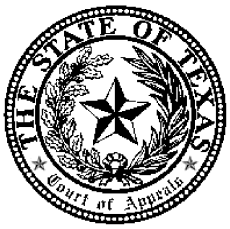
Reversed and Rendered and Opinion filed October 25, 2001.



In The

Fourteenth Court of Appeals

NO. 14-00-00422-CV

MAX KUNZ, Appellant

V.

MACHINE REPAIR & MAINTENANCE, INC. and JOHNNY GUYWSKE, Appellees

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On Appeal from the 334th District Court
Harris County, Texas
Trial Court Cause No. 97-56698

O P I N I O N

Appellant, Max Kunz ("Kunz"), appeals a jury verdict that favors appellees, Johnny Guywske ("Guywske") and Machine Repair & Maintenance, Inc. ("MRM"). In seven points of error, Kunz challenges the judgment of the trial court, while Guywske and MRM bring three cross-points of error. We reverse and render judgment.

Factual and Procedural Background

On July 27, 1996, Kunz, representing All-Tech, Inc. ("All-Tech"), entered into an earnest money contract for the purchase of MRM from Guywske, its owner, for $100,000. This contract was drafted and signed by the parties and provided that Kunz, representing All-Tech, was to pay earnest money in three installments: $5,000 on July 27, 1996; $5,000 on August 15, 1996; and $10,000 on October 15, 1996. The closing was scheduled for January 15, 1997, with the balance due at that time. Kunz made the July 27 and August 15 payments. On September 25, 1996, however, Kunz gave verbal notice to Guywske that he would not complete the sale. On October 2, 1996, Kunz sent written notice of his decision not to complete the sale and requested the return of his earnest money. On October 7, 1996, Guywske replied in writing that he intended to keep the $10,000 in earnest money already paid, as provided by the contract.

Kunz sued Guywske on November 17, 1997, alleging: (1) the earnest money contract was unenforceable for want of consideration; (2) Guywske breached the contract by failing to provide training, introduce clients, or have a line of credit; (3) the amount of earnest money was unreasonable; and (4) Guywske assaulted him during an attempted resolution of the dispute.

Guywske filed a counterclaim on September 30, 1998, alleging: (1) breach of contract for failure to pay the balance owed; (2) lost business opportunities to sell MRM to other prospective purchasers; (3) tortious interference with opportunities to sell MRM to other prospective purchasers; (4) intentional infliction of emotional distress by means of harassing, humiliating and threatening telephone calls; and (5) assault and battery.

A jury found that both Guywske and Kunz breached the earnest money contract, but that neither man assaulted the other. The jury further found $5,000 to be reasonable attorney's fees for Kunz, and $0.00 to be reasonable attorney's fees for Guywske.

Determining that both parties had prevailed, the trial court awarded attorney's fees of $5,000 for Kunz and $10,600 for Guywske. The trial court also stated that the issue regarding retention or release of the earnest money had not been submitted to the jury, but had been retained by the court. Accordingly, the court found the only contractual right to a refund was in the event Guywske refused to sell MRM to Kunz. Because Guywske did not refuse to sell the business, the trial court thus found he was entitled to retain the $10,000 in earnest money. From this judgment, Kunz appeals.

Earnest Money Contract

In his first point of error, appellant contends the earnest money contract was, on its face, invalid and unenforceable for want of consideration. Specifically, Kunz contends the contract lacked mutuality of obligation because it permitted Guywske to avoid performance without incurring liability.

A contract must be based upon a valid consideration, in other words, mutuality of obligation. *Iacono v. Lyons*, 16 S.W.3d 92, 94 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (citing *Texas Gas Util. Co. v. Barrett*, 460 S.W.2d 409, 412 (Tex.1970)). Consideration consists of benefits and detriments to the contracting parties. *In re Turner Bros. Trucking Co., Inc.*, 8 S.W.3d 370, 373 (Tex. App.—Texarkana 1999, orig. proceeding). It may consist of some right, interest, or profit, or benefit that accrues to one party, or, alternatively, of some forbearance, loss or responsibility that is undertaken or incurred by the other party. *Copeland v. Alsobrook*, 3 S.W.3d 598, 606 (Tex. App.—San Antonio 1999, pet. denied); *Solomon v. Greenblatt*, 812 S.W.2d 7, 15 (Tex. App.—Dallas 1991, no writ). "If one of the promises appears on its face to be so insubstantial as to impose no obligation at all on the promisor—who says, in effect, 'I will if I want to'—then that promise may be characterized as an 'illusory' promise, or one that is a 'promise in form but not in substance.'" *Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1311 (11th Cir.

