Affirm and Opinion Filed July 16, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-18-01399-CV

MRI PIONEER AND COLORADO INVESTMENT FUND, LP, Appellant
V.
CURTIS PYATT, Appellee

On Appeal from the County Court at Law No. 1
Dallas County, Texas
Trial Court Cause No. CC-17-01959-A

MEMORANDUM OPINION

Before Justices Partida-Kipness, Nowell, and Evans
Opinion by Justice Partida-Kipness

MRI Pioneer and Colorado Investment Fund, LP (MRI) appeals from a trial court judgment awarding appellee Curtis Pyatt damages on his claim that MRI breached the parties' commercial lease by wrongfully retaining Pyatt's security deposit after the lease terminated. MRI counterclaimed that Pyatt breached the lease by failing to reimburse certain expenses due under the lease. Trial was held to the bench, and the trial court denied MRI's counterclaims and awarded Pyatt damages in the amount of the security deposit, statutory treble damages, and attorney's fees. In four issues, MRI contends (1) the evidence was legally and factually insufficient

to support judgment on liability, damages, and attorney's fees; (2) the trial court misinterpreted the lease provision under which MRI claimed its right to retain Pyatt's security deposit; (3) the trial court erred by denying MRI's counterclaims; and (4) the trial court erred by allowing Pyatt to introduce evidence not produced in discovery. We affirm the trial court's judgment.

BACKGROUND

Pyatt leased the premises at issue in 1998 from MRI's predecessor in interest to sell and service specialty motorcycles. According to Pyatt, the space was littered with garbage from the previous tenant and in a state of disrepair when he moved in. Immediately after taking possession, Pyatt cleaned out the space, built a showroom, and installed a drop ceiling, electrical wiring, fluorescent lights, and a tile floor. Pyatt also installed a cabinet with a sink. MRI later purchased the property and the parties entered into the lease at issue on June 1, 2008.

The parties' 2008 lease had a term of two years, beginning June 1, 2008. Monthly rent was comprised of a base rent plus an estimated operating expense reimbursement, calculated as a pro rata share of MRI's estimated operating expenses, set at $770.83 for 2008. The lease also provided for a year-end reconciliation of MRI's actual operating expenses with the estimated operating expenses. If the actual expenses exceeded Pyatt's estimated expense reimbursements, MRI could invoice Pyatt for the shortfall.

The parties executed two lease modifications, in 2010 and 2011, that extended the term and increased rent. These modifications did not alter the estimated operating expense reimbursement. The parties executed a third modification in 2015 that increased rent and reduced the estimated operating expense reimbursement to $0. The lease and all modifications state that the monthly estimated expense reimbursement was subject to change after all expenses had been paid.

In 2015, Pyatt decided to close his motorcycle sales business in 2016, thus the parties' 2015 lease modification extended the term for only one year. The lease ended on May 31, 2016, and Pyatt vacated the premises. Pyatt testified that before vacating the premises, he stripped, cleaned, and waxed the tile floor in the showroom, painted the walls, replaced one toilet and cleaned both bathrooms, replaced several ceiling tiles damaged by a leaking roof, had the sign removed from the awning, and cleaned the entire space. After he vacated the premises, Pyatt returned to scrape a vinyl sign off the front door.

MRI sent a letter entitled "Disposition of Security Deposit" to Pyatt on June 20, 2016. The letter listed the following Outstanding Charges totaling $4,380.00:

- Removal Tenant Vinyl Signage on door $85.00
- Replace 23 lightbulbs in office/ showroom area @$10/each plus labor $305.00
- Replace bottom shelf of break area sink $65.00
- General Clean Restrooms (2) $50/each $100.00
- Remove gate from Exit Door $75.00
- [R]epair awning damaged when signed [sic] removd [sic] $150.00

- CAM RECON JUN - DEC 2013 - ACT $2.12 FOOT PAID $1.85 FOOT $675.00
- CAM RECON 2014 ACTU $2.24 FOOT PAID $1.85 FOOT $1,950.00
- CAM JAN 2015 - JUNE 2015 PAID $1.85 FOOT ACT $2.24 FOOT $975.00

MRI applied Pyatt's $1,325.00 security deposit to the charges and asked Pyatt to remit the balance within fifteen days "[t]o avoid further collections action." Pyatt sent a letter to MRI on July 19, 2016, contesting the damage, cleaning, and CAM—common area maintenance—charges. Pyatt claimed that the damage and cleaning charges should be excluded as ordinary wear and tear. MRI did not receive the letter until August 23, 2016, however, because Pyatt had sent it to an incorrect address. On July 28, 2016, Pyatt received a letter from National Credit Systems, Inc. (NCS), indicating that NCS had been hired by MRI to collect an unpaid debt of $3,055.38.

