Opinion filed August 1, 2013

In The

Eleventh Court of Appeals

No. 11-11-00278-CV

SELECT INVESTMENTS, L.L.C., Appellant

V.

RIGOBERTO LOZANO; HUGO ADAME; AND LOZANO, ADAME & GARZA, LLC, Appellees

On Appeal from the 98th District Court

Travis County, Texas

Trial Court Cause No. D-1-GN-09-001649

MEMORANDUM OPINION

Select Investments, L.L.C. appeals from a judgment, following a jury trial, in favor of Lozano, Adame & Garza, LLC (LAG) and Hugo Adame, based on fraud, in the amount of $170,000 and prejudgment interest of $18,676.71, as well as exemplary damages, based on fraud, awarded to Hugo Adame in the amount of

$125,000 and to LAG in the amount of $285,884. The trial court did not award Select damages or any offset based upon its counterclaim for breach of contract. Select urges in four issues on appeal that (1) the evidence is legally and factually insufficient to show fraud; (2) the evidence is legally and factually insufficient to show out-of-pocket loss in the amount of $170,000; (3) the trial court erred by not either awarding Select its contract damages or giving it an offset for those damages; and (4) the exemplary damages awarded are legally improper, are not supported by legally or factually sufficient evidence, and are excessive under both state and federal law. We reverse and render judgment that Appellees take nothing by their suit and that Select recover $85,700 from Appellees, jointly and severally, on its counterclaim, with costs of court charged to Appellees.

Select contends in Issue One that the evidence is legally and factually insufficient to show fraud. The evidence is legally insufficient only if (1) the record discloses a complete absence of evidence of a vital fact, (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact, (3) the only evidence offered to prove a vital fact is no more than a mere scintilla, or (4) the evidence conclusively establishes the opposite of the vital fact. *Marathon Corp. v. Pitzner*, 106 S.W.3d 724, 727 (Tex. 2003). We must examine the record for probative evidence that supports the jury's finding, while giving credit to all favorable evidence that reasonable jurors could believe and ignoring all evidence to the contrary unless reasonable jurors could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005).

In determining whether the evidence is factually insufficient, we must consider and weigh all of the evidence and determine whether the evidence in support of the finding is so weak as to be clearly wrong and unjust or whether the finding is so against the great weight and preponderance of the evidence as to be

clearly wrong and manifestly unjust. *Fuqua v. Oncor Elec. Delivery Co.*, 315 S.W.3d 552, 558 (Tex. App.—Eastland 2010, pet. denied).

Fraud is a material misrepresentation, which was false, which was either known to be false when made or was asserted without knowledge of its truth, which was intended to be acted upon, which was relied upon, and which caused injury. *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 47 (Tex. 1998). A false representation of future performance is actionable if the promise was made with no intention of performing. *Id.* at 48. Slight circumstantial evidence of fraud, when coupled with a promise to perform, is sufficient to support a finding of fraudulent intent. *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 225 (Tex. 1992).

LAG was developing residential real estate in Austin in 2008. Based upon a referral from David Hamlin, a real estate agent, LAG sought funding from Select. Hamlin had previously worked on projects involving Select. Three promissory notes and deeds of trust were executed in connection with the funding of the project. Two of the notes and deeds of trust, in the amounts of $330,000 and $340,000 respectively, were signed by Adame and Rigoberto Lozano on behalf of LAG and by Adame and Lozano individually. These notes were secured by the property being developed by LAG. A third note, in the amount of $125,000, was signed by Adame alone. This third note was secured by property in Brownsville owned by Adame. The three notes totaled $795,000.

Lozano testified that Appellees were waiting for the Brownsville property to sell in order to start the Austin project, but Spencer Lindahl, Select's consultant contractor, suggested he would lend them the money represented by the note secured by the Brownsville property rather than wait for the property to sell.

The jury found, in its answer to Question No. 8 of the court's charge, that Select committed fraud against the borrowers in connection with the execution of

the loan documents. A jury could reasonably have believed, based upon the evidence presented, that Select, through Lindahl, promised that it would lend funds based upon the promissory note secured by the Brownsville property but that it never intended to do so.

Select suggests in its brief that no misrepresentation was made by Select. However, we have set forth testimony regarding a misrepresentation made by Select that it would loan Appellees the funds represented by the note secured by the Brownsville property, while it never intended to do so. Lindahl acknowledged that Select never intended to loan money on the note secured by the Brownsville property, insisting that the note represented additional collateral for the other two notes. While Select states that there is no testimony or documentary evidence that details any misrepresentations, the misrepresentation presented through Lindahl's testimony is one which the jury could reasonably have determined as having been made by Select.

