AFFIRMED and Opinion Filed June 22, 2021

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-01115-CV

MIDWEST COMPRESSOR SYSTEMS LLC D/B/A LRS, Appellant
V.
HIGHLAND IMPERIAL, INC, Appellee

On Appeal from the County Court at Law No. 2
Collin County, Texas
Trial Court Cause No. 002-02584-2017

MEMORANDUM OPINION

Before Chief Justice Burns, and Justices Molberg and Goldstein
Opinion by Chief Justice Burns

Midwest Compressor Systems sued Highland Imperial, Inc. to recover payment for compressors Midwest provided at wells managed by Highland and operated by Pantex Oil & Gas, LLC. Following a directed verdict, Midwest seeks reversal. We affirm.

As the operator of certain oil and gas wells located in the Texas Panhandle, Pantex hired vendors to provide equipment and services for the wells. Midwest invoiced Pantex each month for compressors Pantex leased. When Pantex's principal, Barry Eddleman, requested additional compressors for wells in south

Texas, Ken Gerber, Midwest's principal, refused the work because Pantex was behind on Midwest's invoices. Eddleman gave Gerber contact information for Highland because it also managed the south Texas wells. In September 2015, Gerber spoke with Highland's principal, Allison Prince, who, as requested, sent Midwest a check and copies of the Midwest invoices to which the payment should apply.[1] Gerber said that Prince also urged him to quickly provide the compressors for the south Texas wells and instructed him that going forward Midwest should deal directly with her and invoice Highland directly. Highland verbally agreed to Midwest's charges for the compressors requested for the south Texas wells, but located cheaper transportation to reduce the costs for getting the compressors to the wells. Highland did not otherwise dispute, challenge, or negotiate with Midwest about leasing the compressors for the south Texas wells.

From mid-September 2015 to mid-September 2016 Midwest provided compressors at the south Texas wells and sent invoices to Highland, "c/o Pantex." Although the invoices showed the daily rate for the compressors, each reflected a total charge for the preceding month in excess of $1,000.[2] Highland paid some invoices, but like Pantex, fell behind. Although Prince and others at Highland

[1] The invoices were Pantex's own invoices reflecting charges for multiple vendors that Pantex had apparently forwarded to Highland for Highland to pay.

[2] As noted below, some invoices also included additional charges for goods.

promised to get Midwest's bills caught up, Midwest eventually removed its compressors from the wells because $48,165.81 was owed but unpaid.

Midwest sued Highland for breach of contract, open account, breach of implied contract, unjust enrichment and quantum meruit. Following denial of Midwest's motion for summary judgment, the case was called to a jury trial. Gerber testified about Midwest's claims and an attorney testified in support of Midwest's fees. On cross-examination, Gerber admitted Midwest was seeking to enforce a verbal agreement for leases that required payments exceeding $1,000, although on re-direct he also stated "it was a day-to-day contract." When Midwest rested, Highland moved for a directed verdict premised on the statute of frauds.[3] Midwest asserted 1) the leases were not within the statute of frauds because each was a one-day lease for less than $1,000 per day; and 2) partial performance exempted its claims from the statute of frauds. Highland argued partial performance had not been pleaded and was not tried by consent. The trial court granted a directed verdict, and denied Midwest's subsequent motion for a trial amendment to assert partial performance as an exception to the statute of frauds. This appeal followed entry of a judgment awarding Highland its fees but providing no recovery for Midwest.

[3] Midwest does not raise any issues on appeal regarding its quantum meruit or unjust enrichment claims.

In two issues, Midwest contends the trial court erred in 1) granting the directed verdict premised on the statute of frauds, and 2) denying Midwest's motion for a trial amendment. We address each issue in turn.

A. Standard of Review

When the plaintiff admits or the evidence conclusively establishes a defense to the plaintiff's cause of action, a directed verdict is proper. *Prudential Ins. Co. of Am. v. Fin. Review Services, Inc.*, 29 S.W.3d 74, 77 (Tex. 2000); *Edes v. Arriaga*, No. 05-17-01278-CV, 2019 WL 2266391, at *4 (Tex. App.—Dallas May 24, 2019, no pet.) ("A directed verdict for a defendant may be proper in three situations: (1) when a plaintiff fails to present evidence raising a fact issue essential to the plaintiff's right of recovery; (2) if the plaintiff either admits or the evidence conclusively establishes a defense to the plaintiff's cause of action; or (3) a legal principle precludes recovery."). If a question of law provides the basis for the directed verdict, we review the trial court's ruling de novo. *Varel Int'l Indus., L.P. v. PetroDrillbits Int'l, Inc.*, No. 05-14-01556-CV, 2016 WL 4535779, at *4 (Tex. App.—Dallas Aug. 30, 2016, pet. denied). To the extent a directed verdict rests on the plaintiff's failure to present evidence raising a fact issue essential to its right of recovery or evidence conclusively establishing a defense barring the plaintiff's recovery, we apply a legal sufficiency or "no evidence" standard in our review. *Id.* Thus, with respect to the evidentiary inquiry, the directed verdict was proper only if Midwest failed to present more than a scintilla of evidence raising a fact question regarding its entitlement to

