AFFIRM; Opinion Filed August 30, 2012.

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In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-10-01511-CV

AHARON CHEN, Appellant

V.

PARKWOOD CREEK OWNER'S ASSOCIATION, INC., Appellee

On Appeal from the 298th Judicial District Court
Dallas County, Texas
Trial Court Cause No. 05-10204-M

MEMORANDUM OPINION

Before Justices Moseley, Lang-Miers, and Murphy
Opinion By Justice Moseley

Following a bench trial in this breach of contract case, the trial court rendered judgment for Parkwood Creek Owner's Association, Inc. against Aharon Chen. Chen appeals from the judgment and raises nine issues. The background of the case and the evidence adduced at trial are well known to the parties; thus, we do not recite them here in detail. Because all dispositive issues are settled in law, we issue this memorandum opinion. TEX. R. APP. P. 47.2(a), 47.4. We affirm the trial court's judgment.

Parkwood acquired the services of Chen and Robin Gaylord to perform construction work in 2003. Alleging they failed to complete the work and failed to repair defective work, Parkwood sued Chen and Gaylord in 2005 to recover damages. On March 5, 2008, the parties agreed to settle their

disputes and entered into a Rule 11 Agreement detailing specific construction activities Chen and Gaylord would perform and requiring a series of monthly payments by Chen to Parkwood. The parties agreed to enter into an agreed judgment to be signed by the trial court specifying the terms of the settlement and Parkwood agreed to release the judgment upon completion of the work. There is no agreed judgment signed by the trial court. However, the parties agreed in open court on March 5, 2008 to $30,000 as liquidated damages for breach of the Rule 11 Agreement.

Three months later, Parkwood filed a motion to enforce the Rule 11 Agreement alleging that Chen and Gaylord failed to perform. Parkwood alleged Chen failed to deliver all materials necessary for the repairs as required by the agreement and that some materials delivered were substandard or incorrect for the project. Parkwood requested the trial court render the agreed judgment announced earlier and order Chen and Gaylord to pay $30,000. Chen answered and argued he had performed as required by the Rule 11 Agreement.

The parties met again and negotiated for Chen to deliver certain materials by October 2, 2008. However, Chen did not agree to this delivery date and substituted a date later in October. The agreement was never signed by all parties. When Chen attempted to deliver the materials in late October, Parkwood refused delivery.

The trial court heard evidence on the motion to enforce in February 2009, but did not conclude the hearing. Later, the parties agreed[1] to try the case to the court based on the evidence from the February hearing and additional evidence presented on October 19, 2009. A year later, on October 26, 2010, the trial court signed a final judgment.[2] The trial court rendered judgment for

[1] The parties agreed to treat the motion to enforce as a petition alleging breach of the Rule 11 Agreement without the necessity for amending the pleadings. *See Padilla v. LaFrance*, 907 S.W.2d 454, 462 (Tex. 1995) (action to enforce settlement agreement must be based on proper pleading and proof).

[2] According to Chen's appellate brief, Gaylord was non-suited sometime before trial.

Parkwood against Chen for $30,000, plus $7,500 as reasonable and necessary attorney's fees. Chen perfected this appeal, but did not request findings of fact and conclusions of law from the trial court.

STANDARD OF REVIEW

Because neither party requested and the trial court did not make findings of fact or conclusions of law, we assume the trial court made all findings in support of its judgment. *Sixth RMA Partners, L.P. v. Sibley,* 111 S.W.3d 46, 52 (Tex. 2003) ("When neither party requests findings of fact and conclusions of law, it is implied that the trial court made all fact findings necessary to support its judgment."). The trial court's judgment will be affirmed on any legal theory tried and supported in the evidence. *Worford v. Stamper,* 801 S.W.2d 108, 109 (Tex. 1990) (per curiam).

In evaluating the legal sufficiency of the evidence to support a finding, we credit favorable evidence if a reasonable factfinder could, and disregard contrary evidence unless a reasonable factfinder could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). The ultimate test is whether the evidence allows reasonable minds to reach the finding under review. *See id.* In a bench trial, the trial court is the sole judge of the credibility of the witnesses and may believe one witness over another and resolve any conflicts or inconsistencies in the testimony. *Sanders v. Total Heat & Air, Inc.*, 248 S.W.3d 907, 917–18 (Tex. App.—Dallas 2008, no pet.).[3]

BREACH OF CONTRACT

Chen's first six issues concern the trial court's implied finding that he breached the Rule 11 Agreement. Chen contends that Parkwood committed a prior material breach by not giving him a written list of materials, that he substantially performed the contract by delivering the materials and making the monthly payments, and that he did not breach the contract.

