Affirmed and Opinion filed January 18, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-99-00697-CV

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ROBERT LEPPKE, Appellant

V.

COKINOS, BOSIEN & YOUNG, A PROFESSIONAL CORPORATION, Appellee

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On Appeal from the 281st District Court
Harris County, Texas
Trial Court Cause No. 95-03037

O P I N I O N

Robert Leppke ("Leppke"), appellant, seeks relief from an adverse judgment in favor of Cokinos, Bosien & Young ("CBY"), appellee. In five points of error, Leppke contends that the trial court erred in finding him personally liable for attorneys fees incurred by CBY in the representation of Leppke's businesses. We disagree.

In May of 1988, Cokinos, a partner with the law firm of Margraves, Kennerly & Schueler, began providing legal services to Leppke. An engagement letter dated May 10, 1988, from Cokinos to Leppke, provided: "We are pleased that you have selected our Firm to represent you in connection with the

corporate business and litigation legal matters of your Company." The letter went on to explain the fee arrangement between the parties, "You will be billed on a monthly basis for services rendered. Each billing will set forth our legal fees and the costs, disbursements and expenses incurred on your behalf during the period. Under the Firm's fee structure, the hourly rates for attorney time may vary by attorney, and the hourly fees charged for particular attorneys are available upon request." Cokinos later left Margraves, Kennerly & Schueler and formed CBY.

In 1994, CBY withdrew from any representation of Leppke and his businesses. This withdrawal of representation resulted from an outstanding balance of approximately $83,000.00 in unpaid legal fees.

In January of 1995, CBY filed a suit on sworn account against Leppke seeking to recover the liquidated sum of $83,269.00. This sum was later reduced by supplemental petition to $83,248.71. Leppke responded by filing a verified denial of the account, asserting that the amount owing was not fair, reasonable, or just. By supplemental petition, CBY later asserted the alternate theory of quantum meruit. Leppke in his original answer did not raise the defense of capacity. From the discovery initially filed in the case, it appears that Leppke's sole defense focused on the reasonableness of the fees. Leppke initially responded to certain requests for admission propounded by CBY with the following assertion: "Defendant admits he hired Plaintiff. He does not admit that he agreed to be overcharged or under represented."

Two years after litigation had commenced between CBY and Leppke, Leppke retained new counsel, and it appears a different trial strategy developed. Leppke filed an amended answer asserting for the first time the defense of capacity. In essence, Leppke alleged that he could not be individually liable for the legal fees incurred by CBY, because he was merely acting as a representative of the corporation ProMaxima when he hired CBY. Additionally, Leppke sought leave to amend his earlier responses to CBY's requests for admissions. The trial court permitted the amendment, and Leppke denied certain admissions that he responded to earlier. The case then proceeded to a bench trial.

The record at trial is replete with allegations that Leppke assumed personal liability for the legal fees incurred by CBY in its representation of ProMaxima. Beginning with the engagement letter of 1988, CBY contends that this letter evidences a legal relationship between Leppke and Cokinos. The letter opens,

"[w]e are pleased that you have selected our Firm to represent you in connection with the corporate business and litigation legal matters of your Company." CBY then points to documents that indicate an acceptance of this personal liability.

Ignoring for the moment Leppke's initial responses to CBY's request for admissions, which Leppke contends should not be considered as evidence in this case, Leppke responded to interrogatory number seven, propounded by CBY, as follows: "Defendant contends he has paid reasonable attorneys' fees for the services he was given. He believes he was overcharged on the above cases." The reference to the "above cases" is a list of cases in which ProMaxima received legal services from CBY. Further, in interrogatory number nine, Leppke is asked to describe any complaints concerning CBY's legal services. Leppke responded: "Defendant believes he was overcharged for the types of claims he assigned Plaintiff and for the method in which they were handled."

In addition to the written evidence presented at trial reflecting Leppke's personal liability for CBY's legal fees, Cokinos testified that Leppke on more than one occasion promised to pay CBY's legal fees.

> Q. Has Mr. Leppke made any offers to pay that?
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> A. Periodically, yes, up until mediation.
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> ****
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> A. Up until the mediation, he made, you know, offers to settle for amounts - - different amounts and never once really questioning work that we did and he always promised me that he would pay me and even as the bills mounted, he would always promise that he would pay me. And after the mediation, I haven't spoken with him. He got a new lawyer, and things changed a little bit.
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> Q. But he made promises to you that it would be paid, up until mediation?
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> A. Absolutely.

