each month complaining about the heat and stating that payment would be made if Katy repaired the air conditioning.

There was evidence that by May 2014 Katy had ordered replacements for the large air conditioning units on the building's roof. The units were supposed to arrive July 18. Meanwhile, Katy supplied portable cooling units to the law firm and other tenants, but there was evidence that these were ineffective. To cope with the heat, the law firm's employees wore shorts, tank tops, and flip flops and spent more time out in the parking lot than in the building.

The law firm complained to Katy about the heat on June 3, July 1, July 7, and July 8. On July 7, Katy told Gibson that the new roof units were expected on July 18. Nevertheless, by mid-July, when the temperatures in the office were "up to 101 degrees on occasion and seldom below 88 degrees," Gibson felt he had been deceived about the promised repairs, decided to move the law firm, and let his two employees pick out a new office space. He testified that he still would not have moved had Katy fixed the air conditioning by July 18. But the units did not arrive then, and Gibson heard nothing from Katy about the matter after July 18.

On July 24, Gibson sent Katy an email stating that (i) it was 98 degrees in his office at 10:11 a.m. and (ii) it had been 101 degrees in his office when he left the previous night.

The law firm moved out of the Katy Building near the end of July 2014. It introduced evidence that its expenses to move and to finish out its new office space totaled $20,959.02.

B. Procedural History

Katy sued the law firm under the second lease for unpaid rent, asserting claims for contract breach and, in the alternative, for quantum meruit or quantum valebant.

The law firm answered and counterclaimed against Katy for Deceptive Trade Practices Act violations, fraud, negligence, breach of contract, constructive eviction, and fraudulent inducement.

The case was tried without a jury. After a two-day trial, the trial judge took the case under advisement.

The judge later signed a judgment awarding the law firm $20,959 as actual damages for breach of contract and constructive eviction. The judgment also awarded the law firm $14,455 in attorney's fees. The judgment did not expressly dispose of Katy's claims, but it implicitly ordered Katy to take nothing on them. *See Vaughn v. Drennon*, 324 S.W.3d 560, 561 (Tex. 2010) (per curiam) (any judgment after conventional trial on the merits is presumed final for appeal purposes).

Katy timely requested findings of fact and conclusions of law. The trial judge signed findings and conclusions, which include these key findings:

- Katy breached the lease. (Secondary findings indicate that Katy's principal breach was failing to provide adequate air conditioning from at least May through July 2014.)
- The law firm[1] did not breach the lease.
- Katy waived any breach by the law firm.
- The law firm was constructively evicted from the premises before May 1, 2014.[2]
- Katy knew the law firm's premises were too hot to function reasonably as a law office in summer 2014.
- Katy breached the implied warranty of suitability.

Katy appealed.

[1] The findings generally refer to John Gibson or John Wheat Gibson instead of John Wheat Gibson, P.C. We construe these references to mean the defendant, John Wheat Gibson, P.C.

[2] The findings actually recite that the firm was constructively evicted before May 1, 2015, but the 2015 date is plainly a typographical error because the law firm left the Katy Building at the end of July 2014.

II. ISSUES PRESENTED

Katy presents eight issues:

1. The trial court erred by finding that the law firm did not breach the lease.

2. The trial court erred by finding that Katy waived any breach by the law firm.

3. The trial court erred by finding that Katy breached the lease.

4. The trial court erred by finding that the law firm's damages were caused by Katy's breach given that the law firm moved at the end of the lease.

5. The trial court erred by awarding the law firm improper damages elements.

6. The trial court erred by finding that Katy breached the implied warranty of suitability.

7. The trial court erred by finding that the law firm was constructively evicted.

8. The trial court erred by failing to render judgment for Katy on its claims.

III. ANALYSIS

We address Katy's issues contesting (i) the judgment for the law firm on the law firm's counterclaims and then (ii) the take-nothing judgment against Katy on its claims.

A. Issue Three: Did the trial court err by finding that Katy breached the lease?

The trial court found that Katy breached "the Lease Agreement" with the law firm. Because (i) the other findings do not suggest the court found that Katy breached the initial lease and (ii) the findings focus on events in 2013 and 2014, we infer that the breach finding concerns the second lease.

Katy's third issue argues that the finding that Katy breached the second lease is erroneous for two reasons. One, Katy was excused by the law firm's prior material breach. Two, Katy was excused by the nonoccurrence of a condition precedent, being that the law firm itself was not in default under the lease. We address these two arguments in reverse order.

1. Did Katy prove that the law firm's timely rent payments were a condition precedent to Katy's duty to provide air conditioning?

Katy argues that lease § 4.01 requires as a condition precedent to Katy's duty to supply air conditioning that the law firm not be in default under the lease. We reject this argument as contrary to the lease's plain language.

Katy's argument requires us to interpret an unambiguous contract, so we employ a de novo standard of review. *See Hackberry Creek Country Club, Inc. v. Hackberry Creek Home Owners Ass'n*, 205 S.W.3d 46, 56 (Tex. App.—Dallas 2006, pet. denied).