Under the Rule 11 Agreement, Chen agreed to provide at no cost to Parkwood all goods and

[3] It is not clear from his brief whether Chen is attacking the legal or factual sufficiency of the evidence to support the implied findings in favor of the judgment. Without citing authority, Chen incorrectly states the standard of review is "a novo review of all of the evidence supporting the Judgment to determine whether the trial Court correctly drew her legal conclusions from the facts." However, Chen's brief states Parkwood failed to meet its burden of proof and he asks us to "reverse and render the judgment" of the trial court. Rendition of judgment is appropriate when the evidence is legally insufficient. *See Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965). Thus, we conclude Chen's challenge is to the legal sufficiency of the evidence.

materials necessary to properly repair or replace the roof and to replace the siding, trim, and flashing on the chimneys at the property. Chen agreed to provide new siding to replace the siding he had installed in 2003. Chen agreed that the materials provided would be of good quality and free of material defects and consistent with an earlier construction contract for the property. Chen specifically agreed to provide the goods and materials to Gaylord within seven business days of execution of the Rule 11 Agreement. The Rule 11 Agreement listed specific types of new construction materials Chen agreed to provide "as needed and determined by" a Parkwood representative, Jesus Balderas. In addition, Chen agreed to make a series of monthly payments to Parkwood totaling $10,000.

Parkwood resident and board member, Ray Hall, testified about events following the Rule 11 Agreement. Hall testified that Chen did not show up to a meeting to inspect the buildings with Balderas on March 10, 2008. The meeting was rescheduled to March 12, 2008, but Chen refused to go into the attics to inspect for leaks. On March 14, 2008, Chen went into the attics with Hall and Balderas. Balderas pointed out what was needed for the repairs, but Chen disagreed with him. Although Chen said he would supply the materials for the repairs, he did so sporadically. Chen brought some material on March 19, 2008, but it was the wrong type and would not seal properly. He also did not bring enough material for the work to proceed.

On April 3, 2008, Chen again walked the attics with Hall and Balderas to find the chimneys that were causing leaks. Chen delivered more material to repair the chimneys after this meeting. Later, Hall agreed that Chen could substitute a different type of siding because the original siding was not available in the market. However, after this agreement Chen brought yet a different type of material and this material had to be primed before it could be used. When Chen delivered the agreed substitute materials it appeared to be surplus and had to be cleaned before it could be used.

There is evidence that Gaylord had to stop work on the roof repairs because Chen had not delivered enough materials. Eventually, Chen delivered the materials and the roof repairs were completed by Gaylord.

There is evidence Chen worked on eight large chimneys and several smaller chimneys in 2003. There is also evidence Chen did not deliver all the materials needed to repair all of those chimneys under the Rule 11 Agreement. Hall testified Chen did not provide any materials for repair of the large chimneys after the March 5, 2008 Rule 11 Agreement. As late as September 29, 2008, the parties met and discussed the materials still needed to repair the eight large chimneys and two small chimneys. Chen did not tender delivery of these materials until October 20, 2008, but Parkwood refused delivery.

Chen argues this refusal of delivery was wrongful. On this record, whether Chen's tender of delivery in late October was timely and whether Parkwood's refusal of that tender was reasonable were questions of fact for the trial court. There is some evidence to support the trial court's implied finding on this disputed issue.

Chen complains that Parkwood never provided him with a written list of materials from Balderas. But there is evidence in the record of several meetings by Chen with Hall and Balderas where they inspected the property for leaks and determined what materials were needed for the repairs. In addition, the Rule 11 Agreement does not require a written list of materials; it provides that Chen will deliver new material as needed and determined by Balderas. There is evidence to support a reasonable inference Chen was informed of the needs for material during meetings with Balderas and communications with Hall.

Chen also contends Parkwood breached the Rule 11 Agreement by using Balderas to perform the labor on the chimneys instead of Gaylord and that the work was not done on the buildings in

sequence. Because Chen was only required to provide materials for the work, the trial court could have reasonably concluded these failures were not material to whether Chen performed his obligations under the contract.

Chen argues that time was not of the essence of the agreement. If the contract does not expressly provide that time is of the essence, the issue of whether time is of the essence of the contract is a question for the trier of fact. *See Deep Nines, Inc. v. McAfee, Inc.*, 246 S.W.3d 842, 846 (Tex. App.—Dallas 2008, no pet.). The Rule 11 Agreement does not expressly provide that time is of the essence for Chen's delivery of materials. However, it does require Chen to begin delivering material within seven business days of the agreement and gives specific dates and a cure period for the payments Chen was to make to Parkwood. The trial court impliedly found that time was of the essence or, alternatively, that the tendered delivery in late October after the March agreement was not a reasonable tender of performance.[4] Again the evidence is conflicting on this matter and it was for the trial court to resolve those conflicts.