MRI replied to Pyatt's July 19, 2016, letter on September 13, 2016, noting its reply was delayed because Pyatt sent his letter to an incorrect address. In its reply, MRI stated the charges were correct and that ordinary wear and tear did not apply to commercial contracts, such as this. However, MRI offered to remove the $75 charge for removing the gate from the exit door. MRI also included a breakdown of the 2013, 2014, and 2015 CAM charges. Pyatt received additional correspondence from NCS on September 2, 2016, October 12, 2016, and November 2, 2016, seeking payment of the debt. Pyatt did not pay.

Pyatt issued a demand letter to MRI. When MRI failed to respond, Pyatt filed suit for bad faith retention of security deposit and breach of contract. MRI filed a response and counterclaims for breach of contract and quantum meruit. The trial court held a bench trial on June 20, 2018, and issued a final judgment on October 19, 2018, awarding damages and attorney's fees to Pyatt and denying MRI's counterclaims. Specifically, the trial court awarded Pyatt $1,325.00 for breach of contract, $100.00 in statutory damages, and $3,975.00 treble damages for bad faith retention of security deposit under Section 93.011 of the property code. The trial court also awarded attorney's fees "pursuant to either Chapter 38 of the Texas Civil Practice and Remedies Code or Section 93.011 of the Texas Property Code." This appeal followed.

ANALYSIS

In four issues, MRI contends (1) the evidence was legally and factually insufficient to support judgment on liability, damages, and attorney's fees; (2) the trial court misinterpreted the lease provision under which MRI claimed its right to retain Pyatt's security deposit; (3) the trial court erred by denying MRI's counterclaims; and (4) the trial court erred by allowing Pyatt to introduce evidence not produced in discovery. We address each issue in order.

A. Sufficiency of the Evidence

In its first issue, MRI contends that the evidence was legally and factually insufficient to support the trial court's judgment finding MRI breached lease or acted

in bad faith and awarding attorney's fees. Specifically, MRI argues that Pyatt failed to provide notice under the lease, as required for MRI to be liable for breach, and there was no evidence to support a bad faith finding under Section 93.011 of the property code. Regarding the attorney's fees award, MRI argues that it is not an individual or corporation and Pyatt made no presentment, as required for an attorney's fees award under Chapter 38 of the civil practice and remedies code. MRI also argues Pyatt's counsel's testimony was insufficient to support an attorney's fees award.

We may sustain a legal sufficiency challenge only when (1) the record discloses a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla; or (4) the evidence establishes conclusively the opposite of a vital fact. *Crosstex N. Tex. Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580, 613 (Tex. 2016); *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 334 (Tex. 1998), *cert. denied*, 526 U.S. 1040 (1999). When an appellant attacks the legal sufficiency of an adverse finding on an issue for which it did not have the burden of proof, it must demonstrate there is no evidence to support the adverse finding. *Pulley v. Milberger*, 198 S.W.3d 418, 426 (Tex. App.—Dallas 2006, pet. denied). In determining whether there is legally sufficient evidence to support the finding under review, we must consider evidence favorable to the finding if a reasonable factfinder could and

disregard evidence contrary to the finding unless a reasonable factfinder could not. *Cent. Ready Mix Concrete Co. v. Islas*, 228 S.W.3d 649, 651 (Tex. 2007); *City of Keller v. Wilson*, 168 S.W.3d 802, 807, 827 (Tex. 2005).

When reviewing an assertion that the evidence is factually insufficient to support a finding, we set aside the finding only if, after considering and weighing all of the evidence in the record pertinent to that finding, we determine that the credible evidence supporting the finding is so weak, or so contrary to the overwhelming weight of all the evidence, that the answer should be set aside and a new trial ordered. *Gardiner*, 505 S.W.3d at 615; *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986) (op. on reh'g); *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986).

"Findings of fact are the exclusive province of the jury and/or trial court." *Bellefonte Underwriters Ins. Co. v. Brown*, 704 S.W.2d 742, 744–45 (Tex. 1986). A court of appeals "cannot make original findings of fact; it can only 'unfind' facts." *Id*. at 745; *see also United Servs. Auto. Ass'n v. Croft*, 175 S.W.3d 457, 463 (Tex. App.—Dallas 2005, no pet.).

We review findings of fact entered in a bench trial for legal and factual sufficiency of the evidence by the same standards used to review jury findings. *Smith-Gilbard v. Perry*, 332 S.W.3d 709, 713 (Tex. App.—Dallas 2011, no pet.). Here, the trial court did not make findings of fact and conclusions of law. When the trial is to the bench and the trial court does not make findings of fact and conclusions of law, we imply all facts necessary to support the judgment that are supported by

the evidence. *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002).

