Opinion filed April 30, 2018

In The

Eleventh Court of Appeals

No. 11-14-00299-CV

MCG DRILLING INVESTMENTS, LLC, ET AL., Appellants

V.

DOUBLE M RANCH, LTD., ET AL., Appellees

On Appeal from the 32nd District Court
Nolan County, Texas
Trial Court Cause No. 19,360

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

Double M Ranch, Ltd. (Double M) filed suit, including a declaratory judgment action, against MCG Drilling Investments, LLC, and others.[1] MCG Drilling answered, filed counterclaims, and also filed suit as a third-party plaintiff against Double M Ranch Management, LLC and John Mark McLaughlin. Double M asked the trial court to declare that MCG Drilling had no right to claim the right

[1]Double M filed its suit against Gary M. McCaslin; CraRuth Energy Corporation (CraRuth); Carl E. Gungoll Exploration, LLC (CEGX); and MCG Drilling Investments, LLC (MCG). In this opinion, we refer to these parties collectively as "MCG Drilling."

to purchase oil and gas leases and no current or future rights under a 2012 Lease Option Agreement (2012 LOA) because that agreement had expired or, alternatively, any extension of the deadline to pay the bonus payment had expired. After a bench trial, the trial court entered a declaratory judgment in favor of Double M and awarded Double M attorneys' fees and court costs.[2] The trial court also rendered judgment against MCG Drilling on its counterclaims and third-party claims. On appeal, MCG Drilling asserts five issues. We reverse in part and affirm in part.

I. *Background Facts*

Double M Ranch (the Ranch), a 27,000-acre ranch located in Nolan County, is owned by Double M Ranch, Ltd., a family-owned limited partnership; its general partner is Double M Ranch Management, LLC. John Mark McLaughlin is the managing member of the limited partnership; he is a rancher and has been a practicing lawyer for more than sixty years, with experience in real estate and oil and gas law. In 2005, McLaughlin executed a lease option agreement on the Ranch with Gary McCaslin, a petroleum landman. This first lease option agreement[3] provided McCaslin the right, but not the obligation, to purchase one or more oil and gas leases on the Ranch. The parties entered into two more lease option agreements—one in 2010[4] and another in 2012. McLaughlin always drafted the

[2]The trial court awarded attorneys' fees of $230,910.58 and court costs and expenses of $13,490.54. *See* TEX. CIV. PRAC. & REM. § 37.009 (West 2015).

[3]In the 2005 LOA, McCaslin paid the bonus money at the same time he selected the acreage. McCaslin sent a letter on November 28, 2005, in which he selected acreage and included the bonus payment. McLaughlin explained that he prepared and sent the leases after he received the check. McCaslin exercised the option on October 30, 2006, and again sent the bonus payment with the acreage selection. On August 26, 2008, as in 2005, McCaslin extended the option deadline and paid the bonus money at the same time as selecting the acreage.

[4]McLaughlin also extended the 2010 LOA in writing. McLaughlin said that he never granted an oral extension because of the statute of frauds and because he did not want a "nebulous deal."

option agreements and the leases. The 2012 LOA is the subject of the parties' disputes in this case.

A. The 2012 LOA and Assignments

Under the 2012 LOA, McCaslin, as the operator, could exercise the option at any time. However, the 2012 LOA expired if the operator did not execute it at least one time on or before January 10, 2013. After the 2012 LOA was executed, McCaslin assigned all of his rights in the 2012 LOA to CraRuth,[5] subject to an Assignment of Overriding Royalty between CraRuth and McCaslin. McCaslin was to receive an overriding royalty in any leases acquired under the 2012 LOA.[6]

B. The dispute over the extension of the 2012 LOA

One of the terms of the 2012 LOA outlined that, if the operator paid the option fee and purchased additional leases on or before January 10, 2013, then the 2012 LOA would continue for one year. On January 7, 2013, McCaslin told McLaughlin that he was exercising the option, and that same day, McCaslin sent an e-mail with the selected acreage. McLaughlin prepared two oil and gas leases and forwarded them to McCaslin at the end of the day on January 10, 2013.

In an e-mail on January 11, 2013, McCaslin told McLaughlin of errors in the leases. McLaughlin corrected the leases and sent them to McCaslin, who noted additional errors. McLaughlin corrected those errors shortly thereafter and then sent copies of the signature pages[7] to McCaslin on January 11, 2013, as an attachment in

[5]Shortly before the 2012 LOA was executed, CraRuth and MCG entered into an Acreage Purchase Agreement with CEGX, which covered several prospects, including the Ranch. Funding to exercise the option on the 2012 LOA came from CEGX.

[6]On January 24, 2012, CraRuth assigned all of its rights in the 2012 LOA to CEGX, subject to the McCaslin Overriding Royalty Assignment. CraRuth and CEGX executed the escrow agreement, which was not signed by Double M.

