Texas Delta Mechanical

2011 | Cited 0 times | Court of Appeals of Texas | June 30, 2011

AFFIRM;

MEMORANDUM OPINION

Before Justices Bridges, O'Neill, and Myers

Opinion By Justice Bridges

Texas Delta Mechanical, Inc., appeals the trial court's judgment in favor of Republic Underwriter's Insurance Company, as subrogee of Irving Counter, Inc., Lowe's Companies, Inc., and Lowe's Home Centers, Inc., (Republic) on Republic's breach of contract claim. In five issues, Republic argues the trial court erred in (1) finding Texas Delta and Lowe's entered a valid written contract, (2) finding Texas Delta breached a written document that never became a valid contract, (3) recognizing Republic as subrogee of Irving Counter or Lowe's, (4) finding damages for Republic because one cannot determine whether Lowe's is acquiring a double recovery, and (5) failing to segregate damages. We affirm the trial court's judgment. Edward Hamil, Lowe's regional manager of installed sales, testified by deposition that the first thing he does with a potential installer is conduct an interview. After the initial interview, Hamil would explain that installers were independent contractors responsible for their own taxes and insurance. Once an installer "got their insurance supplied," they and a representative for Lowe's signed a contract which was then sent to Lowe's corporate office in North Carolina for review and validation. In this case, Texas Delta and Lowe's representative Sherwin Brosette signed the contract for installation services on October 7, 2002 and sent the contract and documentation to the corporate office in North Carolina. The corporate office issued Texas Delta a vendor number that allowed Brosette to assign work to Texas Delta. Hamil testified the contract did not require that the person signing on behalf of Lowe's had to "physically be in the state of North Carolina when signing the contract."

Vladimire Nikolov, Texas Delta's treasurer at the time of trial and its controller in October of 2002, testified Texas Delta did business with Lowe's pursuant to a contract for installation services as early as October 2002. Texas Delta was required to provide a comprehensive general liability insurance policy that named Lowe's and its subsidiaries as additional insureds. Nikolov testified Texas Delta continued to do business with Lowe's as of the time of trial in 2009.

On November 29, 2003, Nikolay Vladov, a subcontractor working for Texas Delta, was injured while removing a cast iron sink in the home of a Lowe's customer. Vladov filed suit against Lowe's, and

Lowe's in turn sued Irving Counter, which had installed the counter top at the customer's residence in 1999. Lowe's demanded that Irving Counter defend Lowe's under a vendor's contract between Lowe's and Irving Counter.

Irving Counter's insurer, Republic Underwriters Insurance Company, agreed to provide a defense for Lowe's and Irving Counter. Lowe's also sued Texas Delta, whose insurance company stated in a letter [1] that Texas Delta's policy was never endorsed to include Lowe's as an additional insured. Therefore, Texas Delta's insurance company refused to defend and indemnify Lowe's against Vladov. Texas Delta claimed its contract with Lowe's was not valid because Lowe's had never complied with the provision of the contract requiring execution of the document by Lowe's in North Wilkesboro, North Carolina. Republic settled Vladov's claims, and Vladov nonsuited his claims against all defendants.

Lowe's and Republic subsequently sued Texas Delta, alleging Texas Delta breached the contract for installation services by failing to (1) procure general liability insurance and name Lowe's as an additional insured, (2) hold Lowe's harmless and indemnify Lowe's for bodily injury, and (3) use only licensed plumbers. Following a trial before the court, the court entered judgment in favor of Republic and Lowe's in the amount of $73,252.21. The trial court entered findings of fact that Texas Delta entered into a contract with Lowe's obligating Texas Delta to perform all work by experienced, competent, qualified and licensed installers; procure general liability insurance naming Lowe's as additional insured; indemnify Lowe's against all claims arising out of any act or omission of Texas Delta. The court found Texas Delta breached these provisions of the contract and further found the attorney's fees incurred in the Vladov suit and the breach of contract action against Texas Delta were reasonable and necessary. The court entered conclusions of law that Texas Delta's breach of contract caused damages to Republic and Lowe's for attorney's fees in both suits and for the indemnity payment in the Vladov suit. This appeal followed.

