Affirm and Opinion Filed July 30, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-18-00857-CV

ROY AND MILYCE PIPKIN, Appellants
V.
JACK R. GAUBERT AND BARCLAY PROPERTIES, LTD., Appellees

On Appeal from the County Court at Law No. 3
Dallas County, Texas
Trial Court Cause No. CC-17-05538-C

MEMORANDUM OPINION

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

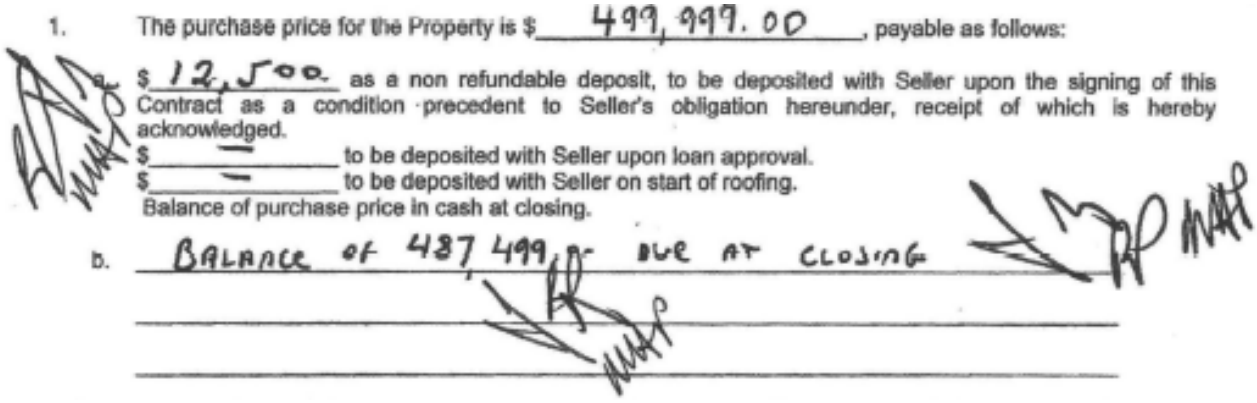
Roy and Milyce Pipkin appeal the trial court's judgment that they take nothing on their claim that Jack R. Gaubert and Barclay Properties, Ltd. (Gaubert) breached a home construction and sale contract by failing to return the Pipkins' deposit. In one issue, the Pipkins contend the evidence was legally and factually sufficient to show that Gaubert was obligated under the contract to return the deposit because the Pipkins substantially performed their contractual obligations, even though they were unable to consummate the sale due to an inadequate appraisal. We affirm the trial court's judgment.

BACKGROUND

In February 2016, the Pipkins approached Gaubert to design and build a new house for them in Eagle Point Estates of DeSoto, Texas. According to the Pipkins, Gaubert was one of the few builders allowed to construct houses in the development. The Pipkins brought Gaubert a Grand Homes promotional flyer depicting the style of house they wished to build. The Pipkins met with Gaubert's architect to develop plans from the Grand Homes's concept and paid Gaubert $1,000 for what they understood would be "a complete set [of] construction plans."

Gaubert produced preliminary plans and a features list with a contract price of $499,999 in April 2016. The Pipkins wanted to finance the purchase of the house with a Veterans Administration (VA) loan. Although they alleged that they had been pre-approved for a $500,000 loan, the Pipkins expressed concern over the price and shopped for another builder. They were unable to find another builder and returned to Gaubert in July 2016.

On July 21, 2016, the parties executed a New Residence Construction Contract based on Gaubert's preliminary plans. Paragraph one of the contract stated:


1. The purchase price for the Property is $ 499,999.00, payable as follows:

a. $ 12,500. as a non refundable deposit, to be deposited with Seller upon the signing of this Contract as a condition precedent to Seller's obligation hereunder, receipt of which is hereby acknowledged.
$ — to be deposited with Seller upon loan approval.
$ — to be deposited with Seller on start of roofing.
Balance of purchase price in cash at closing.

b. BALANCE OF 487,499.- DUE AT CLOSING

The Pipkins did not pay the $12,500 non-refundable deposit when the contract was executed.