[7]The bonus payment was $599,120.78. James R. "Jim" Craig, the owner and president of CraRuth, wanted a copy of the signed leases so that the escrow agent could release funds to pay the bonus of $599,120.78. The courier was not to give the check to McLaughlin until the courier confirmed that the leases had been corrected.

an e-mail. McLaughlin told McCaslin over the phone on January 10 that the option deadline was January 10 and that he was leaving his office at noon on January 11. However, nothing in McLaughlin's prior e-mail on January 10 referred to a noon deadline. McLaughlin asserted that he had not changed the deadline to noon on January 11, 2013. Rebecca Bell Cash, an employee at Texas State Bank, testified that she notarized one lease for McLaughlin, on Friday, January 11, 2013, around 9:00 or 10:00 a.m. and could not recall, but may have notarized a second lease for him.

When McLaughlin sent his e-mail with the signature pages, he was aware that a courier from the escrow agent in Ballinger was en route to San Angelo with the certified cashier's check for the bonus payment. When the courier arrived at McLaughlin's office, McLaughlin had already left for the Ranch. Because McLaughlin and his secretary were not present at his San Angelo office when the courier, with the bonus payment check in hand, arrived around 1:00 p.m. on January 11, the courier went across the hall to the bank. The courier spoke to Cash, the notary at the bank where McLaughlin had the documents notarized. Cash called McLaughlin, and McLaughlin told Cash that he was gone for the day and was not coming back to the office. McLaughlin said, "Tell them I will talk to them on Monday." McLaughlin met with Craig the following Monday, January 14, at McLaughlin's office in San Angelo. McLaughlin refused the bonus check.

II. *Procedural History*

MCG Drilling specially excepted to Double M's second amended petition in which Double M sought a declaratory judgment because, MCG Drilling argued, the proper cause of action was a trespass to try title action. The trial court carried MCG Drilling's special exceptions; after trial, the trial court took the case under advisement. Later, the trial court granted a judgment on liability in Double M's favor and ordered that Double M was entitled to recover attorneys' fees and costs.

On the same day, the trial court overruled MCG Drilling's special exceptions. The trial court later entered a judgment awarding Double M $230,910.58 in attorneys' fees and $13,490.54 in court costs and expenses. MCG Drilling appealed and requested findings of fact and conclusion of law. *See* TEX. R. CIV. P. 296. MCG Drilling also requested additional findings and conclusions, but no additional findings and conclusions were entered.

III. *Analysis*

MCG Drilling presents five issues for our review. MCG Drilling first argues that Double M's claim cannot be brought as a declaratory judgment action. Second, it argues that the trial court's findings of fact failed to support a judgment on trespass to try title or suit to quiet title. Third, MCG Drilling asserts that the trial court improperly awarded attorneys' fees. In MCG Drilling's final two issues, it asserts that the trial court erred when it entered adverse findings on MCG Drilling's waiver and estoppel defenses because MCG Drilling proved those defenses as a matter of law or that the evidence it adduced demonstrated that the trial court's findings were against the great weight and preponderance of the evidence. We will address MCG Drilling's first issue and third issues, then address its second issue, followed by a collective analysis of its fourth and fifth issues.

A. Issues One and Three: The trial court erred when it entered a declaratory judgment and awarded attorneys' fees.

In its first and third issues, MCG Drilling asserts that the trial court erred when it entered declaratory relief and awarded attorneys' fees. MCG argues that "[t]he trial court necessarily resolved a title dispute when it entered its judgment."

The proper method to determine title to lands, tenements, or other real property is a trespass to try title action. TEX. PROP. CODE ANN. § 22.001 (West 2014); *see Teon Mgmt., LLC v. Turquoise Bay Corp.*, 357 S.W.3d 719, 723 (Tex. App.—Eastland 2011, pet. denied). "Any suit that involves a dispute over the title

to land is, in effect, an action in trespass to try title, whatever its form." *Hawk v. E.K. Arledge, Inc.*, 107 S.W.3d 79, 84 (Tex. App.—Eastland 2003, pet. denied). "To prevail in a trespass-to-try-title action, a plaintiff must usually (1) prove a regular chain of conveyances from the sovereign, (2) establish superior title out of a common source, (3) prove title by limitations, or (4) prove title by prior possession coupled with proof that possession was not abandoned." *Lance v. Robinson*, No. 16-0323, 2018 WL 1440476, at *9 (Tex. Mar. 23, 2018) (quoting *Martin v. Ammerman*, 133 S.W.3d 262, 265 (Tex. 2004) (citing *Plumb v. Stuessy*, 617 S.W.2d 667, 668 (Tex. 1981))).

