NUMBER 13-13-00713-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

ARCTURUS CORPORATION, Appellant,

v.

**ESPADA OPERATING, LLC,
BENGAL ENERGY, L.P.,
LEE ROY BILLINGTON, RODNEY ROLSTON,
AND MITCHELL K. MICHELSON, Appellees.**

**On appeal from the 329th District Court
of Wharton County, Texas.**

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Benavides and Perkes
Memorandum Opinion by Justice Perkes

Following a dispute involving a cash call on an oil and gas agreement, appellant Arcturus Corporation (Arcturus) filed suit against appellees Espada Operating, LLC (Espada) and Lee Roy Billington—its president; Bengal Energy, L.P (Bengal) and Mitchell

Michelson—its president; Texas Oil Leasing Company (Texas Oil Leasing); ITEXCO, Inc.; and Rodney Rolston. After a bench trial, the trial court awarded Arcturus the sum of $75,000 in damages and $25,000 in attorney's fees against Espada and Bengal, jointly and severally. The trial court also awarded Rolston $10,000 in attorney's fees against Arcturus. The trial court ordered that Arcturus take nothing against the remaining defendants.[1]

By nine issues, Arcturus argues that the trial court erred: (1) by finding a valid forbearance agreement; (2) by awarding liquidated damages; (3) by failing to find Billington, Michelson, Texas Oil Leasing, ITEXCO, and Rolston liable for various torts; (4) by failing to find Billington, Michelson, Texas Oil Leasing, ITEXCO, and Rolston liable for conversion; (5) by failing to find Rolston liable for promissory estoppel; (6) by failing to find Billington and Michelson liable for civil theft; (7) by awarding Rolston attorney's fees; (8) by failing to award Arcturus all of its requested attorney's fees; and (9) by failing to award Arcturus pre-judgment interest. We affirm.

I. BACKGROUND

Rolston uses two companies, Texas Oil Leasing and ITEXCO, to obtain leases for Bengal and Espada. Rolston acquired the Fraley-Nelson lease, and on September 1, 2009, Arcturus, Bengal, and Espada entered into a joint operating agreement (JOA) to explore and develop the lease for oil and gas production. Espada is the operator under the JOA.

[1] Neither Espada nor Bengal filed a cross-point on appeal. Bengal was not included in any issue on appeal, but was included in various arguments and in appellant's prayer for relief. Therefore, we will include Bengal in the relevant discussions.

In December 2009, Rolston prepared and sent Arcturus a well proposal letter based on an authorization for expenditure (AFE) to fund drilling of the initial test well. Enclosed in the letter was a cash call from Espada requesting $744,504.50. Arcturus could not meet the cash call and requested more time. By letter dated January 18, 2010, Rolston, on behalf of Bengal, offered to extend Arcturus's time to tender the $744,504.50 if Arcturus would make a "good faith" payment of $150,000.00. Rolston re-sent the letter to Arcturus on January 19, 2010, with a requirement to pay the $150,000.00 by January 20, 2010 ("forbearance letter"). The letter also stated that Arcturus's failure to pay the remainder of the cash call totaling $594,504.50 by February 15, 2010 "shall result in the additional forfeiture of the $150,000 as liquidated damages." Arcturus wired $100,000 to Espada on January 20, 2010 and another $50,000 the following day.

Arcturus failed to fund the remainder of the cash call by February 15, 2010. In April 2010, Bengal and Espada terminated Arcturus's interest in the Fraley-Nelson lease pursuant to the terms of the JOA and kept the $150,000 as "liquidated damages." Arcturus then filed suit against Espada, Billington, Bengal, Michelson, Texas Oil Leasing, ITEXCO, and Rolston. In its fourth amended petition, Arcturus raised claims for declaratory judgment, breach of contract, conversion, quantum meruit, breach of fiduciary duty, civil theft, conspiracy, accounting, and promissory estoppel. Arcturus sought the return of its $150,000, together with actual damages, exemplary damages, attorney's fees, and pre-judgment interest.

During the bench trial, the parties presented conflicting testimony regarding whether the $150,000 payment was sent pursuant to the forbearance letter. According

to Michelson, he believed that this money was sent in accordance with the forbearance letter's requirements and that "[t]here was nothing else at the time that existed to cause them to send the money." Rolston testified similarly. Arcturus's president, Alex Parvizian, testified that Rolston asked for an advance on drilling costs and that the money was sent as an advance. The well was never drilled, and the lease subsequently expired.

After hearing the evidence, the trial court found the liquidated damages amount was not commercially reasonable, and further found the commercially reasonable sum would be no more than $75,000. Consequently, the trial court awarded $75,000 in damages to Arcturus and $25,000 in attorney's fees. This appeal followed.

II. THE FORBEARANCE AGREEMENT

By its first issue, Arcturus alleges the trial court erred as a matter of law in finding that a valid forbearance agreement existed. Arcturus challenges the legal and factual sufficiency of the trial court's findings of fact numbers 1, 3, 5, 7, 8, 9, and 10; and conclusions of law numbers 1, 2, and 3. Specifically, Arcturus argues that it did not accept the agreement, the agreement was illusory, it violated the statute of frauds, and it violated the parol evidence rule.[2]

A. Standard of Review

Findings of fact in a bench trial have the same force and effect as findings by the jury. *Anderson v. City of Seven Points*, 806 S.W.2d 791, 794 (Tex. 1991); *Sharifi v.*

[2] Arcturus's argument appears to be limited to the four contentions shown: acceptance, illusory contract, statute of frauds, and parol evidence rule. Notwithstanding, we have reviewed the record for the legal and factual sufficiency of the evidence.

