In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00225-CV

MAZIN ZAID, Appellant

V.

WEINGARTEN REALTY INVESTORS, Appellee

On Appeal from the 9th District Court
Montgomery County, Texas
Trial Cause No. 08-12-11484-CV

MEMORANDUM OPINION

Mazin Zaid appeals the judgment entered on a jury verdict in favor of Weingarten Realty Investors ("Weingarten") in a suit on a commercial lease. Zaid claims that: (1) Weingarten failed to meet its duty to mitigate damages, (2) the trial court impermissibly commented on the weight of the evidence in its instructions to the jury, (3) the trial court erred in refusing to poll the jury on each question, and (4) excessive attorney's fees were awarded in the judgment. We affirm the trial court's judgment.

Zaid assumed the lease of the subject property in 2005 and the parties extended the lease term through May 31, 2010. In 2006, Zaid assigned his interest in the lease to new tenants. Zaid retained liability on the lease through the expiration of the lease term. The new tenants defaulted and were locked out. Weingarten terminated the right of possession without terminating the lease, then sued Zaid and the new tenants for breach of contract. The new tenants were severed from the suit on a suggestion of bankruptcy and Weingarten's claims against Zaid proceeded to a jury trial. The trial court instructed the jury that the damages that resulted from Zaid's breach of the lease agreement included $117,871.40 for unpaid accrued rent and fees, $31,155 for loss of rental payments in the future through the end of the lease term, and $12,150 for reasonable and necessary expenses incurred to make the property suitable for a new tenant. The jury found that Weingarten exercised reasonable diligence in seeking other tenants and found that a reasonable fee for the necessary services of Weingarten's attorney was $46,971.50 for trial, $30,000 for an appeal to the Court of Appeals, and $30,000 for an appeal to the Texas Supreme Court. The trial court signed a judgment on the verdict, and Zaid appealed.

In his first issue, Zaid contends that Weingarten failed to mitigate damages. A landlord must make reasonable efforts to mitigate damages when the tenant breaches the lease and abandons the property. *See* Tex. Prop. Code Ann. § 91.006(a) (West 2007); *Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc.*, 948 S.W.2d 293, 299 (Tex.

1997). This duty requires that the landlord use objectively reasonable efforts to fill the premises when the tenant vacates in breach of the lease, but the landlord's failure to mitigate bars recovery only to the extent that damages reasonably could have been avoided. *Austin Hill Country Realty*, 948 S.W.2d at 299. A tenant who contends that the landlord failed to mitigate damages must plead and prove the failure to mitigate as an affirmative defense. *Id.* at 300.

Zaid argues that in enacting Section 91.006 of the Texas Property Code, the Legislature intended to implement a broad public policy in favor of stringent mitigation and to expand the holding in *Austin Hill Country Realty*. However, the legislative bill analysis indicates that the Legislature merely intended to codify the Supreme Court's holding in the case. The 75th Legislature enacted Section 91.006 in Senate Bill 1678. The bill analysis for Senate Bill 1678 states that the bill combines four house bills, including House Bill 2291. *See* House Comm. on Bus. & Indus., Bill Analysis, Tex. S.B. 1678, 75th Leg., R.S. (1997) (available at http://www.legis.state.tx.us/tlodocs/75R/analysis/html/SB01678H.htm). The bill analysis for House Bill 2291 states that "[t]his bill would merely codify the Texas Supreme Court's ruling." House Comm. on Bus & Indus., Bill Analysis, Tex. H.B. 2291, 75th Leg., R.S. (1997) (available at http://www.legis.state.tx.us/tlodocs/75R/analysis/html/ HB02291H.htm).

Zaid contends the evidence conclusively establishes that Weingarten failed to mitigate damages. Weingarten senior leasing executive John Wise described his efforts

to lease the space to a new tenant. According to Wise, seventy to eighty percent of leasing comes from sign placement and broker networks. Weingarten placed a lease availability sign in the window of the property. Wise made cold calls in the Conroe and FM 1960 areas and left flyers with retailers. He attended broker meetings and sent e-mail blasts. Wise showed the property to several potential tenants. Wise made a proposal to one restaurant to lease the property for three years at $10 per foot and two years at $11 per square foot. Although the price per foot stated in his letter of intent exceeded the price per foot under Zaid's lease, Wise explained that the price was negotiable. Another tenant expressed an interest in the property but rejected the property after discovering that the equipment had been removed. In Wise's opinion, the space did not lease because it was too small for an anchor store and too large for most small retailers. When asked why he did not offer the space to Zaid, Wise explained that he understood that when the property manager let Zaid re-enter property, Zaid removed his equipment and stated that he did not want to run the business anymore.