The Texas Supreme Court recently addressed the propriety of bringing a declaratory judgment action in a suit concerned with an interest in real estate. In *Lance*, the court noted:

> Through the years, the issue of whether claimants were required to seek relief through a trespass-to-try-title action has been relevant to such questions as whether this Court had jurisdiction on appeal, whether particular proof was required to prevail, whether res judicata applied when the claimant was involved in multiple suits, and whether the parties could recover their attorney's fees.

Lance, 2018 WL 1440476, at *9 (citing *Martin*, 133 S.W.3d at 264–67). When a claim for declaratory relief is "merely incidental to . . . title issues," a declaratory judgment action may not supplant a suit to trespass title and allow the recovery of attorney's fees in those circumstances. *Hawk*, 107 S.W.3d at 84 (quoting *John G. and Marie Stella Kennedy Memorial Foundation v. Dewhurst*, 90 S.W.3d 268, 289 (Tex. 2002)). Thus, a trespass to try title action involves a dispute over the claimant's ownership or possessory right in the interest at issue. *See Lance*, 2018 WL 1440476, at *9.

Double M argues that since the bonus payment had never been timely paid, no transfer of ownership occurred. MCG Drilling asserts that McLaughlin waived the payment deadline, or is estopped from enforcing it, so the selection and attempted

tender of payment, in effect, determined equitable title. Equitable title is the present right to legal title. *Carmichael v. Delta Drilling Co.*, 243 S.W.2d 458, 460 (Tex. Civ. App.—Texarkana 1951, writ ref'd). In its conclusions of law, the trial court held that MCG Drilling had no right to claim oil and gas leases and no current or future rights under the 2012 LOA. In *San Antonio Natural Developments, Inc. v. Shield*, plaintiffs brought an action in trespass to try title, while San Antonio Natural Developments and Centex, defendants, filed a cross-action in which they alleged that plaintiffs breached a lease option agreement. *San Antonio Nat. Devs., Inc. v. Shield*, 391 S.W.2d 769 (Tex. Civ. App.—Eastland 1965, writ ref'd n.r.e.) This court resolved the trespass action. *See id.* at 769.

Double M argues that, because the bonus payment was not timely received, the leases were ineffective. Double M also cites as additional authority a case that it argues supports its position that a declaratory judgment action is proper. *See N. Shore Energy, L.L.C. v. Harkins*, 501 S.W.3d 598, 606 (Tex. 2016). In *North Shore*, the Texas Supreme Court concluded that a lease option agreement by itself does not convey a possessory interest in minerals. *Id.* Such an agreement has two components: the covenant to hold open the opportunity for the optionee to accept and the underlying contract, which is not binding until accepted. *Id.* at 606. We note that an oil and gas lease transfers a determinable fee. *Cherokee Water Co. v. Forderhause*, 641 S.W.2d 522, 525 (Tex. 1982). We also note that the lease "vests the lessee with title to oil and gas in place. . . . It logically follows, and has long been held . . . , that an oil and gas lease is a sale of an interest in land." *Id.*

Unlike the facts in *North Shore*, where the court construed an allegedly ambiguous contract, the essential question in this case revolves around the parties' conduct—evidentiary matters—and whether that conduct transferred title to minerals. *See In re Applied Chem. Magnesias Corp.*, 206 S.W.3d 114, 118 (Tex. 2006) (although a venue case, the Texas Supreme Court noted that it disagreed with

the assertion that suit for construction or enforcement of an executory contract for the sale of land is not a suit to recover land or quiet title). In this case, Double M filed suit to assert that it owned the minerals and to quiet title to its interest in the minerals that MCG Drilling claimed it owned as a result of its selection of acreage under the terms of the 2012 LOA and its proffer of the bonus payment, which it alleged was improperly rejected. Because the dispute between MCG Drilling and Double M was over the ownership of minerals that arose from the 2012 LOA—specifically, if the 2012 LOA had expired, the minerals belonged to Double M, whereas if the 2012 LOA was effective, the minerals belonged to MCG Drilling—the dispute was in essence who held title to the minerals. Consequently, we sustain MCG Drilling's first issue in part. We are sustaining the first issue in part because MCG Drilling seeks rendition, but as we explain below, we conclude that MCG Drilling is not entitled to judgment rendered in its favor on the issue of liability.

In light of our resolution of MCG Drilling's first issue, we agree that the trial court should not have awarded attorneys' fees. The declaratory judgment act will not supplant a suit for trespass to try title or a suit to quiet title and allow attorney's fees under these circumstances. *Sw. Guar. Tr. Co. v. Hardy Rd. 13.4 Joint Venture*, 981 S.W.2d 951, 957 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) (citing *Barfield v. Holland*, 844 S.W.2d 759, 771 (Tex. App.—Tyler 1992, writ denied) ("[E]ven though the Uniform Declaratory Judgment Act provides a procedural device for the construction [or] validity of deeds by those whose rights are affected by such instruments, the substantive rights of the parties in this suit are governed by the Trespass to Try Title statutes . . . , which made no provision for attorney's fees."); *accord Kennesaw Life & Accident Ins. Co. v. Goss*, 694 S.W.2d 115, 118 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.) (trespass to try title, cloud on title)); *see Teon Mgmt.*, 357 S.W.3d at 723, 727. We sustain MCG Drilling's third issue.