Select argues that Adame never testified as to what representations were made to him before he signed the Brownsville note. We fail to see the significance of this point in that, while the individual note was signed by Adame, the deal as a whole was between LAG, Adame, and Select.

Select contends that the evidence is insufficient to show its intent not to perform as represented, noting that, when the terms or existence of a contract are in doubt, it is wrong to infer fraudulent intent from a party's different view of what the contract obligates them to do—or even from its denial that an oral agreement was ever made. Select relies on the case of *Miga v. Jensen*, 96 S.W.3d 207, 210 (Tex. 2002), in which the Texas Supreme Court agreed with the appellant in that case that "a dispute over the terms of an oral agreement cannot, by itself, be any evidence of fraud, thereby transforming a contractual disagreement into the tort of fraud." Given the facts as related, the jury could reasonably have found that Select

did not have a different view of what the contract obligated it to do, inasmuch as the documents were in the form of a note, a written agreement. We also note that a denial that a promise was made is a factor showing a lack of any intent to perform the promise. *T.O. Stanley Boot Co.*, 847 S.W.2d at 225.

Select asserts that neither Adame nor Lozano testified that, but for a representation supposedly made about the Brownsville note to Adame, LAG would not have signed the other two notes to move forward with its work on the Austin property. We believe that the jury could reasonably have determined, from the testimony we have set forth, that LAG's work went forward when LAG relied on Select's promise to loan it the money that it was later hoping to recover from the sale of the Brownsville property. Select suggests that Lozano could not have justifiably relied upon Select to loan the money in a manner other than through draw requests. Select sets forth no basis for showing that Lozano anticipated that Select would loan money in some form other than through draw requests.

Addressing the final element of fraud, Select suggests that the evidence is insufficient to show that having access to an additional $125,000 would have permitted LAG to complete the project and make upcoming interest payments to avoid default on the loans. In essence, Select argues that the evidence is insufficient to show that Appellees suffered any injury as a result of any misrepresentation made to them by Select. Appellees' fraud claim fails in the absence of any injury caused by a misrepresentation made by Select. Select incorporates this argument into its second issue, in which it insists that the evidence is legally and factually insufficient to support the $170,000 for out-of-pocket loss found by the jury and awarded in the judgment to Adame and LAG. The out-of-pocket measure of damages in fraud cases computes the difference between the value paid and the value received. *Formosa Plastics*, 960 S.W.2d at 49. Appellees contend that this amount represents the value of the $125,000 that

they lost when the Brownsville property was foreclosed and $45,000 that they spent on construction expenses.

According to Appellees, the evidence is sufficient to show that the value of the Brownsville property was $125,000. Lindahl, Select's representative, testified that, during negotiations, Select used the figure of $125,000 because that is the figure given to it by Adame and Lozano. Lozano, one of LAG's partners, testified, "We had talked about the sales price [of the Brownsville property], and we all came up with that amount." No one testified as to the reasonable market value of the property. Adame, the owner of the property, did not testify at trial.

Despite the fact that no one testified as to the reasonable market value of the property, Appellees assert that the evidence that we have outlined was sufficient to support the jury's finding as to their damages because it constituted evidence as to Adame's opinion as the owner of the property concerning its value. We disagree. Evidence was presented as to the amount of value of the property used in negotiations between the parties, as suggested by Adame, and as to the amount determined by the partners to be the sales price, but no one, including Adame, testified that this amount was the reasonable market value of the property. We hold that there was an absence of evidence as to the vital fact of the reasonable market value of the Brownsville property or that, at best, the evidence in support of the reasonable market value of the property amounts to no more than a scintilla of evidence. *See Porras v. Craig*, 675 S.W.2d 503, 504–05 (Tex. 1984) (Owner's testimony of value of real property based on something other than reasonable market value does not constitute evidence of market value.).

In discussing evidence supporting the amount of $45,000 for construction expenses, Appellees refer us to testimony by Lozano that LAG had spent the initial $45,000 it had on hand at the beginning of the project for amendment of its plans

to provide for garages in the units as demanded by Select and for the initial pouring of the foundation for one of the buildings.