Zaid argues that had Weingarten permitted him to reclaim the property, pay the back rent, and operate the business and continue the lease, Weingarten would have lost no rentals. On June 26, 2008, Zaid's counsel informed Weingarten that Zaid was interested in discussing Zaid's status as an assignor of the lease and expressed a desire to work with Weingarten to obtain replacement tenants. Weingarten's reply noted Zaid's status as a guarantor and requested contact information for any potential tenants. Zaid

testified that Weingarten had not accepted his suggestion that they have a meeting and he concluded from the response that Weingarten did not want to meet with him. As a result, Zaid did nothing. Zaid did not ask for possession because Weingarten's response made him feel that Weingarten did not want him at the property.

The property was not re-let, but Weingarten described the efforts that its leasing agents took to find a new tenant. Zaid complains that Weingarten failed to take extraordinary efforts beyond those normally expended in seeking a tenant for a vacant space. However, Zaid neither showed that standard leasing practices require an action not taken in this instance, nor did Zaid produce any evidence that any potential tenant, including the prospective tenants contacted by Wise, would have rented the property. The jury could have found Weingarten's efforts to be objectively reasonable, and could have rejected Zaid's assertion that he would have taken over the property and paid all of the rent had Weingarten offered the property to him. Zaid's actions do not reveal an intent to operate a business on the leased premises: (1) Zaid re-entered the property and removed his equipment, (2) in his letter to Weingarten, Zaid did not mention the possibility of taking possession of the leased premises, and (3) Zaid produced no evidence of any preparation by him to resume operating the restaurant. "The final test . . . must always be whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review." *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). The jury could reasonably accept that Weingarten made objectively

reasonable efforts to re-let the space and could reasonably reject Zaid's claim that Weingarten could have mitigated its damages by offering to return possession of the premises to Zaid. We overrule issue one.

In his second issue, Zaid contends that the mitigation instruction in the jury charge commented on the weight of the evidence. The charge should not comment directly on the weight of the evidence or advise the jury of the effect of the answers to the questions submitted to the jury. *See* Tex. R. Civ. P. 277. "[B]ut the court's charge shall not be objectionable on the ground that it incidentally constitutes a comment on the weight of the evidence or advises the jury of the effect of their answers when it is properly a part of an instruction or definition." *Id.* An instruction that correctly states the law may be improper if it suggests the trial judge's opinion concerning the issue before the jury. *See Crenshaw v. Kennedy Wire Rope & Sling Co.*, 327 S.W.3d 216, 223-24 (Tex. App.—San Antonio 2010, pet. granted, judgm't vacated by agr.); *Maddox v. Denka Chem. Corp.*, 930 S.W.2d 668, 671 (Tex. App.—Houston [1st Dist.] 1996, no writ).

The trial court submitted mitigation to the jury, as follows:

> Did Weingarten Realty Investors exercise reasonable diligence in seeking other tenants for the property in question?
>
> > A landlord must use objectively reasonable efforts to fill the premises when the tenant vacates in breach of the lease. The landlord is not required to simply fill the premises with any willing tenant or Mazin Zaid; the replacement tenant must be suitable under the circumstances.

Although this instruction is derived from *Austin Hill Country Realty*, the trial court modified the instruction to add "or Mazin Zaid" to the phrase "any willing tenant." *See Austin Hill Country Realty*, 948 S.W.2d at 299.[1] Zaid argues that by including his name in the instruction the trial court invaded the province of the jury by stating to the jury that Zaid was not a suitable tenant.

Zaid's suitability as a tenant was not hotly contested at trial. Wise testified that the original tenants had struggled with the restaurant, but that Zaid "was young, had a lot of business experience for his age, [and his] family had a lot of business experience; and he wanted to improve the business and grow the business, which is what I felt would be good for the shopping center." Zaid has not directed this Court's attention to any testimony in the record from which it could be inferred that Weingarten questioned Zaid's financial ability to either lease the property or to guarantee the payment of rent for the new tenant. The contested issue at trial was not whether Zaid would have been a suitable tenant but whether he would have been a willing tenant. Moreover, the instruction did not suggest that Zaid would not be a suitable tenant, but merely informed the jury that the landlord was not required to accept a replacement tenant, including Zaid, without regard to the circumstances.

