

Affirmed and Majority and Concurring Opinions filed September 20, 2001.



In The

Fourteenth Court of Appeals

NO. 14-00-01473-CV

ALLAN EDWARDS, INDIVIDUALLY AND D/B/A ALLAN EDWARDS BUILDERS, and MEMORIAL CUSTOM BUILDERS, INC., Appellants

V.

ATOM AIR CONDITIONING & HEATING, INC., Appellee

**On Appeal from the County Civil Court at Law No. 1
Harris County, Texas
Trial Court Cause No. 718,596**

MAJORITY OPINION

A residential homebuilder appeals an adverse judgment in favor of a sub-contractor in a suit involving competing breach of contract claims arising from an agreement to install heating and air conditioning (“HVAC”) systems. We affirm.

Background

Atom Air Conditioning & Heating, Inc. entered into an agreement with Memorial Custom Builders, Inc. d/b/a Allan Edwards Builders (“Memorial”) to install HVAC systems in two residential properties being built by Memorial. Atom completed the initial “rough-

in”¹ stage of the installation at both residences and was paid an agreed percentage of the contract price. A disagreement arose between the parties, however, and Memorial ultimately hired a different sub-contractor to complete the work at both residences.

Atom filed suit, seeking recovery of damages for the “materials and/or services” it allegedly provided at each residence, but for which it was not paid. Memorial counterclaimed, asserting breach of contract, deceptive trade practices, fraud, and negligent misrepresentation. Following a bench trial, the trial court entered judgment in favor of Atom for \$3,830.75, plus interest and attorneys’ fees, and ordered that Memorial take nothing on its counterclaims. The court subsequently made findings of fact and conclusions of law in support of its judgment.

Memorial raises three issues on appeal: (1) whether Atom’s incorrect specifications for the component parts of one of the systems constituted a breach of the contract, thus preventing it from enforcing the contract against Memorial; (2) whether the trial court erred in excluding, as hearsay, testimony about certain statements made by Atom’s president; and (3) whether the evidence established a breach of contract by Atom that excused Memorial from further performance.

Atom’s Specifications

Memorial first argues that the trial court erred by failing to find Atom breached the parties’ agreement based on an alleged deficiency in one of the proposals delivered to Memorial by Atom. According to Atom’s president, Memorial provided Atom with blueprints for the two residences and requested Atom to bid on the job. Atom submitted proposals for both houses, which included the size of the proposed system, specifications for the necessary equipment, and price. Memorial then told Atom to begin work on both

¹ Atom’s president, Sam Tavor, explained when installing an HVAC system for a new home, the job is typically divided into two stages – the “rough-in” stage, in which Atom would install the furnace, evaporator coils, refrigeration lines, duct work, and thermostat wire inside the house; and the “finishing” stage, in which Atom would install the outside condensing unit, charge it with Freon, and start up the system.

residences. Memorial asserts that the equipment specified in Atom's proposal for one of the houses was not sufficient to support the overall size of the HVAC system. Memorial claims that Atom breached the contract by failing "to properly identify the necessary materials to correctly perform and install the HVAC systems under the parties' contract," and that this breach prevents Atom from enforcing the contract. We disagree.

Breach of a contract occurs when a party fails or refuses to do something he has promised to do. *Townwest Homeowners Ass'n v. Warner Communication Inc.*, 826 S.W.2d 638, 640 (Tex. App.–Houston [14th Dist.] 1992, no writ). Nothing in the record suggests that Atom ever promised, as part of its contract with Memorial, to identify accurately in its proposal the specific equipment it intended to install. Accordingly, Atom's alleged failure is not a breach of the parties' agreement. Memorial's first issue is overruled.

Exclusion of Testimony

In his second issue, Memorial contends the trial court erred by excluding certain testimony from Memorial's owner, Allan Edwards, about statements allegedly made by Sam Tavor, Atom's president. At trial, Edwards was asked about a telephone conversation with Tavor shortly after Edwards learned that the materials specified in one of Atom's proposals were insufficient to provide the required level of service. The court prevented Edwards from testifying about statements made by Tavor on the basis of hearsay. However, under the Texas Rules of Evidence, a statement by a party's authorized representative offered against that party is an admission by party-opponent, which is not hearsay. TEX. R. EVID. 801(e)(2). Edwards's testimony should not have been excluded on the basis of hearsay.