Even if the evidence were legally sufficient as to both the reasonable market value of the Brownsville property and the $45,000 expenditures, the evidence is legally insufficient as a whole because it does not present evidence from which a reasonable jury could conclude that Appellees received no value from Select. It is undisputed that Appellees received funds from Select in the amount of $550,882.45. Appellees assert in their brief that they received nothing for their efforts. We have not been referred to any evidence that Appellees received no part of that $550,882.45.

Discounting a claim by Select that Appellees held back part of the draws and failed to pay contractors, Appellees assert that such a claim amounts to speculation. In making such an assertion, Appellees seek, in effect, to shift the burden of proof of damages from themselves to Select. If Appellees are asserting that they received no value from the draws they received from Select, they had the obligation to produce evidence to that effect. There being no accounting in the record as to what use was made of all the money received from Select, Appellees have failed to show that they received no value from the draws. Because the insufficiency of the evidence as to damages defeats the jury findings both in support of fraud and the amount of damages, we sustain Issues One and Two.

In Issue Three, Select urges that the trial court erred by neither awarding it damages for breach of contract nor giving it a credit against the judgment in favor of Appellees. The jury found in its answer to Question No. 4 that Appellees' failure to comply with the loan agreement was excused by Select's fraud:

QUESTION NO. 4

Is Borrowers' failure to comply with the loan agreement excused?

In answering Question No. 4 you are instructed that a failure to comply with the Loan Agreement by Borrowers is excused if the following circumstances occurred:

A. [Select Investments]

(1) by words or conduct made a false representation or concealed material facts; and

(2) with knowledge of the facts or with knowledge or information that would lead a reasonable person to discover the facts; and

(3) with the intention that Borrowers would rely on the false representation or concealment in acting or deciding not to act; and

B. Borrowers

(1) did not know and had no means of knowing the real facts and

(2) relied to their detriment on the false representation or concealment of material[] facts.

Answer "Yes" or "No"

Answer: Yes

Select insists that, despite this jury finding, Appellees were not excused by Select's fraud because Appellees did not establish fraud on Select's part. We agree, inasmuch as we have found that the evidence is legally insufficient to support the jury's finding that Select committed fraud against Appellees in connection with the execution of the loan documents. We hold, for the same reason, that the evidence is legally insufficient to support the jury's finding that Appellees' failure to comply with the loan agreement was excused. Appellees urge that Select is not entitled to contract damages because Select's fraud excused

Appellees' subsequent breach, because Appellees did not withhold any contract benefit, and because Select's prior breach was fatal to its recovery.

Arguing that Select's breach was fatal to its recovery, Appellees note that the jury found that Select failed to comply with the loan agreement first. A fundamental principle of contract law is that, when one party to a contract commits a material breach of that contract, the other party is discharged or excused from any obligation to perform. *Hernandez v. Gulf Group Lloyds*, 875 S.W.2d 691, 692 (Tex. 1994). However, when a contracting party commits a material breach, the noncontracting party must elect between two courses of action, either continuing performance under the contract or ceasing performance and terminating the contract. *See Gupta v. E. Idaho Tumor Inst., Inc.*, 140 S.W.3d 747, 756 (Tex. App.—Houston [14th Dist.] 2004, pet. denied). If the nonbreaching party elects to treat the contract as continuing and insists the party in default continue its performance, the previous breach constitutes no excuse for nonperformance on the part of the party not in default, and the contract continues in force for the benefit of both parties. *Hanks v. GAB Bus. Servs., Inc.*, 644 S.W.2d 707, 708 (Tex. 1982). We conclude that, because Appellees, after any breach by Select in insisting that the units in the condos have two-car garages, treated the contract as continuing and insisted that Select continue to perform, any nonperformance by Appellees was not excused. We sustain Issue Three.

Select insists in Issue Four that, if Appellees are not entitled to actual damages, as a result of our determination of Issues One or Two, they are not entitled to exemplary damages. We have held in our discussion of Issues One and Two that the evidence is legally insufficient to support the jury's finding of fraud on the part of Select or to support the jury's finding of actual damages. Inasmuch as there can be no award of exemplary damages in the absence of an award of

compensatory damages, we sustain Issue Four. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 41.004(a) (West 2008).

We reverse and render judgment that Select recover from Appellees, jointly and severally, on its counterclaim, in the amount of $85,700, with costs of court charged to Appellees.

PER CURIAM

August 1, 2013

Panel consists of: Wright, C.J.,
McCall, J., and Hill, J.[1]

[1]John G. Hill, Former Chief Justice, Court of Appeals, 2nd District of Texas at Fort Worth, sitting by assignment.