Steen Auto., LLC, 370 S.W.3d 126, 147 (Tex. App.—Dallas 2012, no pet.). If there is any evidence of a probative nature to support the trial court's judgment, we will not set it aside, and if there is any evidence in the record to sustain the trial court's findings, we may not substitute our findings of fact for those of the trial court. *Ray v. Farmers' State Bank of Hart*, 576 S.W.2d 607, 609 (Tex. 1979); *Garcia v. Tautenhahn*, 314 S.W.3d 541, 544 (Tex. App.—Corpus Christi 2010, no pet.). We review the trial court's findings of fact by the same standards we use in reviewing the sufficiency of the evidence supporting a jury's answers. *Garcia*, 314 S.W.3d at 544. Unchallenged findings of fact are binding on the appellate court, unless the contrary is established as a matter of law or there is no evidence to support the finding. *Sharifi*, 370 S.W.3d at 147. When, as here, the appellate record contains a reporter's record, findings of fact on disputed issues are not conclusive and may be challenged for sufficiency of the evidence. *Id.*

If the party with the burden of proof—here, Arcturus—challenges the legal sufficiency of an adverse finding, we must determine whether the complaining party has demonstrated on appeal that the evidence establishes, as a matter of law, all vital facts in support of the issue. *See Barnes v. Mathis*, 353 S.W.3d 760, 762 (Tex. 2011); *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001) (per curiam); *Garcia*, 314 S.W.3d at 544; *see also Perez v. Perez*, No. 13–11–00169–CV, 2013 WL 398932, at *4 (Tex. App.—Corpus Christi Jan. 31, 2013, no pet.) (mem. op.). In a "matter of law" challenge, we "first examine the record for evidence that supports the finding, while ignoring all evidence to the contrary." *Dow Chem. Co.*, 46 S.W.3d at 241. If there is no evidence to support the finding, we will examine the entire record in order to determine whether the

contrary proposition is established as a matter of law. *Id.*; *Garcia*, 314 S.W.3d at 544. We will sustain the issue if the contrary proposition is conclusively established. *Dow Chem. Co.*, 46 S.W.3d at 241; *Garcia*, 314 S.W.3d at 544. The final test for legal sufficiency 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, 822 (Tex. 2005); *Garcia*, 314 S.W.3d at 544.

When a party attacks the factual sufficiency of an adverse finding on an issue on which it has the burden of proof, it must demonstrate on appeal that the adverse finding is against the great weight and preponderance of the evidence. *Dow Chem. Co.*, 46 S.W.3d at 242; *Garcia*, 314 S.W.3d at 544. The court of appeals must consider and weigh all of the evidence and can set aside a verdict only if the evidence is so weak or if the finding is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust. *Dow Chem. Co.*, 46 S.W.3d at 242.

B. The Forbearance Agreement

With respect to the forbearance agreement, the trial court found:

> 1. As of January 18, 2010 Plaintiff Arcturus Corporation ("Arcturus") was obligated pursuant to the Farmout Agreement or the Operating Agreement, or both either to pay a "cash call" of $744,504.50 or else forfeit its interest in the Fraley-Nelson venture.
>
> . . . .
>
> 3. In its proposed "Forbearance Agreement" letter dated January 19, 2010, Defendant Bengal Energy, L.P. offered to extend Arcturus's cash call deadline to February 15, 2010 on the condition that Arcturus would immediately remit $150,000.
>
> 5. Arcturus transmitted the $150,000 in accordance with the Forbearance Agreement.

7. The Forbearance Agreement that had been proposed to Arcturus was accepted by Arcturus by the conduct of Arcturus in transmitting the $150,000 to Espada, in the form of two wire transfers on January 20 and 21, 2010.

8. Upon Arcturus's payment of the $150,000, Arcturus received the benefit of the forbearance described in the Forbearance Agreement[.]

9. At the end of the forbearance period, Arcturus failed to tender the balance owed on the cash call.

10. As a result of the failure of Arcturus to tender the balance owed on the cash call at the end of the forbearance period, and after still further forbearance gratuitously extended to Arcturus, ultimately Espada retained the $150,000 as liquidated damages, as had been agreed to in the Forbearance Agreement[.]

The trial court thereafter concluded:

1. Arcturus accepted the proposed Forbearance Agreement through its conduct when it transmitted the $150,000 to Espada as called for by the Forbearance Agreement.

2. Arcturus benefitted from the Forbearance Agreement by receiving additional time to pay the balance of the cash call that otherwise was due from Arcturus at the time that the Forbearance Agreement was entered.

3. The Forbearance Agreement became an enforceable contract upon performance by Arcturus after January 19, 2010.

1. Acceptance

Arcturus argues that it did not accept the forbearance agreement because it did not perform in strict compliance with its terms. According to Arcturus, the offer in the January 19 forbearance letter terminated on January 19. Because it did not send the $150,000 until after the forbearance offer expired, on January 20, Arcturus concludes that the forbearance letter created no agreement.

The offeror of a contract may dictate the manner, time, and place of acceptance of the offer. *Lone Star Gas Co. v. Coastal States Gas Producing Co.*, 388 S.W.2d 251, 254 (Tex. Civ. App.—Corpus Christi 1965, no writ). An offer whose manner, time, and place of acceptance is dictated by the offeror becomes a binding contract only when it is accepted according to its terms. *Fail v. Lee*, 535 S.W.2d 203, 208 (Tex. Civ. App.—Fort Worth 1976, no writ). The offeror, however, may waive strict compliance with provisions of the offer concerning acceptance, and may waive compliance with a provision specifying a time limit for acceptance, even if the contract states that time is of the essence. *See Joiner v. Elrod*, 716 S.W.2d 606, 609 (Tex. App.—Corpus Christi 1986, no writ).

Despite Arcturus's claims to the contrary, the forbearance letter required payment of $150,000 by the close of business on January 20, not January 19. According to the record, Arcturus sent $100,000 prior to the deadline and the remaining $50,000 shortly after the deadline. Espada could, and apparently did, waive strict compliance with the deadline of January 20, by accepting Arcturus's later payment on January 21. *See id.* at 609. Moreover, both Rolston and Michelson testified that Arcturus made the two payments pursuant to the forbearance letter. That Arcturus sent the exact amount required by the letter almost as soon as it received the letter, supports Rolston and Michelson's version of events. The effect of Arcturus's payments, as stated in the forbearance letter, and evidenced by the record, was to buy time to meet the cash call. We conclude that the evidence is legally and factually sufficient to support the trial court's finding that Arcturus accepted the terms of the forbearance letter—and formed a valid

agreement—by transmitting $150,000 to Espada. *See Dow Chem. Co.*, 46 S.W.3d at 241; *Garcia*, 314 S.W.3d at 544.

2. Illusory Contracts

Arcturus argues that the forbearance agreement was illusory because it sought to have Arcturus forfeit drilling funds for a "meaningless extension of 30 days to meet an invalid cash call." In effect, Arcturus claims that even if it paid the money, Espada would not have had the requisite funds to begin drilling since none of the other non-operators were cash called.