In construing a contract, we ascertain and effectuate the parties' intent as expressed in the agreement. *Id*. at 55. We consider the contract as a whole, and we attempt to harmonize and give effect to all its provisions. *Id*. If, after applying the rules of construction, we can give the contract a definite or certain legal meaning, we construe it as a matter of law. *Id*. at 56. But if the contract is susceptible to more than one reasonable interpretation, it is ambiguous. *Id*. The interpretation of an ambiguous contract is a fact question. *Royal Maccabees Life Ins. Co. v. James*, 146 S.W.3d 340, 346 (Tex. App.—Dallas 2004, pet. denied).

"A condition precedent is an event that must happen or be performed before a right can accrue to enforce an obligation." *Centex Corp. v. Dalton*, 840 S.W.2d 952, 956 (Tex. 1992). We consider the entire contract in determining whether a provision is a condition precedent. *Criswell v. European Crossroads Shopping Ctr., Ltd.*, 792 S.W.2d 945, 948 (Tex. 1990). To be a condition precedent, a provision must use conditional language such as *if*, *provided that*, or *on condition that*. *Id*. Because of their harshness, conditions are not favorites of the law. *Id*. If the parties' intent is doubtful, courts will interpret an agreement to create a covenant rather than a condition. *Id*.

Applying the contract principles stated in the preceding two paragraphs to the lease, we conclude that the lease unambiguously does not support Katy's interpretation. Specifically, the initial lease, which is incorporated into the second lease, provides:

> 4.01 BUILDING SERVICES. *As long as Lessee is not in default under any of the covenants of this Lease*, Lessor shall provide to Lessee the usual electric energy which Lessee ordinarily and necessarily shall require for the normal use and occupation of the Leased Premises for the use stated hereunder on a so-called "rent inclusion basis". The heating and air conditioning service shall be provided on business days (Monday through Friday, holidays excepted) from 8 A.M. to 6 P.M. and on Saturdays from 8 A.M. to 1 P.M. . . .
>
> 4.02 Lessor shall furnish reasonably adequate water, heating, air conditioning, and automatically operated elevator service on business days during the hours set forth above.

(Emphasis added.)

Under these provisions' plain language, the conditional language in § 4.01's first sentence applies only to Katy's promise to provide electricity (which is that sentence's sole service deliverable)—as opposed to Katy's two subsequent promises to provide air conditioning.

More specifically, the § 4.01 air conditioning promise appears in a separate sentence from the first sentence's conditional language regarding Katy's duty to provide electricity. And there is no grammatical indication that the first sentence's conditional language applies to the second sentence, which does not containing any conditioning language. Furthermore, the second air conditioning promise appears in a separate paragraph, in a separate section that contains no conditioning language.

Construing the lease as a whole (as we are required to, 205 S.W.3d at 56), reading §§ 4.01 and 4.02 together unambiguously shows that Katy's duty to provide air conditioning was separate and independent of Katy's conditional duty to provide electricity. Stated differently, Katy's argument that the conditional language at the beginning of § 4.01 concerning Katy's duty

to provide electricity also applies to its duty to provide air conditioning is unreasonable given the separate air conditioning duty in § 4.02.

Regardless, even if the lease were ambiguous on this point, the trial court implicitly resolved any fact issue about the lease's meaning in the law firm's favor by granting the law firm recovery. And Katy has not shown any error in that decision.

Accordingly, we conclude that Katy did not conclusively prove that the law firm breached a condition precedent to Katy's duty to provide reasonably adequate air conditioning.

2. Did Katy conclusively prove that the law firm committed a prior material breach?

Next we consider Katy's claim, made under both issue one and issue three, that the trial court erroneously denied Katy a recovery on its unpaid rent claim by failing to find that the law firm materially breached the lease before Katy committed any breach.

a. Standard of Review

Although Katy's first and third issues mention both legal and factual sufficiency of the evidence, its arguments under those issues are couched entirely in terms of legal sufficiency, i.e., allegedly conclusive proof that the law firm materially breached the lease before Katy breached. Accordingly, we limit our analysis to legal sufficiency. *See* TEX. R. APP. P. 38.1(i) (contentions must be supported with argument); *Port of Houston Auth. of Harris Cty. v. Zachry Constr. Corp.*, 513 S.W.3d 543, 550 n.1 (Tex. App.—Houston [14th Dist.] 2016, pet. filed).

When a party challenges the legal sufficiency of the evidence supporting an adverse finding on an issue on which the party had the burden of proof, it must show that the evidence establishes all vital facts as a matter of law. *PopCap Games, Inc. v. MumboJumbo, LLC*, 350 S.W.3d 699, 710 (Tex. App.—Dallas 2011, pet. denied). In this instance, we must credit evidence favorable to the finding if reasonable jurors could and disregard contrary evidence unless reasonable jurors could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005).