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Q. And did you tell Bob Leppke that in the last 30 days before the trial date, that a large amount of fees was accruing?

A. I always told him that - - yes. I mean, I'd call him up and say, "You got to get me paid. You got to get me paid." And he said, "Don't worry. I'll get you taken care of. Don't worry."

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Q. Why did you send the letter marked as Plaintiff's 9?

A. We were behind about $9,000 in payments from Bob and my partners were kind of on me to get paid and so I sent Bob a letter enclosing copies of the invoices which are invoices that are all addressed ProMaxima, Inc., attention Bob Leppke. And there are a number of invoices which show the outstanding balance.

Q. Did you talk to him after that?

A. Yeah. I called him shortly after I sent the letter and then I - - I wrote a note to my partner and my note to my partner - - B.K. B is initials for Brian Bosien. Said, "Spoke to Bob and payment forthcoming." And I initialed it G.M.C., which is my initials; and I sent this down to Brian to let him know I'm trying to get this taken care of.

Leppke, however, denied any promise to be personally liable for CBY's legal fees.

Q. Mr. Leppke, did you ever agree with anyone to be responsible for the debts of a corporation known as U.S. Fitness?

A. No.

Q. Mr. Leppke, did you ever agree with anyone to be individually responsible for the debts of ProMaxima Corporation?

A. No.

In the end, the trial court found that "Leppke retained CBY to provide legal services, that Leppke retained CBY in his individual capacity for the purpose of receiving legal advice and service individually, that Leppke agreed to pay for the services, and that services provided by CBY to any of Leppke's businesses were for Leppke's benefit, on his behalf and for which Leppke agreed to pay the fee." The trial court then concluded that "Leppke breached his express agreement with CBY to pay for legal services rendered,"and awarded CBY $20,000.00 for such breach and $7,000.00 in attorney's fees. Both Leppke and CBY filed notices of appeal.

Leppke asserts that the trial court erred: 1) in finding him individually liable in absence of a writing that satisfies the Statute of Frauds; 2) in finding that CBY was prejudiced by his amended answer; 3) in relying upon responses to requests for admissions that were later amended with leave of court; 4) in finding Leppke individually liable with no evidence, or in the alternative, insufficient evidence to support the judgment; and 5) in entering judgment on CBY's alternative claim for quantum meruit where neither pleadings, nor evidence, supported the claim. CBY's cross appeal asserts that the trial court erred in rendering judgment in the amount of $20,000.00 instead of $83,248.71.

Standard of Review

"We review the trial court's findings of fact by the same standards we use to review a jury's findings." *Marsh v. Marsh*, 949 S.W.2d 734, 739 (Tex. App.—Houston[14th Dist.] 1997, no pet.); *Zieben v. Platt*, 786 S.W.2d 797, 799 (Tex. App.—Houston [14th Dist.] 1990, no writ). When reviewing a "no evidence" or legal sufficiency challenge, we apply a two prong test. *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989); *Marsh*, 949 S.W.2d at 739; *Schwartz v. Pinnacle Communications*, 944 S.W.2d 427, 432 (Tex. App.—Houston [14 th Dist.] 1997, no pet.). First, we examine the record for any evidence that supports the challenged finding, disregarding all contrary evidence. *Marsh*, 949 S.W.2d at 739; *Zieben*, 786 S.W.2d at 690. Second, if there is no evidence to support the challenged finding, we examine the entire record to determine if the contrary proposition is established as a matter of law. *Marsh*, 949 S.W.2d at 739; *Schwartz*, 944 S.W.2d at 432.

In a factual sufficiency point of error, all of the evidence will be considered and the finding will be set aside only if the evidence is so weak, or the finding so against the great weight and preponderance of the evidence that it is clearly wrong and unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *Marsh*, 949 S.W.2d at 739; *Zieben* , 786 S.W.2d at 799.

"Our standard of review of the trial court's legal conclusions is to determine their correctness." *Marsh*, 949 S.W.2d at 739; *Zieben*, 786 S.W.2d at 799, 801-02. Upholding conclusions of law on appeal if the judgment can be sustained on any legal theory supported by the evidence. *Marsh*, 949 S.W.2d at 739.

