Affirmed and Opinion filed November 9, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00565-CV

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RICK GRAHAM, Appellant

V.

GEORGE L. CONNER, JANNA A. CONNER, DOUGLAS H. CHILTON, Appellees

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On Appeal from the 122nd District Court
Galveston County, Texas
Trial Court Cause No. 97CV0253

O P I N I O N

This is an appeal from the trial court's order denying sanctions under Rule 13, of the Texas Rules of Civil Procedure, and under sections 10.001-10.002 of the Texas Civil Practice and Remedies Code. In the process of buying a new home, the Conners (the "homeowners") hired a general contractor, Appellant Rick Graham, to paint and wallpaper portions of that home. After discovering that Graham had covered extensive termite damage, the homeowners filed suit against Graham alleging violations of the Deceptive Trade Practices - Consumer Protection Act, conspiracy to disguise termite damage, unconscionable conduct, breach of the warranties of merchantability and fitness for a particular purpose,

and breach of the duty to perform in a workmanlike manner.

After the homeowners refused to non-suit him, Graham filed a "no-evidence" motion for summary judgment under Rule 166a(i) of the Texas Rules of Civil Procedure and moved for sanctions against the homeowners and/or their attorney, appellee Douglas Chilton, alleging that the pleadings filed against him were frivolous, without factual support, and in violation of Rule 13 and sections 10.001-10.002. *See* TEX. R. CIV. P. 13; TEX. CIV. PRAC. & REM. CODE ANN. §§ 10.001-10.002 (Vernon Supp. 2000). The trial court granted Graham's no-evidence motion, denied the motion for sanctions, and later dismissed Graham from the case. Graham now appeals the trial court's denial of his motion for sanctions against Chilton, arguing that the trial court's decision was an abuse of discretion and that the undisputed evidence established sanctionable conduct.

At issue in this case is whether the trial judge erred in *not* awarding sanctions. We review a trial court's decision whether to award sanctions for abuse of discretion, deferring to the trial court's factual determinations while evaluating whether the record supports the trial court's resolution of factual matters. *See Aldine Indep. Sch. Dist. v. Baty*, 999 S.W.2d 113, 115 (Tex. App.—Houston [14th Dist.] 1999, no pet.); *In re Epic Holdings, Inc.*, 985 S.W.2d 41, 56 (Tex. 1998). The test for abuse of discretion is whether the trial court acted without reference to guiding rules and principles, or equivalently, whether under all the circumstances, the trial court's action was arbitrary or unreasonable. *See Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex.1985), *cert. denied*, 476 U.S. 1159 (1986). A court acts arbitrarily or unreasonably where it bases its order on an incorrect interpretation of the law or a clearly erroneous assessment of the evidence. *See Aldine*, 999 S.W.2d at 115.

Rule 13 and section 10.001 are very similar. Both provide for sanctions where a pleading is filed for an improper purpose and lacks evidentiary basis or is not likely to have evidentiary support after reasonable investigation. *See* TEX. R. CIV. P. 13; TEX. CIV. PRAC. & REM. CODE ANN. §§ 10.001-10.002 (Vernon Supp. 2000).[1]

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[1] Section 10.002 refers to motions for sanctions and who may bring them, while section 10.001 refers to the type of conduct that is sanctionable. *See* TEX. R. CIV. P. 13; TEX. CIV. PRAC. & REM. CODE (continued...)

The trial court found, and the record supports, that pursuant to Rule 13's reasonable investigation requirement, Chilton advised his clients to hire an engineer to inspect their home, that an engineer did inspect the home and did find the walls damaged extensively by termites. The court also found that Graham did paint, putty, and paper over that damage. Finally, the trial court also found that suit was filed only after four months of research and investigation, that this investigation was reasonable, and that the homeowners' pleadings were supported by "some evidence." These factual findings must be upheld if more than a scintilla of evidence supports them. *See Stedman v. Georgetown Sav. & Loan Ass'n*, 595 S.W.2d 486, 488 (Tex. 1979).

Nothing in the record indicates that the trial court's assessment of the evidence, and consequent denial of sanctions, was erroneous in this case.[2] To the contrary, the court could have reasonably found that Chilton conducted a reasonable investigation, where he advised his clients to hire an engineer to investigate suspected termite damage before filing suit, and where he filed suit only after learning that Graham had installed wall covering directly over obvious and extensive termite damage. Finally, Chilton filed suit with the knowledge that the sellers' real estate agent, to gain financially in selling the house to the homeowners, recommended that the homeowners have the house painted and papered to improve its look and recommended Graham as someone who had previously performed good work for her.

Because we find that the trial court did not err in concluding that the pleadings filed by Chilton had evidentiary support, we need not address whether the pleadings were filed with an improper motive, a

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[1] (...continued)
ANN. §§ 10.001-10.002.

[2] Appellant's attorney, Scott Rothenberg, has alleged that appellee's attorney, Douglas Chilton, remarked as follows when Graham requested a non-suit: "I know all of the judges in Galveston County, and I am just not worried about being sanctioned." Rothenberg's careless inclusion of this extraneous allegation and his urging that "maybe [Chilton] was right" are gratuitous insults to the judiciary and violative of the Texas Disciplinary Rules of Professional Conduct. Rule 3.04(c)(2) states that a lawyer shall not "state or allude to any matter that the lawyer does not reasonably believe is relevant to such proceeding or that will not be supported by admissible evidence . . . ." And Rule 8.02(a) states that "[a] lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning . . . integrity of a judge . . . ."

finding necessary to award sanctions. We find that the trial court did not abuse its discretion in denying Graham's motion for sanctions. Accordingly, we affirm the judgment of the trial court.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed November 9, 2000.

Panel consists of Chief Justice Murphy and Justices Hudson and Wittig.

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