After the parties signed the contract, the Pipkins' lender ordered an appraisal of the prospective house, and Gaubert submitted the preliminary plans to the lender and appraiser. The appraiser determined that the preliminary plans were not sufficient to meet the VA's appraisal requirements and requested more detailed design documents from Gaubert to include plans for the exterior, elevations, foundation, roof, wall details, and a code requirement certification (final construction drawings). Gaubert informed the Pipkins that the appraiser would not perform the appraisal without final construction drawings and that he could not prepare the drawings without payment of the $12,500 non-refundable deposit. The Pipkins paid the deposit, and Gaubert drafted the final construction drawings and submitted them to the appraiser. Gaubert paid $2,500 of the deposit as earnest money to the owner of the lot on which the house was to be built, and the remainder was used to produce the drawings.

The house appraised for $455,496 on September 8, 2016. The Pipkins requested a reappraisal, and the appraiser revised the appraisal to $459,500 on October 7, 2016. Given the house did not appraise for the sale price, the Pipkins attempted to terminate the contract and asked Gaubert for the plans he had drafted. Gaubert claims he offered the hardcopies of the plans but refused to provide the computer files because of copyright concerns. The Pipkins took the hardcopy plans

to another builder, DC Texas Designs (DC Texas), who built the Pipkins house on the same lot Gaubert helped them purchase.

The Pipkins filed suit in small claims court, seeking return of the "$10,000 non-refundable deposit," comprising the portion of the $12,500 deposit not used to purchase the lot. As grounds for their claim, the Pipkins alleged that Gaubert had "revised the contract to show the deposit was to be deducted from the contract price, therefore cancelling the non-refundable deposit," and that Gaubert "refused to return our deposit. . . . ." Following a bench trial, the small claims court issued judgment for the Pipkins, ordering Gaubert to pay $10,000 and court costs. Gaubert timely appealed to the county court at law. The county court at law issued a take nothing judgment in Gaubert's favor. This appeal followed.

STANDARD OF REVIEW

The Pipkins contend in their pro se brief that the evidence presented to the county court at law was sufficient to establish each element of their breach of contract claim against Gaubert. The Pipkins pray this Court will reverse the trial court's judgment and either remand for a new trial or render judgment in the Pipkins' favor.[1] We treat the Pipkins' argument as a legal and factual sufficiency challenge.

[1] When a case is appealed from small claims court to county court, it is tried de novo "as if there had been no previous trial." TEX. R. CIV. P. 506.3. Consequently, our use of the term "trial court" refers to the county court at law, not the small claims court.

"When a party attacks the legal sufficiency of an adverse finding on an issue on which she has the burden of proof, she must demonstrate on appeal that the evidence establishes, as a matter of law, all vital facts in support of the issue." *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001). We must first examine the record for evidence that supports the finding, while ignoring all evidence to the contrary. *Id*. If there is no evidence to support the finding, we review all the evidence to determine whether the contrary proposition is established as a matter of law. *Id*.; *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989). The issue should be sustained "only if the contrary proposition is conclusively established." *Francis*, 46 S.W.3d at 241–42.

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. *Crosstex N. Tex. Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580, 615 (Tex. 2016); *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.). When, as here, trial is held to the bench and the trial court does not issue findings of fact or conclusions of law, the trial court's judgment implies all findings of fact necessary to support it. *Spir Star AG v. Kimich*, 310 S.W.3d 868, 871–72 (Tex. 2010); *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002).

ANALYSIS

In one issue, the Pipkins contend the trial court erred by entering a take-nothing judgment on their breach of contract claim because the evidence was sufficient to establish each element of their claim. Gaubert argues that the parties entered into a binding contract under which the Pipkins' deposit was non-refundable. Gaubert further argues that the evidence establishes that Gaubert used the Pipkins' deposit to produce the final construction drawings that the Pipkins later used to build the house in which they currently live. Thus, Gaubert did not breach the contract by retaining the deposit, and the Pipkins likewise suffered no injury.

