

Affirmed and Opinion Filed October 31, 2016



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-13-01360-CV

**HIGH REV POWER, L.L.C., Appellant
V.
FREEPORT LOGISTICS, INC., Appellee**

**On Appeal from the County Court at Law No. 4
Dallas County, Texas
Trial Court Cause No. CC-12-07411-D**

MEMORANDUM OPINION

**Before Justices Bridges, Francis, and Whitehill
Opinion by Justice Francis**

In this appeal, High Rev Power, L.L.C. challenges the trial court's judgment awarding damages to Freeport Logistics, Inc. on its breach of contract claim. In six issues, High Rev contends the trial court erred in granting judgment in favor of Freeport, failing to grant judgment in its favor, awarding damages in an amount unsupported by the evidence, improperly awarding attorney's fees, and refusing to grant High Rev's motion to abate the trial and order the parties to arbitration. Freeport challenges the timeliness of High Rev's notice of appeal. We affirm the trial court's judgment.

On May 4, 2010, High Rev and Freeport entered into a contract under which High Rev agreed to sell Freeport 770 go-karts at a unit price of \$471.50 each. The go-karts were to be shipped from China to the United States in fourteen separate containers. Freeport agreed to pay

a 20% deposit on all the go-karts up front and pay the remaining 80% due on each kart as they cleared customs and were released by High Rev. Freeport also agreed to pay freight costs, customs fees, duties, and other shipping expenses.

The contract provided that delivery of the go-karts was to occur within seventy days of receipt of the 20% deposit. With the exception of the first shipment, failure to deliver the go-karts within seventy days would result in a late fee of \$10 per day per kart. The contract also included a binding arbitration clause stating that all disputes that could not be resolved through “amicable discussions” would be submitted to the Dallas Trade Arbitration Commission.

Freeport paid the 20% deposit on May 7, 2010. The first two containers cleared customs on September 15, one hundred and thirty-one days after the deposit was paid. The next day, Freeport paid High Rev the remaining 80% due on the two containers and received delivery of the go-karts. Over the next several weeks, Freeport was notified that five more containers of go-karts had cleared customs. In each case, Freeport paid the remaining 80% to High Rev and received delivery.

On October 21, 2010, Freeport received notice that the eighth container of go-karts had cleared customs. It paid the balance due, but High Rev did not release the go-karts. An arrival notice for the ninth container was delivered to Freeport on October 25.

Freeport hired an attorney and, on October 28, the attorney sent a letter to High Rev. The letter indicated that Freeport had sent numerous requests to High Rev to release the eighth container of go-karts and that High Rev had refused. The letter further indicated that High Rev told Freeport it had to pay for the ninth container before the eighth container would be released. Freeport’s counsel stated that Freeport was hesitant to pay for the ninth container until the eighth container was delivered. High Rev eventually released both containers and Freeport paid for the

ninth container. A tenth container was also delivered to Freeport for which Freeport had not paid.

According to Freeport, after the delayed release of the eighth container, the shipping agent indicated that High Rev did not release the go-karts because it was planning to divert the last shipments of go-karts to a different buyer. Because Freeport considered High Rev's refusal to release the eighth container to be improper, and it believed High Rev intended to divert the last shipments of go-karts to a different buyer, Freeport withheld payment of the balance due on the tenth container it received. Following this, High Rev did not release any more shipments of go-karts to Freeport.

On December 13, 2012, Freeport filed this suit for breach of contract seeking damages including recovery of the 20% down payment on the undelivered go-karts and the profits it would have realized from selling those karts. Freeport later amended its pleadings to allege it was also entitled to recover the late fee agreed to in the contract. Freeport limited the late fee claim to only the second shipment of go-karts that arrived 141 days after the deposit was paid. Freeport alleged for that shipment alone it was owed \$78,960 in late fees.

High Rev filed a general denial and a counterclaim for breach of contract. High Rev alleged it had delivered 616 go-karts to Freeport, but Freeport paid for only 599 of them. The company claimed Freeport's failure to pay for seventeen go-karts that had been delivered constituted a breach of contract and High Rev's failure to deliver the remaining go-karts due under the contract was because of Freeport's breach. High Rev sought to recover the full amount due under the contract for both the delivered and undelivered go-karts. High Rev also claimed it was entitled to recover \$16,301 for parts Freeport ordered but for which it did not pay.

