Affirmed and Memorandum Opinion filed December 28, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00590-CV

RICHARD VAUGHAN, Appellant

V.

HARTMAN MANAGEMENT, Appellee

On Appeal from the 333rd District Court
Harris County, Texas
Trial Court Cause No. 2005-78080

M E M O R A N D U M O P I N I O N

Appellant, Richard Vaughan, contends the trial court erred by rendering a take-nothing judgment on his breach-of-contract claim against Hartman Management Inc. based on the jury's finding that Vaughan materially breached the contract. Because the dispositive issues are clearly settled in law, we issue this memorandum opinion. *See* Tex. R. App. P. 47.4. The trial court's judgment is affirmed.

I. BACKGROUND

In October 2002, Vaughan signed an employment agreement with Hartman Management Inc. ("Hartman Management").[1] Hartman Management was engaged in the business of soliciting investors for various real estate deals. Vaughan was hired to serve as director of investor services. During Vaughan's employment, Allen Hartman ("Mr. Hartman") was the president of Hartman Management. Under the employment agreement, Vaughan was eligible to receive a "back-end participation" bonus based upon his performance.

Vaughan resigned from Hartman Management in July 2005. He later sued Hartman Management, asserting several claims for unpaid compensation, including amounts allegedly due as "back-end participation." Hartman Management responded by alleging that Vaughan materially breached the employment agreement and by asserting various counterclaims, including for defamation. Mr. Hartman, in his individual capacity, intervened and asserted a defamation claim. The trial court granted summary judgment in favor of Hartman Management relative to all of Vaughan's breach-of-contract claims except for back-end participation. However, in February 2008, the trial court abated the back-end participation claim, concluding that it was not ripe.

Vaughan's claim for back-end participation ripened in October 2008 and was subsequently reinstated by the trial court. Mr. Hartman's defamation claim and Hartman Management's material-breach defense were submitted to the jury. The jury found against Mr. Hartman on his defamation claim. The jury also found that Vaughan failed to comply with a material obligation of the employment agreement, thus excusing Hartman Management's failure to pay Vaughan. Vaughan filed a motion for judgment notwithstanding the verdict, arguing that there was no evidence supporting the finding that he materially breached the employment agreement. The trial court denied Vaughan's

[1] The party to the agreement was "Hartman Management Inc.," whereas "Hartman Management" is the party to this appeal. This variance is immaterial to our disposition.

motion and rendered judgment on the jury's findings, thereby ordering that Vaughan take nothing.

II. MATERIAL BREACH

In his first, second, and fourth issues, Vaughan contends the trial court erred by denying his motion for judgment notwithstanding the verdict, failing to determine as a matter of law that there was no material breach, and submitting a jury question regarding material breach when there was no evidence to support the submission. The basis for all these issues is Vaughan's contention there is no evidence supporting a finding that he failed to comply with a material obligation in the employment agreement.

A. Standard of Review and Applicable Law

Judgment without or against a jury verdict is proper at any course of the proceedings only when the law does not allow reasonable jurors to decide otherwise. *City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex. 2005). Accordingly, the test for legal sufficiency is the same for summary judgments, directed verdicts, judgments notwithstanding the verdict, and appellate no-evidence review. *Id.*

A legal-sufficiency point must be sustained when (1) there is a complete absence of a vital fact, (2) rules of law or evidence preclude according weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a scintilla, or (4) the evidence conclusively establishes the opposite of the vital fact. *Id.* at 810. Under the legal-sufficiency standard, we must credit evidence that supports the judgment if reasonable jurors could, and we must disregard contrary evidence unless reasonable jurors could not. *See id.* at 827. If the evidence falls within the zone of reasonable disagreement, we may not invade the fact-finding role of the jurors, who alone determine the credibility of witnesses, the weight to give their testimony, and whether to accept or reject all or any part of that testimony. *See id.* at 822. We must determine whether the evidence at trial would enable reasonable and fair-minded persons to find the facts at issue. *See id.* at 827.

A party breaches a contract by neglecting or refusing to perform an obligation

prescribed in the contract. *Mays v. Pierce*, 203 S.W.3d 564, 575 (Tex. App.—Houston [14th Dist.] 2006, pet. denied). If the breach is material, the non-breaching party is excused from further performance of the contract if that party elects to treat the breach as material.[2] *See Hanks v. GAB Bus. Servs., Inc*., 644 S.W.2d 707, 708 (Tex. 1982) (holding that nonbreaching party must timely decide whether to treat the breach of contract as a material breach or to treat the contract as still in effect); *Kirby Lake Dev. v. Clear Lake City Water Auth*., 321 S.W.3d 1, 7–8 (Tex. App.—Houston [14th Dist.] 2008) (same), *aff'd*, 320 S.W.3d 829, 843–44 (Tex. 2010).