In its first and second issues, Texas Delta argues the evidence does not support the trial court's findings that (1) a valid contract existed between Texas Delta and Lowe's because the contract was never executed in North Wilkesboro, North Carolina and (2) Texas Delta breached the contract because the contract never became valid. Texas Delta argues execution of the contract in North Carolina was a condition precedent to Lowe's right to enforce the contract; thus, the failure to comply with this condition precedent prevented a valid contract from coming into existence.

Findings of fact in a non-jury trial such as the one that occurred in this case have the same force and dignity as a jury's verdict. See, e.g., Lewis v. Dallas Soundstage, Inc., 167 S.W.3d 906, 912 (Tex. App.--Dallas 2005, no pet.) (citing Catalina v. Blasdel, 881 S.W.2d 295, 297 (Tex.1994)). When, as here, a complete reporter's record is filed, the trial court's findings of fact may be reviewed for legal and factual sufficiency under the same standards as jury verdicts. Id. When we review legal sufficiency, we review the evidence in a light that tends to support the finding of the disputed facts and disregard all evidence and inferences to the contrary. Lee Lewis Constr., Inc. v. Harrison, 70 S.W.3d 778, 782 (Tex. 2001). We must 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). If there is more than a scintilla of evidence to support the finding, the legal sufficiency challenge fails. Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc., 960 S.W.2d 41, 48 (Tex. 1998); see also King Ranch, Inc. v. Chapman, 118 S.W.3d 742, 751 (Tex. 2003) (more than scintilla of evidence exists when evidence "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions").

When reviewing the factual sufficiency of evidence, we examine all the evidence and set aside a finding only if it is so contrary to the evidence as to be clearly wrong and unjust. Cameron v. Cameron, 158 S.W.3d 680, 683 (Tex. App.--Dallas 2005, pet. denied). In conducting our review of both the legal and factual sufficiency of the evidence, we are mindful that the fact finder was the sole judge of the credibility of the witnesses and the weight to be given their testimony. City of Keller, 168 S.W.3d at 819; Hinkle v. Hinkle, 223 S.W.3d 773, 782 (Tex. App.--Dallas 2007, no pet.). We may not substitute our judgment for the fact finder's, even if we would have reached a different answer. See Maritime Overseas Corp. v. Ellis, 971 S.W.2d 402, 407 (Tex. 1998); Hinkle, 223 S.W.3d at 782. The court of appeals is not a finder of fact. Maritime Overseas Corp., 971 S.W.2d at 407.

A condition precedent may be either a condition to the formation of a contract or to an obligation to perform an existing agreement. T.F.W. Mgmt. v. Westwood Shores Prop. Owners Ass'n, 162 S.W.3d 564, 570 (Tex. App.-Houston [14th Dist.] 2004, no pet.). A condition precedent to an obligation to perform is an act or event, which occurs subsequently to the making of a contract, that must occur before there is a right to immediate performance and before there is a breach of contractual duty. Id. However, when the intent of the parties is doubtful or when a condition would impose an absurd or impossible result, then the agreement will be interpreted as creating a covenant rather than a condition. Id. Because of their harshness in operation, conditions are not favorites of the law. Criswell v. European Crossroads Shopping Ctr., Ltd., 792 S.W.2d 945, 948 (Tex. 1990); T.F.W. Mgmt., 162 S.W.3d at 570. Thus, in construing a contract, forfeiture by finding a condition precedent is to be avoided when another reasonable reading of the contract is possible. Criswell, 792 S.W.2d at 948; T.F.W. Mgmt., 162 S.W.3d at 570.