Points of Error 1, 3, 4 and 5

In Leppke's first, third and fourth points of error, Leppke asserts that the trial court erred in finding him individually liable. Specifically, point of error one argues that Leppke's alleged oral promise to pay CBY's legal fees, constituted a promise to pay the debt of another, and fails to comply with the Statute of Frauds. Point of error four asserts that the trial court erred in finding that Leppke retained CBY in his individual capacity. Both points of error, one and four, necessarily require us to examine the evidence considered by the trial court, including that evidence contested in Leppke's third point of error. In point of error three, Leppke argues that the trial court improperly considered responses to requests for admissions that were later amended with leave of court.

Beginning with Leppke's third point of error, the trial court did not err in considering his initial responses to requests for admissions that were later amended. "Admissions by a party which have been abandoned may be used in evidence as an admission against interest, but they are not conclusive against the pleader." *Valadez v. Barrera*, 647 S.W.2d 377, 382 (Tex. App.—San Antonio 1983, no writ). This abandoned admission remains a statement seriously made. *Id*. at 382. If the abandoned pleading is inconsistent with the party's present position at trial, then the abandoned pleading is admissible and receivable into evidence as an admission. *Westchester Fire Ins. Co. v. Lowe*, 888 S.W.2d 243, 250 (Tex. App.—Beaumont 1994, no writ).

We conclude that Leppke's initial responses to requests for admissions propounded by CBY were

inconsistent with his position at trial. In response to requests for admissions one through nine, Leppke responded: "Defendant admits he hired Plaintiff. He does not admit that he agreed to be overcharged and under represented." The language used by Leppke clearly and unequivocally reflects that Leppke was the person being charged and represented by CBY. This position is contrary to Leppke's position at trial, where he asserts he merely acted as a representative of ProMaxima in retaining CBY, and never sought representation from CBY in his individual capacity. Accordingly, we overrule Leppke's third point of error.

Moreover, examining the record in its entirety, there is both legally and factually sufficient evidence to support the trial court's finding that Leppke retained CBY in his individual capacity for the purpose of receiving legal services. Aside from the 1988 engagement letter reflecting an attorney client relationship between Lempke and Cokinos, and Leppke's initial responses to CBY's requests for admissions, Cokinos testified at trial:

> Q. Now, I've seen different company names: Promaxima, U.S. Fitness. I guess it was really those two names. What was your understanding of Bob's involvement with those companies?
>
> A. Bob's position was those are just vehicles that he did business through. He was - - he was the guy in charge. He wasn't - - in fact, he said he wasn't president of ProMaxima, that somebody else was, because U.S. Fitness had filed bankruptcy and they had transferred all the assets to ProMaxima and they were doing business. I wasn't involved in that. It was another bankruptcy lawyer.
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> But when I started questioning him about, you know, who's in charge, it was always, "I'm in charge. You report to me. This is my - - these are my activities. These are my dealings," you know, "You don't worry about anybody but talking to me because it's my business, and I want you to handle it."

Clearly, more than a scintilla of evidence of probative force supports the trial court's finding that Leppke retained CBY in his individual capacity. Accordingly, we must reject a "no evidence" challenge to that

finding. *Schwartz*, 944 S.W.2d at 432. With regard to Leppke's factual insufficiency challenge, we recognize that Leppke testified that he never hired CBY in his individual capacity. Furthermore, the testimony at trial indicates that ProMaxima's name appeared on a majority of the invoices evidencing CBY's claim for legal fees against Leppke. This evidence, however, fails to establish that the trial court's finding is "so against the great weight and preponderance of the evidence that it is clearly wrong and unjust." *Zieben v. Platt*, 786 S.W.2d 797, 799 (Tex. App.—Houston [14th Dist.] 1990, no writ). Accordingly, we overrule Leppke's fourth point of error.

Having determined that the evidence supports the trial court's finding that Leppke retained CBY in his individual capacity, we next address Leppke's contention that the Statute of Frauds prevents holding Leppke individually liable.

Leppke, in his first point of error, asserts that any oral promise he made to CBY, in his individual capacity, to pay the debt of ProMaxima, is unenforceable under the Statute of Frauds. Specifically, Leppke contends that the Statute of Frauds renders unenforceable any promise by one person to answer for the debt of another unless the agreement is in writing and is signed by the person charged with the promise. TEX. BUS. & COM. CODE ANN. § 26.01(b)(2) (Vernon 1987). The parties agree that no writing, signed by Leppke, exists that reflects Leppke's oral promise to pay CBY's legal fees. CBY, however, asserts that the "main purpose doctrine" is applicable to remove Leppke's oral promise from the reach of the Statute of Frauds. "To take the oral promise out of the Statute, the promisor must be bargaining for a consideration that is beneficial to him and constitutes his primary object." *Ludlow v. DeBerry*, 959 S.W.2d 265, 274 (Tex. App.—Houston [14 th Dist.] 1998, no pet.).

