Affirmed and Opinion filed November 29, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00283-CV

ANCHOR, INC., Appellant

V.

LAGUNA ENTERPRISES, INC., Appellee

On Appeal from the County Civil Court at Law No. 1
Harris County, Texas
Trial Court Cause No. 671, 234

O P I N I O N

This appeal involves a suit by appellee Laguna Enterprises, Inc. to collect a debt owed by appellant Anchor, Inc. as well as counterclaims by Anchor alleging usury and violations of the Texas Deceptive Trade Practices Act ("DTPA"). Anchor challenges the trial court's order granting summary judgment on Anchor's DTPA counterclaim, the trial court's findings following a bench trial, and the trial court's admission of evidence that allegedly violated the parol evidence rule. We affirm.

FACTUAL BACKGROUND

Anchor contracted with the Houston Independent School District to construct a parking lot and make other improvements at the High School for the Performing and Visual Arts. Anchor subcontracted with Laguna for the construction of a chain-link fence at the high school. Laguna completed the chain-link fence and Anchor paid for the work. In a letter agreement signed by both Anchor and Laguna on August 22, 1995, Anchor accepted Laguna's proposal to perform additional work fabricating and installing a wrought-iron fence at the high school, and Anchor agreed to pay Laguna $12,945.48 for this work. The letter further stated that the "[p]roject must be ready to be occupied by owner by the 22 of August." However, the "22" was crossed out, "30" was written in above, and the change was initialed by authorized representatives of both Laguna and Anchor. Laguna asserts, and Anchor denies, that Anchor gave Laguna additional time to install the wrought-iron fence.

Laguna installed the wrought-iron fence in the first week of October in 1995, and Laguna submitted an invoice to Anchor for this work. Anchor tendered a check to a Laguna employee for $5,448.48, which purportedly represented the $12,945.48 contract amount minus $7,500 in liquidated damages that Anchor assessed against Laguna for failing to timely complete work on the wrought-iron fence.

Laguna disputed the assessment of liquidated damages and refused to cash the check. Laguna sued Anchor to recover the amount owed by Anchor. Anchor filed a counterclaim alleging, among other things, usury and DTPA violations. The trial court granted Laguna's motion for summary judgment and dismissed Anchor's DTPA counterclaim. After a bench trial, the court rendered judgment in favor of Laguna for $12,945.48, plus attorney's fees and prejudgment interest. The trial court also issued findings of fact and conclusions of law.

ISSUES PRESENTED FOR REVIEW

On appeal, Anchor asserts: (1) because Anchor is a consumer under the DTPA, the trial court erred in granting Laguna's motion for summary judgment as to Anchor's DTPA

counterclaim; (2) the evidence is legally and factually insufficient to support the trial court's finding that there is no factual basis for Anchor's usury claim; (3) the trial court erred in making its findings of fact and conclusions of law because they are conflicting and prevent Anchor from properly presenting its case on appeal; and (4) the trial court erred in admitting parol evidence regarding an agreement by Anchor allegedly extending Laguna's time to perform under the parties' contract.

Is Anchor a consumer under the DTPA?

In its first issue, Anchor claims the trial court erred by granting Laguna's motion for summary judgment on Anchor's DTPA counterclaim because the summary-judgment proof established that Anchor is a DTPA consumer. In its counterclaim, Anchor made the following allegations: (1) after Laguna had already completed the construction of the wrought-iron fence under its contract with Anchor and as a result of Laguna's delay in completing this construction, Anchor incurred liquidated damages; (2) Laguna made representations to Anchor that Oscar Laguna, Jr. was authorized to enter into agreements regarding the amount owed by Anchor and that Laguna, Jr. was authorized to sign releases on behalf of Laguna; (3) Laguna's representations were false, misleading, and deceptive; (4) Anchor presented a check to Laguna for $5,445.48; (5) as a proximate result of this fraud Anchor suffered $20 in actual damages because it had to pay this amount to its bank to stop payment on this check. In its petition on file at the time that the trial court granted summary judgment, Anchor did not allege that any of this allegedly fraudulent conduct violated the DTPA. We presume that these allegations were sufficient to allege a DTPA violation; however, we conclude that the trial court correctly granted summary judgment as to these claims because Anchor is not a DTPA consumer.