In *Crenshaw*, the trial court instructed the jury that mere isolated references to each other as husband and wife did not amount to adequate evidence to prove that they

[1] The trial court apparently altered the instruction because at the time of default Zaid was an assignor and guarantor, not the tenant.

represented to others that they were married. *Crenshaw*, 327 S.W.3d at 224. The appellate court held the instruction impermissibly commented on the weight of the evidence in such instruction by stating that a certain category of evidence does not constitute sufficient evidence of the matter to be decided by the jury. *Id.* Here, the trial court did not suggest what evidence would be required to establish that a particular tenant would be suitable. As such, the instruction did not nudge the jury toward a particular answer. *See Southmark Mgmt. Corp. v. Vick*, 692 S.W.2d 157, 160-61 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.) (asking the jury what amount of money, if any, would be a reasonable fee for the services of the plaintiff's attorney did not suggest the trial court's opinion of the proper verdict). We conclude that the instruction did not decide a material contested issue for the jury. Accordingly, we overrule issue two.

In his third issue, Zaid contends that the trial court erred by refusing to poll the jury on each question. Ten jurors signed the verdict. Zaid's counsel asked, "Can we poll the jury whether the 10/2 is for all the questions?" The trial court replied, "Sure," and instructed the jury, "When I call your name, tell me if this is your verdict." Neither the general verdict nor the questions and answers were read to the jury. *See* Tex. R. Civ. P. 294. No objections were made to the procedure the trial court used to poll the jury before the jury was discharged. Any complaint regarding the method of polling the jury was not preserved for appeal. *See* Tex. R. App. P. 33.1(a).

Zaid argues that the record does not establish that the same ten jurors agreed on all of the questions answered by the jury. This argument is not supported by the record. The trial court individually called each of the ten jurors who signed the verdict. Each of the ten jurors individually replied that it was that juror's verdict. Nothing in the record indicates that any of the ten jurors disagreed with any part of the verdict. We overrule issue three.

In his final issue, Zaid challenges the award of attorney's fees. The jury awarded $46,971.50 for trial, $30,000 for an appeal to the Court of Appeals, and $30,000 for an appeal to the Supreme Court. Zaid's motion for judgment notwithstanding the verdict urged that the jury's awards for attorney's fees for trial and appeal were excessive as a matter of law.

Weingarten's attorney testified that in the course of the litigation against Zaid he expended 21 hours and 55 minutes at a rate of $250 per hour, another attorney worked on the case for 131 hours at $185 per hour, and a paralegal spent 151 hours on the case at $90 per hour. The attorney explained that his firm agreed to a combined rate of $300 per hour for all firm members during the trial, that they spent 40 hours in trial preparation, and that the trial took 8.4 hours. The firm sent monthly invoices to Weingarten, and the invoices through the month before trial were submitted to the jury. The invoices do not match lead counsel's testimony about the amount of time the paralegal spent on the case, but the record does not contain an invoice for the eighteen days preceding trial. The

invoices describe the tasks performed and the time spent on each task. Weingarten's counsel testified that appeal is a very expensive process that may involve 50-page briefs and oral argument. According to counsel, appeals can cost "up to $100,000" but in this case a reasonable and necessary fee would be $30,000, with another $30,000 if the appeal were accepted by the Supreme Court.

Zaid argues that 160 total hours at $300 per hour for the combined effort of the two lawyers for their work on the trial "would be more than generous." Concerning the appeal, Zaid argues that an award for 50 hours of work at a rate of $200 per hour would be a reasonable and necessary award of fees for each stage of an appeal. Weingarten's counsel had been practicing law for almost twenty years. He testified that he is aware of the reasonable and necessary fees for a case of this type, and that $46,791.50 is a reasonable fee that was approximately $17,000 less than a forty percent contingent fee would have been. He also testified about the cost involved in an appeal. Zaid presented no evidence that the hourly rates charged by Weingarten's counsel were unreasonable or not customary. On cross-examination, Weingarten's counsel admitted that his first court appearance for the case occurred only recently before trial, but Zaid challenged neither the actual performance of the work documented in the invoices nor the necessity to perform that work. Zaid presented no evidence concerning an amount for reasonable and necessary attorney's fees in the event of an appeal.

When conducting a legal sufficiency review, we must credit favorable evidence if a reasonable fact-finder could and disregard the contrary evidence unless a reasonable fact-finder could not disregard it. *City of Keller*, 168 S.W.3d at 827. The jury had before it the documented work performed in furtherance of the litigation. The testimony regarding the reasonableness of the rates charged by Weingarten's counsel was uncontroverted. Considering all of the evidence favorable to the jury's finding and disregarding evidence to the contrary unless a reasonable fact-finder could not, we hold that the evidence was legally sufficient to support the jury's award of attorney's fees. *Id.* We overrule issue four and affirm the judgment.

AFFIRMED.

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CHARLES KREGER
Justice

Submitted on March 30, 2011
Opinion Delivered August 31, 2011

Before Gaultney, Kreger, and Horton, JJ.