Under Texas law, a promise is illusory when it fails to bind the promisor, who "retains the option of discontinuing performance." *In re C & H News Co.*, 133 S.W.3d 642, 647 (Tex. App.—Corpus Christi 2003, orig. proceeding); *see In re H.E. Butt Grocery Co.*, 17 S.W.3d 360, 370 (Tex. App.—Houston [14th Dist.] 2000, orig. proceeding).

In the forbearance letter, Rolston, on behalf of Bengal, promised Arcturus additional time to pay the cash call in exchange for $150,000. Arcturus's argument about Espada's finances does not concern whether the forbearance agreement failed to bind Bengal to any performance and is of no consequence in determining whether or not the forbearance offer was illusory. The record provides evidence that Arcturus was aware of the relationship between Espada and Bengal, and that Arcturus asked for more time to meet the cash call—which was promised by the forbearance letter. Such a promise is not illusory. *See In re C & H News Co.*, 133 S.W.3d at 647.

3. Statute of Frauds

Arcturus argues that the forbearance agreement violates the Statute of Frauds. Arcturus reasons that since the unsigned forbearance agreement expressly references agreements assigning an interest in oil and gas leases, it is unenforceable under the Statute of Frauds. *See* TEX. BUS. & COM. CODE ANN. § 26.01 (West, Westlaw through 2015 R.S.) (certain promises are not enforceable unless in writing and signed by person to be charged with promise).

An exception to the Statute of Frauds "permits the parties to a written contract to agree orally to extend the time of performance of a contract required to be in writing, so long as the oral agreement is made before the expiration of the written contract." *Dracopoulas v. Rachal*, 411 S.W.2d 719, 721 (Tex. 1967); *Joiner*, 716 S.W.2d at 609. Unless an agreement extending time for performance materially alters the terms of the original contract "so much as to make the modification an entirely new contract," the Statute of Frauds will not bar its enforcement. *Triton Commercial Props., Ltd. v. Norwest Bank Texas, NA.*, 1 S.W.3d 814, 818 (Tex. App.—Corpus Christi 1999, pet. denied).

While the sale of an interest in an oil and gas lease must comply with the Statute of Frauds, the forbearance agreement merely extended the time to perform an obligation under the joint operating agreement. The parties' contract here—the joint operating agreement—indisputably had not expired at the time Arcturus received the forbearance agreement. Rather, the record establishes that the joint operating agreement was not terminated until April 2010, several months after the forbearance agreement. Therefore, Arcturus did not establish that extending its deadline for meeting the cash call effectively

rewrote the joint operating agreement to the point that it was a new contract. The Statute of Frauds does not render the unsigned forbearance agreement unenforceable.

4. Parol Evidence

Arcturus argues that the forbearance agreement violates the parol evidence rule. Arcturus contends that enforcing the forbearance letter amounts to an alteration and contradiction of the terms of the joint operating agreement.

When the parties have concluded a valid integrated agreement with respect to a particular subject matter, the parol evidence rule precludes the enforcement of inconsistent prior or contemporaneous agreements. *Hubacek v. Ennis State Bank*, 317 S.W.2d 30, 31 (Tex. 1958). The rule, however, does not apply to agreements made after the written agreement, nor does it prevent the written instrument from being later modified by the parties by oral agreement. *Quitta v. Fossati*, 808 S.W.2d 636, 642 (Tex. App.—Corpus Christi 1991, writ denied).

According to the record, Arcturus received the forbearance agreement after it executed the joint operating agreement. Since the parol evidence rule does not apply to subsequent agreements, Arcturus's argument to the contrary is without merit. *See id.*

5. Summary

After review, we conclude that the evidence is legally and factually sufficient to support the trial court's findings of fact 1, 3, 5, 7, 8, 9, and 10. We further hold that the trial court correctly concluded Arcturus accepted the proposed forbearance agreement by transmitting $150,000 to Espada, that Arcturus benefited by receiving additional time to

meet the cash call, and that Arcturus's performance made the forbearance agreement an enforceable contract. Arcturus's first issue is overruled.

III. LIQUIDATED DAMAGES

In its second issue, Arcturus argues "the trial court erred as a matter of law in acting without authority in re-writing an unenforceable liquidated damages provision." Arcturus further argues the evidence established that there were no damages to Bengal or Espada in delaying the drilling of the well for a period of less than thirty days. According to Arcturus, Bengal did not have the funds necessary to pay for its portion of the drilling the well at the time of the forbearance letter and no drilling permit existed.

With respect to the liquidated damages, the trial court found: "(11) The sum of $150,000 in liquidated damages, as called for in the Forbearance Agreement, is not a commercially reasonable sum for liquidated damages in these circumstances, but rather, it is excessive;" and "(12) A commercially reasonable sum for liquidated damages in such circumstances would be no more than $75,000." The trial court thereafter concluded: "(4) The Forbearance Agreement should be reformed to reflect liquidated damages of $75,000 instead of $150,000."

A. Applicable Law

The test for determining whether a provision is valid and enforceable as liquidated damages is: (1) if the damages for the prospective breach of the contract are difficult to measure; and (2) the stipulated damages are a reasonable estimate of actual damages. *Phillips v. Phillips*, 820 S.W.2d 785, 788 (Tex. 1991) (citing *Rio Grande Valley Sugar Growers, Inc. v. Campesi*, 592 S.W.2d 340, 342 n. 2 (Tex. 1979)); *Baker v. Int'l Record*

Syndicate, Inc., 812 S.W.2d 53, 55 (Tex. App.—Dallas 1991, no writ). The question of whether a contractual provision is an enforceable liquidated damages provision or an unenforceable penalty is a question of law which is to be determined as of the time when the contract was executed. *See Phillips*, 820 S.W.2d at 788; *Zucht v. Stewart Title Guar. Co.*, 207 S.W.2d 414, 418 (Tex. Civ. App.—San Antonio 1947, writ dism'd); *Bourland v. Huffhines*, 244 S.W. 847, 849 (Tex. Civ. App.—Amarillo 1922, writ dism'd w.o.j.). Merely designating a provision as one for "liquidated damages" will not prevent the court from holding that the provision is in fact a penalty; however, when it clearly appears from the terms of the contract that it was the intention of the parties that the sum stated should be treated as providing for liquidated damages, this intention will be enforced. *Elliott v. Henck*, 223 S.W.2d 292, 295 (Tex. Civ. App.—Galveston 1949, writ ref'd n.r.e.).

