

Affirmed as Modified and Memorandum Opinion filed October 26, 2010.



In The

Fourteenth Court of Appeals

NO. 14-09-00814-CV

**DAVID POWERS, DAVID POWERS HOMES, INC., AND DJPH, LLC,
Appellants**

V.

**M. L. RENDLEMAN COMPANY, INC. D.B.A. FIBERGLASS INSULATORS,
Appellee**

**On Appeal from the 215th District Court
Harris County, Texas
Trial Court Cause No. 2009-17376**

MEMORANDUM OPINION

Appellee, M. L. Rendleman Company, Inc. d.b.a. Fiberglass Insulators, sued David Powers Homes, Inc. ("David Powers Homes"), and DJPH, LLC ("DJPH") for breach of contract, and appellant, David Powers, for fraud. When appellant and the other defendants did not file an answer, appellee moved for default judgment, which the trial court granted. The judgment included not only an award of damages for breach of contract against David Powers Homes and DJPH, but also an award of exemplary damages against appellant, individually, for fraud. Appellant appeals the award of exemplary

damages. We modify the judgment to delete the award of exemplary damages in the amount of \$100,000.00 and affirm the judgment as modified.

FACTUAL AND PROCEDURAL BACKGROUND

Appellee installed insulation materials in numerous homes built by David Powers Homes and/or DJPH. Appellee submitted invoices, totaling \$78,736.00, which were not paid. Appellant assured appellee the invoices would be paid and even negotiated selling appellee a home at a reduced price to pay off the unpaid invoices. Eventually, the negotiations ended without the invoices being paid. Following the end of the payment negotiations, appellee discovered that many of the homes where it had installed insulation had been sold without paying off appellee's invoices. Appellee also learned that appellant had executed the bills paid affidavits which were made at the closings to ensure that the builder passed the properties free from debt to the purchasers.

Appellee filed suit against David Powers Homes, DJPH, and appellant alleging that David Powers Homes and DJPH had breached their agreements to pay appellee for the installation of insulation and that appellant had committed fraud by executing the bills paid affidavits when appellee's invoices had not been paid. None of the defendants filed an answer and appellee moved for a default judgment. The trial court granted appellee's motion and, following an evidentiary hearing on appellee's damages, the trial court rendered a final default judgment on June 8, 2009. The judgment held David Powers Homes and DJPH jointly and severally liable for \$78,736.00 on appellee's breach of contract cause of action. In addition, the judgment held appellant individually liable for \$100,000.00 in exemplary damages on appellee's fraud claims.

On June 5, 2009, the same morning as the evidentiary hearing on appellee's damages, appellant filed with the district clerk a letter, dated June 3, 2009, stating that, since he could not afford an attorney, he "was not planning on attending court." The letter did not deny liability, but instead admitted appellants were behind on paying their debts and that, "looking at our cash flow as we see it today, it will be 2010 before payment is

possible ever.” While appellant’s letter did list the trial court cause number, it did not contain the address for any of the defendants.

Appellant and the other defendants filed a motion for new trial, which the trial court denied. This appeal followed.¹

DISCUSSION

I. Did the trial court err when it awarded appellee exemplary damages?

In his first issue, appellant contends the trial court erred when it held him individually liable for \$100,000.00 in exemplary damages for fraud when the judgment does not contain an award of actual fraud damages. We agree.

Section 41.004(a) of the Texas Civil Practice and Remedies Code precludes exemplary damages when no actual damages are awarded. Tex. Civ. Prac. & Rem. Code Ann. § 41.004(a) (West 2008); *see Avco Corp., Textron Lycoming Reciprocating Engine Div. of Avco Corp. v. Interstate Southwest, Ltd.*, 251 S.W.3d 632, 662 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (citing Tex. Civ. Prac. & Rem. Code Ann. § 41.004(a)) (“Exemplary damages are not available unless the plaintiff establishes that it sustained actual loss or injury as the result of an underlying tort.”). Accordingly, we sustain appellant’s first issue.²

¹ David Powers Homes and DJPH both dismissed their appeals of the judgment against them.

² Because we have sustained appellant’s first issue on appeal, we need not address appellant’s three remaining issues, including appellant’s conditional fourth issue asserting the June 3, 2009 letter constituted an answer. Tex. R. App. P. 47.1.

CONCLUSION

Having sustained appellant's first issue on appeal, we modify the trial court's final default judgment to delete the award of exemplary damages against David Powers individually and affirm the judgment as modified.

/s/ John S. Anderson
Justice

Panel consists of Chief Justice Hedges and Justices Anderson and Christopher.