1. Damages for Breach of Contract

MRI contends the trial court erred by awarding Pyatt damages for breach of contract because Pyatt failed to provide MRI with notice and an opportunity to cure as required by the lease. Relying on our opinion in *Cheung-Loon, LLC v. Cergon, Inc.*, 392 S.W.3d 738, 744–45 (Tex. App.—Dallas 2012, no pet.), MRI argues that compliance with the lease's notice-and-cure provision was a prerequisite to Pyatt's breach-of-contract claim.

Cheung-Loon involved a suit for breach of a commercial lease arising from a tenant's failure to obtain a certificate of occupancy and make rental payments. *Id.* at 742–43. The tenant brought counterclaims arising from the landlord's alleged violation of the tenant's exclusive right to use the parking lot. *Id*. at 743. The trial court granted summary judgment to the tenant on its counterclaims and dismissed the landlord's claims. *Id*. at 743. One issue on appeal concerned whether the tenant had provided the landlord notice and opportunity to cure the alleged breach under the terms of the lease. *Id*. at 744. The lease's notice-and-cure provision required the tenant to provide the landlord and its "ground lessor, mortgagee or beneficiary under a deed of trust" a written notice of an alleged breach of the lease and a thirty-day opportunity to cure before the tenant could pursue remedies for default. *Id*. The tenant orally notified the landlord that it was being excluded from the parking lot but

provided no written notice before its letter terminating the lease. *Id*. at 744–45. The tenant stopped paying rent less than two weeks later, thus we held the tenant did not provide the landlord with notice and a thirty-day opportunity to cure. *Id*.

The notice-and-cure provision at issue in *Cheung-Loon* is identical to that at issue here, and MRI contends that Pyatt "sent no written notice." However, our opinion in *Cheung-Loon* is not helpful to our analysis because the tenant there provided only an oral notice, and the record here reflects that Pyatt provided written notice. Specifically, Pyatt contends that he sent a letter on July 19, 2016, to MRI disputing the charges listed on MRI's Disposition of Security Deposit letter. Although the letter is not in the record, MRI does not dispute that Pyatt sent such a letter. Instead, MRI argues there is no evidence it was sent by a means listed in section 16.08 of the lease, which establishes the date on which notice is deemed delivered based on the means of delivery. According to MRI, there is no "proof of delivery" by any of the means allowed under the lease. The lease does not specify, however, what constitutes proof of delivery and MRI acknowledged receipt of Pyatt's letter.

Specifically, MRI acknowledged receiving Pyatt's July 19, 2016 letter in its September 13, 2016 response. In its response, MRI noted that, although Pyatt's letter was mailed to an incorrect address, the "letter was mailed to the appropriate address on August 23rd, 2016 [sic] and received shortly there-after." The response contends that MRI's charges at issue were "fair and accurate based on the terms of

the contract," MRI's "files contain photographs to prove the condition of the suite at the time [Pyatt] vacated," and that Pyatt's "claim of ordinary wear and tear"—obviously referring to a claim made in Pyatt's letter—applies only to residential, not commercial, leases. MRI offered to remove the $75.00 "cost assessed to remove the gate," enclosed CAM reconciliations for 2013, 2014, and 2015, and requested payment of the remaining balance within ten days. Thus, the record reflects that Pyatt's letter was received by MRI between August 23, 2016, and September 13, 2016, and notified MRI of the alleged breach in wrongfully retaining the security deposit to pay for illegitimate expenses. Pyatt did not file suit until April 4, 2017, more than thirty days later.

MRI argues for the first time in its reply brief that Pyatt's letter did not provide adequate notice of the alleged default and Pyatt did not provide notice to MRI's lender, as required under the lease's notice-and-cure provision. Issues raised for the first time in a reply brief are ordinarily waived and may not be considered by an appellate court. *Powell v. Knipp*, 479 S.W.3d 394, 408 (Tex. App.—Dallas 2015, pet. denied); *see also St. John Missionary Baptist Church v. Flakes*, 595 S.W.3d 211, 215 (Tex. 2020) (holding courts of appeals may order additional briefing on issues "fairly included" in or "inextricably entwined" with a briefed issue while retaining their authority to "deem an unbriefed point waived in lieu of requesting additional briefing"). The questions of whether Pyatt's notice adequately notified MRI of its alleged default or whether Pyatt notified MRI's lender are not fairly included or

inextricably entwined with the question of what means Pyatt used to deliver the notice. Thus, we need not address MRI's new argument. Nonetheless, as noted above, the record reflects that Pyatt's letter adequately notified MRI of its alleged default by way of Pyatt's objections to the charges listed in MRI's Disposition of Security Deposit. Although MRI directs the Court to Pyatt's testimony that he did not provide notice to MRI's lender, the record also reflects that Pyatt did not know MRI had a lender. The lease's notice-and-cure provision required MRI to provide the name and address of its lender to Pyatt in writing, and there is no evidence in the record that MRI provided such information to Pyatt.