The burden is on the party asserting the defense of penalty to demonstrate the contractual provision is an unenforceable penalty rather than an enforceable liquidated damages provision. *See Fluid Concepts, Inc. v. DA Dallas Apartments Ltd. P'ship*, 159 S.W.3d 226, 231 (Tex. App.—Dallas 2005, no pet.). In order to meet this burden, the party asserting the defense is required to prove the amount of the other parties' actual damages, if any, to show that the liquidated damages are not an approximation of the stipulated sum. *Johnson Eng'rs, Inc. v. Tri-County Water Supply Corp.*, 582 S.W.2d 555, 557 (Tex. Civ. App.—Texarkana 1979, no writ). If the liquidated damages are shown to be disproportionate to the actual damages, then the liquidated damages must be declared a penalty and recovery limited to the actual damages proven. *Id.*

B. Analysis

The forbearance letter included the following provision: "[Arcturus's] failure to pay the $594,504.50 by goods [sic] funds by the close of business February 15th, at our option, shall result in the additional forfeiture of the $150,000, as liquidated damages." To meet its burden, Arcturus needed to prove a reasonable forecast of damages arising from its failure to perform its obligation to pay the cash call by the end of the extension period. *See Phillips*, 820 S.W.2d at 788; *Johnson Eng'rs, Inc.,* 582 S.W.2d at 557. During trial, Michelson responded to the trial court's questions about the amount of liquidated damages:

> THE COURT: How did you come up with that number? What did you relate it to?
>
> [MICHELSON]: I don't remember exactly at the time. I mean, now looking back at then. But we probably based it on some percentage of the costs that we would have been asking for prior to that.
>
> THE COURT: Okay. And why did you think the hundred fifty thousand dollars was a reasonable liquidated damages amount? Why would that—people in your business doing what you do on a pretty regular basis, why would you conclude that that was a reasonable amount of liquidated damages if they chose not to put up the rest of the money?
>
> [MICHELSON]: The liquidated damages at the end wasn't the driver for the number and for the amount. It was more looking at it as a percentage of the drilling costs and something that would be substantial enough and liken it to an earnest money commitment in a real estate transaction. Something that made them have skin in the game to have this forbearance and the idea—I'm sorry.
>
> THE COURT: No, no. That's all right. I understand your answers. But I guess my question is do you also—agree that a reasonable person evaluating this transaction could

> conclude that that's a pretty heavy penalty to pay because it's probably a fact that neither Bengal nor Espada suffered damages that come anywhere close to $150,000?
>
> [MICHELSON]: One could reach that conclusion, yes, sir.

No other testimony or evidence regarding the amount of damages appears in the record. Contrary to Arcturus's claim, the evidence does not show that Espada or Bengal did not suffer any damages. Rather, the record is silent regarding the amount of actual damages, if any. The forbearance letter yields no information on damages, and the record does not show what, if any, damages were caused by the delay.[3] Moreover, the mere fact that stipulated damages are in excess of actual damages does not prevent the stipulation from being lawful. *American Nat'l Ins. Co. v. Tri–Cities Constr., Inc.*, 551 S.W.2d 106, 109 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ).

Arcturus had the burden to provide evidence of actual damages to show that the liquidated damages somehow amounted to a penalty. *See Johnson Eng'rs, Inc.,* 582 S.W.2d at 557. Arcturus offers no evidence to show that information concerning actual damages is readily available, or even what information a court could use to determine the amount of actual damages. *See, e.g. Phillips*, 820 S.W.2d at 787–89 (court considered contractual provision in which one party agreed to pay other party as liquidated damages sum of ten times actual damages). Moreover, numerous courts have held Michelson's methodology for calculating liquidated damages—as a percentage of the total price—is acceptable. *See Ashton v. Bennett*, 503 S.W.2d 392, 394–95 (Tex. Civ. App.—Waco

[3] The cash call amount in the sum of $744,504.50 is the only sum in the record that we have to consider. That sum, however, does not necessarily equate to actual damages.

1974, writ ref'd n.r.e.) (upholding liquidated damages provision entitling seller to approximately 16% of purchase price); *Thanksgiving Tower Partners v. Anros Thanksgiving Partners*, 64 F.3d 227, 232 (5th Cir.1995) ($5 million was reasonable liquidated damage amount despite internal memorandum stating anticipated damages were only $1.4 million); *see also Chan v. Montebello Dev. Co.*, No. 14–06–00936–CV, 2008 WL 2986379, at *5 (Tex. App.—Houston [14th Dist.] July 31, 2008, pet. denied) (mem. op.) (10% of total purchase price is reasonable amount of liquidated damages).

Inasmuch as Arcturus did not meet its burden of proof, we agree with the trial court's conclusion that, as a matter of law, the forbearance agreement included an enforceable liquidated damages provision.[4] Arcturus's second issue is overruled.

IV. ARCTURUS'S ADDITIONAL CLAIMS

In issues three through six, Arcturus claims the trial court erred by not finding liability against the respective appellees for various torts. In each issue, Arcturus generally recites that the evidence is legally and factually insufficient to support the trial court's findings of fact and conclusions of law that relate to each particular issue.

A. Standard of Review

As in its previous issues, Arcturus generally challenges the legal and factual sufficiency of adverse findings that it had the burden of proving at trial. *See Barnes,* 353 S.W.3d at 762. We apply the same standard of review to Arcturus's issues three through

[4] Neither Espada nor Bengal have brought a cross-point on appeal asserting the trial court erred by reducing the amount of contracted liquidated damages. *See Pat Baker Co. v. Wilson*, 971 S.W.2d 447, 450 (Tex.1998) (appellate courts are prohibited from addressing unassigned error in civil cases).

six as we do in issues one and two. *See City of Keller*, 168 S.W.3d at 822; *Dow Chem. Co.*, 46 S.W.3d at 242.