The elements of a breach of contract claim are (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages to the plaintiff resulting from that breach. *Woodhaven Partners, Ltd. v. Shamoun & Norman, L.L.P.*, 422 S.W.3d 821, 837 (Tex. App.—Dallas 2014, no pet.). Gaubert contends that the Pipkins' original petition fails to allege a breach of contract claim. Yet, Gaubert did not file a special

exception. "When a party fails to specially except, courts should construe the pleadings liberally in favor of the pleader." *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 897 (Tex. 2000).

Although not the picture of clarity, the Pipkins' pro se petition alleges a contract existed between themselves and Gaubert, they tendered performance by paying the deposit, Gaubert breached the contract by revising it and refusing to return the deposit under the terms of the revised contract, and they suffered monetary damages by having to pay DC Texas for additional plans. The record further demonstrates that Gaubert understood the nature of the Pipkins' claim. Consequently, we conclude the Pipkins' petition gave Gaubert fair notice of the Pipkins' claim and the facts in support of that claim. *See Auld*, 34 S.W.3d at 896 (the fair-notice pleading standard "looks to whether the opposing party can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant"); TEX. R. CIV. P. 45(b).

The parties do not contest whether a valid contract existed or that the Pipkins paid the $12,500 deposit under the terms of that contract. The only contested matter, aside from damages, is whether Gaubert could retain $10,000 of the deposit after the contract was terminated. The Pipkins contend that they performed under the contract by paying the deposit and Gaubert breached the contract by retaining the deposit after the planned house did not appraise for the sale price. Gaubert contends that the sale was not contingent upon the appraisal, but that his obligation to begin

construction was contingent on the Pipkins' ability to obtain financing. Because they failed to obtain financing, Gaubert had no obligation to return the non-refundable deposit. Gaubert further contends that the Pipkins received value for their deposit in the form of the construction drawings they took to DC Texas, who constructed a house substantially similar to that designed by Gaubert.

A. Performance

To prevail on their breach of contract claim, the Pipkins had to prove they either "performed or tendered performance under the contract." *Krayem v. USRP (PAC), L.P.*, 194 S.W.3d 91, 94 (Tex. App.—Dallas 2006, pet. denied). The trial court determines what conduct the contract requires of the parties. *Orix Capital Mkts., L.L.C. v. Wash. Mut. Bank*, 260 S.W.3d 620, 623 (Tex. App.—Dallas 2008, no pet.). When the evidence of a party's conduct under a contract is undisputed, the trial court must determine whether it shows performance or breach of a contract obligation. *Id*.

The parties executed what appears to be a form contract of sale. Although the contract contains a third-party financing contingency provision, which would have permitted the return of the Pipkins' non-refundable deposit, the provision was marked out with an "x," and the blanks for pre-approved loan amount and timeframe for securing the loan were left empty. *See Fischer v. CTMI, L.L.C.*, 479 S.W.3d 231, 237 (Tex. 2016) (a contract must be "definite and certain as to those terms that are 'material and essential' to the parties' agreement"); *Learners Online, Inc. v. Dallas*

Indep. Sch. Dist., 333 S.W.3d 636, 643 (Tex. App.—Dallas 2009, no pet.) ("'Essential terms' of a contract may include time of performance, price to be paid, [or] work to be done. . . ."). Furthermore, the provision expressly states that it is applicable only "[i]f a part of the purchase price is to be paid from the proceeds of a loan," but the contract contains no provision for payment of the purchase price from loan proceeds. Additionally, the parties chose not to make any portion of the deposit due upon loan approval, although the form contract has a blank for such a provision. Instead, the contract expressly states the Pipkins' $12,500 deposit is non-refundable and that the "[b]alance of the purchase price" was due "in cash at closing." When read in the context of the contract as a whole, it is apparent the parties' agreement did not include the contract's third-party financing contingency provision. *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).

