AFFIRMED as MODIFIED and Opinion Filed July 6, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00925-CV

MOE'S HOME COLLECTION, INC., Appellant
V.
DAVIS STREET MERCANTILE, LLC, Appellee

On Appeal from the 95th District Court
Dallas County, Texas
Trial Court Cause No. DC-17-07544

MEMORANDUM OPINION

Before Justices Whitehill, Osborne, and Carlyle
Opinion by Justice Whitehill

Appellant Moe's Home Collection, Inc. (MHC) appeals an adverse judgment in appellee Davis Street Mercantile, LLC's contract breach lawsuit. In two issues, MHC argues that (i) the parties' agreement for the sale of goods was too indefinite to be enforced and (ii) Davis's lost profits evidence was insufficient. We overrule the first issue because the parties adequately specified the subject goods. We sustain the second issue in part, because the evidence sufficiently supported a lost profits award slightly smaller than the trial court awarded. However, the judgment did not

award Davis all the attorney's fees it proved, because of a legal cap on Davis's total recovery. Therefore, we modify the judgment by reducing the actual damages award correspondingly and increasing the attorney's fees award by the same amount. We affirm the judgment as modified.

I. BACKGROUND

Davis sued MHC and another defendant on contract breach and other liability theories alleging that:

- Davis offered to buy all inventory displayed at MHC's Dallas Market Center furniture showroom for $30,000;
- MHC accepted;
- Davis wired $30,000 to MHC as instructed; and
- MHC refused to let Davis have all the goods Davis purchased.

Because Davis pled that it sought only monetary relief aggregating $100,000 or less, the suit was a Rule 169 expedited action. *See generally* TEX. R. CIV. P. 169.

MHC answered.

Davis won a partial summary judgment on its contract claim against MHC. It then nonsuited its remaining claims and moved for final judgment. However, the trial judge instead granted MHC a new trial solely as to damages.

After a bench trial, the judge signed a final judgment awarding Davis $79,702.63 in actual damages and $20,297.37 in attorney's fees against MHC. *See* TEX. R. CIV. P. 169(b) (capping recovery in expedited actions at $100,000).

No fact findings were requested or made.

The judge denied MHC's new trial motion, and this appeal followed.

II. ISSUES PRESENTED AND STANDARDS OF REVIEW

MHC presents two issues. First, it contends that the trial court erred by granting partial summary judgment because Davis did not conclusively establish a meeting of the minds. Second, it contends that the lost profits component of the damages award is not supported by sufficient evidence.

We review a summary judgment de novo. *Trial v. Dragon*, 593 S.W.3d 313, 316 (Tex. 2019). When we review a summary judgment in favor of a claimant, we determine whether the claimant established every element of its claim as a matter of law. *Alexander v. Wilmington Sav. Fund Soc'y*, 555 S.W.3d 297, 299 (Tex. App.—Dallas 2018, no pet.). We consider the evidence in the light most favorable to the nonmovant, indulge every reasonable inference in favor of the nonmovant, and resolve any doubts against the movant. *Id*.

We review the legal and factual sufficiency of the evidence to support a trial court's fact findings under the same standards applicable to a jury's verdict. *Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994).

When an appellant attacks the legal sufficiency of the evidence to support an adverse finding on an issue on which it did not have the burden of proof, it must show that no evidence supports the finding. *Guillory v. Dietrich*, 598 S.W.3d 284, 293 (Tex. App.—Dallas 2020, pet. denied). The evidence is legally sufficient if it would allow reasonable and fair-minded people to reach the finding under review.

City of Keller v. Wilson, 168 S.W.3d 802, 827 (Tex. 2005). In conducting our review, we view the evidence in the light most favorable to the finding and indulge every reasonable inference that would support it. *Id*. at 822. We must credit evidence favorable to the finding if a reasonable person could, and we must disregard contrary evidence unless a reasonable person could not. *Id*. at 827.

When an appellant challenges the factual sufficiency of the evidence to support an adverse finding on an issue on which it did not have the burden of proof, it must demonstrate that there is insufficient evidence to support the adverse finding. *Hoss v. Alardin*, 338 S.W.3d 635, 651 (Tex. App.—Dallas 2011, no pet.). In reviewing the challenge, we consider all the evidence in the record and set the finding aside only if the evidence supporting it is so weak or so against the overwhelming weight of the evidence that the finding is clearly wrong and unjust. *Id*.

III. ANALYSIS

A. Issue One: Did Davis fail to prove as a matter of law a meeting of the minds regarding the subject goods?

No. The summary judgment evidence established that (i) the parties agreed that MHC would sell Davis the entire showroom inventory for $30,000 and (ii) the agreement was sufficiently definite as to what goods were included in the sale.