B. Breach of Fiduciary Duty Claim

By its third issue, Arcturus argues Espada is liable for breach of fiduciary duty. Arcturus does not state what element it is challenging and did not obtain any findings of fact on this claim. The trial court, however, did enter the following conclusion of law:

> 4. Neither Espada Operating, LLC, Bengal Energy, L.P., Lee Roy Billington nor Mitchell K. Michelson breached a fiduciary duty to Arcturus Corporation.

The elements of a breach of fiduciary duty claim are: (1) a fiduciary relationship between the plaintiff and defendant, (2) a breach by the defendant of his fiduciary duty to the plaintiff, and (3) an injury to the plaintiff or benefit to the defendant as a result of the defendant's breach. *Fred Loya Ins. Agency, Inc. v. Cohen*, 446 S.W.3d 913, 919 (Tex. App.—El Paso 2014, pet. denied) (quoting *Dernick Res., Inc. v. Wilstein*, 312 S.W.3d 864, 877 (Tex. App.—Houston [1st Dist.] 2009, no pet.). A fiduciary owes his principal a high duty of good faith, fair dealing, honest performance, and strict accountability. *Vogt v. Warnock*, 107 S.W.3d 778, 782 (Tex. App.—El Paso 2003, pet. denied).

Arcturus claims Espada breached a fiduciary duty when it retained the $150,000. Arcturus contends that Espada was obligated to return the $150,000, but instead, used the money to purchase additional oil leases. Arcturus, however, ignores the trial court's finding that Arcturus paid the $150,000 pursuant to a forbearance agreement. Arcturus further ignores that its failure to pay the remainder of the cash call by the forbearance agreement's deadline, entitled Espada to withhold the $150,000 as liquidated damages.

Given the evidence, the trial court could have found that because Espada was entitled to retain the liquidated damages based on the forbearance agreement, no breach of fiduciary duty occurred.

C. Conversion

By its third issue, Arcturus alleges Espada and Bengal are liable for conversion. By its fourth issue, Arcturus claims that Michelson, Rolston, and Billington are also liable for conversion. Arcturus specifically challenges the following trial court findings:

> 18. Neither Rolston, Texas Oil Leasing Company, nor ITEXCO, Inc. wrongfully exercised dominion or control over money or personal property owned or possessed by Arcturus Corporation.

Arcturus further challenges the trial court's following conclusion of law:

> 8. Neither Rolston, Texas Oil Leasing Company, nor ITEXCO, Inc. converted any money or other personal property belonging to Arcturus Corporation.

Arcturus also challenges the trial court's following supplemental conclusion of law:

> 2. Neither Espada Operating, LLC, Bengal Energy, L.P., Lee Roy Billington nor Mitchell K. Michelson converted any money or other personal property belonging to Arcturus Corporation.

The elements of a conversion claim are: (1) the plaintiff owned or had possession of the property or entitlement to possession; (2) the defendant unlawfully and without authorization assumed and exercised control over the property to the exclusion of, or inconsistent with, the plaintiff's rights as an owner; (3) the plaintiff demanded return of the property; and (4) the defendant refused to return the property. *Stroud Production, L.L.C. v. Hosford*, 405 S.W.3d 794, 811 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (citing *Khorshid, Inc. v. Christian*, 257 S.W.3d 748, 759 (Tex. App.—Dallas 2008, no pet.)).

Arcturus's conversion claims against Michelson, Rolston, and Billington are based on alleged "wrongful dominion." Rolston testified that the $150,000 was wired by Arcturus directly to Espada, and never passed through Rolston. Ultimately when Arcturus demanded return of the funds some time later, the evidence established that the funds were not in the custody, dominion or control of Rolston, nor had the funds ever been in his control. Arcturus cites no evidence suggesting that Rolston had the authority to compel Espada to release the funds back to Arcturus, and Arcturus does not challenge the trial court's finding of fact number eighteen that "[n]either Rolston, Texas Oil Leasing Company, nor ITEXCO, Inc. wrongfully exercised dominion or control over money or personal property owned or possessed by Arcturus Corporation." Any unchallenged findings of fact that support the judgment will preclude reversal of the case. *Zagorksi v. Zagorski*, 116 S.W.3d 309, 319 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). Regarding Espada, Bengal, Billington, and Michelson, aside from rehashing the same disputed facts—that Espada received and retained the money pursuant to the forbearance agreement—Arcturus fails to explain what additional evidence shows that those appellees converted Arcturus's property.

3. Theft Liability Claims

By its third and sixth issues, Arcturus claims Espada, Bengal, Michelson, and Billington are liable for civil theft. The trial court found:

> 1. Neither Espada Operating, LLC, Bengal Energy, L.P., Lee Roy Billington nor Mitchell K. Michelson appropriated, secured, or stole of or from Arcturus Corporation, property or services as described by Section 31.03, 31.04, 31.05, 31.06, 31.07, 31.11, 31.12, 31.13, or 31.14 of the Texas Penal Code.

The Texas Theft Liability Act provides for civil liability for criminal theft. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 134.001–.005 (West, Westlaw through 2015 R.S.). "Theft" means unlawfully appropriating property or unlawfully obtaining services as is described by the Texas Penal Code. *Id.* § 134.002(2); *see* TEX. PENAL CODE ANN. § 31.03 (West, Westlaw through 2015 R.S.).

Arcturus's claims of theft-liability-act violations fail. As discussed, the crux of the case is Espada's retention of the $150,000 pursuant to the forbearance agreement. Arcturus points to no evidence in the record that shows either Espada, Bengal, Michelson, or Billington retained Arcturus's payment pursuant to the forbearance letter but also knew it was not entitled to the money. *See Jacobs v. State*, 230 S.W.3d 225, 229–30 (Tex. App.—Houston [14th Dist.] 2006, no pet.) ("If no more than intent and appropriation is shown in a contract claim, nothing illegal is apparent, because under the terms of [a contract] individuals typically have the right to 'deprive the owner of property,' albeit in return for consideration.") (quoting *Baker v. State*, 986 S.W.2d 271, 274 (Tex. 1998)).

4. Promissory Estoppel

By its fifth issue, Arcturus asserts that Rolston is liable for promissory estoppel. Arcturus challenges the trial court's following additional finding:

> 4. Neither Rolston, ITEXCO, nor Texas Oil Leasing made any promises to Arcturus that the $150,000 wired to Espada would be applied toward the drilling of the well or else returned to Arcturus.