If there is no evidence to support the finding, we review the entire record to determine if the contrary proposition is established as a matter of law. *PopCap Games*, 350 S.W.3d at 710. We sustain the issue only if the contrary proposition is conclusively established—that is, if Katy conclusively established that the law firm materially breached first. *See id.*

If the trial court finds one or more elements of a claim or defense but omits others, the omitted elements "will be supplied by presumption in support of the judgment" if they are supported by evidence. TEX. R. CIV. P. 299. Implied findings can be challenged for legal and factual sufficiency. *Hollingsworth v. Hollingsworth*, 274 S.W.3d 811, 815 (Tex. App.—Dallas 2008, no pet.).

b. Applicable Law

The contention that a party is excused from its contract performance by the other party's prior material breach is an affirmative defense. *Blackstone Med., Inc. v. Phoenix Surgicals, L.L.C.*, 470 S.W.3d 636, 646 (Tex. App.—Dallas 2015, no pet.); *Compass Bank v. MFP Fin. Servs., Inc.*, 152 S.W.3d 844, 852 (Tex. App.—Dallas 2005, pet. denied); *see generally Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 314 (Tex. 2006) (referring to prior material breach as an affirmative defense). Whether a breach is material is ordinarily a fact question. *Bartush-Schnitzius Foods Co. v. Cimco Refrig., Inc.*, 518 S.W.3d 432, 436 (Tex. 2017) (per curiam).

The supreme court recognizes five factors relevant to the materiality determination. *Mustang Pipeline Co., Inc. v. Driver Pipeline Co., Inc.*, 134 S.W.3d 195, 199 (Tex. 2004) (per curiam). These five factors are:

> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
>
> (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;

> (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
>
> (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of the circumstances including any reasonable assurances;
>
> (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Id. (quoting *Restatement (Second) of Contracts* § 241 (1981)). Two additional circumstances are relevant in determining whether a material breach discharges the other party's duties:

> (1) the extent to which it reasonably appears to the injured party that delay may prevent or hinder him in making reasonable substitute arrangements.
>
> (2) the extent to which the agreement provides for performance without delay, but a material failure to perform or to offer to perform on a stated day does not of itself discharge the other party's remaining duties unless the circumstances, including the language of the agreement, indicate that performance or an offer to perform by that day is important.

Id. (quoting *Restatement (Second) of Contracts* § 242).

c. Did Katy conclusively prove that the law firm committed a prior material breach?

Katy argues that its breaches were excused because the law firm "committed multiple material breaches of the Lease by failing to pay rent on time." The trial court, however, implicitly rejected this defense by finding that the law firm did not breach the lease. Moreover, as discussed in Part III.A.2.c.(2)–(3) below, there is evidence supporting the implied finding that the law firm was not in prior material breach. We thus conclude that Katy did not establish its defense as a matter of law and therefore overrule Katy's third issue.

(1) When did Katy breach?

To determine whether the law firm committed a prior material breach vis-à-vis Katy's breach by failing to provide air conditioning, we must know when Katy breached.

The trial court found that Katy breached the lease but it did not expressly find when Katy began doing so. But its findings support an implied finding that Katy breached by failing to

provide reasonably adequate air conditioning starting before May 1, 2014 and continuing through June and July. *See* TEX. R. CIV. P. 299. Specifically, the trial court found:

- Katy knew the premises "were too hot to reasonably function as a law office in the summer of 2014."
- Before 2014 began, Katy knew that the premises "would probably not have sufficient cooling to be functional as a law office in the summer of 2014."
- Katy "did not take timely reasonable measures or actions to provide cooling to the inside offices of the 701 Katy Building prior to May 1, 2014."
- The building "was uninhabitable for law offices in the months of June and July, 2014."

And the law firm adduced evidence that its premises were unbearably warm by the beginning of May 2014. For example:

- On April 3, 2014, Gibson sent Katy a letter saying, "We appreciate your apparent efforts to make the temperature in our offices somewhat responsive to the thermostat settings." That phrasing raises an inference that as of April 3, the air conditioning was still not working properly, despite the history of prior problems. Gibson testified that the temperature was bearable only because it was April rather than August or December.
- On May 5, 2014, Gibson sent Katy a letter saying that the May rent would be withheld until the heating and cooling systems worked properly. He further reported that it was 80 degrees in the receptionist's office and the vent was blowing hot air—even though the thermostat was set at 55 degrees. And he said, "The inability to control the cooling and heating seriously interferes with the work that is the purpose of the lease agreement." Thus, this letter shows that the air conditioning was not working properly as of May 5. Because the rent was due May 1, this evidence, together with the history of air conditioning problems, raises a further inference that the air conditioning also was not working properly as of May 1.
- Another Katy Building tenant, attorney John Key, testified that the heat was "God awful" and "unbearable" in May, June, and July. He also testified that "[i]t was always about 80, 85 degrees in the morning," and that the temperature inside would be 15 to 20 degrees hotter than it was outside. He further testified that during May, June, and July it was impossible to be in his office during normal business hours without feeling the extreme heat. He testified that "[p]retty much" all the tenants had the same complaints.

- Another building tenant, attorney Darren Wolf, testified that "you couldn't work there" from May through July 2014 because of the heat.
- Katy's building manager Roxy Robinson testified that she remembered getting emails saying that Gibson's office was hotter than 80 degrees in May, June, and July 2014.
- The firm's office manager, Gracie Cortez, testified that consistently in May, June, and July 2014, the staff would leave early, at 4 or 4:30. From the context of her testimony as a whole, it is apparent that she meant the staff left early because of the excessive heat.