1. Applicable Law

A contract breach claim's elements are (i) a valid contract, (ii) performance or tendered performance by the plaintiff, (iii) a breach by the defendant, and (iv)

damages sustained by the plaintiff as a result of the breach. *Petras v. Criswell*, 248 S.W.3d 471, 477 (Tex. App.—Dallas 2008, no pet.). A binding contract's elements are (i) an offer, (ii) an acceptance in strict compliance with the offer's terms, (iii) a meeting of the minds, (iv) each party's consent to the terms, and (v) execution and delivery of the contract with the intent that it be mutual and binding. *Aflalo v. Harris*, 583 S.W.3d 236, 241 n.4 (Tex. App.—Dallas 2018, pet. denied) (en banc).

MHC's issue challenges only the meeting of the minds element. Specifically, MHC contends that the parties' agreement was too indefinite as to the identity of the goods to be sold.

Whether there was a meeting of the minds is based on an objective standard of what the parties said and did rather than their subjective state of mind. *Crisp Analytical Lab, L.L.C. v. Jakalam Props., Ltd.*, 422 S.W.3d 85, 89 (Tex. App.—Dallas 2014, pet. denied). The parties' minds must meet as to all of the agreement's essential terms, and the agreement is legally binding only if its terms are sufficiently definite to allow a court to understand the parties' obligations. *Effel v. McGarry*, 339 S.W.3d 789, 792 (Tex. App.—Dallas 2011, pet. denied); *see also Fischer v. CTMI, L.L.C.*, 479 S.W.3d 231, 237 (Tex. 2016) ("To be enforceable, a contract must address all of its essential and material terms with 'a reasonable degree of certainty and definiteness.'") (citation omitted). But because the law disfavors forfeitures, "we will find terms to be sufficiently definite whenever the language is reasonably susceptible to that interpretation." *Fischer*, 479 S.W.3d at 239.

Finally, whether an agreement fails for indefiniteness is a legal question for the court. *COC Servs., Ltd. v. CompUSA, Inc.*, 150 S.W.3d 654, 664 (Tex. App.—Dallas 2004, pet. denied).

2. Applying the Law to the Facts

Davis's summary judgment evidence showed the following facts:

In early 2017, MHC had a showroom at the Dallas Market Center where it displayed furniture and home furnishings for sale. MHC's independent sales representative, The Mix, Inc., acted as its liaison to customers.

Before 2017, Kristen Pierik, a Davis managing member, did business with MHC through The Mix and the Dallas Market Center showroom. Davis intended to open its own merchant location in Dallas County by July 2017. During the first few months of 2017, Pierik toured the MHC showroom several times and asked The Mix's employees Catherine Luba and Michelle Georges to compile a complete inventory list of the showroom items available for purchase.

On or about March 29, 2017, Luba and Georges compiled a complete showroom inventory by electronically scanning the items. Each scanned half of the inventory, and on March 29, 2017, they emailed the inventory to Pierik in two parts. The two lists included price information, and together they indicated a "net merchandise total" of roughly $71,000. Georges's affidavit said that the showroom's contents did not change between March 29 and April 25, 2017.

Davis contends that the contract was formed by text messages between Pierik and Georges in April 2017. At the time, Georges was in High Point, North Carolina, with MHC's executives. On or about April 21, Pierik sent Georges a text message saying, "I want the whole showroom for $30,000." The following text message exchange then occurred:

Georges: Ummm I can ask
But I'm sure not [thumbs up emoji, apparently by Pierik]
We can see
Is that a real offer?

Pierik: Otherwise I have a list of things we will take.

Georges: OK! Let me know

Pierik: Cash.
I know it's a low, low, low offer. I don't want all of it but we could accommodate a mass move and sale of it.

Georges's affidavit said that she "verbally communicated" Pierik's offer to MHC's CEO Moe Samieian, Jr. as it had been communicated to her: "Davis Street Mercantile wants to purchase the entire DMC Showroom for $30,000." He "counteroffered to sell the contents of the DMC Showroom for $35,000." At 11:33 a.m. on April 22, the text messages continued as follows:

Georges: 35k cash??

Pierik: Hi! $30,000 cash. I'm ready with the money, just tell me when and where :)
And it will all be moved, wall to wall and floor to ceiling, before the end of May deadline; with the floor swept clean.

Georges's affidavit said that she communicated the "restated offer to purchase the entire showroom for $30,000" to Samieian, and he responded that he would accept if Davis could wire funds to MHC.

On April 22, the text messages between Georges and Pierik continued as follows:

> Georges: He said that is fine. Can you do a wire transfer?
>
> Pierik: Wonderful!
> Yes, I can pay via wire transfer. Send me the wiring instructions when you get them. Text or email . . . .
>
> Georges: Got it!! [heart emoji, apparently added by Pierik]

Georges's affidavit said that Samieian sent her the wire transfer instructions and she sent them on to Pierik. Pierik's affidavit said that she wired the funds to MHC according to the instructions and "MHC confirmed it received the $30,000 wire on April 25, 2017."

