AFFIRM; and Opinion Filed May 14, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00230-CV

MANJIT KAUR-GARDNER, Appellant
V.
KEANE LANDSCAPING, INC., Appellee

On Appeal from the County Court at Law No. 6
Collin County, Texas
Trial Court Cause No. 006-00355-2016

MEMORANDUM OPINION

Before Justices Lang, Fillmore, and Schenck
Opinion by Justice Fillmore

Keane Landscaping, Inc. (KLI) performed extensive landscaping work in Manjit Kaur-Gardner's backyard. Kaur-Gardner paid KLI a total of $40,000 for the work, but refused to pay all of KLI's charges. KLI sued Kaur-Gardner, asserting claims for breach of contract, suit on a sworn account, and quantum meruit. The trial court awarded KLI actual damages of $400 and attorney's fees of $2,032. The trial court made findings of fact and conclusions of law that supported recovery by KLI on its breach of contract claim or, alternatively, on its quantum meruit claim.

Kaur-Gardner appealed, contending in five issues that (1) the evidence is legally insufficient to prove the reasonable value of the benefit she allegedly received or that she either accepted KLI's services and materials or used and enjoyed them; and (2) the trial court erred by awarding damages based on breach of contract on KLI's claim for quantum meruit, granting a

directed verdict on its own initiative without allowing Kaur-Gardner the opportunity to present her defense, and making alternative conclusions of law.[1] We affirm the trial court's judgment.

Background

After KLI installed a concrete pad under a fence in Kaur-Gardner's backyard, she requested a proposal for extensive landscaping work at her house. Maurice Keane prepared a proposal for Kaur-Gardner that included landscaping in the front, side, and back yards of her house. The proposal segregated the work into different categories labeled "A" through "M." As "phase one" of the project, Kaur-Gardner approved work included in categories E through J of the proposal, which related to extending and staining the patio in the backyard, constructing a cedar arbor with an outdoor kitchen, modifying the irrigation system, and constructing a concrete pad for Kaur-Gardner's trashcans. KLI charged $32,426.29 for the phase one work. Kaur-Gardner gave Keane a check in the amount of $17,000, and wrote in the memorandum line of the check "1/2 down Phase 1."

KLI began performing the work approved by Kaur-Gardner. Before phase one was completed, Kaur-Gardner approved the work in categories K through M of the proposal, which related to the installation of plants and trees in the backyard. The parties referred to this work as "phase two." KLI charged $14,613.75 for the work in phase two. Keane testified Kaur-Gardner requested additional work that was not included in the original proposal. Keane referred to this work as a "change order." According to Keane, the charges for the additional work were $3,247.50. Kaur-Gardner, however, testified she believed the work in the "change order" was encompassed in the original proposal.

Keane testified that after both phases were completed, he performed a walk-through with Kaur-Gardner and she was happy with the work. Kaur-Gardner paid KLI an additional $23,000, and requested a few days to allow her family an opportunity to inspect the work before she paid

[1] KLI did not file an appellee's brief.

the remaining balance. Kaur-Gardner later gave Keane a "check list" of eight items she believed needed to be corrected. Although KLI attempted to complete the items, it did not do so to Kaur-Gardner's satisfaction. Kaur-Gardner refused to allow KLI to return to her property and hired other contractors to address the identified issues.

KLI sued Kaur-Gardner, seeking to recover $10,287.56, the amount it alleged Kaur-Gardner owed for the work KLI had performed. Although she admitted KLI performed work for her, Kaur-Gardner disputed the quality of the work and testified she believed she owed KLI only $400.

After KLI rested its case-in-chief, Kaur-Gardner moved for a "directed finding" on each of KLI's claims. Kaur-Gardner argued there was no evidence of either a contract or the reasonable value of any services or materials provided by KLI. After KLI "withdrew" its suit on a sworn account, the trial court stated the parties did not have a contract and it was taking the quantum meruit claim under advisement "to make a determination as to damages." The trial court indicated it was going to take "some time to sift through to determine reasonableness based upon the documentation." Kaur-Gardner requested that she be allowed to file a post-submission brief "with regard to the fact that the – the contract price can't be used for quantum meruit, that there has to be something separate submitted." The trial court indicated both parties could "present any briefs they care to provide to this Court." In its post-submission brief, KLI requested the trial court reconsider its ruling on the breach of contract claim.

