

Dismissed in Part, Affirmed in Part, and Memorandum Opinion filed January 26, 2010.



In The

Fourteenth Court of Appeals

NO. 14-08-00648-CV

BOSS HOSS CYCLES OF HOUSTON, L.L.C. AND DAVID CHESSHIR,
Appellants

V.

WELLS FARGO BANK, N.A., Appellee

On Appeal from the County Civil Court at Law No. 1
Harris County, Texas
Trial Court Cause No. 900523

MEMORANDUM OPINION

In this contract dispute, a jury determined that a motorcycle dealer breached the terms of its agreement with a bank. In three issues, the motorcycle dealer appeals the jury's verdict in favor of the bank on the grounds that the bank failed to prove that the dealer breached its agreement with the bank, the dealer perfected the bank's security interest in the motorcycle at issue, and even if the dealer did not perfect the bank's security interest in the motorcycle, the dealer was excused from doing so as a matter of law. In addition, the motorcycle dealer asks that we remand the case to enable it to

recover attorneys' fees. Because we conclude that sufficient evidence supports the jury's findings, we affirm the trial court's judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

In July 2003, appellant Boss Hoss Cycles of Houston, L.L.C. ("Boss Hoss") and appellee Wells Fargo Bank, N.A. ("Wells Fargo") entered into an agreement (the "Dealer Agreement") in which Boss Hoss, as a motorcycle dealer, assigned installment contracts from the sale of motorcycles to Wells Fargo. Under the terms of the agreement, Boss Hoss warranted, among other things, that as of the assignment of the installment contracts to Wells Fargo,

as a result of [Boss Hoss] making application for same, a Certificate of Title, or comparable evidence of the perfection of [Wells Fargo]'s lien on the property as collateral for the [c]ontract will be issued by the lawful issuing agency of the state in which the property is sold within 90 days of the date on which the [c]ontract was signed by the purchaser, on which the "Lienholder," "Legal Owner," or other such terminology reflecting collateral ownership with regard to the property is identified as [Wells Fargo.]

Boss Hoss further agreed to undertake actions requested by Wells Fargo to

evidence and perfect [the Dealer Agreement], [Wells Fargo]'s ownership interest in a [c]ontract and its proceeds, [Wells Fargo]'s ownership or security interest in the related property financed and any [related rights.]

Finally, Boss Hoss agreed to repurchase any contract or any of Wells Fargo's ownership or security interest in the financed property if Wells Fargo determined that Boss Hoss "breached any warranty, covenant or other duty to [Wells Fargo] arising" under the Dealer Agreement. The repurchase price would be the amount of the unpaid installment contract, including any premiums or other amounts due under the installment contract. Boss Hoss's president and owner, David Chesshir, executed the agreement.

In August 2006, Boss Hoss sold a motorcycle to Ronald Elic at a motorcycle rally in Sturgis, South Dakota. Elic executed a retail-installment contract for the purchase of

the motorcycle at the time of the sale. Under the contract, Elic agreed to make 84 monthly payments, beginning September 9, 2006, and ending August 9, 2013. Wells Fargo approved Elic for financing and the contract was assigned to the bank. On August 10, 2006, Chesshir wrote a letter on behalf of Boss Hoss (the “Guarantee Letter”) to Wells Fargo, stating:

This letter will service [sic] as a guarantee of title on RONALD P. ELIC that Boss Hoss Cycles of Houston will forward to WELLS FARGO BANK, N.A. all title papers on 2006 BOSS HOSS 502 BIKE, VIN NO: 1B96BC446D285250 upon receipt of MSO^[1] and check in the amount of \$35,300.00.

If Wells Fargo has not received the perfected title showing Wells Fargo as the lien holder within 90 days, Wells Fargo may require the Dealership, (Boss Hoss Cycles of Houston), to repurchase the loan.

Wells Fargo paid Boss Hoss \$35,300.00 for the assignment of the Elic contract. In September, Boss Hoss endorsed the reverse-side of the MSO, notating Wells Fargo as a lienholder, and sent it to Elic. Elic did not apply for a title on the motorcycle, and Wells Fargo did not receive a perfected title showing it as a lienholder within 90 days of the date of the Guarantee Letter.

Elic defaulted on the installment contract, and in May 2007, Wells Fargo notified Boss Hoss in writing that Wells Fargo had never obtained a “perfected lien interest” on the loan. Wells Fargo stated that under the terms of the Dealer Agreement and the Guarantee Letter, Boss Hoss was required to repurchase the loan and that the payoff amount of the Elic contract was \$32,705.54. Boss Hoss did not provide the funds to Wells Fargo, and Wells Fargo filed suit against Boss Hoss and Chesshir for breach of contract and conversion.²

¹ MSO stands for “Manufacturer’s Statement of Origin.” According to Chesshir, such a form is the first document in a chain of title. The MSO comes from the factory to the dealership and then later is transferred into a certificate of title.