The case was tried to the court without a jury. May Shan testified on behalf of Freeport. Shan conceded that the company had not paid the 80% owed on the tenth container of go-karts.

She said this refusal was based on High Rev's refusal to timely release the eighth container of karts and her concern that High Rev did not intend to deliver the remaining go-karts under the contract. Shan stated Freeport never refused to accept or pay for the last four containers of go-karts and High Rev never sent the company a demand for payment. They waited for the shipments, but the containers were never sent. High Rev delivered only 568 of the 770 go-karts ordered and it was seeking the return of the 20% deposit on the 202 undelivered karts as well as the 20% profit it would have made on the sale of those karts. The tenth container held 56 go-karts and the remaining 80% of the purchase price for those karts would be deducted from any recovery they obtained.

Zhi Yao Zhang testified for High Rev and said they delivered eleven containers of go-karts rather than only ten as alleged by Freeport. Zhang further testified, contrary to her company's own pleadings, that Freeport failed to pay for a shipment of approximately 87 go-karts that had been delivered to it. The remaining go-karts due under the contract were shipped from China and High Rev sought shipping costs and the storage expenses High Rev paid for the karts after they arrived in the United States. Although High Rev never delivered the last shipments of go-karts to Freeport, Zhang stated High Rev was seeking the balance of the purchase price for those karts. Zhang testified that, in an earlier lawsuit, High Rev offered to deliver the karts to Freeport if Freeport paid for them, but Freeport declined. Zhang also stated High Rev was seeking to recover for parts Freeport allegedly ordered. Zhang conceded no written contract covered the sale of parts to Freeport.

After hearing the evidence, the trial court found in favor of Freeport and awarded the company \$40,974 in actual damages and \$4,404.71 in prejudgment interest. The trial court also awarded Freeport \$19,049 in attorney's fees. The final judgment was signed on July 8, 2013.

On August 6, 2013, High Rev attempted to file a motion for new trial electronically. Although the Dallas County Clerk's Office has no record of the motion, the record on appeal shows that High Rev's motion was successfully transmitted to its electronic filing service provider on that date. High Rev filed its notice of appeal on September 30, 2013.

Freeport contends High Rev's notice of appeal was untimely. Freeport argues because no motion for new trial was filed with the Dallas County Clerk's Office, High Rev's notice of appeal was due within thirty days after the judgment was signed. *See* TEX. R. APP. P. 26.1. Freeport says the appeal must be dismissed since High Rev did not file its motion until eighty-four days after the judgment was signed.

High Rev attempted to file its motion for new trial electronically, therefore the filing is governed by Texas Rule of Civil Procedure 21(f)(5). Under rule 21(f)(5), except under circumstances not applicable here, an electronically filed document is deemed filed when it is transmitted to the filing party's electronic service provider. *See* TEX. R. CIV. P. 21(f)(5). Although High Rev's motion for new trial was never forwarded to the county clerk's office, it was deemed filed on August 6, 2013 when it was successfully transmitted to the company's electronic service provider. Because High Rev timely filed a motion for new trial under rule 21(f)(5), the time within which it was required to file its notice of appeal was extended to ninety days. *See* TEX. R. CIV. P. 26.1. High Rev's notice of appeal, filed eighty-four days after the judgment was signed, was within the time permitted. *Id.* Freeport's request that we dismiss the case on the ground that the notice of appeal was untimely is without merit.

With respect to the merits of the appeal, High Rev's first three issues challenge the legal and factual sufficiency of the evidence supporting the trial court's judgment in favor of Freeport and the damages awarded. The trial court did not file findings of fact and conclusions of law. Although High Rev requested findings, it did not do so within the time allowed. High Rev

therefore waived its right to complain of the trial court's refusal to make findings and conclusions. *See Morrison v. Morrison*, 713 S.W.2d 377, 380–81 (Tex. App.—Dallas 1986, writ dismissed). Absent findings and conclusions, all facts necessary to support the judgment and supported by the evidence are implied. *See BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002). When the appellate record includes the reporter's and clerk's records, as it does here, these implied findings are not conclusive and may be challenged for legal and factual sufficiency. *Id.*

The undisputed evidence shows none of the go-karts were delivered within seventy days of receipt of the deposit as required by the contract. The evidence further shows High Rev refused to release a container of go-karts that Freeport had paid for until after Freeport hired counsel and demanded High Rev comply with the terms of the contract. The shipping company then delivered a container of go-karts that Freeport had not paid for and Freeport withheld payment for that shipment. Thereafter, High Rev did not deliver any more go-karts to Freeport. The undisputed evidence shows that neither party fully performed under the contract.