On the record before us, we conclude that the evidence is legally and factually sufficient to show that Pyatt provided MRI with notice of default and opportunity to cure under the lease terms. *See Gardiner*, 505 S.W.3d at 613, 615.

2. Statutory Damages and Attorney's Fees

MRI next contends that the trial court erred by awarding statutory damages and attorney's fees under section 93.011 of the property code because there is no evidence that it acted in bad faith.

Chapter 93 establishes two distinct causes of action for a commercial tenant seeking the return of its security deposit. *See* TEX. PROP. CODE § 93.011; *EDG Prop. Mgmt., Inc. v. Ratnani*, 279 S.W.3d 905, 907 (Tex. App.—Dallas 2009, no pet.). The first cause of action arises from the landlord's bad faith retention of the security deposit. TEX. PROP. CODE § 93.011(a). The second arises from the landlord's bad

faith failure to account for the security deposit. *Id*. § 93.011(b). If the tenant shows that the landlord failed to provide a refund of the security deposit or an accounting within sixty days after the tenant surrenders possession of the premises, then it is presumed that the landlord acted in bad faith. *Id.* § 93.011(d); *FP Stores, Inc. v. Tramontina US, Inc.*, 513 S.W.3d 684, 693 (Tex. App.—Houston [1st Dist.] 2016, pet. denied).

Pyatt does not allege that MRI failed to provide an accounting of damages and charges but contends only that MRI's accounting included illegitimate charges that did not justify MRI's retention of the security deposit. Consequently, Pyatt pleaded a claim under section 93.011(a). Because MRI provided an accounting twenty days after the lease terminated there is no presumption that MRI acted in bad faith, *see* TEX. PROP. CODE § 93.011(d), and MRI argues that it was Pyatt's burden to prove MRI acted in bad faith.

A landlord acts in bad faith when it retains the security deposit in dishonest disregard of the tenant's rights. *Pulley*, 198 S.W.3d at 428 (construing section 92.109 of the property code); *Zhang v. Capital Plastic & Bags, Inc.*, 587 S.W.3d 82, 94 (Tex. App.—Houston [14th Dist.] 2019, pet. denied) (citing *Pulley* and noting that courts seek guidance from the more developed body of case law construing section 92.109—a parallel statute applying to residential leases—due to the dearth of case law construing section 93.011). Bad faith implies an intention to deprive the tenant of a lawfully due refund. *Pulley*, 198 S.W.3d at 428. MRI argues there is no

evidence to support a bad faith finding, claiming that the parties' dispute is merely a "bona fide dispute as to . . . rights under the lease." Pyatt disagrees and identifies certain testimony in support of his bad-faith claim.

Specifically, Pyatt refers the Court to MRI's claim that it could retain Pyatt's security deposit for ordinary wear and tear even though the lease and property code prohibit it. Section 93.006 of the property code allows a landlord to "deduct from the deposit damages and charges for which the tenant is legally liable under the lease . . . ." TEX. PROP. CODE § 93.006(a). However, "[t]he landlord may not retain any portion of a security deposit to cover normal wear and tear." TEX. PROP. CODE § 93.006(b). Normal wear and tear is "deterioration that results from the intended use of the commercial premises, including breakage or malfunction due to age or deteriorated condition, but the term does not include deterioration that results from negligence, carelessness, accident, or abuse of the premises, equipment, or chattels by the tenant or by a guest or invitee of the tenant." *Id*. Section 7.03(B) of the lease also excepted "ordinary wear and tear" from Pyatt's obligations. And section 7.05 required Pyatt to surrender the premises upon termination "broom clean and in the same condition as received, except for ordinary wear and tear that [Pyatt] is not otherwise obligated to remedy under any provision of this Lease."

On this point, MRI's Disposition of Security Deposit identified three items in need of repair or replacement: "23 lightbulbs in office/ showroom," "bottom shelf of break area sink," and "awning damaged when signed [sic] removd [sic]." As

evidence that Pyatt was responsible for replacing the lightbulbs, MRI cites section 6.05 of the lease, which required Pyatt to "pay the cost of all utility services . . . and for replacing all electric lights, lamps and tubes." Section 6.05 further states that MRI "is the party entitled to designate utility and telecommunications service providers to the Property and the Premises." Read in the larger context of article six, entitled "Use of Premises," it is apparent that section 6.05 was intended only to establish each party's rights and duties with respect to maintaining utility services during Pyatt's use of the premises. *See Stephens v. Beard*, 485 S.W.3d 914, 916 (Tex. 2016) (to ascertain and give effect to the parties' intentions as expressed in an agreement, we consider the agreement as a whole). It did not impose a duty on Pyatt to ensure that all light bulbs on the premises were functional.