Although we find evidentiary error, to obtain a reversal of the trial court's judgment, Memorial must prove that this error "probably resulted in an improper judgment." *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 753 (Tex. 1995). To meet this standard, the complaining party usually must show that the judgment turns on the particular evidence excluded. *Id.* at 753-54. Edwards apparently would have testified that Tavor was

demanding more money from Memorial and that Atom refused to finish the installation work in accordance with the parties' contract. Memorial contends that this testimony refutes Atom's claim that Memorial breached the contract by refusing to allow Atom to complete the installation. Although Edwards was unable to testify about Tavor's direct statements, he was permitted to testify without objection that he determined from his conversation with Tavor that Atom was seeking an additional \$3,000.00 to complete the installation. Furthermore, the evidence showed that shortly after this conversation, Edwards sent a letter demanding that Atom complete the installation work. Tavor responded in writing that Atom would complete the job, and that it expected payment "as per contract." Even if Edwards had been permitted to testify about Tavor's alleged statements, the trial court, as fact finder, could have found that those statements were superseded by Tavor's subsequent letter, and Atom was prepared to complete the installation as called for in the contract but for Memorial's breach.

Memorial also argues that Tavor's alleged statements provide evidence of Atom's anticipatory breach of the contract. Anticipatory breach, also known as repudiation, is a positive and unconditional refusal to perform the contract in the future, expressed either before performance is due or after partial performance. *Van Polen v. Wisch*, 23 S.W.3d 510, 516 (Tex. App.—Houston [1st Dist.] 2000, pet. denied). An alleged anticipatory breach has no effect unless it is accepted or acted on by the other party. *Townwest Homeowners Ass'n*, 826 S.W.2d at 640. A threat to repudiate a contract may be withdrawn unless the party entitled to performance accepts the repudiation or shows that it has detrimentally relied on the threat. *Kingsbery v. Phillips Petroleum Co.*, 315 S.W.2d 561, 568 (Tex. Civ. App.—Austin 1958, writ ref'd n.r.e.). Shortly after Atom's alleged repudiation, Memorial requested in writing that Atom complete the installation job, to which Atom responded that it would. Again, even with Edwards's testimony, there was evidence in the record from which the trial court could have found that Atom's alleged refusal to perform was not so positive and unconditional as to constitute an anticipatory breach.

Memorial failed to prove that the trial court's error in excluding Edwards's testimony probably resulted in an improper judgment. Accordingly, Memorial's second issue is overruled.

Sufficiency of the Evidence

In its third issue, Memorial claims the trial court erred by entering judgment for Atom because Atom materially breached the contract, excusing Memorial from performing. We construe this issue as an attack on the trial court's finding that Memorial did not show by a preponderance of the evidence that Atom breached the contract. As our discussion above demonstrates, the evidence, including Edwards's testimony that was excluded as hearsay, was legally and factually sufficient to support this finding. We overrule Memorial's third issue.

The judgment of the trial court is affirmed.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed September 20, 2001.

Panel consists of Justices Yates, Edelman, and Wittig.

Do Not Publish — TEX. R. APP. P. 47.3(b).

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CONCURRING OPINION

Memorial's first issue complains that Atom: (1) agreed to provide an 11.5 ton capacity HVAC system; (2) specified equipment that would provide only 10.5 tons; (3) expressed an initial unwillingness to provide the 11.5 ton system for the agreed upon price; (4)

subsequently promised that it would complete the job; but (5) failed to ever contact Memorial to schedule the necessary work. Memorial claims that, after waiting nearly a month, it arranged to have the work done by someone else. Even if Atom's conduct constituted a breach of contract which excused Memorial from any obligation to allow Atom to complete the work, Memorial's brief does not explain how the amount awarded to Atom relates to the work Atom had yet to perform, as contrasted from that which it had already performed. Accordingly, I concur with the majority that Memorial's first issue affords no basis for relief.

/s/ Richard H. Edelman
 Justice

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