² The jury charge contained no questions regarding conversion.

Before trial, the trial court granted partial summary judgment, concluding that (a) Missouri law governed the perfection of Wells Fargo's security interest in the motorcycle purchased by Elic, (b) a security interest under Missouri law can only be perfected by delivery of a notice of lien to the Missouri director of revenue, and (c) Boss Hoss did not perfect Wells Fargo's security interest in the motorcycle. The case proceeded to a jury trial.

At trial, Chesshir testified that, pursuant to the Dealer Agreement, Boss Hoss agreed to take "such action as necessary" or as Wells Fargo requested to perfect its security interest. He also agreed that Boss Hoss warranted it would repurchase any installment contract if Boss Hoss breached any warranty or duty arising out of the Dealer Agreement. He admitted that he sent the Guarantee Letter to Wells Fargo, and that Boss Hoss received the \$35,300 from Wells Fargo. In addition, the following colloquy occurred between Chesshir and the attorney representing Wells Fargo:

Q.: You promised Wells Fargo Bank, as the owner of Boss Hoss, that if they paid you \$35,300, you would guarantee that Wells Fargo would get a perfected title; isn't that correct?

A.: I don't know how to answer that.

Q.: You need to answer yes or no, Mr. Chesshir.

A.: Yes.

Chesshir also explained that Wells Fargo approved the loan to Elic. He testified that "title work" was provided to Wells Fargo in the form of a copy of the front side of the MSO. According to Chesshir, an MSO is a form of a title, but not a certificate of title. He stated that other out-of-state sales had been handled in a similar manner with Wells Fargo without any problems. Chesshir explained that he took several actions to protect Wells Fargo's security interest: (1) he filled out the back side of the MSO with Wells Fargo listed as the lienholder and sent it to Elic; (2) he called Elic numerous times when Wells Fargo notified him that Elic had not titled the vehicle; (3) he provided Wells Fargo with

Elic's contact information and insurance information when Wells Fargo notified him that Elic had missed payments; (4) he suggested that Wells Fargo inform Elic's motorcycle insurance provider that Elic had failed to title the motorcycle; and (5) he offered to pick up the motorcycle if Wells Fargo decided to repossess it. Chesshir further admitted that Boss Hoss provided no evidence of a perfected lien to Wells Fargo for this particular transaction and that, without an MSO, a party cannot get a certificate of title. According to Chesshir, Wells Fargo decided not to repossess the motorcycle, and shortly after sending him a demand letter regarding repurchasing the Elic contract, Wells Fargo notified him that it would no longer be financing motorcycles. Chesshir also stated that he believed the Dealer Agreement only applied to transactions occurring in Texas, and that the only reason Boss Hoss had not gotten the motorcycle titled in Missouri for Wells Fargo was that it would be illegal for it to do so.

Mary Walker, a representative of Wells Fargo, testified that the Elic loan was in default. When questioned about repossessing the motorcycle, she stated that Wells Fargo could not repossess the motorcycle without a perfected title. She admitted that she was unaware that, under Missouri law, Wells Fargo could have notified the Missouri director of revenue of its lien on the motorcycle to perfect its security interest. Finally, both attorneys for Wells Fargo and Boss Hoss testified regarding reasonable attorneys' fees for handling this dispute.

The trial court charged the jury, and the jury unanimously determined that Boss Hoss failed to comply with its "Agreement" with Wells Fargo, and that its failure to comply was not excused. The jury found (a) \$32,705.54 in damages for Boss Hoss's failure to comply with the agreement and (b) \$15,522.94 to be reasonable attorneys' fees for prosecution of Wells Fargo's claims through trial.³ Boss Hoss and Chesshir filed a motion for judgment notwithstanding the verdict, contending that the evidence

³ The jury also found \$2,500 to be reasonable attorneys' fees for prevailing on an appeal to an intermediate court, \$1,500 for responding to a petition for review in the Supreme Court, and \$1,500 for prevailing in the Supreme Court if a petition for review were granted.

conclusively established that it perfected Wells Fargo's security interest and, if it did not, its failure to do so was excused as a matter of law. After denying Boss Hoss's and Chesshir's motion for judgment notwithstanding the verdict, the trial court entered judgment against them. Boss Hoss and Chesshir filed a motion for new trial, which was overruled by operation of law, and this appeal timely ensued.

II. ISSUES PRESENTED

In its first issue, Boss Hoss asserts that Wells Fargo did not prove that Boss Hoss breached the Dealer Agreement. Boss Hoss contends that it perfected Wells Fargo's security interest in its second issue. In issue three, Boss Hoss argues that, if it did not perfect Wells Fargo's security interest, its failure to do so was excused as a matter of law. Finally, Boss Hoss asks that the case be remanded so that it can recover attorneys' fees in issue four.