The following material-breach question was submitted to the jury: "Did Richard Vaughan fail to comply with a material obligation of his employment agreement with Hartman Management?" The Texas Supreme Court has recognized certain non-exclusive factors that may be considered by a jury when determining the materiality of a breach. *See Mustang Pipeline Co., Inc. v. Driver Pipeline Co., Inc.*, 134 S.W.3d 195, 199 (Tex. 2004) (*citing* Restatement (Second) of Contracts § 241(a) (1981)). However, neither the word "material" nor the phrase "material obligation" was defined in the charge, the charge did not include the factors set forth in *Mustang Pipeline*, and the trial court refused Vaughan's requested instruction regarding the word "material." On appeal, Vaughan does not contend the trial court erred by refusing his requested instruction. Therefore, we review the sufficiency of the evidence based on the charge actually submitted, without regard to whether it is a correct statement of the law. *See Osterberg v. Peca*, 12 S.W.3d 31, 55 (Tex. 2000).

The trial court instructed jurors that they would receive an obligatory legal definition in the charge when words were used in a sense that varied from the commonly understood meaning. Consequently, we measure the sufficiency of the evidence against the commonly understood meaning of "material obligation of [Vaughan's] employment agreement. . . ." *See The Kroger Co. v. Brown*, 267 S.W.3d 320, 322–23 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (measuring sufficiency of evidence against commonly

[2] Hartman Management timely elected to treat the breach as material.

understood meaning of term that was not defined in charge). The commonly understood meaning of "material" in this context is "important, essential, or pertinent (*to* the matter under discussion)." Webster's New World College Dictionary (4th ed. 2004). Therefore, we must decide whether evidence supports a finding by reasonable and fair-minded jurors that Vaughan failed to comply with an important, essential, or pertinent obligation of the employment agreement.

B. Analysis

During trial, Hartman Management argued that Vaughan materially breached the employment agreement by, among other actions, misappropriating confidential documents. The three-page employment agreement contains the following page-long confidentiality section, which we recite verbatim:

> Vaughan and Hartman Management look forward to developing a fruitful business relationship with each other. In those regards, both parties are ready to take affirmative steps and use their resources to that end. *However, both are, among other things, involved in highly competitive industry and are therefore constantly striving to protect the proprietary trade secret information as well as significant investments each has made in developing various business relationships with others. It is clear that for Vaughan and Hartman to pursue our relative undertakings that Vaughan may from time to time, have to disclose certain aspects of this data and certain business relationships to each other. Accordingly, Vaughan and Hartman Management are willing to do so but only after and in complete reliance on both parties agreement with, execution of and abiding by the terms and conditions of this letter agreement*. As such, Vaughan and Hartman Management hereby agree to the following:
>
> A. *The parties, each of them, understand that the purpose of this agreement is to restrict the parties rights to disclose or use, during or subsequent to the parties association with one another in reliance upon this agreement information learned or developed as a result of the relationship and to prevent either of the parties from circumventing business relationships or business opportunities of the other based upon disclosures made by on party to the other in reliance upon this agreement*.
>
> B. *The parties, each of them, consider this agreement to be vitally important to the protection of each of their respective businesses*. Each party intends to enforce the terms of the agreement and to seek appropriate

> injunctions or restraining order, and well as monetary damages, should either party violate the agreement.
>
> C. It is understood that Vaughan shall work exclusively for Hartman Management. *In further consideration of the parties furnishing information and/or proposals, each to the other, for itself and on behalf of its affiliates, agrees not to circumvent or participate in, or cause or assist anyone in circumventing any of the parties hereto in their business relations disclosed in reliance upon this agreement*. ~~The parties hereto agree that a violation of the provision shall be considered a bad faith breach for which punitive damages will lie.~~ [strike-through in original]
>
> D. The parties agree that this agreement and any attachments hereto are the complete and exclusive agreement among the parties with respect to the protection and confidentiality of the information and prevention of circumvention upon disclosure.

(emphasis added).