High Rev argues the trial court erred in not granting judgment in its favor on its counterclaim for breach of contract because the evidence showed Freeport was in breach before High Rev stopped releasing go-karts for delivery. The amount of the judgment indicates, however, that High Rev was granted all the relief to which it was entitled. Freeport sought almost \$117,057.20 in damages. From this amount Freeport conceded High Rev was entitled to an offset of \$21,123.20 representing the 80% balance due on the tenth container of go-karts that was delivered but for which Freeport had not paid.¹ This brings the total amount of damages claimed by Freeport to \$95,934. If we remove Freeport's claim for lost profits, which High Rev

¹ On appeal, High Rev appears to concede that Freeport only received ten containers of go-karts and that the number of go-karts for which Freeport had not paid was fifty-six.

asserts was not supported by sufficient proof, Freeport's claimed damages for late fees and return of the deposit on the undelivered go-karts amounts to \$76,885.40. Yet the trial court awarded Freeport only \$40,974. It appears, therefore, that High Rev was credited with the amount of monetary damages it proved was caused by Freeport's alleged breach.

The contract at issue involves the sale of goods and is therefore governed by article two of the Uniform Commercial Code, adopted in Texas as chapter two of the business and commerce code. *See Selectouch Corp. v. Perfect Starch, Inc.*, 111 S.W.3d 830, 834 (Tex. App.—Dallas 2003, no pet.). Despite retaining possession of the last four containers of go-karts, High Rev claimed it was entitled to keep the 20% deposit paid by Freeport for those karts and recover the remaining 80% of the purchase price as damages. This is clearly not the proper measure of damages as it would result in a windfall to High Rev. The damages that may be recovered by a seller are those that will put it in as good a position as if performance had occurred. *See* TEX. BUS. & COM. CODE ANN. § 2.708 (West 2009)

Under the UCC, High Rev's recovery for Freeport's alleged repudiation of the contract was limited to "the difference between the market price [of the goods] at the time and place for tender and the unpaid contract price together with any incidental damages provided in this chapter (Section 2.710) but less expenses saved in consequence of the buyer's breach." *Id.* If that measure was inadequate, Freeport could recover "the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this chapter (section 2.710), due allowance for costs reasonably incurred and due credit for payment or proceeds from resale." *Id.* Incidental damages include "any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach. *Id.* § 2.710.

High Rev produced no evidence at trial that the market price for the go-karts at the time and place for tender was different than the contract price. Nor did it put on any evidence that this measure was inadequate or what its profits would have been. Accordingly, no evidence supports High Rev's retention of the deposit or recovery of any damages other than incidental damages. *See id.* § 2.708.

The incidental damages claimed by High Rev were \$4,225 in freight costs for the tenth container, \$18,602.60 in freight costs for the last four containers, and \$12,000 in storage fees for the undelivered go-karts. If we subtract those amounts from Freeport's recovery of the late fees and deposit, Freeport would still be entitled to recover \$42,057.40. Although the trial court awarded Freeport only \$40,974, it had the discretion to award damages in an amount within the range supported by the evidence. *See Sharifi v. Steen Automotive, LLC*, 370 S.W.3d 126, 151 (Tex. App.—Dallas 2012, no pet.); *Mays v. Pierce*, 203 S.W.3d 564, 578 (Tex. App.—Houston [14th Dist.] 2006, pet. denied).