B. <u>Issue Two:</u> Whether Double M is precluded from recovery because it did not request findings of fact and conclusions of law on its trespass to try title or suit to quiet title claims.

MCG Drilling asserts in its second issue that Double M failed to obtain findings of fact sufficient to support a trespass to try title action and, consequently, that this court should enter a take-nothing judgment. We note that Double M pleaded causes of action for both a trespass to try title and a suit to quiet title, although it did not ask for findings of fact and conclusions of law on the elements of those specific claims.

Rule 299 of the Texas Rules of Civil Procedures provides in pertinent part:

> When findings of fact are filed by the trial court they shall form the basis of the judgment upon all grounds of recovery and of defense embraced therein. The judgment may not be supported upon appeal by a presumed finding upon any ground of recovery or defense, no element of which has been included in the findings of fact; but when one or more elements thereof have been found by the trial court, omitted unrequested elements, when supported by evidence, will be supplied by presumption in support of the judgment.

TEX. R. CIV. P. 299. Courts have interpreted this rule to require parties to request findings of fact and conclusions of law relevant to a defense or theory of recovery that they wish to assert on appeal. *See Pinnacle Homes Inc. v. R.C.L. Offshore Eng'g Co.*, 640 S.W.2d 629, 630 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.); *see also Park v. Payne*, 381 S.W.3d 615, 618 (Tex. App.—Eastland 2012, no pet.). "When a party appeals from a nonjury trial, it must complain of specific findings and conclusions of the trial court, because a general complaint against the trial court's judgment does not present a justiciable question." *Serrano v. Union Planters Bank, N.A.*, 162 S.W.3d 576, 580 (Tex. App.—El Paso 2004, pet. denied) (citing *Fiduciary Mortgage Co. v. City Nat'l Bank of Irving*, 762 S.W.2d 196, 204 (Tex. App.—Dallas 1988, writ denied)).

"When an appellant does not request or file findings and conclusions by the trial court, the appellate court presumes the trial court found all fact questions in support of its judgment, and the reviewing court must affirm that judgment on any legal theory finding support in the pleadings and evidence." *Serrano*, 162 S.W.3d at 580 (citing *Point Lookout West, Inc. v. Whorton*, 742 S.W.2d 277, 278 (Tex. 1987)). Therefore, "[i]f the appellant does not challenge the trial court's findings of fact, when filed, these facts are binding upon both the party and the appellate court." *Id.* (citing *Wade v. Anderson*, 602 S.W.2d 347, 349 (Tex. Civ. App.—Beaumont 1980, writ ref'd n.r.e.)).

We also note that generally "[w]hen a given theory of recovery, or of defense, is raised by the pleadings and evidence, and findings of fact are made and filed, but no finding is referable to such theory, it will, on appeal, be deemed that such theory has been waived." *Imatani v. Marmolejo*, 606 S.W.2d 710, 713–14 (Tex. Civ. App.—Corpus Christi 1980, no writ) (citing TEX. R. CIV. P. 299; *Gasperson v. Madill Nat'l Bank*, 455 S.W.2d 381 (Tex. Civ. App.—Fort Worth 1970, writ ref'd n. r. e.); *Home Indem. Co. v. Muncy*, 449 S.W.2d 312 (Tex. Civ. App.—Tyler 1969, writ ref'd n.r.e.); *McKenzie v. Carte*, 385 S.W.2d 520 (Tex. Civ. App.—Corpus Christi 1964, writ ref'd n.r.e.); *Pinson v. Dreymala*, 320 S.W.2d 152 (Tex. Civ. App.—Houston 1958, writ ref'd n.r.e.); 4 R. MCDONALD, TEXAS CIVIL PRACTICE § 16.09 (1971)) ("Failure of plaintiffs, therefore, to request additional findings constituted a waiver of their proper tender ground of recovery when no element thereof had been found by the trial court.").

However, "[o]mitted findings can be presumed if an element of the ground of recovery was included in the findings of fact, if a finding on the omitted element has not been properly requested, and if the omitted finding is supported by the evidence." *Blanton v. Torres*, No. 11-98-00292-CV, 2000 WL 34234853, at *2 (Tex. App.—Eastland Feb. 24, 2000, no pet.) (not designated for publication) (citing

Lindner v. Hill, 691 S.W.2d 590 (Tex. 1985)). Rule 299 "provides that, when one or more elements of a cause of action have been found by the trial court, 'omitted unrequested elements, *when supported by evidence*, will be supplied by presumption in support of the judgment.'" *Id.* (citing TEX. R. CIV. P. 299).