Given all of the evidence, it is reasonable to infer that the air conditioning problems did not begin on May 1. We thus conclude that Katy's relevant breaches began prior to May 1, 2014.

(2) What were the law firm's breaches?

Next we ascertain the law firm's obligations under the second lease. The second lease incorporated the initial lease's rent provisions, which made the monthly rent "due and payable on or before the first day of each calendar month." However, § 2.08 provided that the firm would owe a late fee only if Katy received the rent after the fifth day of the month. The late fee was set at 10% of the past due amount.

We then review the evidence regarding the law firm's breaches.[3] *See Gaspar v. Lawnpro, Inc.*, 372 S.W.3d 754, 757 (Tex. App.—Dallas 2012, no pet.) ("A breach of contract occurs when a party fails to perform an act it has expressly or impliedly promised to perform."). Katy introduced an exhibit summarizing the firm's payment history. Notably, there is (i) no evidence that the firm ever paid any late fees under the second lease and (ii) some evidence that it did not pay them.

[3] Katy's brief includes arguments that the law firm breached the initial lease, but it does not explain how the firm's breach of the initial lease could excuse Katy's duty to perform its obligations under the second lease. Accordingly, we address only the evidence that the firm breached the second lease.

According to Katy's evidence, from August through December 2012 Katy received the firm's rent by the fifth day of the month every month except September; it received that month's rent on September 10. The firm did not pay its rent in January or February 2013, but Katy received the rent for January, February, and March on March 5. Katy received the rent by the fifth day of the month in April, May, and June. It received the July rent on July 10. Katy received no rent in August. Its record showed a partial payment of $1,254.98 was received on September 4 (indicating the $95.02 deducting the firm made to treat a flea infestation) and a full rent payment was received on September 10. Gibson testified that he later had his staff pay $95.02, so Katy's evidence that this amount was never paid is not conclusive.

Then Katy received no rent from October 1, 2013 through April 3, 2014, when it received all the unpaid rent for those months. Katy's evidence that the firm never paid any rent for May, June, or July 2014 was uncontroverted.

In summary, the evidence indicates the law firm (i) paid its rent from one to nine days late several times, (ii) expressly withheld its rent for a month or longer several times, but each time eventually paid all its back rent up to May 1, 2014, (iii) never paid any late fees, and (iv) did not pay its last three months' rent starting May 1, 2014.

(3) Did Katy conclusively show that the law firm's breaches before May 2014 were material?

Assuming without deciding that Katy conclusively proved that the law firm breached the second lease as described above, we determine whether Katy conclusively proved that those pre-May 2014 breaches were material. Katy's brief does not discuss the *Mustang Pipeline* materiality factors. Nevertheless, we conclude that Katy did not conclusively prove that the law firm's breaches were material.

As applied to this case, the first two materiality factors are (i) the extent to which the law firm's breaches deprived Katy of the benefit it reasonably expected and (ii) the extent to which

Katy can be adequately compensated for the part of the benefit it was deprived of. *See* 134 S.W.3d at 199. The evidence shows that before May 2014 the law firm always eventually paid all its back rent. The lease provided for late fees, which the trial court could have concluded would adequately compensate Katy for the law firm's tardiness. There is no evidence that Katy ever demanded that the law firm pay late fees or that the law firm ever paid them. Nor does Katy cite any evidence that paying the late fees would have been inadequate compensation. We thus conclude there was some evidence that the first two materiality factors supported the premise that the law firm's pre-May 2014 breaches were not material.

The fourth and fifth materiality factors are the likelihood that the law firm would cure its failure and the extent to which the law firm's behavior comported with standards of good faith and fair dealing. *See id*. Here, the law firm gave Katy assurances that the rent would be paid if Katy honored its own lease obligations—generally those related to the air conditioning—and it ultimately paid all the unpaid rent before May 2014. Thus, there was evidence that the fourth and fifth materiality factors supported the premise that the law firm's pre-May 2014 breaches were not material.

We see no evidence bearing on the third materiality factor, whether the law firm would suffer forfeiture.

Because there is some evidence showing that several materiality factors weighed in the law firm's favor, we conclude that Katy did not conclusively establish that the law firm materially breached the lease before May 2014. We therefore overrule Katy's third issue.

B. Issue Two: Did the trial court err in finding that Katy waived any breaches by the law firm?

Although the trial court found that the law firm did not breach the lease, it also made an alternative finding that Katy "waived any failure [to comply with the lease] on the part of" the law firm. We construe this as a finding that, even if the law firm materially breached the lease

first, Katy waived its prior material breach affirmative defense by continuing to perform the lease.[4] *See Henry v. Masson*, 333 S.W.3d 825, 840 (Tex. App.—Houston [1st Dist.] 2010, no pet.) ("If the non-breaching party treats the contract as continuing after the breach, he is deprived of any excuse for terminating his own performance."). Katy's second issue attacks the sufficiency of the evidence supporting this alternative finding.

We have already concluded that Katy did not conclusively prove its prior material breach defense. Accordingly, we need not address whether the trial court erred by alternatively finding that Katy waived that affirmative defense. Thus, we do not address Katy's second issue. *See* TEX. R. APP. P. 47.1.