Arcturus also challenges the trial court's following additional conclusion:

> 2. Rolston, ITEXCO, and Texas Oil Leasing are not liable to Arcturus Corporation for promissory estoppel.

Generally, promissory estoppel is a viable alternative to breach of contract. *Allied Vista, Inc. v. Holt*, 987 S.W.2d 138, 141 (Tex. App.—Houston [14th Dist.] 1999, pet. denied). Promissory estoppel is not applicable to a promise covered by a valid contract between the parties. Promissory estoppel, however, will apply to a promise outside a contract. *See Richter v. Wagner Oil Co.*, 90 S.W.3d 890, 899 (Tex. App.—San Antonio 2002, no pet.).

The elements of a promissory estoppel claim are (1) a promise, (2) foreseeability of reliance thereon by the promisor, and (3) substantial detrimental reliance by the promisee. *See English v. Fischer*, 660 S.W.2d 521, 524 (Tex. 1983); *Fretz Constr. Co. v. S. Nat'l Bank of Houston*, 626 S.W.2d 478, 480 (Tex. 1981). To show detrimental reliance, the plaintiff must demonstrate that it materially changed its position in reliance on the promise. *See English*, 660 S.W.2d at 524 (finding no promissory estoppel when plaintiff could not show it would not have taken its detrimental actions if defendant had not made promise); *Sandel v. ATP Oil & Gas Corp.*, 243 S.W.3d 749, 753 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (demonstrating failure to seek another job was insufficient to show detrimental reliance; employee required to show that but for stock option letter, he would have stopped working for employer).

According to Arcturus, Rolston promised that the $150,000 paid pursuant to the forbearance letter would be applied toward drilling the well. However, Rolston testified that based on his conversations with Arcturus, the forbearance agreement allowed another thirty days to meet the cash call. Further, the $150,000 would be applied to the drilling if and when Arcturus paid the remainder of the funds required by the cash call.

Rolston explained that the forbearance letter accurately reflected the discussions he had with Arcturus. Based on Rolston's testimony, the trial court could have concluded that, contrary to Arcturus's claims, Rolston did not promise to return the money if the well was not drilled. *See Chislum v. Home Owners Funding Corp.*, 803 S.W.2d 800, 804 (Tex. App.—Corpus Christi 1991, writ denied) ("The trial court, as the trier of fact, has the duty to weigh the evidence and judge the credibility of a witness.").

5. Civil Conspiracy & Aiding and Abetting Claims

By its third issue, Arcturus claims Michelson, Rolston, Texas Oil Leasing, ITEXCO, and Billington are liable for civil conspiracy and aiding and abetting a breach of fiduciary duty. Arcturus asserts the following findings and conclusions are legally and factually insufficient.

In its findings of fact, the trial court found:

> 22. Neither Rolston, Texas Oil Leasing Company, nor ITEXCO, Inc. was a member of a combination of two or more persons, the object of which was to accomplish either an unlawful purpose or a lawful purpose by unlawful means, with a meeting of the minds on such object of course of action, proximately resulting in injury or damage to Arcturus Corporation.

In its supplemental findings, the trial court found:

> 6. Neither Espada Operating, LLC, Bengal Energy, L.P., Lee Roy Billington nor Mitchell K. Michelson was a member of a combination of two or more persons, the object of which was to accomplish either an unlawful purpose of lawful purpose by unlawful means, with a meeting of the minds of such object or course of action, proximately resulting in injury or damage to Arcturus Corporation.

In its additional findings, the trial court found:

> 1. Neither Rolston, ITEXCO, nor Texas Oil Leasing induced any breach of fiduciary duty, or aided or abetted any breach of fiduciary duty, if any, owed by any person to Arcturus Corporation.

. . . .

7. Neither Rolston, ITEXCO, nor Texas Oil Leasing committed any unlawful, overt act to further the object or course of any civil conspiracy.

The trial court concluded:

11. Neither Rolston, Texas Oil Leasing Company, nor ITEXCO, Inc. engaged in, or was a party to, a civil conspiracy that injured Arcturus Corporation.

12. Neither Rolston, Texas Oil Leasing Company, nor ITEXCO, Inc. aided or abetted another party that committed any wrongful act, omission, or breach against Arcturus Corporation.

13. Rolston, Texas Oil Leasing, ITEXCO, Michelson and Billington are each the prevailing party as against Arcturus with regard to each cause of action that Arcturus alleged against each of them.

14. Arcturus failed to establish by a preponderance of the credible evidence that it is entitled to any relief or recovery against Rolston, Texas Oil Leasing, ITEXCO, Michelson or Billington.

In its supplemental conclusions of law, the trial court concluded:

4. Neither Espada Operating, LLC, Bengal Energy, L.P., Lee Roy Billington nor Mitchell K. Michelson breached a fiduciary duty to Arcturus Corporation.

5. Neither Espada Operating, LLC, Bengal Energy, L.P., Lee Roy Billington nor Mitchell K. Michelson engaged in, or was a party to, a civil conspiracy that injured Arcturus Corporation.

6. Neither Espada Operting, LLC, Bengal Energy, L.P., Lee Roy Billington nor Mitchell K. Michelson aided or abetted another party that committed any wrongful act, omission, or breach against Arcturus Corporation.

In its additional conclusions, the trial court concluded:

1. Rolston, ITEXCO, and Texas Oil Leasing are not liable to Arcturus Corporation for inducing or aiding or abetting a breach of fiduciary duty.

The essential elements of a civil conspiracy are: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as a proximate result. *Anderton v. Cawley*, 378 S.W.3d 38, 60 (Tex. App.—Dallas 2012, no pet.). The object to be accomplished must be either an unlawful purpose or a lawful purpose to be achieved by unlawful means. *Id.* Aiding, abetting, and inducing claims require the actor, with unlawful intent, to give substantial assistance and encouragement to a wrongdoer in a tortious act. *Juhl v. Airington*, 936 S.W.2d 640, 644 (Tex. 1996). The Texas Supreme Court has specifically dealt with aiding and abetting—as it has dealt with conspiracy—as a "dependent" claim, which is "premised on" an underlying tort. *See Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co.*, 51 S.W.3d 573, 583 (Tex. 2001).