1998) (quoting E. ALLAN FARNSWORTH, CONTRACTS § 2.13, at 75-76 (2d ed.1990)).[1] Thus, a contract that lacks consideration lacks mutuality of obligation and is unenforceable. *Copeland*, 3 S.W.3d at 606 (citing *Federal Sign v. Texas Southern Univ.*, 951 S.W.2d 401, 409 (Tex. 1997)).

Here, the "seller" is identified in the contract as "Johnny Guywske, Representing Machine Repair & Maintenance, Inc." Thereafter, Guywske also describes himself as the "owner of all outstanding stock in Machine Repair & Maintenance, Inc." As the seller, Guywske promises to "sell all outstanding stocks in Machine Repair & Maintenance, Inc.," and "all fixed Assets (Land & buildings) non-fixed Assets, Machinery, Tools & Equipment as described [in the contract]." However, the contract also provides that if Guywske, as representative of MRM, refuses to sell the assets of MRM, such refusal will cancel the entire

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[1] The Restatement of Contract Law states:

> A promise or apparent promise is not consideration if by its terms the promisor or purported promisor reserves a choice of alternative performance unless
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> (a) each of the alternative performances would have been consideration if it alone had been bargained for; or
>
> (b) one of the alternative performances would have been consideration and there is or appears to the parties to be a substantial possibility that before the promisor exercises his choice events may eliminate the alternatives which would not have been consideration.

RESTATEMENT (SECOND) OF CONTRACTS § 77 (1981). The comment following this section notes, in pertinent part:

> *a. Illusory promises.* Words of promise which by their terms make performance entirely optional with the "promisor" do not constitute a promise. . . . In such cases there might theoretically be a bargain to pay for the utterance of the words, but in practice it is performance which is bargained for. Where the apparent assurance of performance is illusory, it is not consideration for a return promise.

RESTATEMENT (SECOND) OF CONTRACTS § 77 cmt. a (1981).

contract and all earnest money will be returned to Kunz.[2] Thus, Guywske, as representative of MRM, retained the power to nullify, at his choosing, all contractual responsibilities owed to the buyer by MRM or Guywske, individually. Kunz claims, and we agree, that these provisions ensure the absence of a mutual reciprocal obligation, and the contract thus fails for want of consideration. Such an agreement is illusory, as performance is dependent upon something exclusively within the control of one of the promisors.

In *Culbertson v. Brodsky*, 788 S.W.2d 156, 157 (Tex. App.—Fort Worth 1990, writ dism'd w.o.j.), the court found a similar earnest money contract to be purely illusory. The suit was based upon a written real estate contract of sale which provided that the buyer would deliver his earnest money check to a title company. The contract required the title company to hold the check in escrow until the expiration of a sixty-day feasibility period. During the period, the buyer could conduct various tests and studies, enter the property at will, and if the property was unacceptable to him, then he, at his sole election, could terminate the agreement and demand return of the earnest money with neither party having any continuing obligation to the other. This unbridled discretion was found to render the contract unenforceable for want of consideration.

A contract in which there is no consideration moving from one party, or no obligation upon him, lacks mutuality, is unilateral, and unenforceable. *Texas Gas Utilities Co. v. Barrett*, 460 S.W.2d 409, 412 (Tex. 1970) (quoting *Texas Farm Bureau Cotton Ass'n v. Stovall*, 113 Tex. 273, 253 S.W. 1101 (1923)); *Peterson v. Dean Witter Reynolds, Inc.*, 805 S.W.2d 541, 550 (Tex. App.—Dallas 1991, no writ). Because the performance of MRM,

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[2] The Conditions of Cancellation section stated:

> Refusal to honor this contract by Johnny Guywske, [r]epresenting[] Machine Repair & Maintenance, Inc. . . . will result in the cancellation of this contract & the return of all funds (Monies) that have been destributed [*sic*] up to that time.

through its representative Guywske was entirely optional, the agreement was illusory and unenforceable. Accordingly, we sustain appellant's first point of error and overrule appellees' third cross-point.