C. Issue Five: Did the law firm adduce any evidence that its damages were reasonable?

Katy's fifth issue raises several arguments, but we focus on only one: Katy's premise that the law firm adduced no evidence that the expenses it claimed as damages were reasonable. We agree.

It is well settled that "[a] claimant has the burden of proving the reasonableness of expenses." *Cook Consultants, Inc. v. Larson*, 700 S.W.2d 231, 238 (Tex. App.—Dallas 1985, writ ref'd n.r.e.); *see also McGinty v. Hennen*, 372 S.W.3d 625, 627 (Tex. 2012) (per curiam) ("A party seeking to recover remedial damages must prove that the damages sought are reasonable and necessary."). Moreover, "[e]vidence of the amounts charged and paid, standing alone, is no evidence that such payment was reasonable and necessary." *Mustang Pipeline Co., Inc. v. Driver Pipeline Co., Inc.*, 134 S.W.3d 195, 200–01 (Tex. 2004) (per curiam) (citing *Dallas Ry. & Terminal Co. v. Gossett*, 294 S.W.2d 377, 382–83 (Tex. 1956)). Rather, some additional evidence must be adduced to show that the claimants' expenses were reasonable.

[4] It may also be an alternative finding that Katy waived its own contract breach claim. We address Katy's breach claim below in our discussion of issues one and eight. *See* Part III.G *infra*.

McGinty, 372 S.W.3d at 627. This rule applies in tort and contract cases alike. *See id*. (contract breach case); *Mustang Pipeline*, 134 S.W.3d at 196 (contract breach case); *Cook Consultants*, 700 S.W.2d at 233 (negligent misrepresentation case); *Gossett*, 294 S.W.2d at 379–80 (negligence case); *Kennerly v. B.F. Avery & Sons Plow Co.*, 300 S.W. 159, 162 (Tex. Civ. App.—Amarillo 1927) (tenant could recover "the expense of removing to the new location; but such expenses must be shown to have been reasonable and necessary"), *rev'd on other grounds*, 12 S.W.2d 140 (Tex. Comm'n App. 1929, judgm't adopted).

The requirements that expenses must be both reasonable and necessary are independent and distinct. For example, as the court said in *Gossett*, "the fact that treatment is necessary is not proof, or a circumstance tending to prove, the reasonableness of the charges made therefor." 294 S.W.2d at 382. In *Mustang Pipeline*, the court reversed a judgment for lack of evidence that the claimed expenses were reasonable without addressing the expenses' necessity. 134 S.W.3d at 201. Here, the trial court found that the law firm incurred actual damages of $20,959. This figure was supported principally by defendant's exhibit 47, which was a one-page exhibit that itemized the damages the law firm was seeking. This is the substance of that exhibit:

Type	Date	Num	Name	Memo	Split	Original Amo...	Paid Amount
Moving Expense							
Check	07/15/2014	14860	Firm	Rent Deposit	Operati...	1,215.57	1,215.57
Check	07/16/2014	14862	Firm	new office b...	Operati...	3,500.00	3,500.00
Check	07/16/2014		Firm	new office b...	Operati...	10,064.00	10,064.00
Check	07/24/2014	14869	Firm	freight eleva...	Operati...	50.00	50.00
Bill	07/24/2014		Firm	two advance...	Accoun...	230.12	230.12
Bill	07/29/2014		Firm	moving com...	Accoun...	270.00	270.00
Bill	08/08/2014		Firm	Network Mo...	Accoun...	1,803.00	1,803.00
Bill	08/08/2014		Firm	copier move...	Accoun...	162.38	162.38
Bill	08/25/2014		Firm	parking fee	Accoun...	16.00	16.00
Bill	08/25/2014		Firm	recycling fee	Accoun...	50.88	50.88
Bill	08/25/2014		Firm	meal	Accoun...	27.08	27.08
Bill	08/25/2014		Firm	Shell Oil	Accoun...	30.01	30.01
Bill	08/25/2014		Firm	HomeDepot	Accoun...	12.57	12.57
Bill	08/25/2014		Firm	recycling fee	Accoun...	50.88	50.88
Bill	08/25/2014		Firm	Shell Oild	Accoun...	32.00	32.00
Bill	08/25/2014		Firm	coffee and d...	Accoun...	23.26	23.26
Bill	08/25/2014		Firm	meal	Accoun...	132.01	132.01
Bill	08/25/2014		Firm	new office cl...	Accoun...	25.23	25.23
Bill	08/25/2014		Firm	Coffee, water	Accoun...	7.23	7.23
Bill	08/25/2014		Firm	new office s...	Accoun...	59.92	59.92
Bill	08/25/2014		Firm	delivery fee f...	Accoun...	75.78	75.78
Bill	08/25/2014		Firm	meal	Accoun...	31.47	31.47
Bill	08/25/2014		Firm	keys	Accoun...	4.27	4.27
Bill	08/25/2014		Firm	office supplies	Accoun...	1.08	1.08
Check	09/16/2014	14905	Firm	fee for certifi...	Operati...	0.00	0.00
Bill	09/24/2014		Firm	cash purcha...	Accoun...	3,205.28	3,205.28
Deposit	10/20/2014	32887	National Te...	overpament ...	Operati...	-121.00	-121.00
Total Moving Expense							20,959.02
TOTAL							20,959.02