relief. *Halmos v. Bombardier Aerospace Corp.*, 314 S.W.3d 606, 620 (Tex. App.—Dallas 2010, no pet.). More than a scintilla of evidence exists when the evidence "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Coastal Transp., Inc. v. Crown Cent. Petrol. Corp.*, 136 S.W.3d 227, 234 (Tex. 2004) (internal quotation omitted)). In determining whether more than a scintilla of evidence exists, we view the evidence in the light most favorable to the non-movant. *Id.* We credit the favorable evidence if reasonable jurors could, and disregard the contrary evidence unless reasonable jurors could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). We may affirm a directed verdict on any ground that supports it. *RSL-3B-IL, Ltd. v. Prudential Ins. Co. of Am.*, 470 S.W.3d 131, 136 (Tex. App.—Houston [1st Dist.] 2015, pet. denied); *Exxon Corp. v. Breezevale Ltd.*, 82 S.W.3d 429, 443 (Tex. App.—Dallas 2002, pet. denied).

B. Legally Sufficient Evidence Regarding Existence Of An Oral Contract

The parties do not dispute the absence of a written agreement between them. Instead, Midwest contends Highland orally agreed to pay for the compressors and further asserts the statute of frauds did not govern the transactions because the leases[4] were for daily rental of equipment at amounts less than $1,000. Highland contends Prince's instruction that Midwest deal directly with Highland was legally

[4] We recognize that at least a few of the invoices included goods that were sold for more than $500, rather than compressors that were leased for $1,000 or more. Midwest does not contest the applicability of section 2.201 regarding the sale contracts and neither party asserts we should engage in an independent analysis for those contracts. As the parties have done, we therefore assume the statute applies to the contracts for sales. *See* TEX. BUS. & COM. CODE § 2.201.

insufficient to create even an oral contract, and alternatively, contends that if oral leases were created, they fall within the statute of frauds.

As an initial matter, we conclude Midwest presented more than a scintilla of evidence creating a fact question regarding the existence of a—or several—contracts. *See Coastal Transp., Inc.,* 136 S.W.3d at 233 (evidence that "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions" is legally sufficient). Gerber testified not only that Prince solicited the compressors and urged him to deliver them quickly, but also testified about Highland's receipt and use of the compressors. This evidence creates at least a question of fact regarding the existence of oral leases. *See* TEX. BUS. & COM. CODE § 2A.204(a) ("A lease contract may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of a lease contract."); *see also Copeland v. Alsobrook*, 3 S.W.3d 598, 605 (Tex. App.—San Antonio 1999, pet. denied) (court looks to communications between parties, circumstances surrounding communications and subsequent conduct in determining existence of oral contract). But legally sufficient evidence supporting the existence of oral contracts ultimately does not help Midwest, because we also conclude the statute of frauds governed the parties' leases.

C. Statute of Frauds

To "remove uncertainty, prevent fraudulent claims, and reduce litigation," the statute of frauds precludes enforcement of certain contracts unless they are in writing

and signed by the party to be charged. *Hill v. Shamoun & Norman, LLP*, 544 S.W.3d 724, 735 (Tex. 2018). The statute applies to leases on which "total payments to be made" are $1,000 or more. TEX. BUS. & COM. CODE § 2A.201. Likewise, contracts for the sale of goods priced at $500 or more fall within the statute. TEX. BUS. & COM. CODE § 2.201. Generally, whether the statute of frauds governs a contract presents a question of law. *Dynegy, Inc. v. Yates*, 422 S.W.3d 638, 642 (Tex. 2013). Applicability of exceptions to the statute, however, often involve questions of fact. *Berryman's S. Fork, Inc. v. J. Baxter Brinkmann Intern. Corp.*, 418 S.W.3d 172, 192 (Tex. App.—Dallas 2013, pet. denied).