1. *Although Double M did not request findings of fact on its suit to quiet title claim, the trial court nonetheless made findings specific to the elements of that claim, which were supported by the evidence.*

Double M asserted both a suit to quiet title and a trespass to try title claim. We address the suit to quiet title claim first. "In a suit to quiet title, the plaintiff must allege right, title, or ownership of the property with sufficient certainty to warrant judicial interference." *Montenegro v. Ocwen Loan Servicing, LLC*, 419 S.W.3d 561, 567 (Tex. App.—Amarillo 2013, pet. denied). Specifically, "the purpose of a traditional suit to quiet title is to remove a cloud from the title created by an invalid claim." *Teon Mgmt.*, 357 S.W.3d at 726–27. To remove that cloud, "the plaintiff must prove, as a matter of law, right, title, or ownership in himself with sufficient certainty to enable the court to see that he has a right of ownership and that the alleged adverse claim is a cloud on the title that equity will remove." *Hahn v. Love*, 321 S.W.3d 517, 531–32 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). The elements of a suit to quiet title are (1) the plaintiff has an interest in a specific property, (2) title to the property is affected by a claim by the defendant, and (3) the defendant's claim, though facially valid, is invalid or unenforceable. *Montenegro*, 419 S.W.3d at 572 (citing *Vernon v. Perrien*, 390 S.W.3d 47, 61 (Tex. App.—El Paso 2012, pet. denied)).

In its Findings of Fact and Conclusions of Law, the trial court made the following findings:

> 2. Double M owns a ranch of approximately 27,000 acres in Nolan County, Texas (the "Ranch"). Double M Ranch Ltd. has owned the Ranch at all times relevant to this lawsuit.

11. On January 19, 2012, Double M, entered into a third successive lease option agreement with McCaslin (the "2012 LOA"). As in the prior option agreements, Double M was designated as "Owner" and McCaslin as "Operator" in the 2012 LOA, and McLaughlin signed the 2012 LOA on behalf of Double M. The 2012 LOA covered 17,609 acres of land of the Ranch. [CR451]

14. The initial term of the 2012 LOA expired on January 10, 2013, but the agreement could be extended for another year if the Operator exercised the right to take an oil and gas lease on some of the optioned lands any time within the initial term. To exercise the option to lease, the Operator had to identify and describe not less than 4000 acres of the optioned lands to lease and pay Double M, on or before January 10, 2013, a cash lease bonus of $150 per net mineral acre to be leased. That was the only way that the 2012 LOA would be extended for another term of one year.

23. On the 2012 LOA's expiration date of January 10, 2013, McLaughlin and McCaslin spoke by phone shortly after 3:00 p.m., and McLaughlin reminded McCaslin that the 2012 LOA's option to lease term expired that day. McLaughlin also told McCaslin that he would not drive from San Angelo to Grindstaff and Grindstaff [to] Ballinger to deliver signed leases and the other documents in exchange for the lease bonus payments. McCaslin told McLaughlin he would not have to travel to Ballinger and asked McLaughlin to email to him the drafts of the leases and related documents.

33. No one, including McCaslin, CraRuth, MCG, CEGX and the escrow agent, paid the lease bonus amount to Double M in San Angelo, Texas on or before January 10, 2013.

39. No one, including McCaslin, CraRuth, MCG, CEGX and the escrow agent, paid the lease bonus amount to Double M in San Angelo, Texas on or before noon on January 11, 2013.

These findings, although not outlined as specific findings for a suit to quiet title claim, are essentially findings of some of the elements of that claim.

A trial court's findings of fact have the same force and effect as a jury's verdict. *Anderson v. City of Seven Points*, 806 S.W.2d 791, 794 (Tex. 1991). MCG Drilling has not challenged any of the trial court's findings of fact set out above. We defer to unchallenged findings of fact that are supported by some evidence. *Tenaska Energy, Inc. v. Ponderosa Pine Energy, LLC*, 437 S.W.3d 518, 523 (Tex. 2014) (citing *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 696–97 (Tex. 1986)). Unchallenged findings of fact "are binding on an appellate court, unless the contrary is established as a matter of law or there is no evidence to support the finding." *McGalliard*, 722 S.W.2d 694 at 696. We conclude that we are bound by the unchallenged findings of fact because the contrary was not established as a matter of law and there is some evidence to support the findings.