A defendant's liability for conspiracy or aiding and abetting depends on participation in some underlying tort for which the plaintiff seeks to hold at least one of the named defendants liable. *Id.* (quotations omitted). Thus, when an underlying tort fails, there can be neither a conspiracy claim nor an aiding and abetting claim related to that failed tort. *Id; West Fork Advisors, LLC v. SunGard Consulting Servs., LLC*, 437 S.W.3d 917, 921 (Tex. App.—Dallas 2014, pet. denied).

In order to show that Michelson, Rolston, Texas Oil Leasing, ITEXCO, and Billington are liable for civil conspiracy or aiding and abetting, Arcturus must first prove an underlying tort. *See Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996); *West Fork Advisors, LLC,* 437 S.W.3d at 921. Arcturus failed to do so. Since the trial court

properly rejected all of Arcturus's tort claims, we conclude that the trial court correctly rejected Arcturus's civil conspiracy and aiding and abetting claims.

8. Limitations

The trial court concluded:

> 15. Arcturus' causes of action alleged against Texas Oil Leasing and ITEXCO for "money had and received", conversion, civil theft, and conspiracy are each barred by the two-year statute of limitations. TEX. CIV. PRAC. & REM. CODE § 16.003(a).

Arcturus does not challenge the trial court's finding that its causes of action against Texas Oil Leasing and ITEXCO for conversion, civil theft, and conspiracy were each barred by the statute of limitations. *See Zagorski*, 116 S.W.3d at 319 (concluding any unchallenged findings of fact that support the judgment will preclude reversal of the case). Because a limitations defense precludes a judgment, we conclude that the trial court correctly barred Arcturus's claims against Texas Oil Leasing and ITEXCO. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (West, Westlaw through 2015 R.S.) (two year statute of limitations for conversion and conspiracy).

16. Summary

After reviewing the record, we hold that the trial court's adverse findings are supported by evidence sufficient to enable fair minded people to reach the challenged conclusions. *See City of Keller*, 168 S.W.3d at 822. Arcturus's legal sufficiency challenges fail. Likewise, we hold that Arcturus failed to prove that the adverse findings are against the great weight and preponderance of the evidence; thus its factual sufficiency challenges fail. *See Dow Chem. Co.*, 46 S.W.3d at 242; *Garcia*, 314 S.W.3d at 544. Arcturus's third through sixth issues are overruled.

V. ROLSTON'S ATTORNEY FEES

By its seventh issue, Arcturus argues the trial court erred in awarding $10,000 to Rolston in attorney's fees because he was not the prevailing party in the declaratory judgment claim. Arcturus further asserts that Rolston's attorney's fee award was neither reasonable and necessary nor equitable and just.

The trial court found:

> 23. The sum of $10,000 is a reasonable attorney's fee for services necessarily performed by the attorney for Rodney Ralston in representing Mr. Rolston through trial on those causes of action that were alleged against Rolston for which recovery of attorney's fees is allowed by law.

The trial court concluded:

> 14. Rolston is entitled to recover reasonable attorney's fees of $10,000 from Arcturus as the prevailing party on the breach of contract claim and the declaratory judgment cause of action that Arcturus plead against Rolston, Texas Oil Leasing and ITEXCO.

A. Standard of Review

The party seeking to recover attorney's fees carries the burden of proof. *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 10 (Tex. 1991). Generally, the reasonableness of attorney's fees is a question of fact to be determined by the fact-finder and the award, if any, must be supported by competent evidence. *See Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998); *Great Am. Reserve Ins. Co. v. Britton*, 406 S.W.2d 901, 907 (Tex. 1966); *see also Charette v. Fitzgerald*, 213 S.W.3d 505, 513 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

Whether the awarded fees are "equitable and just" is a question of law. *Feldman v. KPMG LLP*, 438 S.W.3d 678, 686 (Tex. App.—Houston [1st Dist.] 2014, no pet.). In

a declaratory judgment case, we review a trial court's award of attorney's fees for an abuse of discretion. *Id.* It is an abuse of discretion for a trial court to rule arbitrarily, unreasonably, or without regard to guiding legal principles. *Id.* We must view the evidence in the light most favorable to the trial court's ruling, indulging every presumption in its favor. *Id.* (citing *Approach Resources I, L.P. v. Clayton*, 360 S.W.3d 632, 639 (Tex. App.—El Paso 2012, no pet.)).

B. Applicable Law

In "any proceeding" under the Uniform Declaratory Judgment Act (UDJA), "the court may award costs and reasonable and necessary attorney's fees as are equitable and just." TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (West, Westlaw through 2015 R.S.). The UDJA "entrusts attorney fee awards to the trial court's sound discretion, subject to the requirements that any fees awarded be reasonable and necessary, which are matters of fact, and to the additional requirements that fees be equitable and just, which are matters of law." *Bocquet,* 972 S.W.2d at 21. The award of attorney's fees is not dependent on a finding that the party "substantially prevailed." *Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 637 (Tex. 1996). Instead, a trial court may award attorney's fees to a non-prevailing party as are equitable and just. *State Farm Lloyds v. C.M.W.*, 53 S.W.3d 877, 894 (Tex. App.—Dallas 2001, pet. denied). The trial court has broad discretion to (i) afford all parties the opportunity to request fees; (ii) decline to award fees; and (iii) allow an award only when reasonable, necessary, equitable, and just. *Feldman*, 438 S.W.3d at 685.

Before a court can award attorney's fees, the party requesting the fees must prove they are reasonable and necessary. *Manon v. Tejas Toyota, Inc.*, 162 S.W.3d 743, 751 (Tex. App.—Houston [14th Dist.] 2005, no pet.). The Texas Supreme Court has identified the factors that the trial court is to consider in evaluating the reasonableness of attorney's fees. *See Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997) (identifying non-exclusive list of factors the trial court should consider).

C. Analysis

Arcturus's fourth petition raised a declaratory judgment action against Rolston and the other defendants; however, Arcturus did not obtain any of the declaratory relief that it requested. Rather, Rolston successfully defended against Arcturus's declaratory claims, and thus is the "prevailing party." *See id.* at 687. Therefore, the trial court had discretion to award fees to Rolston.