The parties agree, however, that the contract includes provisions governing the timing of Gaubert's performance and dictating other situations in which a deposit could be refunded. Paragraph twelve of the contract required Gaubert to begin construction within seven days after the parties approved the complete plans, appropriate building permits had been obtained, and the Pipkins "obtained permanent financing acceptable to [Gaubert]." Paragraph seventeen allowed the Pipkins to terminate the contract and receive a full refund of all money previously

deposited with Gaubert if Gaubert failed to consummate the contract, except for permitted reasons that included the Pipkins' default. Inversely, Gaubert could terminate the contract under paragraph nineteen and "retain all money previously deposited by [the Pipkins] as liquidated damages" if the Pipkins defaulted or failed to consummate the contract, except for permitted reasons that included Gaubert's default.

The Pipkins argue on appeal that they fulfilled paragraph twelve's requirement when they were "pre-approved for the loan to purchase the . . . proposed construction." At trial, the Pipkins repeatedly testified that they were "preapproved through [their] lender for half a million dollars." Lindsey Snook, the lender's transaction coordinator, testified, however, that the lender would not make the loan unless the house appraised for the sale price, which included the cost of the land. Thus, the evidence indicated that the Pipkins' pre-approval related to their personal financial condition and not the value of the house. Without an appraisal equal to the sale price, the Pipkins' lender would not loan the money. The Pipkins received two appraisals, neither of which met the sale price. Thus, the record does not reflect evidence that the Pipkins "obtained permanent financing" for the sale. As a matter of law, then, Gaubert was not obligated to begin construction and was permitted under paragraph nineteen to terminate the contract and retain the Pipkins' deposit as liquidated damages. *See Orix Capital Mkts.*, 260 S.W.3d at 623.

B. Breach

The Pipkins also had to prove that Gaubert breached the contract by failing or refusing to perform an act that he expressly promised to do. *Halmos v. Bombardier Aerospace Corp.*, 314 S.W.3d 606, 620 (Tex. App.—Dallas 2010, no pet.). The Pipkins contend that Gaubert breached the contract by making changes to the house plans without the Pipkins' authorization and these alleged changes increased the sale price. According to the Pipkins, Gaubert could not make any changes to the house plans without a written request to the Pipkins. The Pipkins cite language contained in paragraph three of the contract, which states that all change orders must be in writing, approved by both parties, and state any increase in the sale price. The Pipkins, however, do not refer the Court to evidence supporting their contention that Gaubert changed the house plans after the contract was executed, and our review of the record has not uncovered any such evidence.

The evidence presented at trial reflects that Gaubert initially drafted preliminary plans for the Pipkins in April 2016. The contract reflecting a sale price of $499,999 was executed on July 21, 2016. Ten days later, on August 1, 2016, the Pipkins paid the $12,500 deposit. The parties offered differing testimony as to what happened between the time the contract was executed and when the Pipkins paid the deposit.

Gaubert testified that he submitted the preliminary plans to the appraiser shortly after the contract was executed. The appraiser then contacted Gaubert to say

that the VA required final construction drawings to perform an appraisal. Gaubert met with the Pipkins to discuss this issue and collect the deposit if they wished to proceed. They agreed and paid the deposit. Gaubert then prepared and submitted the requested final construction drawings to the appraiser. Consistent with Gaubert's testimony, Gaubert offered into evidence design plans dated August 10, 2016, and foundation plans and a first-floor shear wall plan dated August 30, 2016. Gaubert also paid $2,500 of the deposit as earnest money to the owner of the lot on which the house was to be built.

The Pipkins testified that Gaubert was only securing the lot during this time. According to Mrs. Pipkin, "[T]hat's why we were called, come write the check for $12,500, 10 [$10,000] for his deposit, 25 [$2,500] for the deposit for the lot." Consistent with both parties' testimony, the Pipkins offered into evidence a check written on August 5, 2016, from Gaubert to Capital Title of Texas for a lot at Eagle Point Estates. The Pipkins offered no other evidence regarding the period between contract execution and their deposit payment. Nor did they offer any evidence regarding the appraiser's rejection of Gaubert's preliminary plans or Gaubert's alleged plan modifications, or any evidence reflecting an increase in the sale price above the $499,999 quoted in the July 21, 2026 contract.