Although "supported by evidence" is not defined in Rule 299, courts in the family law context have outlined that phrase to mean evidence that is legally sufficient. *See In re S.M.V.*, 287 S.W.3d 435, 447 (Tex. App.—Dallas 2009, no pet.); *cf. In re S.K.A.*, 236 S.W.3d 875, 902–03 (Tex. App.—Texarkana 2007, no pet.) (describing legally and factually sufficient evidence). In order to resolve a "no evidence" issue, we consider all the evidence in the light most favorable to the prevailing party, make every reasonable inference in that party's favor, and disregard contrary evidence unless a reasonable factfinder could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005); *City of Houston v. Hildebrandt*, 265 S.W.3d 22, 27 (Tex. App.—Houston [1st Dist.] 2008, pet. denied).

In this case, Double M first introduced, as evidence, the conveyances or warranty deeds from a common source that showed its ownership of the lands and mineral interests covered by the 2012 LOA. Second, the 2012 LOA was in evidence and provided that payment of the bonus had to occur on or before January 10, 2013 and be paid in San Angelo. Third, the record reflected that the courier brought a cashier's check to San Angelo on January 11, 2013. This evidence is more than a

scintilla of evidence that the payment was not delivered on January 10, 2013, and that the 2012 LOA had expired. In addition, without the two oil and gas leases, MCG Drilling had no determinable fee. *See Forderhause*, 641 S.W.2d at 525. Therefore, Double M adduced more than a scintilla of evidence, which the trial court noted and made reference to in its findings, that Double M effectively had established a superior right to ownership to the mineral interests at issue for which equity could remove a cloud on title.

In addition, the evidence that we have outlined, although referenced in the findings but not explicitly enumerated as a finding of fact on the elements of a suit to quiet title, nonetheless established factually that Double M had a superior right to ownership for which the trial court in equity could intervene to remove any cloud on that title. Consequently, although Double M did not request findings of fact on its suit to quiet title, the trial court issued findings, although not explicitly labelled as such, that nonetheless established the elements of the suit to quiet title claim, and those findings were supported by the evidence.

The trial court concluded that Double M held superior title to MCG for the mineral interests outlined in MCG Drilling's selection of acreage, under the 2012 LOA. The evidence supported the findings that MCG Drilling failed to timely pay the lease bonus payment; therefore, it had no interest in the selected acreage. Accordingly, even though Double M did not request findings on its alternate theory of suit to quiet title, the trial court made findings relevant to the elements of that claim. Even if we assume without deciding, one or more suit to quiet title findings were not requested and were omitted, where the trial court nonetheless made such findings that support at least one of the elements of that claim, which are in turn supported by evidence in the record, we may hold that the party established its claim because sufficient findings supported the omitted elements. *See Serrano*, 162 S.W.3d at 580 (citing *Wade v. Anderson*, 602 S.W.2d 347, 349 (Tex. Civ. App.—

Beaumont 1980, writ ref'd n.r.e.)). Given our holding on Double M's suit to quiet title claim, we need not address its trespass to try title claim. We overrule MCG Drilling's second issue.

C. Issues Four and Five: MCG Drilling failed to prove its waiver and estoppel defenses as a matter of law or by the great weight and preponderance of the evidence.

MCG Drilling asserts in its fourth and fifth issues that the trial court erred when it failed to find that Double M waived the 2012 LOA's deadline of January 10, 2013 or was estopped from asserting that deadline.

1. Legal Sufficiency Standard

"A party challenging the legal sufficiency of an adverse finding on an issue on which that party had the burden of proof at trial must demonstrate on appeal that the evidence conclusively established, as a matter of law, all vital facts in support of the issue." *RM Crowe Prop. Servs. Co., L.P. v. Strategic Energy, L.L.C.*, 348 S.W.3d 444, 448 (Tex. App.—Dallas 2011, no pet.) (quoting *Dallas Cty. Constable Precinct No. 5 v. Garden City Boxing Club, Inc.*, 219 S.W.3d 613, 616 (Tex. App.—Dallas 2007, no pet.)); *see Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001). In this review, we examine the record for evidence that supports the finding and credit favorable evidence if a reasonable factfinder could; we also disregard all contrary evidence unless a reasonable factfinder could not. *Id.* (citing *City of Keller*, 168 S.W.3d at 827). If there is no evidence to support the adverse ruling, then we examine the entire record to determine whether the contrary position is established as a matter of law. *Id.* (citing *Dow Chem. Co.*, 46 S.W.3d at 241).

2. Factual Sufficiency Standard

When an appellant "attacks the factual sufficiency of an adverse finding on an issue on which" it had 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. To analyze a factual sufficiency challenge, we "must

consider and weigh all of the evidence" and may "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." *Id.*; *see Al-Turki v. Taher*, 958 S.W.2d 258, 261 & n.2 (Tex. App.—Eastland 1997, pet. denied).