High Rev also sought breach of contract damages for go-kart parts allegedly delivered to Freeport but for which Freeport did not pay. High Rev does not dispute that no written contract covers the sale of parts to Freeport. Under the UCC, "a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker." TEX. BUS. & COM. CODE ANN. § 2.201. Because High Rev sought to recover more than \$500 for the sale of goods with no written contract, High Rev is precluded from recovering on this claim under a breach of contract theory. *Id.*

Without question all of the go-kart deliveries were late under the terms of the contract. High Rev's only argument that Freeport was not entitled to recover the late fees agreed to by

both parties is the fees constitute an illegal penalty. Although late charges may amount to unenforceable liquated damages in some cases, the burden of proving the fee is an illegal penalty is on the party seeking to invalidate the provision. *See Domizio v. Progressive County Mut. Ins. Co.*, 54 S.W.3d 867, 875 (Tex. App.—Austin 2001, pet. denied). In this case, High Rev did not challenge the propriety of the late fee in the trial court, and makes no argument on appeal to show why the fees are an illegal penalty. Accordingly, High Rev has waived this issue. *See* TEX. R. APP. P. 33.1 & 38.1(i).

We conclude the evidence is legally and factually sufficient to support the trial court's award of \$40,974 to Freeport. We resolve the first three issues against High Rev.

In its next two issues, High Rev challenges the award of attorney's fees to Freeport and the trial court's failure to grant its request for attorney's fees. We review an award of attorney's fees under an abuse of discretion standard. *See Belew v. Rector*, 202 S.W.3d 849, 853 (Tex. App.—Eastland 2006, no pet.) High Rev's sole challenge to the fees awarded to Freeport is that Freeport was not entitled to attorney's fees because it should not have been awarded damages. Because of our resolution of High Rev's first three issues, we do not address the merits of this argument.

High Rev also contends that it was entitled to an award of attorney's fees. A party may recover attorney's fees even if the amount of damages awarded to it is entirely offset by the amount awarded to the opposing party. *See Matthews v. Candlewood Builders, Inc.*, 685 S.W.2d 649, 650 (Tex. 1985). To recover fees, however, a party is required to present its claim at least thirty days before trial. TEX. CIV. PRAC. & REM. CODE ANN. § 38.002 (West 2015). Merely filing a breach of contract claim is insufficient. *See Belew*, 202 S.W.3d at 856–57. Freeport presented evidence at trial that High Rev never made any demand on Freeport for payment. High Rev points to no evidence that it made any presentment of its claim other than filing its

counterclaim. We conclude, therefore, the trial court did not abuse its discretion in refusing to award attorney's fees to High Rev. *See id.*

In its last issue, High Rev contends the trial court erred in failing to grant its request, made at the start of trial, to abate the case and order the parties to arbitration under the contract's arbitration provision. In response to High Rev's request, counsel for Freeport informed the trial court that High Rev's prior counsel in the case had explicitly agreed to litigate rather than arbitrate. The parties were ordered to mediation and, when that was unsuccessful, High Rev filed its counterclaim. Thereafter, the parties conducted discovery and prepared for trial. A party may waive an arbitration clause by substantially invoking the judicial process to the other party's detriment or prejudice. *See Perry Homes v. Cull*, 258 S.W.3d 580, 589–90 (Tex. 2008). Allowing a party to conduct full discovery, file motions going to the merits, and seek arbitration only on the eve of trial is sufficient conduct to amount to waiver. *Id.* at 590. In this case, Freeport's counsel stated High Rev had represented it wished to litigate rather than arbitrate. High Rev did not seek to invoke the arbitration clause until after all discovery had been conducted and trial of the case had begun. Under these circumstances, we conclude High Rev waived its right to enforce the arbitration provision. We resolve this issue against High Rev.

We affirm the trial court's judgment.

/Molly Francis/
MOLLY FRANCIS
JUSTICE

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

HIGH REV POWER, L.L.C., Appellant

No. 05-13-01360-CV V.

FREEPORT LOGISTICS, INC., Appellee

On Appeal from the County Court at Law
No. 4, Dallas County, Texas

Trial Court Cause No. CC-12-07411-D.

Opinion delivered by Justice Francis.

Justices Bridges and Whitehill participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee FREEPORT LOGISTICS, INC. recover its costs of this appeal and the full amount of the trial court's judgment from appellant HIGH REV POWER, L.L.C. and from {Surety} as surety on appellant's supersedeas bond.

Judgment entered October 31, 2016.