Here, the contract states it is subject to approval, acceptance, and execution by Lowe's at its headquarters in North Wilkesboro, North Carolina, and will "become effective and binding upon the parties hereto only upon the date of such acceptance and execution." The contract does not define the terms "acceptance" or "execution." However, the record shows Texas Delta and Lowe's representative signed the contract in Texas and sent it to Lowe's headquarters in North Wilkesboro, North Carolina, where the contract was received and reviewed. Lowe's then issued Texas Delta a vendor number that allowed Texas Delta to perform work for Lowe's. Hamil testified the contract did not require that the person signing on behalf of Lowe's had to "physically be in the state of North Carolina when signing the contract." Texas Delta began doing installation work for Lowe's customers in 2002 and continued to do business with Lowe's as of the time of trial in 2009. We conclude this evidence is legally and factually sufficient to support the trial court's finding that Texas

Delta and Lowe's entered into a valid contract that was "accepted and executed" in North Carolina. See Formosa Plastics Corp., 960 S.W.2d at 48; Cameron, 158 S.W.3d at 683. In reaching this conclusion, we reject Texas Delta's arguments that "execution" of the contract in North Carolina could only be accomplished by physically signing the contract and that such a signature was a condition precedent to the formation of a valid contract. See T.F.W. Mgmt., 162 S.W.3d at 570. We overrule Texas Delta's first issue.

As to whether Texas Delta breached the contract, the record shows the contract required Texas Delta to procure and maintain comprehensive general liability insurance naming Lowe's and its subsidiaries as additional insureds. The contract also obligated Texas Delta to indemnify Lowe's from all claims arising out of any actual or alleged act or omission of Texas Delta and to perform all work by qualified and licensed installers. However, Texas Delta did not include Lowe's as an additional insured on its commercial general liability policy and refused to indemnify Lowe's against Vladov. Further, Vladov was not a licensed plumber at the time he was injured while working for Texas Delta. We conclude this evidence is legally and factually sufficient to support the trial court's finding that Texas Delta breached its contract with Lowe's. See Formosa Plastics Corp., 960 S.W.2d at 48; Cameron, 158 S.W.3d at 683. We overrule Texas Delta's second issue.

In its third issue, Texas Delta argues the trial court erred in recognizing Republic as subrogee of Irving Counter or Lowe's and awarding damages to Republic in that capacity. On the contrary, the record shows Republic sued from the outset as subrogee of Irving Counter and Lowe's and asserted its right to recover in that capacity. The trial court's conclusions of law state Texas Delta's breach of contract caused damages to Lowe's and Republic as subrogee of Irving Counter. Republic's capacity was not challenged in the trial court. When issues not raised by the pleadings are tried by express or implied consent of the parties, such issues must be treated in all respects as if they had been raised in the pleadings. Tex. R. Civ. P. 67. A party's unpleaded issue may be deemed tried by consent when evidence on the issue is developed under circumstances indicating that both parties understood the issue was in the case, and the other party fails to make an appropriate complaint. Johnson v. Structured Asset Servs., LLC, 148 S.W.3d 711, 719 (Tex. App.-Dallas 2004, no pet.). Here, Republic sued in its capacity as subrogee of Irving Counter and Lowe's, and Texas Delta made no complaint in the trial court. Accordingly, we conclude the issue was tried by consent, and the trial court did not err in recognizing Republic as subrogee of Irving Counter or Lowe's. We overrule Texas Delta's third issue.

In its fourth issue, Texas Delta argues the trial court erred in awarding damages because, as awarded, one cannot determine whether Lowe's is acquiring a double recovery. In its fifth issue, Texas Delta argues the trial court erred in failing to segregate damages. However, Texas Delta did not raise these issues in the trial court and has not preserved these issues for our review. See Tex. R. App. P. 33.1. We overrule Texas Delta's fourth and fifth issues.

We affirm the trial court's judgment.

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1. Texas Delta's insurance company, Evanston Insurance Company, sent its denial of coverage via a letter from Evanston's affiliated underwriting manager, Markel Southwest Underwriters, Inc.