The trial court rendered judgment in favor of KLI for $400 in actual damages and $2,032 in attorney's fees without specifying the basis of its ruling. In its written findings of fact and conclusions of law, the trial court concluded the parties operated under an express contract, Kaur-Gardner failed to fully perform under the contract, and KLI suffered actual damages of $400. In

the alternative, the trial court concluded KLI had proved it was entitled to recover on its quantum meruit claim.[2]

"Directed Verdict" on Quantum Meruit Claim

In her fourth issue, Kaur-Gardner argues the trial court erred by *sua sponte* granting a "directed verdict" in favor of KLI on its quantum meruit claim at the close of KLI's case-in-chief. Kaur-Gardner contends the trial court should have given her an "opportunity to proceed with her defense, tender her own evidence and present her affirmative defenses[.]"

A party must preserve any complaint it did not have an opportunity to present evidence in the trial court. *Smith v. El Paso Veterans Transitional Living Ctr.*, No. 08-17-00181-CV, 2018 WL 1407087, at *1 (Tex. App.—El Paso Mar. 21, 2018, no pet. h.); *In re C.C.E.*, 530 S.W.3d 314, 322 (Tex. App.—Houston [14th Dist.] 2017, no pet.). This generally requires the party to make its request or objection in the trial court in a timely, specific manner and obtain a ruling. TEX. R. APP. P. 33.1(a); *In re C.F.M.*, No. 05-16-00285-CV, 2018 WL 1704202, at *3 (Tex. App.—Dallas Apr. 9, 2018, no pet. h.) (mem. op.). The objection must be asserted at the earliest opportunity or when the potential error becomes apparent. *Luciano v. Luciano*, No. 11-15-00280-CV, 2017 WL 6559656, at *3 (Tex. App.—Eastland Dec. 21, 2017, no pet.) (mem. op.); *see also Arkoma Basin Expl. Co., Inc. v. FMF Assocs. 1990-A, Ltd.*, 249 S.W.3d 380, 387 (Tex. 2008) ("[T]he cardinal rule for preserving error is that an objection must be clear enough to give the trial court an opportunity to correct it.").

At the beginning of trial, KLI informed the trial court that Kaur-Gardner had failed to respond to KLI's request for disclosures. *See* TEX. R. CIV. P. 194.1. Kaur-Gardner's counsel

[2] To recover under a quantum meruit claim, the plaintiff must prove: (1) valuable services were rendered or materials were furnished; (2) for the person sought to be charged; (3) those services and materials were accepted by the person sought to be charged, and were used and enjoyed by her; and (4) the person sought to be charged was reasonably notified that the plaintiff performing such services or furnishing such materials was expecting to be paid by the person sought to be charged. *Hill v. Shamoun & Norman, LLP*, No. 16-0107, 2018 WL 1770527, at *4 (Tex. Apr. 13, 2018).

responded that he received the request "late," but was "not seeking to have anything entered or anything that would apply under the request for disclosure at this time."[3]

At the close of KLI's case-in-chief, Kaur-Gardner moved for a directed finding on each of KLI's claims. After KLI withdrew its suit on a sworn account, the trial court stated the parties did not have a contract. The trial court then stated it was taking the issue of KLI's damages on the quantum meruit claim under advisement, indicating it was ruling in favor of KLI on that claim. Kaur-Gardner did not: (1) object that the trial court had ruled KLI could recover on its quantum meruit claim before Kaur-Gardner had put on any evidence,[4] (2) inform the trial court she wished to offer any additional evidence, (3) make an offer of proof regarding the substance of any evidence she wished to offer, (4) indicate why she should be allowed to offer any such evidence given her failure to respond to KLI's request for disclosure and representation she would not be offering any evidence, or (5) request the opportunity to present oral argument. Accordingly, Kaur-Gardner waived any complaint the trial court erred by determining that KLI could recover on its quantum meruit claim at the close of KLI's case-in-chief. *See In re C.C.E.*, 530 S.W.3d at 322; *see also Smith*, 2018 WL 1407087, at *1. We resolve Kaur-Gardner's fourth issue against her.

Conclusions of Law

In her fifth issue, Kaur-Gardner complains the trial court erred by "enter[ing] both a conclusion of law based in contract and also, in the alternative fashion, a conclusion of law based in quantum meruit." Kaur-Gardner specifically argues (1) the trial court's written conclusion of law that the parties had an express contract is inconsistent with its statement at trial that the parties

[3] A party who fails to timely make, amend, or supplement a discovery response may be precluded from offering the undisclosed evidence or calling an undisclosed nonparty witness to testify. TEX. R. CIV. P. 193.6(a); *RDJRLW, Inc. v. Miller*, No. 02-16-00132-CV, 2017 WL 2590568, at *7–8 (Tex. App.—Fort Worth June 15, 2017, no pet.) (mem. op.).