We reject Midwest's assertion that since Highland could have cancelled at any time, the "unit price"—the daily rate reflected on each invoice—was the total amount to be paid therefore removing the leases from the statute of frauds. Midwest did not bill in advance for each day of Highland's use; it billed in arrears for the 30 days' use that had already occurred. Hence an invoice dated June 30 expressly stated it was for "June compressor rental." Thus, although the amount required for each lease *could have been* less than $1,000 if the leases had terminated after one day, each lease on which Midwest sought payment continued for thirty days and Midwest admitted the total amount fell within the statute:

> Q. Looking at these invoices -- so, for example, let's go to 4. These are pursuant to lease agreements that required payments in excess of $1,000; right?
>
> A. Correct.

. . . .

> Q. All right. And so according to you, you're asking the jury to enforce verbal agreements for a lease that required payments -- or leases that required payments in excess of $1,000; right?
>
> A. Okay.
>
> Q. And you're also asking the jury to award you less money for an agreement from Midwest to provide goods in excess of $500?
>
> A. Yes.

We also observe that Midwest provides no authority supporting its contention that the daily rate *charged* was the *total amount to be paid* on a lease terminable at will but billed in arrears on a monthly basis. Charges accruing based on a daily rate do not demonstrate a daily lease renewing each day. Nor can we accept Midwest's unsupported argument that because "total payments to be made" speaks to the future, we cannot look to the total amount billed on each invoice as evidence of the total amount to be paid for each lease. As a matter of law, we conclude these facts establish the lease agreements required total payments in excess of $1,000 and were accordingly within the statute of frauds. *See, e.g., Kachina Pipeline Co. v. Lillis*, 471 S.W.3d 445, 450 (Tex. 2015) (court may consider facts, circumstances and objectively determinable factors that give context to the parties' transaction); RESTATEMENT (SECOND) OF CONTRACTS § 33 cmt. a (course of dealing between

parties may give meaning to indefinite terms). The trial court did not err in granting a directed verdict[5] and we overrule Midwest's first issue.

D. Motion for Leave to File Trial Amendment

In its second issue,[6] Midwest contends the trial court erred in denying its motion for leave to amend its pleading and assert partial performance as an exception to Highland's statute of frauds defense. Midwest argues the trial judge lacked discretion to deny the motion because Highland failed to demonstrate surprise.[7] Highland asserts Midwest's motion to amend was 1) untimely; and 2) even if not untimely, properly denied.

Judgments generally rest on three events: rendition, reduction to writing, and judicial signing. *Vann v. Brown*, 244 S.W.3d 612, 615 (Tex. App.—Dallas 2008, no pet.). Rendition occurs when "the trial court officially announces its decision in open court or by written memorandum filed with the clerk." *S & A Rest. Corp. v.*

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[5] We also reject Midwest's assertion, made under its second issue, that the trial court erred in granting the motion for directed verdict because its pleadings implied partial performance as an exception to the statute of frauds. We find no support for and decline to rely on an "implied" assertion of an affirmative defense. *See* TEX. R. CIV. P. 94; *Dynegy, Inc.,* 422 S.W.3d at 642 (exceptions to statute of frauds, like the statute itself, are matters of confession and avoidance that must be pleaded).

[6] In its Reply Brief, Midwest asserted the parties had tried partial performance by consent because it raised the defense in a summary judgment motion. Even if we agreed that arguing an unpleaded defense in a motion for summary judgment equates to trying the defense by consent in a subsequent trial, Midwest did not raise this argument in its opening brief. We therefore decline to consider it. *Hunter v. PriceKubecka, PLLC*, 339 S.W.3d 795, 803 n.5 (Tex. App.—Dallas 2011, no pet.).

[7] Midwest relies on rule 63 in contending the trial court abused its discretion in denying the trial amendment. Rule 63 provides that leave to file amendments sought "within seven days of trial or thereafter . . . shall be" permitted unless the opposing party demonstrates the amendment operates as a surprise. TEX. R. CIV. P. 63. In comparison, rule 66 speaks specifically to amendments offered during trial, which should be freely allowed unless "the objecting party fails to satisfy the court that the allowance of such amendment would prejudice him in maintaining his action or defense upon the merits." TEX. R. CIV. P. 66.

Leal, 892 S.W.2d 855, 857–58 (Tex. 1995); *Araujo v. Araujo*, 493 S.W.3d 232, 235 (Tex. App.—San Antonio 2016, no pet.) ("The rendition of the trial court's decision, whether in open court or by official document of the court, is the critical moment when the judgment becomes effective."); *Stallworth v. Stallworth*, 201 S.W.3d 338, 348 (Tex. App.—Dallas 2006, no pet.) ("Rendition is the act by which the court declares the decision of the law upon the matters at issue."). Rather than expressing an intention to rule in the future, the trial court must clearly state—orally or in writing—that a decision has been made. *S & A Rest. Corp.,* 892 S.W.2d at 857–58. Thus, rendition requires the *present act* of expressing the decision by which the law is applied to the facts. *Reese v. Piperi*, 534 S.W.2d 329, 330 (Tex. 1976); *Able Cabling Services, Inc. v. Aaron-Carter Elec., Inc.*, 16 S.W.3d 98, 101 (Tex. App.—Houston [1st Dist.] 2000, pet. denied).