Although Gibson agreed that this exhibit showed "the sum total of all moving expenses" the law firm was seeking, the exhibit and other trial testimony shows that the $20,959 figure included expenses other than moving expenses. The evidence showed that the exhibit encompassed (i) expenses to procure, finish out, and equip the new space, including a rent deposit and the purchase of a new $3,200 telephone system, (ii) moving expenses, and (iii) miscellaneous expenses that we infer were related to the move—expenses that were not described beyond labels such as "parking fee," "recycling fee," "meal," and "Coffee, water." (Gibson testified that he was "sure" the Shell Oil charges were for law firm employees' gasoline, and that the firm's new office was between a mile and a mile and a half from the Katy Building.)

Although the trial court did not expressly find that these expenses were reasonable, we supply that finding by implication, TEX. R. CIV. P. 299, and Katy can challenge the sufficiency of

the evidence to support that implied finding, *In re Guardianship of Miller*, 299 S.W.3d 179, 188 (Tex. App.—Dallas 2009, no pet.) (en banc).

Katy argues, and we agree, that the law firm did not adduce any evidence that any of the expenditures listed in defendant's exhibit 47 were reasonable. (We focus our attention on the "reasonable" component because that is where Katy focuses its argument on this damages issue.) Gibson did not testify that the expenses were reasonable, nor does defendant's exhibit 47 contain any information to support a reasonableness finding. Gibson testified that the law firm's staff picked out the firm's new office space and that he did not know what other options were available. The law firm's office manager, Gracie Cortez, also testified at trial, but she gave no testimony explaining how the new office space was chosen or why the expenses listed in defendant's exhibit 47 were reasonable. Gibson also testified that he contacted the moving service and that this was about all he did with respect to arranging the move.[5]

In sum, there is no evidence that the cost to procure the new office space (such as the deposit) or to equip it (such as the new telephone system) was reasonable.[6] There is no evidence that the direct moving expenses were reasonable. There is no evidence that the miscellaneous expenses, such as the payments for meals, gasoline, and recycling fees, were reasonable. The only evidence about the expenses is the bare fact that they were paid. Under the authorities cited above, this is legally insufficient evidence of reasonableness. *See Mustang Pipeline*, 134 S.W.3d at 200–01 (trial court correctly granted j.n.o.v. against contract claimant because "[e]vidence of the amounts charged and paid, standing alone, is no evidence that such payment was reasonable and necessary.").

[5] In closing argument, the law firm's lawyer pointed to no evidence of reasonableness but did assert, "There is no evidence from anyone that these moving costs are unreasonable."

[6] Katy argues that there are other flaws with the trial court's award of the full amounts associated with the deposit and the telephone system. But because there is no evidence these expenses were reasonable, we need not address these issues.

We sustain Katy's fifth issue and hold that the law firm adduced legally insufficient evidence that its claimed expenses were reasonable. Accordingly, the trial court erred by assessing them as damages, either for contract breach or for constructive eviction. And because the law firm was not entitled to recover damages on its contract breach claim, it was not entitled to recover its attorney's fees either. *See Myers v. Hall Columbus Lender, LLC*, 437 S.W.3d 632, 640 (Tex. App.—Dallas 2014, no pet.); *Bonnema v. Builders Carpet & Design Ctr., Inc.*, No. 05-08-01149-CV, 2010 WL 923997, at *3 (Tex. App.—Dallas Mar. 16, 2010, no pet.) (mem. op.).

D. Issue Four: Did the trial court err by finding that Katy's contract breach caused the law firm's alleged damages, i.e., moving and finish-out expenses?

Because we have concluded that the law firm adduced no evidence that its damages were recoverable, we need not and do not address one way or the other Katy's fourth issue, which argues that the law firm adduced no evidence of a causal nexus between Katy's breach and the law firm's damages.

E. Issue Six: Did the trial court err by finding that Katy breached the implied warranty of suitability?

Katy's sixth issue argues that there is legally and factually insufficient evidence to support the trial court's finding that Katy breached the implied warranty of suitability. It is unnecessary to address this issue because the judgment is not based on the law firm's warranty breach claim. Moreover, we have already concluded that the law firm adduced no evidence that its expenses were reasonable. For these reasons, we need not address Katy's sixth issue.

F. Issue Seven: Did the trial court err by finding that Katy constructively evicted the law firm?

Katy's seventh issue raises numerous legal and factual sufficiency challenges to the trial court's finding that the law firm was constructively evicted from the Katy Building. Having already concluded that the law firm adduced no evidence that its expenses were reasonable, we need not address this issue.

G. Issues One and Eight: Did the trial court err by failing to render judgment for Katy on its rent claim?

Finally, we address Katy's issues arguing that the trial court should have rendered judgment for Katy on its claim for contract breach and attorney's fees. Again Katy purports to challenge both legal and factual sufficiency of the evidence, but it argues these issues solely in terms of legal sufficiency. Accordingly, we address them only as legal sufficiency issues.