In applying the main purpose doctrine, courts must make the following inquiries: 1) did the promisor intend to accept primary responsibility to pay the debt; 2) was there consideration for the promise to pay; and 3) is the consideration for the promise to pay the sort of consideration to take the promise to pay out of the Statute of Frauds. *Haas Drilling Co. v. First National Bank*, 456 S.W.2d 886, 890 (Tex. 1970); *Ludlow*, 959 S.W.2d at 274. Consideration is sufficient to take a promise to pay the debt of another out of the Statute of Frauds when: 1) as part of the consideration, a benefit accrues to the

promisor personally; and 2) obtaining this benefit was the main purpose of the promisor to make the promise. *Haas Drilling Co.*, 456 S.W.2d at 891; *Ludlow*, 959 S.W.2d at 274.

Leppke asserts that because he allegedly made this promise to pay as a representative of ProMaxima, no benefit can accrue to him personally unless CBY pierces the corporate veil. We disagree.

"'[W]here the stockholders and directors are the moving force in the corporation, and their main purpose was to subserve their own purpose and promote their financial gain, an oral promise made by one of this class can be categorized as original and not within the statute.'" *Ludlow*, 959 S.W.2d at 274 (quoting *Dyer v. A-I Automotive, Inc.*, 743 S.W.2d 685, 687 (Tex. App.—El Paso 1987, no writ)). "The amount of stock owned, controlled, and personal benefit are cogent considerations in arriving at the factual concept of main purpose." *Dyer*, 743 S.W.2d at 687. Additionally, the Fifth Circuit, applying Texas law, determined that the main purpose doctrine applied to facts similar to the present case.

In *Pravel, Wilson & Matthews v. Voss*, a law firm provided legal services to V&S Ice Machine Company at the request of a stockholder. 471 F.2d 1186, 1187 (5th Cir. 1973). The law firm, upon being instructed that this stockholder would not pay for their services, contacted the president of the corporation, who they were told made all the corporation's decisions. *Id*. at 1188. During the course of the law firm's representation of V&S Ice Machine Company, the president of the corporation stated, "that he was willing to spend as much as twenty-five thousand dollars in attorneys' fees because he expected that the litigation would yield a 'return' of several hundred thousand dollars to him." *Id*. Moreover, the president of the corporation told one of the attorneys representing the corporation "that he would 'take care' of the fee." *Id*. Lastly, when the law firm informed the president of the corporation that they were looking to him personally for payment, the president did not contest his personal liability. *Id*. The court in *Voss* found that "the record compels the conclusion that the promisor could have been acting only to protect his personal interests." *Id*. at 1189. We find the record in our case no less compelling.

From the evidence we previously examined, an oral promise by Leppke to pay the legal fees incurred by CBY clearly existed. The question we must determine is whether the evidence at trial supports the trial court's finding that "services provided by CBY to any of Leppke's businesses were for Leppke's

benefit . . . ." We find that it does.

Leppke's initial response to CBY's requests for admissions reflects that he was the one "under represented" and "overcharged" by CBY. The logical inference to draw from this response is that the legal services provided by CBY were for Leppke's, not ProMaxima's, benefit. This is supported by the fact that Leppke owns 100% of ProMaxima, and testified at trial that he agreed to settle a case in which ProMaxima was involved for $20,000.00 because he "needed the money - a bunch of money to - or ProMaxima needed a bunch of money." The record establishes that Leppke was the moving force in ProMaxima, and his main purpose was to subserve his own purpose and promote his financial gain. *See Ludlow v. DeBerry*, 959 S.W.2d 265, 274 (Tex. App.—Houston [14th Dist.] 1998, no pet.). Leppke's oral promise to pay CBY's legal fees does not fall within the Statute of Frauds. *See id*. Accordingly, we overrule Leppke's first point of error. Moreover, having determined that the trial court did not err in finding Leppke individually liable for the legal fees incurred by CBY as a result of Leppke's breach of an express agreement to pay for the services CBY provided, we need not address Leppke's fifth point of error, that the trial court erred in finding Leppke individually liable under the alternate theory of quantum meruit.