III. ANALYSIS

A. Dismissal of Chesshir's Appeal

The pleadings, judgment, and notice of appeal filed in the trial court all reference both Boss Hoss and Chesshir as parties. But the appellate brief filed by Boss Hoss in this court lists only Boss Hoss as a party; Chesshir is not included as a party. On September 9, 2009, this court notified the parties that we would consider dismissal of Chesshir's appeal for want of prosecution if no party filed a response on or before September 21, 2009, showing meritorious grounds for continuing the appeal. This letter additionally advised Chesshir that he could join Boss Hoss's brief. No response was filed to this letter. Thus, we order Chesshir's appeal dismissed for want of prosecution.

B. Perfection of Security Interest

Boss Hoss's second and third issues specifically concern whether it perfected Wells Fargo's security interest in the motorcycle. These issues appear to be challenges to the trial court's pre-trial partial summary judgment that Missouri law applies to this

dispute and that Boss Hoss failed to perfect Wells Fargo's security interest in the motorcycle under Missouri law. But Boss Hoss provides no argument or authority regarding a choice-of-law issue. Thus, to the extent that these challenges relate to the trial court's choice-of-law determinations, they are inadequately briefed and are waived. *See* TEX. R. APP. P. 38.1(i) ("The brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record."); *see also Priddy v. Rawson*, 282 S.W.3d 588, 595 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (stating that it is not the duty of an appellate court to perform an independent review of the summary-judgment record for evidence supporting an appellant's position).

Further, the questions presented to the jury did not concern whether Boss Hoss perfected Wells Fargo's security interest in the motorcycle subject to the retail-installment contract. Instead, the questions the jury was asked concerned whether Boss Hoss failed to comply with its agreement with Wells Fargo and whether this failure, if any, was excused. Neither the Dealer Agreement nor the Guarantee Letter required Boss Hoss to perfect Wells Fargo's security interest; instead, both required Boss Hoss to provide evidence to Wells Fargo that the security interest was perfected. Thus, rather than considering whether Boss Hoss "perfected" Wells Fargo's security interest in the motorcycle, we confine our review to the issues actually before the jury: whether Boss Hoss breached its agreement with Wells Fargo, and if so, whether the breach was excused.

C. Failure to Comply with the Agreement

Under its first issue, Boss Hoss argues (1) Wells Fargo did not plead that Boss Hoss breached the Dealer Agreement and instead alleged that Chesshir breached the agreement; (2) the only breach Wells Fargo alleges is that Boss Hoss violated the laws of the State of Texas, but the trial court concluded that Missouri law governed this dispute, hence the duties alleged by Wells Fargo are inapplicable; (3) delivery of the MSO to a buyer does not constitute a breach of the Dealer Agreement because Wells Fargo was not

deprived of a means of perfecting a security interest in the motorcycle; and (4) there “is no pleading or evidence” that Boss Hoss breached the Dealer Agreement.

As to the first two of these arguments, Wells Fargo pleaded that Boss Hoss breached the Dealer Agreement by failing to provide it with evidence of lien perfection within 90 days as promised in the agreement. Wells Fargo further alleged that Boss Hoss breached the Guarantee Letter. Thus, Boss Hoss’s first two arguments are without merit. Turning to the third argument, it is immaterial whether the delivery of the MSO to Elic constituted a breach of the Dealer Agreement; rather, the definitive issue is whether sufficient evidence supports the jury’s verdict that Boss Hoss breached an agreement with Wells Fargo. We thus turn to Boss Hoss’s fourth argument under this issue: whether there is proof that Boss Hoss breached the Dealer Agreement.

First, the question presented to the jury was not limited to whether Boss Hoss breached the Dealer Agreement. Rather, the question presented to the jury was this: “Did Boss Hoss Cycles of Houston, L.L.C. fail to comply with its Agreement with Wells Fargo Bank, N.A.?” The term “Agreement” was not defined in the jury charge;⁴ thus, it could have applied to either the Dealer Agreement or the Guarantee Letter. We therefore consider whether there is legally sufficient evidence to support the jury’s finding that Boss Hoss breached either the Dealer Agreement or the Guarantee Letter.