1. What claims did Katy's live pleading assert?

As a preliminary matter, we note that Katy's appellate brief seeks relief on some theories it did not assert in its live pleading. Specifically, Katy's live pleading pled only the following specific breaches of the second lease: (i) failure to pay three months' rent,[7] (ii) failure to pay the $95.02 that the law firm allegedly withheld from its rent in 2013 after spending that much to quell a flea infestation, and (iii) failure to pay three months' holdover rent that the firm allegedly incurred in August, September, and October 2014. Conversely, the live pleading did not mention or seek to recover (i) any holdover rent from the initial lease or (ii) any late fees under either lease.

Katy's appellate brief, however, argues that it is entitled to late fees incurred throughout both the initial lease and the second lease, as well as five months' holdover rent under the initial lease. But because these claims were not alleged in its live pleading, the trial court did not err by denying judgment for Katy on them.[8] *See Cunningham v. Parkdale Bank*, 660 S.W.2d 810, 813 (Tex. 1983) ("[A] judgment must be supported by the pleadings and, if not so supported, it is erroneous."); *Bundren v. Holly Oaks Townhomes Ass'n, Inc.*, 347 S.W.3d 421, 437 (Tex. App.—

[7] Katy's live pleading alleged that the three months of unpaid rent were January–March 2013, not May–July 2014 as the evidence showed. Because Katy's claim for the May–July rent fails for reasons discussed later in the opinion, we disregard the discrepancy between the pleadings and the evidence.

[8] Katy has not argued that these unpled claims were tried by consent.

Dallas 2011, pet. denied) (trial court did not err by failing to grant judgment for defendants on unpled counterclaim for rent).

Accordingly, we limit our analysis to the claims alleged in Katy's live pleading: three months' unpaid rent, a $95.02 rent shortfall, and three months' unpaid holdover rent.

2. Did Katy conclusively prove any of its pled rent claims?

As mentioned in Part I.A above, Gibson testified that he had his staff pay the $95.02 shortfall, which is some evidence that the law firm did not owe Katy that amount. Therefore, because Katy had the burden of proof for these damages and did not secure favorable findings on them, the trial court did not err by denying them to Katy.

And on appeal Katy does not repeat its allegation that the law firm owed holdover rent for the three months after July 2014.

This leaves only Katy's claim for three months' unpaid rent. Here, the evidence was undisputed that the law firm did not pay its last three months' rent on the second lease. But the law firm pled the affirmative defense of Katy's prior material breach (as "failure of consideration"), and the trial court found one element of that defense by finding that Katy breached the lease. *See In re Estate of Snow*, No. 12-11-00055-CV, 2012 WL 3793273, at *11–12 (Tex. App.—Tyler Aug. 30, 2012, no pet.) (mem. op.) (using terms "prior material breach" and "failure of consideration" interchangeably). Thus, if the evidence supports them, we will imply the omitted findings that Katy's breaches were material and were committed first. *See* TEX. R. CIV. P. 299.

As discussed below, we conclude that the law firm presented legally sufficient evidence of its prior material breach affirmative defense. This defeats Katy's argument that it was entitled to judgment on its rent claim. *See Mustang Pipeline*, 134 S.W.3d at 196 (material breach by one party excuses the other from further performance).

First, we note the following fact findings, which Katy has not challenged:

> 12. Many times in the summer of 2014, the temperature inside the [leased premises] exceeded 85 degrees and 90 degrees.
>
> . . .
>
> 14. 701 KATY BUILDING, L.P.['s] employees or agents knew the [leased premises] were too hot to reasonably function as a law office in the summer of 2014.
>
> . . .
>
> 16. 701 KATY BUILDING, L.P. did not take timely reasonable measures or actions to provide cooling to the inside offices of the 701 Katy Building prior to May 1, 2014.
>
> . . .
>
> 20. The 701 KATY BUILDING was uninhabitable for law offices in the months of June and July, 2014.

Unchallenged findings are binding. *Rich v. Olah*, 274 S.W.3d 878, 884 (Tex. App.—Dallas 2008, no pet.).

We take finding 20 to establish Katy's material breach during June and July. The question is whether sufficient evidence supports an implied finding that Katy's material breach had begun by May 1, 2014. We conclude that it does.

The evidence supported the following facts:

- The law firm did not pay its rent in January, February, and March 2014. Each month it sent Katy a letter saying that the rent had been withheld and would be paid if and when the heating and cooling system started to work properly. Each letter recited that the firm's inability to control the heating and cooling seriously interfered with work that was the lease agreement's purpose.

- On April 3, 2014, Gibson sent Katy a letter saying, "We appreciate your apparent efforts to make the temperature in our offices somewhat responsive to the thermostat settings." That phrasing raises an inference that as of April 3, the air conditioning was still not working properly. Gibson testified that the temperature was bearable only because it was April rather than August or December.