Whether Anchor is a consumer under the DTPA is a question of law. *Wright v. Gundersen*, 956 S.W.2d 43, 47 (Tex. App.—Houston [14th Dist.] 1996, no writ). To be a "consumer": (1) the party must have sought or acquired goods or services by purchase or lease; and (2) the goods or services purchased or leased must form the basis of the complaint.

Cameron v. Terrell & Garrett, Inc., 618 S.W.2d 535, 539 (Tex. 1981). "If either requirement is lacking, the person aggrieved by a deceptive act or practice must look to the common law or some other statutory provision for redress." *Id.*

Anchor asserts that its purchase of goods and services from Laguna for the installation of the wrought-iron fence forms the basis of Anchor's DTPA claim for the $20 stop-payment charge from its bank. We disagree. Before the alleged DTPA violations by Laguna occurred, both of the following had already happened: (1) Anchor had purchased the goods and services relating to the installation of the wrought-iron fence and (2) Laguna had installed the wrought-iron fence and had provided all of the goods and services necessary to properly install this fence. In its DTPA claim, Anchor does not complain in any way about the quality of the goods and services provided by Laguna. Rather, Anchor asserts that Laguna misrepresented the authority of one of its employees to negotiate and enter into an accord regarding Anchor's indebtedness to Laguna. Even if Anchor's petition sufficiently pleaded DTPA violations regarding these alleged misrepresentations, the goods and services provided by Laguna are ancillary to Anchor's DTPA complaint and do not form the basis of Anchor's DTPA complaint. *See Malone v. E.I. du Pont de Nemours & Co.*, 8 S.W.3d 710, 715 (Tex. App.—Fort Worth 1999, pet. denied); *GTE Mobilnet of South Texas Ltd. Partnership v. Telecell Cellular, Inc.*, 955 S.W.2d 286, 292-93 (Tex. App.—Houston [1st Dist.] 1997, pet. denied); *Central Texas Hardware, Inc. v. First City, Texas-Bryan, N.A.*, 810 S.W.2d 234, 236-37 (Tex. App.—Houston [14th Dist.] 1991, writ denied). Therefore, Anchor is not a consumer under the DTPA, and the trial court did not err in granting summary judgment as to Anchor's DTPA counterclaim. We overrule Anchor's first issue.

Was there sufficient evidence to support a finding that the alleged usurious charge related to a discount rather than to a charge of interest?

In its second issue, Anchor claims the trial court's finding that there was no factual basis for Anchor's usury claim was improper as a matter of law and, in the alternative, is against the great weight and preponderance of the evidence. Because Anchor attacks the legal sufficiency of an adverse fact finding on an issue for which it had the burden of proof,

it must demonstrate on appeal that the evidence established that issue "as a matter of law." *Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983). Under the requisite two-prong analysis, this court must examine the record for evidence which tends to support the finding, while disregarding all evidence and inferences to the contrary. *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex.1989). If there is no evidence to support the finding, then the entire record must be examined to see if the contrary proposition is established as a matter of law. *Id*. In a review for legal sufficiency, we consider only the evidence and reasonable inferences therefrom that support the finding in question and disregard all evidence and inferences to the contrary. *Texarkana Memorial Hosp., Inc. v. Murdock*, 946 S.W.2d 836, 838 (Tex. 1997).

When reviewing a challenge to the factual sufficiency of the evidence, we examine the entire record, considering both the evidence in favor of, and contrary to, the challenged finding. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex.1986) (per curiam). After considering and weighing all the evidence, we set aside the finding only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986). The trier of fact is the sole judge of the credibility of the witnesses and the weight to be given to their testimony. *Mayes v. Stewart*, 11 S.W.3d 440, 451 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). Because we are not the fact finder, we may not substitute our own judgment for that of the trier of fact, even if we would reach a different answer on the evidence. *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 407 (Tex. 1998). The amount of evidence necessary to affirm a judgment is far less than that necessary to reverse a judgment. *Mayes*, 11 S.W.3d at 451.

Laguna committed usury if it contracted for, charged, or received interest greater than the maximum amount allowed by law.[1] TEX. REV. CIV. STAT. ANN. art 5069-1.06 (Vernon 1987), *repealed by* Acts 1997, 75th Leg., ch 1008, § 6(a); *Parhms v. B & B Ventures, Inc.*,

[1] Anchor's usury claim is governed by TEX. REV. CIV. STAT. ANN. art 5069-1.06 (Vernon 1987), although this statute has been repealed by Acts 1997, 75th Leg., ch 1008, § 6(a).