Chen contends he proved his affirmative defense of substantial performance. Substantial performance is an affirmative defense by a contractor to a breach of contract action. *See Gentry v. Squires Constr., Inc.*, 188 S.W.3d 396, 403 n.3 (Tex. App.—Dallas 2006, no pet.). Chen bore the burden to prove this affirmative defense and his legal sufficiency challenge must show that he conclusively proved the defense as a matter of law. *See Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001). As already discussed, there is some evidence in the record the trial court could reasonably believe that supports the implied finding that Chen breached the Rule 11 Agreement and thus did not substantially perform. Chen has failed to show that the evidence conclusively proves his affirmative defense.

[4] Where the contract does not specify a time for performance, the law implies a reasonable time based on the facts and circumstances existing on the date of the contract. *See Solomon v. Greenblatt*, 812 S.W.2d 7, 15 (Tex. App.—Dallas 1991, no writ). What is a reasonable time is relative, but it "never means an indulgence in unnecessary delay; instead it denotes such promptitude as the circumstances will allow for the action called for by the contract." *Heritage Res., Inc. v. Anschutz Corp.*, 689 S.W.2d 952, 955 (Tex. App.—El Paso 1985, writ ref'd n.r.e.).

There is conflicting evidence in the record about whether Chen provided all the new materials "as needed and determined by" Balderas and whether the material delivered was new, of good quality, and free of material defects. The trial court resolved these conflicts in favor of Parkwood and impliedly determined Chen did not substantially perform the contract. The court impliedly found that Chen materially breached the contract and that Parkwood did not commit a prior material breach excusing Chen from performance. We conclude there is legally sufficient evidence to support the trial court's implied findings in support of the judgment.

We overrule Chen's first six issues.

DAMAGES

Parkwood's motion to enforce requested the trial court to render the "agreed judgment that was previously entered into record on March 6, 2008" and requested an order for Chen and Gaylord to pay "actual damages in the amount of $30,000" plus attorney's fees.[5] That motion was then tried to the court as a breach of contract case, and the trial court rendered judgment for $30,000 plus post-judgment interest and $7,500 in attorneys fees.

Chen's last three issues address the damages awarded by the trial court. He asserts there was no proof of a liquidated damages agreement; that liquidated damages of $30,000 were not proper in this case; and that he was entitled to offset these damages by his partial performance.

1. Proof of Liquidated Damage Provision

As indicated above, the written Rule 11 Agreement does not contain a liquidated damage provision and no agreed judgment was signed by the trial court as provided in the agreement. However, Parkwood's counsel referred to the $30,000 as "liquidated damages" in his opening statement and in his closing arguments. And during cross-examination on his testimony about attorney's fees, he testified the parties entered into an agreement in open court on March 5, 2008, for

[5] Chen alludes to the fact that Parkwood's motion to enforce requested "actual damages" not liquidated damages. But the motion gave notice of the amount of the judgment Parkwood sought and referred to the announcement in open court. It does not appear Chen was mislead in any way. Chen did not specially except to this pleading, thus any defect in form or substance is waived. TEX. R. CIV. P. 90.

$30,000 liquidated damages in the event Chen did not comply with the agreement. This testimony was uncontroverted.

Although Chen argued in the trial court that the liquidated damages were inequitable, he never disputed at trial that the Rule 11 Agreement announced in open court on March 5, 2008, contained the $30,000 liquidated damage term.

Furthermore, on appeal, Chen *does not deny the existence or the amount* of the liquidated damage provision, only that there is no proof because the trial court did not take judicial notice of it.[6] In view of the testimony from Parkwood's attorney as to the existence and amount of the liquidated damages provision in the Rule 11 Agreement, whether or not the trial court was requested to take—or did take—judicial notice of the Rule 11 Agreement is irrelevant.

We conclude there is sufficient evidence to support the trial court's implied finding of the existence and amount of a liquidated damages agreement. We overrule Chen's seventh issue.

2. Pleading of Penalty Defense

Chen argues the trial court erred by awarding liquidated damages against him because the damages amount to a penalty.

A liquidated damages provision is enforceable where the harm caused by a breach is difficult to estimate and the liquidated damage amount is a reasonable estimate of the actual damages. *See Phillips v. Phillips*, 820 S.W.2d 785, 788 (Tex. 1991). Whether the provision is enforceable is a question of law. *Id.* However, fact issues may arise. "For example, to show that a liquidated damages provision is unreasonable because the actual damages incurred were much less than the amount contracted for, a defendant may be required to prove what the actual damages were." *Id.*

[6] In his appellate brief, Chen states: "The Plaintiff at no time asked the Court to take judicial notice of an alleged oral agreement read into the record on March 5, 2006 [sic]. [Opposing counsel] stated, *and Defendant does not dispute*, that the Rule 11 Agreement was read into the Record; however the Rule 11 Agreement read into the Record was not transcribed and the Plaintiff did not request the Court to take judicial notice of that agreement." (Emphasis added.) After quoting the requirements of Rule 11, Chen's brief continues: "*Defendant admits that the Record may have been made in Open Court*; however there is no docket entry indicating that the Court accepted a Rule 11 Agreement. There was no offer by the Plaintiff of a Rule 11 Agreement on liquidated damages and the Court did not take judicial notice whether by discretion or at the request of the Plaintiff for an award of liquidated damages." (Emphasis added.)