Regardless, MRI did not produce evidence establishing that it needed to replace the twenty-three light bulbs identified in its letter. To the contrary, Pyatt testified that all lightbulbs were working when he vacated the premsies, with the exception of two four-bulb fixtures that intentionally contained only two bulbs each and were used as night lights. William Ziegler, a managing member of MRI, also testified that some fixtures were not fully illuminated but could not confirm that there were twenty-three bulbs in need of replacement. Additionally, MRI's documentary evidence did not depict twenty-three missing or burned-out bulbs.

Regarding the shelf below the break room sink, Pyatt testified that he installed the vanity in which the shelf was located. He admitted the shelf was warped, either

from a leak in the sink above or from the weight of the cleaning materials he stored there. On cross-examination, Pyatt admitted that he had repaired a water leak. However, the shelf was still functional, and Pyatt considered the warping ordinary wear and tear. MRI offered no evidence to rebut Pyatt's contention that the shelf was still functional and not in need of replacement.

Regarding the awning, Pyatt testified that the sign was removed by a "professional company" and there was no damage to the awning. Ziegler testified that he was not present when the sign was removed but claimed the damage had been behind the sign. Ziegler also testified that although the damage had not been repaired, he estimated the repair would cost $150 based on his "38 years of experience in this industry." MRI did not produce any evidence that any its three listed repairs or replacements were due to "negligence, carelessness, accident, or abuse" by Pyatt, a guest, or invitee as opposed to the "intended use of the commercial premises." *See* TEX. PROP. CODE § 93.006(b).

MRI's Disposition of Security Deposit also identified two tasks Pyatt allegedly failed to perform before vacating the premises: removal of "Vinyl Signage on door" and "General Clean Restrooms." Regarding the removal of the vinyl sign, MRI argues that Pyatt had a duty under section 6.04 to "remove all signs, decorations and ornaments at the expiration or termination of this Lease and must repair any damage and close any holes caused by the removal." MRI produced a photograph allegedly taken during Ziegler's property inspection depicting the front door with

the vinyl sign still in place. The photograph also shows a sheet of paper, identified by Pyatt as a "moved" sign, taped over the vinyl sign. Pyatt testified that he placed the "moved" sign on the door after he vacated the premises, and that he later scraped the vinyl sign off the door. Ziegler testified that MRI removed the vinyl sign, but later admitted that Pyatt scraped the sign off, and MRI only removed the glue that was left behind. MRI did not produce any evidence other than Ziegler's testimony regarding the removal of the glue and produced no evidence of any associated damage.

Ziegler also testified that the restrooms were dirty and greasy. Pyatt testified, however, that the grease Ziegler identified was actually paint left over from the prior tenant, that he had personally cleaned the restrooms before vacating, and that the premises was "broom-clean" when he vacated it. Ziegler responded that the substance in question was oil because it smeared when "you rub your finger across it." MRI offered no evidence that it actually spent the $100 it charged Pyatt to clean the restrooms.

Almost all of the evidence presented on these five charges consisted of Pyatt's and Ziegler's testimony. As the trier-of-fact, the trial court was the sole judge of the credibility of the witnesses and the weight given to their testimony. *See Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003). Faced with conflicting testimony, the trial court may have given greater weight to Pyatt's testimony, and we will not substitute our judgment for that of the trial court. *See id.*

Regarding the CAM charges (or reconciliations), Pyatt argues that MRI did not invoice the CAM charges according to the lease terms—referring to MRI's failure to invoice on a year-end basis—and incorrectly claimed CAM charges through June 2015, even though the lease term ended in May 2015. MRI's Disposition of Security Deposit shows CAM charges from June 2013 through June 2015. Pyatt argues that MRI had to invoice CAM charges on an annual basis, which MRI had never done, and the parties did not contemplate a cumulative, multi-year invoice. We agree.

In construing a written contract, we must ascertain and give effect to the parties' intentions as expressed in the agreement. *Stephens*, 485 S.W.3d at 916. To do so, we consider the agreement as a whole. *Id*. We presume the words of a contract reflect the parties' intent, but we must construe words in the context in which they are used. *URI, Inc. v. Kleberg Cnty.*, 543 S.W.3d 755, 764 (Tex. 2018). If, after the pertinent rules of construction are applied, the contract can be given a definite or certain legal meaning, it is unambiguous and courts should construe it as a matter of law. *Frost Nat'l Bank v. L & F Distribs., Ltd.*, 165 S.W.3d 310, 312 (Tex. 2005) (per curiam). If a contract is susceptible to more than one reasonable interpretation, it is ambiguous. *Reilly v. Rangers Mgmt., Inc.*, 727 S.W.2d 527, 530 (Tex. 1987). Whether a contract is ambiguous is a question of law for the court to decide by looking at the contract as a whole in light of the circumstances existing at the time the contract was entered into. *Id*. at 529.