[4] In her post- submission brief filed in the trial court, Kaur-Gardner stated in a footnote that if the trial court "maintain[ed] its denial of [Kaur-Gardner's] Motion for Directed Finding regarding [KLI's] quantum meruit claim, the trial should continue." However, including an objection in a post-trial filing "does not satisfy the contemporaneous objection rule if the complaint could have been urged earlier." *Luciano*, 2017 WL 6559656, at *3 (quoting *Hoxie Implement Co., Inc. v. Baker*, 65 S.W.3d 140, 145 (Tex. App.—Amarillo 2001, pet. denied)).

did not have a contract, and (2) the "two avenues of recovery cannot be reconciled" because KLI cannot recover in quantum meruit if there is an express contract between the parties.

Standard of Review

In an appeal from a bench trial, the trial court's findings of fact carry the same weight as a jury verdict upon questions. *Anderson v. City of Seven Points*, 806 S.W.2d 791, 794 (Tex. 1991); *Scott Pelley P.C. v. Wynne*, No. 05-15-01560-CV, 2017 WL 3699823, at *8 (Tex. App.—Dallas Aug. 28, 2017, pet. denied) (mem. op.). Unchallenged findings of fact are binding on this Court unless the contrary is established as a matter of law or there is no evidence to support the finding. *Walker v. Anderson*, 232 S.W.3d 899, 907 (Tex. App.—Dallas 2007, no pet.); *see also Tenaska Energy, Inc. v. Ponderosa Pine Energy, LLC*, 437 S.W.3d 518, 526 (Tex. 2014) (concluding unchallenged findings supported by some evidence were binding on appellate court); *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 696 (Tex. 1986).

We review the trial court's conclusions of law de novo. *Credit Suisse AG v. Claymore Holdings, LLC*, No. 05-15-01463-CV, 2018 WL 947902, at *4 (Tex. App.—Dallas Feb. 20, 2018, no pet. h.) (mem. op.). We may not reverse a trial court's conclusion of law unless it is erroneous as a matter of law. *Id.* We will uphold the trial court's judgment if it can be sustained on any legal theory supported by the evidence. *Villages of Sanger, Ltd. v. Interstate 35/Chisam Rd., L.P.*, No. 05-16-00366-CV, 2018 WL 703327, at *2 (Tex. App.—Dallas Feb. 5, 2018, no pet.) (mem. op.) (citing *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002)).

Inconsistent Conclusions

Kaur-Gardner contends the trial court's written conclusion the parties had an express contract conflicts with its oral statements at trial that there was not a contract. However, written orders or judgments control over conflicting oral pronouncements. *Carter v. Lavergne*, No. 05-09-00333-CV, 2010 WL 2880211, at *3 (Tex. App.—Dallas July 23, 2010, no pet.) (mem. op.); *Wise Bus. Servs., Inc. v. Incisive Info, Inc.*, No. 05-08-00360-CV, 2009 WL 998685, at *4 (Tex.

App.—Dallas Apr. 15, 2009, no pet.) (mem. op.) (concluding trial court's judgment and findings showed trial court simply changed its mind after oral pronouncement and before judgment; in civil cases, written judgment controls over oral pronouncements made by trial court). "[W]e cannot look to comments the judge makes from the bench as a substitute for findings of fact and conclusions of law." *In re Guardianship of Laroe*, No. 05-15-01006-CV, 2017 WL 511156, at *7 (Tex. App.—Dallas Feb. 8, 2017, pet. denied) (mem. op.). Rather, the trial court's written findings supersede any oral statements. *Id.*; *see also Gasperson v. Madill Nat'l Bank*, 455 S.W.2d 381, 387 (Tex. Civ. App.—Fort Worth 1970, writ ref'd n.r.e.) ("Any time there is a conflict between oral pronouncements made by a trial judge and his written findings of fact, conclusions of law, and signed court judgments that are provided for by rules of trial, then the matters set forth in such written instruments control."). Accordingly, the trial court's written conclusion that KLI and Kaur-Gardner had an express contract controls over the trial court's oral statements that a contract did not exist. *See Sherman v. Triton Energy Corp.*, 124 S.W.3d 272, 279 (Tex. App.—Dallas 2003, pet. denied) (concluding that because neither the parties nor the trial court "sought to modify the terms of the final judgment, the written final judgment prevails over the prior oral pronouncement").