Our disposition of the first issue makes it unnecessary to address appellant's second, third, and fourth points of error in which he claims that the amount of earnest money effects a forfeiture, and that he was discharged from further payment or performance obligations because Guywske breached or anticipatorily repudiated the contract.[3]

Attorney's Fees

In his fifth, sixth, and seventh points of error, appellant contends (1) Guywske was not entitled to recover attorney's fees when he was not the prevailing party, (2) the trial court erred in disregarding the jury award of no monies for Guywske's attorney's fees, and (3) Guywske failed to tender a proper claim for attorney's fees.

As a general rule, the amount of an award of fees rests in the sound discretion of the trial court, and its judgment will not be reversed on appeal without a clear showing of abuse of discretion. *Rowley v. Lake Area Nat'l Bank*, 976 S.W.2d 715, 724 (Tex. App.—Houston [1st Dist.] 1998, pet. denied). However, if a party does not prevail on one or more claims for which attorney's fees may be recovered, he is not entitled to an award of attorney's fees. *Aetna Cas. & Sur. v. Wild*, 944 S.W.2d 37, 41 (Tex. App.—Amarillo 1997, writ denied). "A prevailing party is 'one of the parties to a suit who successfully prosecutes the action or

[3] We also note that Kunz filed only a partial reporter's record. While this is permitted under the Texas Rules of Appellate Procedure, an appellant must first file a statement of the points or issues to be presented on appeal. TEX. R. APP. P. 34.6(c)(1). Kunz, however, did not file a complete record on appeal, or comply with the partial reporter's record provisions of Appellate Rule 34.6. Were we to address the second, third, and fourth points of error, we would have to presume the omitted portions of the reporter's record support the judgment. *See Sandoval v. Comm'n for Lawyer Discipline*, 25 S.W.3d 720, 722 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

successfully defends against it, prevailing on the main issue, even though not to the extent of its original contention.'" *Federal Deposit Ins. Corp. v. Graham*, 882 S.W.2d 890 (Tex. App.—Houston [14th Dist.] 1994, no writ) (interpreting TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (Vernon 1997)).

The jury found that both Guywske and Kunz breached the earnest money contract, and that neither assaulted the other. Recovery of attorney's fees is allowable even if the award is entirely offset by the opposing party's claim. *Whitehead v. State Farm Mut. Auto. Ins. Co.*, 952 S.W.2d 79, 89 (Tex. App.—Texarkana 1997), *rev'd on other grounds*, 988 S.W.2d 744 (Tex. 1999) (citing *McKinley v. Drozd*, 685 S.W.2d 7, 10 (Tex. 1985)). However, upon reversal of a claimant's judgment, all dependent causes of action are simultaneously defeated. *First American Title v. Willard*, 949 S.W.2d 342, 352 (Tex. App.—Tyler 1997, writ denied). The trial court's award of attorney's fees was predicated on the existence of a valid contract for the sale of MRM and its assets. Because we hold that the July 27, 1996 earnest money agreement was illusory and unenforceable for want of consideration, there was nothing upon which to base an attorney's fee award. Neither Guywske nor Kunz may recover attorney's fees.[4]

Accordingly, appellant's fifth and sixth points of error are sustained and appellees' first and second cross-points are overruled. Our disposition of these issues makes it unnecessary to address appellant's seventh point of error in which he claims that Guywske failed to make proper presentment of his claim for attorney's fees.

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[4] Although appellant complained only of the fee award given Guywske, we may also resolve the issue of whether he himself is entitled to attorney's fees. *First American Title*, 949 S.W.2d at 352 ("The assertion of a point of error is not a requisite where there has been an automatic reversal of a dependent cause of action as in the instant case"); *see also Saenz v. Fidelity & Guar. Ins. Underwriters*, 925 S.W.2d 607, 613-14 (Tex. 1996).

We reverse the judgment of the trial court and render judgment that appellant recover the $10,000 earnest money already paid Guywske, plus pre and post-judgment interest, that appellees take nothing on their counterclaims, and that no party recover attorney's fees.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed October 25, 2001.

Panel consists of Justices Anderson, Hudson, and Frost. (Anderson, J., concurs in the result only.)

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