Pierik's affidavit further said that she took some items from the MHC showroom over the next few weeks. But then on May 24, 2017, MHC sent Davis an email asserting that there had been a "major miss communication" and MHC wouldn't deliver the entire showroom contents unless Davis paid an additional $18,000. MHC also communicated two other options: (i) delivery of part of the inventory for the $30,000 paid or (ii) return of the $30,000 in exchange for a release of claims. Based on a subsequent telephone call with an MHC employee, Pierik decided it would be best not to return to the showroom until the disagreement was

resolved. MHC never returned Davis's funds, and Davis sought replacement goods for its planned store.

MHC first asserts that we should analyze the transaction as an implied contract because the agreement was not reduced to writing. We disagree.

An implied contract arises when mutual asset is inferred from the circumstances. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 850 (Tex. 2009). Here, however, the mutual assent was expressed in emails and text messages. The question is whether those communications resulted in an agreement definite enough to be enforced.

The crux of MHC's argument is that there is no evidence of the showroom's contents at the time Pierik offered to purchase "the whole showroom" for $30,000. This is incorrect. The Georges and Luba affidavits establish that they compiled a complete showroom inventory in two parts on or about March 29, 2017, and transmitted both parts to Pierik that day. That two-part inventory is also in the summary judgment record. Further, Georges swore that, between the March 29 inventory preparation and Davis's April 25 wire payment, no portion of the DMC showroom was sold and its contents did not otherwise change. Thus, the evidence shows what goods were in the MHC showroom when Pierik made her April 21 offer to buy "the whole showroom" for $30,000. We conclude the agreement is sufficiently definite regarding the goods being sold.

MHC relies on evidence that Samieian misunderstood the transaction and thought that Pierik's $30,000 offer concerned only one of the two partial inventories prepared by Georges and Luba (apparently the one Luba prepared). But evidence of a party's subjective misunderstanding has no bearing on the definiteness of the agreement, which is an objective inquiry. *See Crisp Analytical Lab, L.L.C.*, 422 S.W.3d at 89 (meeting of the minds is an objective standard); *Rice v. Metro. Life Ins. Co.*, 324 S.W.3d 660, 670 (Tex. App.—Fort Worth 2010, no pet.) (party's subjective mental state not relevant to offer, acceptance, and meeting of the minds).

MHC also relies on evidence that on May 12, 2017, Luba forwarded Pierik an invoice that listed only some of the showroom inventory. But the offer and acceptance were exchanged on April 21 and 22, so the question is whether the April agreement was sufficiently definite. "[T]he minds of the parties must meet with respect to the subject matter of the agreement and all its essential terms. The parties must agree to the same thing, in the same sense, at the same time." *Lanier v. E. Founds., Inc.*, 401 S.W.3d 445, 459 (Tex. App.—Dallas 2013, no pet.) (citations omitted). Thus, the subsequent invoice, which does not match the expressed terms of the offer and acceptance, does not affect whether the already existing agreement is sufficiently definite. *See COC Servs.*, 150 S.W.3d at 664 (whether agreement is sufficiently definite is a legal question).

We overrule MHC's first issue.

B. Issue Two: Is the lost profits evidence legally or factually insufficient?

Yes, in part. Davis concedes, and we agree, that the trial court's actual damages award exceeds the amount supported by the evidence by $1,505.20. Otherwise, we conclude that the lost profits evidence is sufficient.

The trial court's judgment awards Davis actual damages of $79,702.63. MHC argues, and Davis does not dispute, that this figure consists of the recoverable contract price of $28,376.70, substitute performance costs less expenses saved of $39,342.55, and lost profits of $11,983.38.[1] MHC contends that the lost profits evidence was too speculative and thus insufficient to support the judgment.

Although a lost profits recovery does not require that the loss be subject to exact calculation, the amount must be shown by competent evidence with reasonable certainty. *Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 84 (Tex. 1992). At a minimum, lost profits must be based on objective facts, figures, or data from which the amount may be ascertained. *Szczepanik v. First S. Trust Co.*, 883 S.W.2d 648, 649 (Tex. 1994) (per curiam).

Courts are skeptical of lost profits claims by untested ventures. *Phillips v. Carlton Energy Grp., LLC*, 475 S.W.3d 265, 280 (Tex. 2015). However, "[w]hen there are firmer reasons [than mere hope] to expect a business to yield a profit, the

[1] Davis submitted a post-trial letter brief to the trial court arguing that the evidence supported exactly these amounts.

enterprise is not prohibited from recovering merely because it is new." *Tex. Instruments, Inc. v. Teletron Energy Mgmt., Inc.*, 877 S.W.2d 276, 280 (Tex. 1994).