Pyatt's monthly rent obligation under the lease consisted of a base rent plus an estimated operating expense reimbursement. Article Seventeen of the 2008 lease states that "[t]he estimated monthly operating expense reimbursement is an estimate only and is subject to change after all expenses have been paid annually." The 2010 and 2011 modifications altered this language to state, "The estimated monthly reimbursement expense is subject to change after all expenses have been paid." The 2015 modification, altered the language further, stating, "This is a gross modified lease, and tenant will pay only the difference in CAM at year end bill back." Addendum A of the lease, entitled "Expense Reimbursement," contains expense reimbursement payment terms and defines the scope of the expenses included. Section C of Addendum A states,

> Tenant agrees to pay and [sic] end-of-year lump sum Reimbursement within thirty (30) days after receiving an invoice from Landlord. Any time during the Term (or renewals or extensions) Landlord may direct Tenant to pay monthly an estimated portion of the projected future Reimbursement amount. Any such payment directed by Landlord will be due and payable monthly on the same day that the Base Rent is due.

Section C does not specify a timeframe in which MRI must invoice the "end-of-year lump sum Reimbursement." However, it is well established that the law will impose a reasonable time for performance when no time limit is provided, unless the lack of a time limit was by design. *Caruso v. Young*, 582 S.W.3d 634, 638 (Tex. App.—Texarkana 2019, no pet.); *Horseshoe Bay Resort, Ltd. v. CRVI CDP Portfolio, LLC*, 415 S.W.3d 370, 381 (Tex. App.—Eastland 2013, no pet.). Reading these provisions

together demonstrates that the parties intended MRI to calculate actual operating expenses and invoice the reimbursement shortly after the year-end so that MRI could adjust any projected reimbursement and charge Pyatt accordingly. The lease contains no language indicating that the parties intended the "end-of-year lump sum Reimbursement" to encompass multiple years. *See Caruso*, 582 S.W.3d at 638.

Even assuming MRI could charge Pyatt for prior years' CAM reconciliation, it overstated Pyatt's 2015 share. The detailed calculation attached to MRI's September 13, 2016 response to Pyatt's July 19, 2016 objection to MRI's charges reflects that MRI's actual reimbursable expense was $124,900.10. The document states that the "[l]ease term ends June 2015" and reflects an adjusted amount of $64,450.05, presumably covering the first six months of the year. From this adjusted amount, MRI calculated Pyatt's pro-rated share as $975.92. This amount is reflected on MRI's Disposition of Security Deposit. The lease documents reflect, however, that the lease terms all ran from June 1st through May 31st, with the last term running from June 1, 2015 to May 31, 2016. Thus, Pyatt's pro-rated share for 2015 should have been based on a five-month adjusted amount (January–May), instead of the six-month adjusted amount used by MRI.

On the record before us, we conclude that MRI failed to demonstrate there is no evidence to support the trial court's finding that it retained Pyatt's security deposit in bad faith. *See Pulley*, 198 S.W.3d at 426. We likewise conclude that MRI failed to demonstrate that its billed charges were reasonable. *See* TEX. PROP. CODE §

93.011(c) (requiring a landlord to prove "the retention of any portion of the security deposit was reasonable"); *Ratnani*, 279 S.W.3d at 907 ("Although [landlord's] March 30 letter included an itemized list of repairs and charges to which it claimed to have applied the $10,000 security deposit, [landlord] had the statutory burden of proving that its retention of [tenant's] security deposit was reasonable."); *Zhang*, 587 S.W.3d at 93 ("[T]he landlord has the burden to prove the retention of any portion of the security deposit was reasonable."); *Johnson v. Waters at Elm Creek, L.L.C.*, 416 S.W.3d 42, 47 (Tex. App.—San Antonio 2013, pet. denied) ("If the landlord is able to defeat the presumption of bad faith with regard to the retention of a security deposit, the landlord also is required to prove that his retention of any portion of the security deposit was reasonable.").