In conducting our review of factual insufficiency challenges, we do not reweigh the evidence and set the finding aside merely because we feel that a different result is more reasonable. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 634 (Tex. 1986). We set aside the verdict only when we find that the evidence, standing alone, is too weak to support the finding or that the finding is so against the overwhelming weight of the evidence that it is manifestly unjust and clearly wrong. *Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996). The factfinder has several alternatives when presented with conflicting evidence; it may believe one witness and disbelieve another, and it may resolve inconsistencies in the testimony. *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 697 (Tex. 1986). If reasonable minds can differ on the meaning of evidence or the inferences or conclusions to be drawn from that evidence, we may not substitute our judgment for that of the factfinder even if we would draw a different conclusion from the evidence. *Herbert v. Herbert*, 754 S.W.2d 141, 144 (Tex. 1988).

3. Legal and Factual Sufficiency Analysis of Waiver and Estoppel Defenses

In this case, the 2012 LOA outlined the procedure to purchase leases:

> 6. Oil and Gas Leases Purchased: Operator shall furnish to Owner an accurate description of the lands selected and this description and the date the bonus amount is paid shall be inserted in the appropriate places in the Oil and Gas Lease, the Memorandum of Oil and Gas Lease and the Schedule of Damages in the form of the attached Exhibits B, C and D. The lease bonus amount shall be paid to Owner in San Angelo, Texas. Upon receipt of the bonus amount, Owner shall immediately execute [the documents] in the form attached to this agreement and marked Exhibits B, C and D, respectively . . . . Upon the receipt of the executed copies . . . , Operator shall execute and return

> to Owner one copy of each of said agreements . . . . The Memorandum of Oil and Gas Lease . . . shall be placed of record in Nolan County by Operator.

The 2012 LOA also provided as follows:

> 3. First Extension of Option Term: If Operator has paid the option fee required in paragraph 1 *above and on or before January 10, 2013* purchases from Owner one or more oil and gas leases, using the documents attached as Exhibits B, C and D, covering not less than 4,000 acres of the Described Lands at a price of $150 per net mineral acre as a bonus, the term of this *Option shall be extended to January 10, 2014.*

(Emphasis added). If "time is of the essence," performance must occur within the specified time before a party is entitled to specific performance. *17090 Parkway, Ltd. v. McDavid*, 80 S.W.3d 252, 255 (Tex. App.—Dallas 2002, pet. denied). However, a 'time is of the essence' provision may be waived." *Id.* (citing *Puckett v. Hoover*, 202 S.W.2d 209, 212 (1947); *Stevenson v. Adams*, 640 S.W.2d 681, 684 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.)).

Waiver involves "an intentional relinquishment of a known right or intentional conduct inconsistent with claiming it." *Shaver v. Schuster*, 815 S.W.2d 818, 824 (Tex. App.—Amarillo 1991, no writ) (quoting *Furr v. Hall*, 553 S.W.2d 666, 674 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.)). A party may demonstrate waiver by conduct if it is misled into an honest belief that the waiver was intended or assented to. *Alford, Meroney & Co. v. Rowe*, 619 S.W.2d 210, 213 (Tex. Civ. App.—Amarillo 1981, writ ref'd n.r.e.). "A waiver of time of performance of a contract will result from any act that *induces* the opposite party to believe that exact performance within the time designated in the contract will not be insisted upon." *Kennedy Ship & Repair, L.P. v. Pham*, 210 S.W.3d 11, 20 (Tex. App.—Houston [14th Dist.] 2006, no pet.). When "there is a duty to speak,"

estoppel may arise from silence or words spoken. *Smith v. Nat'l Resort Communities, Inc.*, 585 S.W.2d 655, 658 (Tex. 1979).

We note that an "extension of time for performance may be implied as well as express," and that "[w]here the exact duration of an extension of time is not expressed, the law will imply a reasonable time." *Cotten v. Deasey*, 766 S.W.2d 874, 877 (Tex. App.—Dallas 1989, writ denied); *Intermedics, Inc. v. Grady*, 683 S.W.2d 842, 846 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). "Waiver may be shown by course of dealing between the parties." *17090 Parkway*, 80 S.W.3d at 255. McLaughlin testified that he received a copy of the selected acreage on January 7, 2013, from McCaslin. McLaughlin also testified that he did not immediately draft the two leases. He further admitted that, after he drafted the two leases and sent them to McCaslin to review, McLaughlin had to correct them twice.

McLaughlin told McCaslin that the deadline was January 10, as reflected in the 2012 LOA. McCaslin and Craig testified that, although McLaughlin told McCaslin the deadline was January 10, McLaughlin also said that they did not have to pay the money until after they reviewed the leases. McCaslin testified that he offered to bring the money to McLaughlin on January 10, as did Craig, but that McLaughlin told him to review the leases first. However, McLaughlin denied that he ever made that statement to McCaslin and denied that he spoke to Craig on January 10. We note that McLaughlin said nothing in his January 10 e-mail about the January 10 deadline.