Inconsistent Theories of Recovery

Kaur-Gardner also argues the trial court erred by making conclusions of law supporting recovery by KLI on both its claims for breach of contract and quantum meruit because the two theories of recovery are inconsistent. A party generally cannot recover under quantum meruit when there is a valid contract covering the services or materials furnished. *Hill v. Shamoun & Norman, LLP*, No. 16-0107, 2018 WL 1770527, at *4 (Tex. Apr. 13, 2018) (citing *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 740 (Tex. 2005) (orig. proceeding)). However, although it may not receive a double recovery for the same injury, a party generally may seek to recover on alternative theories. *E.F. Johnson Co. v. Infinity Glob. Tech.*, No. 05-14-01209-CV, 2016 WL

4254496, at *14 (Tex. App.—Dallas Aug. 11, 2016, no pet.) (mem. op.); *see also In re Kellogg Brown & Root*, 166 S.W.3d at 740 (noting party to contract may seek alternative relief under both contract and quasi-contract theories). When the party obtains favorable findings on alternate theories, it is entitled to judgment on the theory that provides the greatest or most favorable relief. *E.F. Johnson Co.*, 2016 WL 4254496, at *14 (citing *Boyce Iron Works, Inc. v. Sw. Bell Tel. Co.*, 747 S.W.2d 785, 787 (Tex. 1988)); *Brown Servs., Inc. v. Fairbrother*, 776 S.W.2d 772, 776 (Tex. App.—Corpus Christi 1989, writ denied) (applying principle to trial court's findings of fact and conclusions of law following bench trial).

To recover on its breach of contract claim, KLI was required to establish: (1) the existence of a valid contract between KLI and Kaur-Gardner; (2) KLI performed or tendered performance; (3) Kaur-Gardner breached the contract; and (4) KLI was damaged as a result of that breach. *See Scott Pelley P.C.*, 2017 WL 3699823, at *10. The trial court made findings of fact that Kaur-Gardner and KLI agreed KLI would provide labor and materials to landscape the "rear" of Kaur-Gardner's property, KLI performed under phase one of the agreement and sent an invoice for its work, Kaur-Gardner paid $17,000, noting on the check that the payment was for half of the phase one work, the parties agreed KLI would perform additional work under phase two, Kaur-Gardner subsequently paid KLI an additional $23,000, Kaur-Gardner asked for additional labor and materials, which KLI showed as a "change order," KLI claimed Kaur-Gardner owed a remaining $10,287.54 for the work, and Kaur-Gardner admitted she owed KLI an additional $400. Based on its findings, the trial court concluded there was an express contract between Kaur-Gardner and KLI, Kaur-Gardner breached the contract, and KLI was entitled to recover $400 in actual damages.

Kaur-Gardner has not challenged any of the trial court's findings of fact relevant to KLI's breach of contract claim. Further, the trial court's findings are supported by Keane's testimony, KLI's "contract proposals," KLI's invoices for the work, and the payments made by Kaur-Gardner. Therefore, these findings are binding on this Court, *see Tenaska Energy*, 437 S.W.3d at 526, and

support the trial court's conclusion KLI was entitled to prevail on its breach of contract claim, *see Scott Pelley P.*C, 2017 WL 3699823, at *10 (concluding unchallenged findings of fact were binding and supported trial court's conclusion defendant did not breach contract). The trial court's judgment was based on alternative grounds and can be sustained under the legal theory of breach of contract. Accordingly, any conflict between the trial court's conclusions regarding the different theories of recovery is immaterial. *See Van Brunt v. BancTexas Quorum, N.A.*, 804 S.W.2d 117, 123 (Tex. App.—Dallas 1989, no writ); *Holden v. Weidenfeller*, 929 S.W.2d 124, 133 (Tex. App.—San Antonio 1996, writ denied). We resolve Kaur-Gardner's fifth issue against her.

Because the trial court's judgment can be sustained based on KLI's breach of contract claim, we need not address Kaur-Gardner's first three issues, in which she complains the evidence is insufficient to support the trial court's judgment based on quantum meruit. *See* TEX. R. APP. P. 47.1; *Fulgham v. Fischer*, 349 S.W.3d 153, 162 (Tex. App.—Dallas 2011, no pet.); *see also Ginther v. Taub*, 675 S.W.2d 724, 725 (Tex. 1984) (declining to address other issues after determining independent ground existed for supporting judgment). We affirm the trial court's judgment.

/Robert M. Fillmore/
ROBERT M. FILLMORE
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

MANJIT KAUR-GARDNER, Appellant	On Appeal from the County Court at Law No. 6, Collin County, Texas,
No. 05-17-00230-CV V.	Trial Court Cause No. 006-00355-2016. Opinion delivered by Justice Fillmore,
KEANE LANDSCAPING, INC., Appellee	Justices Lang 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 Keane Landscaping, Inc. recover its costs of this appeal from appellant Manjit Kaur-Gardner.

Judgment entered this 14th day of May, 2018.