Point of Error 2

In Leppke's second point of error, he alleges that the trial court erred in finding that his amended answer prejudiced CBY. While the trial court did make this finding in its finding of fact and conclusions of law, Leppke presented no evidence on how he had been harmed by this finding. The issue of capacity, or Leppke's individual liability for the legal fees, was clearly tried to the bench. Both sides put on evidence, that either supported a finding of individual liability for the legal fees incurred, or did not support such a finding. Leppke has failed to demonstrate that he suffered any harm as a result of the trial court's finding that his amended answer prejudiced CBY. We, therefore, overrule Leppke's second point of error.

CBY's Cross Appeal

On cross appeal, CBY asserts that the trial court erred in rendering judgment for CBY in the amount of $20,000, in light of the alleged "uncontroverted" evidence establishing the amount of unpaid legal

fees to be $83,248.71 as a matter of law. We disagree.

The trial court concluded that Leppke breached his express agreement with CBY to pay for legal services rendered, and as a result of this breach, CBY should recover the sum of $20,000.00. These conclusions were drawn from the trial court's finding that the damages for Leppke's breach of contract and CBY's suit on sworn account were $20,000.00.

To support a prima facie case in a suit on a sworn account the movant must strictly follow the provisions outlined in Rule 185 of the Texas Rules of Civil Procedure. *Powers v. Adams*, 2 S.W.3d 496, 498 (Tex. App.—Houston [14th Dist.] 1999, no pet.); *Andrews v. East Texas Med. Ctr.-Athens*, 885 S.W.2d 264, 267 (Tex. App.—Tyler 1994, no writ). Under Rule 185, a plaintiff's petition must contain: 1) a systematic, itemized statement of the goods or services sold; 2) all offsets made to the account; and 3) an affidavit stating the claim is within the affiant's personal knowledge, and that the claim is just and true. TEX. R. CIV. P. 185; *Powers*, 2 S.W.3d at 498; *Andrews*, 885 S.W.2d at 267.

The defendant in response, can file a written denial supported by an affidavit denying the account. *Powers*, 2 S.W.3d at 498; *Andrews*, 885 S.W.2d at 267. "Where a defendant files a sworn denial of the plaintiff's account in the form required by rule 185, the evidentiary effect of the itemized account is destroyed and the plaintiff is forced to put on proof of its claim." *Powers*, 2 S.W.3d at 498; *Livingston Ford Mercury, Inc. v. Haley*, 997 S.W.2d 425, 430 (Tex. App.—Beaumont 1999, no pet.).

CBY utilized the procedural advantages of Rule 185 to recover unpaid legal fees for services rendered to Leppke. *See Powers*, 2 S.W.3d at 499. Leppke, in turn filed a proper verified denial under Rule 185, thus destroying the evidentiary effect of CBY's sworn account, and requiring CBY to put on proof of its claim. *Haley*, 997 S.W.2d at 430. CBY, therefore, had to establish at trial: 1) a sale and delivery of services; 2) that the prices for the services provided were pursuant to an agreement or, in absence of an agreement, were ususal, customary, and reasonable; and 3) that the purchase price remains unpaid by defendant. *Powers*, 2 S.W.3d at 499; *Andrews*, 885 S.W.2d at 266.

The trial court, being the trier of fact, had the obligation of determining whether CBY met its burden as to each of these elements. The trial court concluded, from the evidence, that $20,000.00 was

reasonable for the legal services provided by CBY. The record reveals no agreement between CBY and Leppke detailing the prices for the legal services provided, and no hourly rate can be determined from the evidence CBY produced at trial. Leppke testified that he was displeased with the services provided by CBY, and the record reflected that a suit brought against former employees of Leppke, in which CBY billed approximately $69,000.00, settled at mediation for $20,000.00. We believe that the trial court's challenged finding of $20,000.00 finds support in the record. Moreover, the record fails to support that $83,248.71 was established as a matter of law. Accordingly, we overrule CBY's sole point of error.

Having overruled all of Leppke's and CBY's points of error, we affirm the judgment of the trial court.

/s/ Paul C. Murphy
Chief Justice

Judgment rendered and Opinion filed January 18, 2001.

Panel consists of Chief Justice Murphy and Justices Yates and Fowler.

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