3. Attorney's Fees Award Under Chapter 38 of the Civil Practice and Remedies Code

The trial court's judgment awarded attorney's fees "pursuant to either Chapter 38 of the Texas Civil Practice and Remedies Code or Section 93.011 of the Texas Property Code." MRI contends that the trial court could not award attorney's fees under Chapter 38 of the civil practice and remedies code because MRI is not an individual or corporation and there was no evidence of a presentment. MRI argues that section 38.001 restricts recovery of "reasonable attorney's fees from an individual or corporation" and that "Appellant is a Texas limited partnership." *See* TEX. CIV. PRAC. & REM. CODE § 38.001. We agree and, thus, need not address

MRI's argument that Pyatt did not plead and prove that he made a presentment of his contract claim as required by section 38.002. *See* TEX. R. APP. P. 47.1. Our conclusion does not affect our judgment, however, because, as discussed above, the evidence was legally and factually sufficient to support the trial court's award under section 93.011 of the property code.

4. Sufficiency of Evidence to Support Attorney's Fees Award

MRI contends that the evidence presented at trial was insufficient to support the trial court's attorney's fees award. Citing *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 496–97 (Tex. 2019), MRI argues that Pyatt "did not introduce any fee bills or any detail of work performed as evidence at trial" and "[c]ounsel did not testify as to the duties performed by his legal assistant."

An award of attorney's fees must be supported by evidence that the fees are reasonable and necessary. *See Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 10 (Tex. 1991); *see also Rohrmoos Venture*, 578 S.W.3d at 484 ("When fee-shifting is authorized, whether by statute or contract, the party seeking a fee award must prove the reasonableness and necessity of the requested attorney's fees."). Although contemporaneous billing records are not required, legally sufficient evidence to establish a reasonable and necessary fee must include a description of the services performed, the identity of each attorney who performed the service, approximately when service was performed, the reasonable amount of time required to perform the service, and the reasonable hourly rate for each attorney performing the service.

Rohrmoos Venture, 578 S.W.3d at 502. The fact finder may adjust this base lodestar using relevant factors. *Id*. at 494. These include the novelty and difficulty of the questions involved, the skill required to properly perform the service, the likelihood acceptance of the employment will preclude other employment, the results obtained, time limitations imposed by the client or circumstances, the nature and length of the professional relationship with the client, whether the fee is fixed or contingent. *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997).

The record reflects that Pyatt's counsel offered testimony regarding Pyatt's claim for attorney's fees. Counsel provided his experience and familiarity with the rates charged in similar litigation, testified that his rates are lower than prevailing rates, offered the rates charged by himself and his legal assistant, and described the various tasks performed during his representation of Pyatt. Counsel specified the number of hours billed and the total billed charges for three categories of work: pretrial, trial preparation, and trial. Counsel also offered a prediction of the number of hours and charges required for post-trial proceedings, appeal to this Court, and petition to the Texas Supreme Court. MRI did not object or cross-examine Pyatt's counsel.

The trial court accepted Pyatt's attorney's fee evidence for proceedings through trial but awarded $500 less than requested for post-trial proceedings and $6,000 less than requested for proceedings before the supreme court. On this record,

we conclude that counsel's testimony is legally sufficient to support the trial court's attorney's fees award. *See Rohrmoos Venture*, 578 S.W.3d at 502.

Having determined that the evidence supporting the trial court's judgment on Pyatt's claims, damages, and attorney's fees is legally and factually sufficient, we overrule MRI's first issue. *See Gardiner*, 505 S.W.3d at 613, 615.

B. Interpretation of the Lease's Expense Reimbursement Payment Provision

In its second issue, MRI contends that the trial court misinterpreted the lease's Expense Reimbursement Payment provision by not finding that Pyatt breached the lease in failing to pay MRI's charges within thirty days, "regardless of whether [Pyatt] agreed with the charges." According to MRI, the provision required Pyatt to pay MRI's charges and later request an audit of charges Pyatt disputed. MRI would then refund any overpayment established by the audit. Pyatt contends such an interpretation of the provision would lead to an absurd result, allowing MRI to invoice Pyatt years after the lease had terminated.

As we previously noted, the lease provisions concerning the parties' expense reimbursement scheme do not support MRI's attempt to invoice Pyatt for multiple years at the end of the lease. Rather, these provisions required MRI to invoice Pyatt at the end of each year. Although the lease does not specify a timeframe in which MRI must invoice Pyatt, the lease contains no language indicating that the parties contemplated that MRI could invoice Pyatt more than a year after the period in which

MRI incurred the operating expenses. Consequently, MRI failed to properly invoice Pyatt for reimbursement of its operating expenses, and we overrule MRI's second issue.

C. MRI's Counterclaim

In its third issue, MRI contends the trial court erred by denying MRI's counterclaim that Pyatt breached the lease by failing to pay the cleaning, repair, and replacement charges listed on MRI's Disposition of Security Deposit. MRI filed an affidavit of necessity under section 18.001 of the civil practice and remedies code to prove-up the charges, and Pyatt did not file a counter-affidavit. MRI argues that its affidavit and Ziegler's testimony was sufficient to prove-up the charges, and the trial court erred by dismissing MRI's claim and in failing to award MRI attorney's fees.