Arcturus argues that the evidence presented in support of the $10,000 figure is insufficient because the evidence does not include a detailed breakdown of specific tasks performed by Rolston's counsel during the course of the litigation. Arcturus relies on the recent Texas Supreme Court decision in *El Apple I, Ltd. v. Olivas* to support of its contention that more detailed evidence was necessary. *See* 370 S.W.3d 757, 764 (Tex. 2012). There, the court analyzed attorney's fees calculated using the lodestar method in an employment discrimination lawsuit. *Id.* at 762. No billing records or other documentation supported the attorney's testimony. *Id. at 760.* The court held that an attorney fee award under the lodestar method must include proof documenting the

performance of specific tasks, the time required for those tasks, the person who performed the work, and his or her specific rate. *Id.* at 764.

El Apple is distinguishable. *El Apple* involved calculating attorney's fees using a different statute and a different method. *Id.* Texas courts have not required billing records or other documentary evidence to substantiate a claim for attorney's fees. *Id.* at 762; *see, e.g., Tex. Commerce Bank, Nat'l Ass'n v. New*, 3 S.W.3d 515, 517–18 (Tex. 1999) (per curiam) (recognizing attorney's affidavit to be sufficient support for award of fees in default judgment); *Save Our Springs Alliance, Inc. v. City of Dripping Springs*, 304 S.W.3d 871, 892–93 (Tex. App.—Austin 2010, pet. denied) (accepting affidavit testimony detailing legal work and rates); *In re A.B.P.*, 291 S.W.3d 91, 99 (Tex. App.—Dallas 2009, no pet.) (documentary evidence is not prerequisite to award of attorney's fees); *Schlager v. Clements*, 939 S.W.2d 183, 191–93 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (holding failure to produce documentary evidence would affect weight of attorney's testimony regarding fees rather than its admissibility).

Rolston's attorney testified that he represented Rolston, ITEXCO, and Texas Oil Leasing. He explained that his billing rate was $300 per hour and that his total billing through trial was $30,000. He stated that he would allocate $10,000 to defending against the declaratory judgment action. He further testified regarding the nature of the services rendered and the reasonableness of the fees charged. Rolston's attorney testified that he was the only attorney whose work went into the fee and that he was personally familiar with the services performed. Although no billing records were produced, Rolston's

attorney's testimony was clear, direct and positive, and uncontroverted by any other witness.

We conclude that Rolston's attorney's fees were reasonable and necessary and supported by sufficient evidence. We further find nothing to indicate that the court's award was inequitable or unjust. The trial court did not abuse its discretion in awarding attorney's fees. Arcturus's seventh issue is overruled.

VI. ARCTURUS'S ATTORNEY FEES & PREJUDGMENT INTEREST

By its eighth and ninth issues, Arcturus contends that the trial court erred by not awarding it all of its requested attorney's fees and pre-judgment interest. Arcturus has not adequately briefed these two issues.

The trial court found:

> 9. Arcturus' reasonable and necessary attorney's fees in support of its claim against Bengal and Espada for the $150,000 it forwarded pursuant to the Forbearance Agreement are $25,000.00.

The trial court concluded:

> 7. Inasmuch as the Forbearance Agreement should be reformed to reflect liquidated damages of $75,000 instead of $150,000, Bengal Energy, L.P. and Espada, jointly and severally, must remit to Arcturus the sum of $75,000, as well as $25,000 in attorney's fees, for a total amount to be paid by Bengal Energy, L.P., and Espada to Arcturus.

Arcturus's brief of its eighth and ninth issues consists of a single three-sentence paragraph per issue. In each paragraph, Arcturus concludes it is entitled to additional attorney's fees and pre-judgment interest, respectively. There is no legal argument presented, and Arcturus offers but a single case citation as standing for the proposition

that pre-judgment interest may be awarded under equity principles. *See Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc*. 962 S.W.2d 507, 528 (Tex. 1998).

Arcturus is required to provide us with legal argument and authorities that support the argument to maintain the point at issue. *Dodge v. Dodge*, 314 S.W.3d 82, 86 (Tex. App.—El Paso 2010, no pet.); *see* TEX. R. APP. P. 38.1. This is not done by merely uttering facts and brief conclusory statements, unsupported by analysis and analogous legal authority. *Id.* Arcturus waived its complaints by presenting such attenuated, unsupported arguments. *See* TEX. R. APP. P. 38.1; *Johnson v. Oliver*, 250 S.W.3d 182, 187 (Tex. App.—Dallas 2008, no pet.) (issue inadequately briefed when party presented no authority to support contention or argument); *Ratsavong v. Menevilay*, 176 S.W.3d 661, 666 (Tex. App.—El Paso 2005, pet. denied) (issues inadequately briefed when party recited evidence at trial followed by conclusory statements without any supporting case law and only stating that standard of review was abuse of discretion); *Wheeler v. Methodist Hosp.*, 95 S.W.3d 628, 646 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (issue inadequately briefed when party did little more than summarily state point of error, without citations to legal authority or substantive analysis).

Regarding Arcturus's claim for prejudgment interest, a trial court may award prejudgment interest based on an enabling statute or general principles of equity. *Henry v. Masson*, 453 S.W.3d 43, 49 (Tex. App.—Houston [1st Dist.] 2014, no pet.). When, as here, no statute controls the award of prejudgment interest, the decision to award prejudgment interest is left to the sound discretion of the trial court, which should rely upon equitable principles and public policy in making its decision. *Id; see Joe v. Two*

Thirty Nine Joint Venture, 145 S.W.3d 150, 161 (Tex. 2004) (trial court abuses its discretion when it reaches decision so arbitrary and unreasonable as to amount to clear and prejudicial error of law).

Arcturus's claim to the money paid pursuant to the forbearance agreement was the subject of a serious and genuine dispute regarding ultimate liability. Thus, we cannot conclude that the trial court's decision not to award prejudgment interest was so arbitrary and unreasonable as to amount to a clear error. *See Henry*, 452 S.W.3d at 50 (holding trial court properly denied award of prejudgment interest because parties to a breach of contract action contested ultimate liability in good faith); *Pickens v. Alsup*, 568 S.W.2d 742, 744 (Tex. Civ. App.—Austin 1978, writ ref'd n.r.e.) (same).

Arcturus's eighth and ninth issues are overruled.

VII. CONCLUSION

We affirm the trial court's judgment.

GREGORY T. PERKES
Justice

Delivered and filed the
11th day of August, 2016.