Here, there was evidence that MHC's contract breach delayed Davis's store opening by about four and a half months and that Davis consistently operated at a net profit after it opened. Specifically, Pierik testified that Davis anticipated opening its doors at the end of June or in July 2017, but because of MHC's breach Davis's store didn't open until December 2, 2017. By the time of trial, the store had been open for fourteen months and had earned a net profit each month during that time. Davis argued to the trial court that its lost profits caused by MHC's breach should be calculated by multiplying its 142-day delay in opening by its subsequent average daily net profit of $84.39.

MHC makes three arguments attacking Davis's lost profits evidence:

First, MHC argues that Davis's damages model did not take into account the evidence that retail businesses are less busy in midsummer and busier in November and December. Specifically, MHC criticizes Davis for calculating its lost daily net profit based on figures from January 2018 through February 2019 instead of limiting the comparison to July through November 2018, to match the actual dates of delay the MHC's breach caused. This would have yielded a lower daily net profit figure. But we reject MHC's argument. MHC's breach caused Davis to miss the month of November 2017, and the trial court could consider the other evidence indicating that November and December are generally a retailer's busiest months. Moreover, it was

within the trial court's purview as fact finder to accept or reject Davis's proposed calculation method. *See Sharifi v. Steen Auto., LLC*, 370 S.W.3d 126, 151 (Tex. App.—Dallas 2012, no pet.) ("The fact-finder has the discretion to award damages within the range of evidence presented at trial, so long as a rational basis exists for its calculation.").

Second, MHC argues that Pierik admitted during trial testimony that Davis's lost profits evidence was speculative. We disagree.

Pierik was asked, "Ms. Pierik, do you have any reason to believe that [Davis's] store would have performed any differently between the time you would have opened had [MHC] performed around the middle of August [sic] 2017 and the time you actually opened, December 2nd, 2017?" This question focused on whether Pierik thought there would have been a delta regarding Davis's profits had it opened on time and the lost profits calculated for that lost time period—not whether Davis's lost profits calculation during the delay period were speculative.

Pierik's long response to that question began, "Just on the speculative nature of things, you know, we kind of had an idea of, you know, what we would be selling." This statement did not concede that Davis's lost profits were speculative. In light of the question asked, the factfinder could reasonably have found that Pierik was saying it would be speculative to argue that Davis would have been more or less profitable in 2017 had it opened on schedule than it actually was in 2018 and 2019.

Accordingly, we conclude that her testimony did not render Davis's lost profits evidence too speculative.

Third, MHC argues that Davis's lost profits calculation included a mathematical error. Specifically, MHC argues that Davis's fourteen-month net profit figure is overstated by $4,492.31, which would mean its daily net profit was $73.79 rather than $84.39.

Davis concedes the error, calculates that the lost profits amount supported by the evidence is $10,478.18 rather than $11,983.38, and acknowledges that the actual damages award should be reduced by $1,505.20. However, it argues that we should also increase its attorney's fee award by the same amount (to bring the judgment up to the $100,000 cap under Rule 169) because the trial court did not award Davis all the attorney's fees it proved up.

We agree with Davis. Because it does not seek a greater judgment, it was not required to (formally) cross-appeal. *See* TEX. R. APP. P. 25.1(c); *United Residential Props., L.P. v. Theis*, 378 S.W.3d 552, 557 n.3 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

And Davis proved reasonable and necessary attorney's fees of $50,232.50. But the trial court reduced the fee award due to Rule 169's $100,000.00 judgment cap. Accordingly, we increase the judgment's attorney's fees award by $1,505.20 to offset that deduction from the actual damages award.

IV. DISPOSITION

We modify the judgment by (i) reducing the actual damages award by $1,505.20 and (ii) increasing the attorney's fees award by $1,505.20. We affirm the judgment as modified.

/Bill Whitehill/
BILL WHITEHILL
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

MOE'S HOME COLLECTION, INC., Appellant	On Appeal from the 95th District Court, Dallas County, Texas Trial Court Cause No. DC-17-07544.
No. 05-19-00925-CV V.	Opinion delivered by Justice Whitehill. Justices Osborne and Carlyle participating.
DAVIS STREET MERCANTILE, LLC, Appellee	

In accordance with this Court's opinion of this date, we **MODIFY** the trial court's judgment as follows:

> Paragraph 1.a. is modified to read "Actual damages in the sum of $78,197.43."
>
> The last sentence of paragraph 2 is modified to read "Accordingly, the Court orders defendant, **Moe's Homes Collection, Inc.**, to pay $21,802.57 for attorney's fees."

We **AFFIRM** the judgment as modified. It is **ORDERED** that appellee Davis Street Mercantile, LLC recover its costs of this appeal from appellant Moe's Home Collection, Inc.

Judgment entered July 6, 2020.