An assertion that a liquidated damages provision is a penalty is an affirmative defense that the defendant has the burden of pleading and proving. *See Phillips*, 820 S.W.2d at 789; *Urban Television Network Corp. v. Liquidity Solutions, L.P.*, 277 S.W.3d 917, 919 (Tex. App.—Dallas 2009, no pet.); *see also* TEX. R. CIV. P. 94. However, "the defense of penalty is not waived by the failure to plead it if it is apparent on the face of the petition and established as a matter of law." *Phillips*, 820 S.W.2d at 789.

Here, Chen did not plead penalty as an affirmative defense to enforcement of the liquidated damages provision. He raises two arguments as to why he was not required to plead the defense: (1) Parkwood pleaded for "actual damages" not "liquidated damages"; and (2) the *Phillips* exception applies here.

First, Chen argues he was not required to plead an affirmative defense of penalty because Parkwood did not plead for "liquidated damages" in its motion to enforce. As mentioned above, the motion requested "actual damages" of $30,000, but it also referred to the "agreed judgment that was previously entered into record." Given there is no dispute that a $30,000 liquidated damage provision was announced on the record, it is reasonable to conclude that the reference to actual damages was intended to be liquidated damages. Chen never asserted in the trial court or on appeal that he was surprised that Parkwood was seeking liquidated damages and not actual damages. And Chen's assertion that Parkwood did not raise the issue of liquidated damages in the two hearings on the motion is incorrect. Parkwood's counsel referred to the $30,000 as "liquidated damages" in his opening statement at the February 2009 hearing and in his testimony and closing arguments at the October 2009 trial.

Second, Chen argues the exception applied in *Phillips* should apply here. In *Phillips*, the liquidated damages provision was a penalty on its face—it required the payment of ten times the

amount of actual damages. *See Phillips*, 820 S.W.2d at 789–90. In this case, the liquidated damage provision is not a penalty on its face; it does not require payment of a multiple of actual damages. As Chen states in his brief, the provision was not a penalty when the agreement was formed: "The Defendant does not dispute that the sum of $30,000 was in effect a calculation of the actual damages in the event of a total breach. Accordingly, this was not a penalty as such at the time that it was signed . . . ." Because the provision is not a penalty on its face, Chen is not entitled to the *Phillips* exception to the pleading requirement. *See Phillips*, 820 S.W.2d at 790 ("Whenever the defense [of penalty] is not clearly established on the face of the pleadings, . . . it must be pleaded.").[7]

We overrule Chen's eighth issue.

3. Claim for Offset

Lastly, Chen argues he was entitled to offset his partial performance against the $30,000 awarded by the trial court. This argument is based on his defense of substantial performance. As indicated above, Chen failed to prove conclusively all elements of this affirmative defense and there is some evidence to support the trial court's implied findings rejecting the defense. Thus, Chen is not entitled to an offset. *See Gentry*, 188 S.W.3d at 403 n.3 (noting that contractor has burden of poof on substantial performance and must prove (1) he substantially performed according to the contract, (2) the consideration owed to him, and (3) the cost of remedying the defects due to his errors or omissions).

We overrule Chen's ninth issue.

CONCLUSION

Chen has not shown reversible error on appeal. Accordingly, we affirm the trial court's judgment.

[7] Even if we were to consider the unpleaded defense, Chen was required to prove it. *See Baker v. Int'l Record Syndicate, Inc.*, 812 S.W.2d 53, 55 (Tex. App.—Dallas 1991, no writ) (party asserting defense is required to prove amount of the other party's actual damages, if any, to show that actual loss was not an approximation of the stipulated sum). In the trial court, Chen argued it was inequitable to award Parkwood liquidated damages of $30,000 for his failure to deliver $1,750 worth of materials. Chen focuses on the October tender of delivery of materials as the only breach. There is evidence, however, of other breaches: late deliveries, short deliveries, and non-conforming deliveries going back to March of 2008. There is no evidence of Parkwood's actual damages resulting from these breaches. Thus, Chen did not satisfy his burden to conclusively establish the affirmative defense.

JIM MOSELEY
JUSTICE

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