Under the confidentiality section, Vaughan was restricted from disclosing or using information he received through employment with Hartman Management. It is undisputed that Vaughan retained over 300 pages of Hartman Management's documents, including the following: (1) confidential documents from two law firms in which attorneys advised Hartman entities relative to an exemption for executives from broker/dealer registration requirements; (2) an email from a consulting firm recommending that Hartman Management withdraw its broker/dealer application with the NASD; (3) emails Vaughan believed demonstrated a securities-rules violation; and (4) five letters sent by disgruntled investors to Hartman or board members and officers of a Hartman entity. Vaughan testified that he retained these documents because "[i]f there was an investigation by a regulatory agency while I was there or after I was gone, I took those for my file for self-protection, frankly," and "in my experience[,] Mr. Hartman, I heard, would destroy evidence in the past and asked for falsification of sworn documents and so I thought, well, I better kind of cover myself here and protect it because I had a pretty good idea that discovery would [not] be of much value to me." Vaughan also testified that he disclosed these documents to his attorney.

Vaughan contends these facts do not support a material-breach finding under the specific provisions of the employment agreement. First, he argues that, in the second sentence of paragraph B, the parties specified the exclusive remedies for breach of confidentiality and did not include excused performance. This provision, however, does not limit remedies in the event of a breach, but merely emphasizes the parties' right to pursue legal action. Thus, Hartman Management's admitted failure to pursue injunctive relief when it first discovered Vaughan had retained confidential documents is not dispositive of the materiality issue.

Next, Vaughan attaches importance to the stricken punitive-damages language in paragraph C of the agreement. He argues the parties considered, but opted not to incorporate, punitive damages for bad-faith breach of the agreement and, therefore, did not intend that a breach of the confidentiality provisions would be material. Again, we disagree with Vaughan's interpretation. We will not speculate regarding the motive or intent of either party in striking the punitive-damages provision.

Finally, Vaughan argues that Hartman Management was required, but failed, to present evidence that the misappropriated documents were *proprietary trade secrets*. Vaughan directs us to the following language from the primary paragraph in the confidentiality section:

> Both [parties] are, among other things, involved in highly competitive industry and are therefore constantly striving to protect the *proprietary trade secret information* as well as significant investments each has made in developing various business relationships with others. It is clear that for Vaughan and Hartman to pursue our relative undertakings that Vaughan may from time to time, have to disclose certain aspects of *this data* and certain business relationships to each other. Accordingly, Vaughan and Hartman Management are willing to do so but only after and in complete reliance on both parties[']agreement with, execution of and abiding by the terms and conditions of this letter agreement.

(emphasis added). We do not interpret the above language to require Hartman Management to prove the misappropriated documents were "proprietary trade secrets" as a predicate for establishing a material breach. As noted above, in paragraph A, the

parties agreed that "the purpose of this agreement is to restrict the parties[']' rights to disclose or use, during or subsequent to the parties[']' association with one another in reliance upon this agreement *information learned or developed as a result of the relationship* . . . ." (emphasis added). The intrinsic nature of some of the documents taken by Vaughan supports an implicit finding that they contained confidential, sensitive information with the potential to harm Hartman Management.

Accordingly, Vaughan's disclosure of approximately 300 pages of Hartman Management's documents to his attorney supports a finding by reasonable and fair-minded jurors that Vaughan failed to comply with an important, essential, or pertinent obligation of the employment agreement. We overrule Vaughan's first, second, and fourth issues.[3] Consequently, we need not consider Vaughan's third issue, which is premised upon our having sustained at least one of his other issues.

We affirm the trial court's judgment.

/s/ Charles W. Seymore
Justice

Panel consists of Justices Anderson, Frost, and Seymore.

[3] When the evidence was closed, Vaughan moved for directed verdict relative to the existence of a material breach, arguing that any misuse or publication of the documents was not a material breach because there was no evidence that Hartman Management sustained damage. The trial court denied this motion.

In addition to alleging Vaughan materially breached the employment agreement by misappropriating documents, Hartman Management alleged Vaughan committed a material breach by publishing disparaging letters regarding Mr. Hartman. Although the jury ultimately rejected Hartman Management's contention that Vaughan sent the letters to third persons, the trial court could have properly denied Vaughan's motion for directed verdict because a fact question was raised regarding whether Vaughan sent the disparaging letters to third persons, and such a finding would support the claim that a material breach occurred. Presuming that Vaughan assigned error and presented sufficient argument in this regard, we hold the trial court did not err by denying Vaughan's motion for directed verdict.