938 S.W.2d 199, 202 (Tex. App.—Houston [14th Dist.] 1997, writ denied). Anchor does not allege that Laguna contracted for or received usurious interest; rather, Anchor contends that a demand letter from Laguna's counsel and three petitions filed by Laguna in the trial court constitute charges for usurious interest because they allegedly seek payment for a $3,091.52 late charge.

Laguna asserts that Anchor was to pay $16,037 for the goods and services in question but that a $3,091.52 discount would be applied if Anchor promptly paid its debt. Laguna asserts that, because Anchor did not promptly pay, Anchor owed the principal amount of $16,037. Therefore, Laguna asserts that, when it included $3,091.52 in statements of the amount due and owing, it was not charging $3,091.52 in interest but rather reflecting the fact that Anchor did not qualify for the discount. In its Third Amended Petition, upon which Laguna went to trial, Laguna asserted that, although Anchor owed $16,037, Laguna was only seeking payment for $12,945.48, which is $16,037 minus $3,091.52.

The demand letter from Laguna's attorney stated that the enclosed original petition would be filed within seven days unless Anchor paid Laguna. The letter itself did not state the amount allegedly owed. The enclosed petition stated that Anchor owed Laguna the principal amount of $16,037, which reflects "[a] total of $12,945.48, plus the sum of $3,091.52 which was the amount of the discount if Defendant paid as agreed. . . ." Similar statements were contained in the three petitions that Laguna filed. The demand letter and these petitions never state that $3,091.52 is being assessed as interest or as a late-payment charge. At trial, Gloria Laguna and Oscar Laguna, Sr. both testified as to the existence of this discount.[2] A seller may lawfully exact one price if payment is made promptly in cash, and a higher price if the sale is on credit or the cash payment is delayed, and the difference is not interest. *See Rattan v. Commercial Credit Co.*, 131 S.W.2d 399, 400 (Tex. Civ.

[2] In its brief, Anchor states in passing that this evidence was inadmissible parol evidence and hearsay. Anchor provides no analysis and no citations of legal authorities to support this assertion; therefore, we find Anchor has waived review of this issue. *See* TEX. R. APP. P. 38.1(h); *Baker v. Gregg County*, 33 S.W.2d 72, 79-80 (Tex. App.—Texarkana 2000, pet. dism'd); *Houghton v. Port Terminal R. R. Ass'n*, 999 S.W.2d 39, 51 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

App.—Dallas 1939, writ ref'd); *Argonaut Ins. Co. v. ABC Steel Products Co., Inc.*, 582 S.W.2d 883, 887-88 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.).

The trial court found that there was no factual basis for Anchor's usury claim. After reviewing the record on appeal, we conclude that the evidence at trial was sufficient to supply the omitted and unrequested finding that the demand letter and the petitions reflected a $3,091.52 discount rather than a charge of interest. *See* TEX. R. CIV. P. 299; *Vickery v. Commission for Lawyer Discipline*, 5 S.W.3d 241, 253 (Tex. App.—Houston [14th Dist.] 1999, pet. denied) (when the trial court finds one or more element of a ground of recovery or defense, omitted and unrequested elements, when supported by evidence, will be supplied by presumption in support of the trial court's judgment). Therefore, these alleged charges are not charges of interest that are subject to the usury laws. *See Rattan*, 131 S.W.2d at 400; *Argonaut Ins. Co.*, 582 S.W.2d at 887-88. After applying the applicable standard of review, we hold that there was some evidence to support the trial court's finding against Anchor on its usury claim. After reviewing the entire record and considering both the evidence in favor of, and contrary to, the challenged finding, we hold that this finding was not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Therefore, we reject Anchor's legal and factual sufficiency challenges and overrule its second issue.[3]

Were the trial court's findings of fact in fatal conflict?