McLaughlin said that he signed the documents and signed Cash's notary book; he was not sure whether he re-signed the documents after he had made changes and had replaced a few pages. McLaughlin disagrees with Cash's testimony that he signed the documents in her office. Cash testified that McLaughlin signed the leases in her office on the morning of Friday, January 11, and her notary book reflected the date as January 11. McLaughlin testified that he sent the signed and notarized

signature pages of the corrected leases, dated January 10, 2013, to McCaslin on January 11, 2013. But when asked if the January 11 e-mail, which McLaughlin sent with the signature pages, set a new deadline of noon on January 11, 2013, McLaughlin said, "No."

The 2012 LOA included a "time is of the essence" requirement, and the parties agree that no writing extended the deadline. The parties also agree that extensions had been given in the past on the first LOA and the 2010 LOA, but those had been written extensions. The record does not reflect that any "oral extensions" of any LOA had occurred in the past. McLaughlin testified that the deadline was January 10, 2013, and he denied that he had extended the deadline to January 11, 2013, at noon. He maintained that the deal at that point was for two leases with an acknowledgement that the 2012 LOA had expired.

On the 2012 LOA, if the deadline was January 10, 2013, then McLaughlin could have had two reasons for sending the signature pages on the day after the deadline had passed. First, as argued by MCG Drilling, McLaughlin had waived the "time is of the essence" provision and wanted to proceed with the deal. *See Langley v. Norris*, 173 S.W.2d 454, 456 (Tex. 1943). Second, as argued by McLaughlin, the 2012 LOA had expired, but he would still have provided the two leases in exchange for the bonus payment and an acknowledgement that the 2012 LOA had expired.

In *Langley*, the parties went past the closing date and continued to work to close the deal through correspondence, and the Texas Supreme Court upheld the ruling by this court and the district court that the seller led the purchaser to believe there was a reasonable time to complete the transaction. *Langley*, 173 S.W.2d at 458–59. In another case, *Parkway*, the parties' written amendment extended the deadline to complete a transaction, and the parties then orally agreed to another deadline extension. *17090 Parkway*, 80 S.W.3d at 255. But in the case before us,

the record reflects that the bonus was not paid on January 10 and that there was no written agreement to extend that deadline. In addition, McLaughlin and McCaslin disagreed whether the telephone call between McLaughlin and McCaslin on January 10 and subsequent e-mail correspondence extended the deadline. The factfinder resolved the conflicting testimony of McLaughlin and McCaslin, as well as Craig, as to what McLaughlin told them about reviewing documents before paying the bonus. Based on the evidence in the record, we cannot substitute our judgment for the factfinder's judgment. Therefore, because of the conflicting evidence as to whether the 2012 LOA deadline for payment of the bonus had been waived or whether McLaughlin was estopped from enforcing the January 10 deadline, MCG Drilling's waiver and estoppel defenses are not proved as a matter of law. In addition, MCG Drilling did not show by the great weight and preponderance of the evidence that Double M's actions established the waiver and estoppel defenses. Accordingly, we overrule MCG Drilling's fourth and fifth issues.

D. Harm Analysis and Disposition Requests

"No judgment may be reversed on appeal . . . unless the court of appeals concludes that the error complained of: (1) probably caused the rendition of an improper judgment; or (2) probably prevented the appellant from properly presenting the case to the court of appeals." TEX. R. APP. P. 44.1.

As to the disposition of the case, MCG Drilling asserts that this court must order a take-nothing judgment on Double M's claims. MCG Drilling relies on *Hunt v. Heaton*, in which the Texas Supreme Court held that Hunt's action was a trespass to try title claim and his failure to timely file an abstract within twenty days of demand "excluded any offer of proof by Hunt relating to his claim or title," which necessitated a take-nothing judgment. *Hunt v. Heaton*, 643 S.W.2d 677, 679 (Tex. 1982). *Hunt* is distinguishable from this case because Double M pleaded declaratory judgment, trespass to try title, and suit to quiet title and because Double M presented

sufficient evidence relating to its claim or title to the property at issue, under a suit to quiet title, and the trial court issued findings on the essential elements of that theory. In addition, MCG Drilling did not establish by the great weight and preponderance of the evidence that Double M had waived the January 10 deadline in the 2012 LOA or was estopped from asserting it.

IV. *This Court's Ruling*

We reverse the judgment of the trial court insofar as it entered a declaratory judgment, and we vacate the attorneys' fees award to Double M. We affirm the remainder of the trial court's judgment.

MIKE WILLSON
JUSTICE

April 30, 2018

Panel consists of: Willson, J.,
Bailey, J., and Wright, S.C.J.[8]

[8]Jim R. Wright, Senior Chief Justice (Retired), Court of Appeals, 11th District of Texas at Eastland, sitting by assignment.