To determine whether the evidence is legally sufficient to support the judgment, we review the entire record, crediting favorable evidence if reasonable jurors could and disregarding contrary evidence unless reasonable jurors could not. *See City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). We assume that jurors decided questions of credibility or conflicting evidence in favor of the verdict if they reasonably could do so. *Id.* at 819, 820. We do not substitute our judgment for that of the trier-of-fact if the evidence falls within this zone of reasonable disagreement. *Id.* at 822. If the evidence

⁴ Boss Hoss neither objected to the jury charge nor complains of charge error on appeal.

would enable reasonable and fair-minded people to differ in their conclusions, then it is legally sufficient to support the verdict. *Id.*

As detailed above, under the unambiguous terms of the Dealer Agreement, Boss Hoss was required to provide evidence to Wells Fargo of a perfected security interest in the property as collateral for any assigned contracts. If Boss Hoss breached the duties imposed by the Dealer Agreement, Wells Fargo could require it to repurchase the contract. Further, under the similarly unambiguous terms of the Guarantee Letter, Wells Fargo could require Boss Hoss to repurchase Elic's loan contract if Wells Fargo did not receive a "perfected title showing Wells Fargo as the lien holder within 90 days" of the date of the letter. It is undisputed that Wells Fargo did not receive a perfected title showing it as the lien holder for the motorcycle that was the subject of the Elic contract within either 90 days of the date of the contract or 90 days of the date of the Guarantee Letter.⁵ Indeed, both Chesshir and Walker testified that perfection of Wells Fargo's security interest in the motorcycle did not occur. We thus conclude that there is legally sufficient evidence to support the jury's conclusion that Boss Hoss did not comply with either the Dealer Agreement or the Guarantee Letter.

D. "Excuse" for Failure to Comply with Agreement

Next, in an abundance of caution, we consider whether there is legally sufficient evidence to support the jury's negative answer to the question, "Was [Boss Hoss's] failure to comply [with its agreement with Wells Fargo] excused?" Boss Hoss argues that it would have been impossible for it to perfect Wells Fargo's security interest under Missouri law because only a lienholder or a licensed agent may create a lien on a motor vehicle under Missouri law. It contends that, because Chesshir testified it would have been illegal for Boss Hoss to attempt to file a notice of lien to perfect Wells Fargo's security interest in Missouri, any requirement under the Dealer Agreement that Boss

⁵ It is also undisputed that the amount owed on the loan at the time Elic defaulted was \$32,705.54; the Dealer Agreement explicitly provided that the repurchase price would be the amount of the unpaid installment contract.

Hoss do so must be excused. *See, e.g., Centex Corp. v. Dalton*, 840 S.W.2d 952, 954 (Tex. 1992) (discussing the defense of supervening impossibility due to a change in law).⁶

This argument is based on the faulty premise that Boss Hoss was required, under the Dealer Agreement or the Guarantee Letter, to perfect Wells Fargo's security interest itself. As discussed above, however, neither of these agreements required Boss Hoss to perfect the security interest. Instead, both agreements required Boss Hoss to provide evidence to Wells Fargo that its security interest in the motorcycle was perfected. It is undisputed that Boss Hoss failed to provide any evidence of a perfected security interest in the motorcycle to Wells Fargo. Further, instead of providing the MSO to Wells Fargo so that it could perfect its own security interest, Boss Hoss sent the MSO to Elic, who failed to title the motorcycle. We thus conclude that there is legally sufficient evidence to support the jury's finding that Boss Hoss's failure to comply with its agreement(s) with Wells Fargo was not excused.⁷

IV. CONCLUSION

First, Chesshir's appeal is dismissed for want of prosecution. Second, we conclude that legally sufficient evidence supports the jury's finding that Boss Hoss failed to comply with its agreement(s) with Wells Fargo and that its failure to do so was not excused. We therefore overrule its first issue. Additionally, Boss Hoss has waived its second and third issues by failing to adequately brief them, and they are overruled. Finally, because Boss Hoss has not established that the jury's verdict was erroneous, it is

⁶ *Centex Corp.* is the only case cited in the entirety of Boss Hoss's appellate brief.

⁷ At trial, as detailed above, Chesshir indicated that Boss Hoss previously had handled out-of-state sales in a similar manner as this one was handled without any problems or complaints from Wells Fargo. He also explained the actions he took to protect Wells Fargo's security interest in the bike. He testified that "title work" was provided to Wells Fargo in the form of a copy of the MSO. Finally, he stated that he believed the Dealer Agreement only applied to transactions occurring in Texas. But none of these arguments have been made on appeal. Thus, if any of these efforts would have "excused" Boss Hoss's failure to comply with its agreement(s) with Wells Fargo, they have been waived on appeal.

not entitled to attorneys' fees.⁸ We therefore overrule Boss Hoss's fourth issue and affirm the trial court's judgment.

/s/ Jeffrey V. Brown
Justice

Panel consists of Justices Anderson, Brown, and Boyce.

⁸ Under the terms of the contract, only the prevailing party in any legal proceedings is entitled to recover attorneys' fees and costs. Further, the Texas Civil Practice and Remedies Code provides for the award of attorneys' fees only to a prevailing party in a breach of contract case. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 38.001(8) (Vernon 2008).