- On May 5, 2014, Gibson sent Katy a letter saying that the May rent would be withheld until the heating and cooling systems worked properly. He further reported that it was 80 degrees in the receptionist's office and the vent was blowing hot air—even though the thermostat was set at 55 degrees. And he said, "The inability to control the cooling and heating seriously interferes with the work that is the purpose of the lease agreement." Thus, this letter shows that the air conditioning was not working properly as of May 5. Because the rent was due May 1, this evidence raises a further inference that the air conditioning also was not working properly as of May 1.

- Another Katy Building tenant, attorney John Key, testified that the heat was "God awful" and "unbearable" in May, June, and July. He also testified that "[i]t was always about 80, 85 degrees in the morning," and that the temperature inside would be 15 to 20 degrees hotter than it was outside. He further testified that during May, June, and July it was impossible to be in his office during normal business hours without feeling the extreme heat. He testified that "[p]retty much" all the tenants had the same complaints.

- Another building tenant, attorney Darren Wolf, testified that "you couldn't work there" from May through July 2014 because of the heat.

- Katy's building manager Roxy Robinson testified that she remembered getting emails saying that Gibson's office was hotter than 80 degrees in May, June, and July 2014.

- The firm's office manager, Gracie Cortez, testified that consistently in May, June, and July 2014, the staff would leave early, at 4 or 4:30. From the context of her testimony as a whole, it is apparent that she meant the staff left early because of the excessive heat. Additionally, by July, the staff had to wear shorts, tank tops, and flip-flops to work because it was so hot.

We first address the material breach question and then the related timing question.

Concerning material breach, we conclude that the foregoing evidence is legally sufficient to show that (i) Katy breached the second lease by failing to provide reasonably adequate air conditioning, (ii) Katy's breach caused unbearably hot temperatures in the leased premises throughout May, June, and July 2014, and (iii) this breach was material under the *Mustang Pipeline* factors.

As to the materiality factors, the trial court could reasonably conclude that (i) the extreme heat deprived the law firm of its expected benefit to a large extent, (ii) given Katy's track record,

there was little likelihood that Katy was going to cure its breach, and (iii) Katy's course of conduct did not comport with good faith and fair dealing. *See Mustang Pipeline*, 134 S.W.3d at 199. The record does not contain evidence bearing on the other two factors—whether the law firm could be adequately compensated for losing part of the benefit of the bargain and the extent to which Katy would suffer forfeiture—so we disregard those factors.

Next, did Katy's material breach throughout May, June, and July 2014 precede the firm's non-payment of rent during those months? We conclude that there is evidence supporting the implied finding that the answer is yes. Specifically, the lease permitted the law firm to pay its rent after the first day of the month with no late fee as long as Katy received it on or before the fifth day of the month. Thus, the lease essentially allowed the law firm a five-day grace period within which to pay its rent, and the law firm did not effectively breach the lease until the end of May 5, 2014. But, as discussed above, the evidence supports the trial court's implied finding that Katy's material breach began before May 1. Therefore, we conclude that the evidence is legally sufficient to show that Katy's material breach preceded the firm's nonpayment of rent in May, June, and July.

Because there is legally sufficient evidence that the firm's nonpayment of May, June, and July 2014 rent was excused by Katy's prior material breaches of failing to provide reasonably adequate air conditioning during those months, the trial court did not err by rendering a take-nothing judgment against Katy on its rent claim.[9] We overrule Katy's first and eighth issues.

[9] The trial court's rejection of Katy's claim may also have been based on its finding that Katy waived any breach by the law firm. Because we affirm the trial court's judgment based on Katy's prior material breach, we again need not address Katy's second issue attacking the trial court's alternative waiver finding. *See* Part III.B *supra*.

H. Conclusion

Because the law firm introduced no evidence that its expenses were reasonable, it cannot recover its claimed damages from Katy on any theory. Accordingly, the trial court erred by rendering judgment for the law firm on its contract breach and constructive eviction claims.

The trial court did not err by implicitly rendering judgment that Katy take nothing on its contract breach claim.

IV. DISPOSITION

We reverse the judgment to the extent it awarded the law firm damages, attorney's fees, court costs, and interest, and we render judgment that the law firm take nothing from Katy. We affirm the judgment to the extent it awarded Katy no relief on its claims.

/Bill Whitehill/
BILL WHITEHILL
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

701 KATY BUILDING, L.P., Appellant	On Appeal from the 134th Judicial District Court, Dallas County, Texas
No. 05-16-00193-CV V.	Trial Court Cause No. DC-15-06152.
	Opinion delivered by Justice Whitehill.
JOHN WHEAT GIBSON, P.C., Appellee	Justices Francis and Lang-Miers participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED** in part and **REVERSED** in part. We **REVERSE** that portion of the trial court's judgment awarding appellee John Wheat Gibson, P.C. damages, attorney's fees, interest, and court costs, and we **RENDER** judgment that appellee John Wheat Gibson, P.C. take nothing on its claims. In all other respects, the trial court's judgment is **AFFIRMED**.

It is **ORDERED** that each party bear its own costs of this appeal.

After all costs have been paid, the clerk of the district court is directed to release the balance, if any, of the cash deposit in lieu of supersedeas bond to the person who made the deposit.

Judgment entered August 24, 2017.