Section 18.001 is an evidentiary statute that accomplishes three things: (1) it allows for the admissibility, by affidavit, of evidence of the reasonableness and necessity of charges that would otherwise be inadmissible hearsay; (2) it permits the use of otherwise inadmissible hearsay to support findings of fact by the trier of fact; and (3) it provides for exclusion of evidence to the contrary, upon proper objection, in the absence of a properly filed controverting affidavit. TEX. CIV. PRAC. & REM. CODE § 18.001; *Wal-Mart Stores Tex., LLC v. Bishop*, 553 S.W.3d 648, 671–72 (Tex. App.—Dallas 2018, pet. granted); *Hong v. Bennett*, 209 S.W.3d 795, 800 (Tex. App.—Fort Worth 2006, no pet.). Although an unchallenged section 18.001 affidavit provides legally sufficient evidence to support a finding that the amount

charged was reasonable, it is not conclusive proof. *McGibney v. Rauhauser*, 549 S.W.3d 816, 827 (Tex. App.—Fort Worth 2018, pet. denied); *Namdarkhan v. Glast, Phillips & Murray, P.C.*, No. 05-18-00802-CV, 2020 WL 1969507, at *10 (Tex. App.—Dallas Apr. 24, 2020, no pet. h.) (mem. op.).

As previously discussed, evidence offered at trial rebutted MRI's affidavit of necessity and demonstrated that MRI's charges were not reasonable. *See* TEX. PROP. CODE § 93.011(c). MRI has not identified any objections it raised in the trial court to evidence rebutting its section 18.011 affidavit. *See Bishop*, 553 S.W.3d at 671–72. Accordingly, we overrule MRI's third issue.

D. Admission of Pyatt's Exhibit 13

During trial, Pyatt offered Exhibit 13, a photograph depicting Pyatt scraping a vinyl sign off of the front door of the premises. MRI objected that the exhibit had not been produced in discovery. In its fourth issue, MRI contends that, although the record does not reflect that the exhibit was admitted into evidence, the trial court erred in considering the exhibit because it was not produced in discovery.

At trial, Ziegler testified regarding MRI's charge to remove the vinyl sign from the front door of the premises. On cross-examination, Pyatt asked Ziegler whether MRI actually removed the sign. When Ziegler responded that MRI had removed the sign, Pyatt offered the photograph of Pyatt removing the sign. MRI objected, and Pyatt responded that the photograph was being offered for impeachment. The trial court did not expressly rule on MRI's objection but

instructed Pyatt to proceed. Pyatt then questioned Ziegler on the scene depicted in the photograph. Ziegler then admitted that Pyatt scraped the sign off the door, but that MRI had to remove glue that remained after Pyatt removed the sign.

We review a trial court's evidentiary rulings for abuse of discretion. *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 906 (Tex. 2000). We must uphold the trial court's evidentiary ruling if there is any legitimate basis for the ruling. *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998). Any error in admitting evidence is cured when the same evidence comes in elsewhere without objection. *Combs v. Gent*, 181 S.W.3d 378, 385 (Tex. App.—Dallas 2005, no pet.). Unless the trial court's erroneous evidentiary ruling probably caused the rendition of an improper judgment, we will not reverse the ruling. *Malone*, 972 S.W.2d at 43; *see also* TEX. R. EVID. 103(a) ("A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party" and the party timely objects and states the specific ground for the objection).

The record reflects that Pyatt introduced the photograph only to impeach Ziegler's prior testimony that MRI had removed the sign. Pyatt does not contest MRI's contention that he did not produce the photograph during discovery. However, other evidence in form of Pyatt's own testimony that he removed the sign was admitted without objection. Thus, assuming, without deciding, that the trial court abused its discretion in admitting the photograph, the error was cured by

Pyatt's own testimony. *See Combs*, 181 S.W.3d at 385. Accordingly, we overrule MRI's fourth issue.

CONCLUSION

Having overruled all of MRI's issues, we affirm the trial court's judgment in all respects.

/s/ Robbie Partida-Kipness
ROBBIE PARTIDA-KIPNESS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

MRI PIONEER AND COLORADO INVESTMENT FUND, LP, Appellant	On Appeal from the County Court at Law No. 1, Dallas County, Texas Trial Court Cause No. CC-17-01959-A.
No. 05-18-01399-CV V.	Opinion delivered by Justice Partida-Kipness. Justices Nowell and Evans participating.
CURTIS PYATT, Appellee	

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

It is **ORDERED** that appellee CURTIS PYATT recover his costs of this appeal from appellant MRI PIONEER AND COLORADO INVESTMENT FUND, LP.

Judgment entered this 16th day of July, 2020.