After Midwest rested, Highland moved for a directed verdict. The trial court invited the parties to submit authorities the next day regarding Midwest's argument that the leases renewed daily and the maximum amount to be charged was the daily rate, and recessed the trial. When trial resumed and in the jury's presence, the trial judge stated, "Motion for directed verdict is granted. Court finds that this case does fall under the statute of frauds requirements." Midwest's attorney immediately requested a trial amendment to conform its pleadings to the evidence regarding partial performance as an exception to the statute of frauds and asserted the exception had been tried by consent. The trial court denied the motion, and after conducting a

hearing several months later on Highland's motion for entry of judgment and Midwest's motion to reconsider the directed verdict, signed a judgment ordering that Midwest take nothing on its claims and awarding costs to Highland.

The trial court's pronouncement that it was granting a directed verdict expressed its present intent to render judgment in Highland's favor. It unequivocally applied the law to the facts in finding Midwest's claims fell within the statute of frauds. We accordingly conclude judgment was rendered when the directed verdict was granted. *See Burnett v. Lunceford*, 545 S.W.3d 587, 592 (Tex. App.—El Paso 2016, pet. denied) (court's statement that motion to disqualify movants seeking guardianship "is granted" demonstrated present intent to rule and constituted oral rendition); *In re C.M.*, No. 05-12-00380-CV, 2014 WL 470774, at *6 (Tex. App.—Dallas Feb. 6, 2014, no pet.) (judgment rendered by statement that, "[b]ased on the testimony presented and pleadings on file, I'll grant the divorce and render judgment in accordance with the agreement."); *In re Marriage of Joyner*, 196 S.W.3d 883, 885, 886 (Tex. App.—Texarkana 2006, pet. denied) (rendition premised on trial court's announcement that "your divorce is granted"); *and compare In re S.L.*, No. 05-11-00560-CV, 2012 WL 5355708, at *3 (Tex. App.—Dallas Oct. 30, 2012, no pet.) (judgment not rendered when court's statements used future tense: "I will grant the divorce"; "I will approve the agreement"; and "I will approve the property settlement."). Moreover, we reject Midwest's unsupported argument that the trial court merely "rendered a directed verdict" rather than judgment. Although the jury

would typically have *returned* a verdict upon which judgment would be rendered, here, the trial judge rendered judgment premised on a legal principle—the statute of frauds—which foreclosed any fact-finding or verdict by the jury. *See Vann*, 244 S.W.3d at 615 (jury's verdict finds facts upon which court then renders judgment by applying the law).

Midwest requested a trial amendment after rendition. Its motion was therefore untimely. *Rodriguez v. Crutchfield*, 301 S.W.3d 772, 775 (Tex. App.—Dallas 2009, no pet.) ("[I]t is too late to amend the pleadings after judgment has been rendered."). Accordingly, the trial court did not abuse its discretion in denying Midwest's motion to amend its pleadings. *Prater v. State Farm Lloyds*, 217 S.W.3d 739, 741 (Tex. App.—Dallas 2007, no pet.) ("A trial court cannot grant a motion to amend the pleadings once the court renders judgment."); *see also Automaker, Inc. v. C.C.R.T. Co., Ltd.*, 976 S.W.2d 744, 746 (Tex. App.—Houston [1st Dist.] 1998, no pet.) ("A trial court cannot grant a motion to amend the pleadings once the trial court renders judgment.").

We overrule Midwest's second issue and affirm the judgment.

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/Robert D. Burns, III/
ROBERT D. BURNS, III
CHIEF JUSTICE

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

MIDWEST COMPRESSOR SYSTEMS LLC D/B/A LRS, Appellant	On Appeal from the County Court at Law No. 2, Collin County, Texas Trial Court Cause No. 002-02584-2017.
No. 05-19-01115-CV V.	Opinion delivered by Chief Justice Burns. Justices Molberg and Goldstein participating.
HIGHLAND IMPERIAL, INC, Appellee	

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

It is **ORDERED** that appellee HIGHLAND IMPERIAL, INC recover its costs of this appeal from appellant MIDWEST COMPRESSOR SYSTEMS LLC D/B/A LRS.

Judgment entered June 22, 2021.

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