In its third issue, Anchor claims the trial court erred in making its findings of fact and conclusions of law because findings three, six, and nine are in fatal conflict and thus, prevent Anchor from properly presenting its appeal to this court. We review an alleged conflict between findings of fact by the same standard applied to an alleged conflict between answers to jury questions. *Hartford Ins. Co. v. Jiminez*, 814 S.W.2d 551, 552 (Tex. App.–Houston [1st Dist.] 1991, no writ). The reviewing court must reconcile apparent

[3] As to Anchor's usury claim based on the three petitions that Laguna filed at trial, Anchor's claim also fails because a pleading by itself, even if it contains a claim for usurious interest, does not constitute a charge of usurious interest. *D & S Kingsway Ventures v. Texas Capital Bank-Richmond, N.A.*, 882 S.W.2d 573, 575 (Tex. App.—Houston [14th Dist.] 1994, no writ).

conflicts in the findings if reasonably possible in light of the pleadings and evidence, the manner of submission, and the other findings considered as a whole. *Bender v. S. Pac. Transp. Co.*, 600 S.W.2d 257, 260 (Tex. 1980). A conflict in jury findings will not prevent the rendition of judgment and require a mistrial unless the findings, considered separately and taken as true, would compel the rendition of different judgments. *Tex. & Pac. Ry. Co. v. Snider*, 321 S.W.2d 280, 282 (Tex. 1959). We will not determine whether the findings may be reasonably viewed as conflicting; to the contrary, the question is whether there is any reasonable basis upon which the findings may be reconciled. *Bender*, 600 S.W.2d at 260.

The findings of fact which Anchor asserts to be in fatal conflict are: (1) that Exhibit "A" attached to plaintiff's Third Amended Original Petition is a verified and itemized account that represents a liquidated money demand for which the defendant is obligated (finding three); (2) that the defendant is obligated to the plaintiff by way of account stated (finding nine); and (3) that the defendant promised and became bound and obligated to pay the plaintiff for the goods and services made the basis of this lawsuit in the amount of $12,945.48 (finding six). Anchor argues that these findings are in fatal conflict because findings three and nine refer to the account contained in Laguna's Third Amended Original Petition, the amount of which is $16,037; whereas finding six indicates that Anchor is only liable for $12,945.48. The verified account attached to plaintiff's Third Amended Original Petition does indicate that Anchor owes Laguna $16,037; however, this account also states as follows: "Laguna is only seeking the reduced account amount of $12,945.48 plus the damages described in the attached petition. The amount claimed is just and correct, and all just and lawful offsets, payments, and credits known to me have been allowed." The Third Amended Original Petition seeks actual damages in the principal amount of $12,945.48 and does not seek to recover the $3,091.52 discount amount. In light of these facts, findings three, six, and nine are not in fatal conflict because they are all consistent with Anchor recovering the principal amount of $12,945.48 based on either an account stated or a sworn account. *See Bender* 600 S.W.2d at 263. We overrule Anchor's third issue.

Did the trial court commit reversible error when it admitted evidence alleged to be in violation of the parol evidence rule?

In its fourth issue, Anchor claims that the trial court committed reversible error in admitting parol evidence regarding discussions on August 22, 1995 between Anchor and Laguna to the effect that it would take six to eight weeks for the wrought-iron gates to arrive once they were ordered by Laguna from its supplier. Anchor argues that the admission of this evidence was reversible error because it precluded Anchor from succeeding in its argument that Laguna materially breached its contract by not completing construction of the cast-iron fence by August 30, 1995.

Even if the trial court's consideration of this evidence was erroneous, we hold that Anchor has not shown that the consideration of this testimony probably resulted in an improper judgment. *See* TEX. R. APP. P. 44.1; *The Kroger Co. v. Betancourt*, 996 S.W.2d 353, 363 (Tex. App.—Houston [14th Dist.] 1999, pet. denied). Reversible error usually does not result unless the complaining party can demonstrate that the whole case turns on the particular evidence in question. *See Betancourt*, 996 S.W.2d at 363. Based on the entire record, the trial could have concluded, regardless of the evidence in question, that Laguna did not materially breach its contract by installing the cast-iron fence in October of 1995. For example, a letter from Anchor was admitted into evidence, and this letter indicated that performance by Laguna as late as November of 1995 was acceptable to Anchor. Anchor has not shown that the alleged error was reversible error. *See Betancourt*, 996 S.W.2d at 363. We overrule Anchor's fourth issue.

Having overruled all of Anchor's issues, we affirm the trial court's judgment.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed November 29, 2001.

Panel consists of Justices Edelman, Frost and Murphy.[4]

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[4] Senior Chief Justice Paul C. Murphy sitting by assignment.