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 Gaubert's testimony, and we will not substitute our judgment for that of the trial court. *See id.* Regardless, the evidence presented showed only that Gaubert provided more detailed plans, as required by the VA, and there is no evidence in the record that Gaubert changed the plans as the Pipkins contend. *See Francis*, 46 S.W.3d at 241 (in a legal sufficiency challenge by the party with the burden of proof, appellant must demonstrate that the evidence establishes all vital facts in support of the issue as a matter of law).

C. Damages

To recover damages for breach of contract, a plaintiff must show that it suffered a pecuniary loss as a result of the breach. *Multi-Moto Corp. v. ITT Commercial Fin. Corp.*, 806 S.W.2d 560, 569 (Tex. App.—Dallas 1990, writ denied); *AZZ Inc. v. Morgan*, 462 S.W.3d 284, 289 (Tex. App.—Fort Worth 2015, no pet.). The Pipkins claim that Gaubert did not provide his plans to them. Thus, the Pipkins contend that they suffered a pecuniary loss by forfeiting "their $10,000 deposit/down-payment" to find another builder and pay for a new set of house plans.

At trial, Gaubert testified that he used $10,000 of the Pipkins' deposit to produce the final construction drawings required by the VA. Ordinarily, he would not produce those drawings until later, but the Pipkins could not obtain an appraisal without them. Thus, he asked for the deposit before he ordinarily would.

The Pipkins testified that they asked Gaubert for the plans, but he declined. Gaubert testified, however, that he offered the plans to the Pipkins. Specifically,

Gaubert claimed that the Pipkins asked for a refund when it became apparent they could not get an acceptable appraisal. Gaubert said that he could not refund the money, but he offered to give them the plans. He explained further that he could not provide the computer files containing the plans due to copyright concerns, but that he could provide the hardcopies of the plans. Evidence offered by Gaubert showed the house DC Texas constructed was very similar to that reflected in Gaubert's design documents. Moreover, Mr. Pipkin later testified that he did receive the hardcopies, which he took to DC Texas, who ultimately constructed the Pipkins' house on the lot Gaubert helped secure. Consequently, we conclude that the Pipkins failed to produce more than a scintilla of evidence to show they suffered a pecuniary loss as a result of Gaubert's refusal to return their deposit. *See Gardiner*, 505 S.W.3d at 613 (evidence is not legally sufficient unless it constitutes more than a scintilla of evidence on which a reasonable fact-finder could find the fact to be true).

On the record before us, we conclude that the evidence is legally and factually sufficient to support the trial court's judgment. *See id.* at 613, 615. Accordingly, we overrule the Pipkins' sole issue.

CONCLUSION

Appealing from the trial court's adverse judgment on their breach of contract claim, the Pipkins had the burden to demonstrate that the evidence presented at trial established all vital facts in support of their claim as a matter of law, or that credible evidence supporting the trial court's judgment is so weak or so contrary to the

overwhelming weight of all the evidence. The Pipkins have not met this burden. Accordingly, we affirm the trial court's judgment.

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

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

ROY AND MILYCE PIPKIN, Appellants No. 05-18-00857-CV V. JACK R. GAUBERT, BARCLAY PROPERTIES, LTD., Appellees	On Appeal from the County Court at Law No. 3, Dallas County, Texas Trial Court Cause No. CC-17-05538-C. Opinion delivered by Justice Partida-Kipness. Justices Nowell and Evans participating.

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

It is **ORDERED** that appellees JACK R. GAUBERT, BARCLAY PROPERTIES, LTD. recover their costs of this appeal from appellant ROY AND MILYCE PIPKIN.

Judgment entered this 30th day of July, 2020.