REVERSE and RENDER; and Opinion Filed July 28, 2016.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-00022-CV

JERRY GOSSETT, Appellant
V.
NATIONAL CREDIT UNION ADMINISTRATION, AS CONSERVATOR FOR TEXANS CREDIT UNION AND TEXANS CREDIT UNION, Appellees

On Appeal from the 298th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-13-06137

MEMORANDUM OPINION

Before Justices Francis, Lang-Miers, and Myers
Opinion by Justice Lang-Miers

Appellees Texans Credit Union (Texans) and its conservator, National Credit Union Administration, sued appellant Jerry Gossett for breach of a guaranty agreement. After a nonjury trial, the trial court found in favor of appellees and awarded them damages and attorneys' fees. On appeal Gossett challenges both awards. We conclude that the evidence is legally insufficient to support the award of damages. As a result, appellees are not entitled to an award of attorneys' fees. We reverse and render a take-nothing judgment in favor of Gossett.

BACKGROUND

The material facts giving rise to this case are undisputed. Gossett is the limited partner of PBG Properties, LP. In 2003, Texans loaned PBG $1 million. The terms of the note included interest-only payments for the first nine months, a floating interest rate, and a maturity date of

April 20, 2014. In connection with its loan, PBG executed a $1 million promissory note and a deed of trust that gave Texans (among other things) a security interest in a commercial building owned by PBG. In addition, Gossett signed an unconditional guaranty for any and all amounts PBG owed up to $1 million plus reasonable attorneys' fees incurred to enforce the guaranty.

In 2012, PBG defaulted on the note by failing to maintain insurance and pay property taxes on the commercial property securing the note. In early 2013, Texans accelerated the note and PBG filed for Chapter 11 federal bankruptcy protection.

While PBG's bankruptcy was pending, appellees filed this lawsuit against Gossett for breach of his guaranty agreement, seeking payment of the remaining balance under the prepetition note as well as statutory and contractual attorneys' fees.

In November 2013, while appellees' claims against Gossett were awaiting trial in this lawsuit, the bankruptcy court entered an order confirming PBG's plan of reorganization, stating that it was "a result of the compromise between [PBG] and [Texans]" concerning PBG's loan. The section of the plan that addresses PBG's loan states that Texans' claim is impaired, and that according to Texans, the total amount due under the prepetition note was $592,042.34 as of the petition date. It also states that PBG and Texans would execute a new note in the amount of $659,149.69 with new terms that include a fixed interest rate and a two-year repayment period. Finally, it states that all other terms of the prepetition note and related loan documents would continue to apply to the new note, and that after a third event of default under the new note, Texans is entitled to foreclose on any collateral securing its loan without notice and without being subject to the automatic stay that would otherwise apply in a bankruptcy proceeding. In addition, several pages later in a different section titled "DISCHARGE," the plan essentially states that confirmation of the plan does not impact Gossett's guaranty of the prepetition note:

> NOTWITHSTANDING ANYTHING CONTAINED HEREIN TO THE CONTRARY, DEBTOR, REORGANIZED DEBTOR, GUARANTORS, THE

> OFFICERS SHAREHOLDERS AND DIRECTORS OF THE DEBTOR SHALL BE DISCHARGED AND RELEASED FROM ANY LIABILITY FOR CLAIMS UNDER THIS PLAN, PROVIDED HOWEVER THAT **CONFIRMATION OF THE PLAN SHALL NOT IMPACT THE VALIDITY OR ENFORCEABILITY OF ANY PRE-PETITION GUARANTIES OF THE PRE-PETITION NOTE HELD BY TEXANS**.

(Emphasis added.)

In December 2013, PBG, Texans, and Gossett, individually, entered into a loan modification agreement in which the parties restructured PBG's loan and repayment terms pursuant to the plan of reorganization. As part of that agreement, Gossett continued to guarantee PBG's performance of its obligations.

After the loan was restructured and the bankruptcy case was closed, appellees continued to pursue their claims against Gossett in this lawsuit for breach of the guaranty, alleging that the plan of reorganization and the loan modification agreement did not extinguish or affect Gossett's liability under that guaranty for PBG's prepetition debt. Appellees sought to recover the entire balance due under the prepetition note plus all attorneys' fees incurred in the bankruptcy and in the lawsuit against Gossett. In response, Gossett asserted a general denial and several affirmative defenses, including modification and satisfaction.

In November 2014 both sides appeared for a nonjury trial. Texans' general counsel testified that the outstanding balance due under the prepetition note was $665,849.26. In addition, appellees' trial counsel testified that they incurred a total of $135,507.32 in attorneys' fees in connection with the bankruptcy and the lawsuit against Gossett, and that they would incur $45,000 in conditional appellate attorneys' fees. The parties' closing arguments centered on whether Gossett was relieved of his obligation to guarantee the balance due under the prepetition note because the parties entered into the subsequent loan modification agreement.

The trial court found in favor of appellees and ordered that they recover from Gossett $665,849.26 in damages, prejudgment and postjudgment interest and court costs, $135,507.32

for attorneys' fees, $30,000 in conditional attorneys' fees for prevailing in an intermediate appeal, and $15,000 in conditional attorneys' fees for prevailing in an appeal to the Texas Supreme Court. No findings of fact or conclusions of law were requested or issued.

ISSUES ON APPEAL

In two issues on appeal Gossett challenges the award of damages and attorneys' fees. First, he argues that the evidence is legally insufficient to support the award of damages because the loan modification agreement relieved him of liability on the prepetition note. And second, he argues that the evidence is legally insufficient to support the award of attorneys' fees because (1) the loan modification agreement requires appellees to pay their own attorneys' fees relating to the bankruptcy, (2) appellees did not submit evidence of four of the five required elements to recover for work done by paralegals and law clerks, and (3) there is no evidence of the reasonableness or necessity concerning the conditional appellate attorneys' fees awarded.

STANDARD OF REVIEW

In a nonjury trial where no findings of fact or conclusions of law are requested or filed, the judgment implies all findings of fact necessary to support it. *Johnson v. Oliver*, 250 S.W.3d 182, 186 (Tex. App.—Dallas 2008, no pet.). But if, as in this case, the appellate record includes a clerk's record and a reporter's record, implied findings are not conclusive and may be challenged for legal sufficiency on appeal. *Id.*

When an appellant attacks the legal sufficiency of an adverse finding on an issue on which he did not have the burden of proof, the appellant must demonstrate there is no evidence to support the adverse finding. *See Exxon Corp. v. Emerald Oil & Gas, Co.*, 348 S.W.3d 194, 215 (Tex. 2011). We will sustain a no-evidence challenge if the record shows (1) a complete absence of evidence of a vital fact, (2) the court is barred by the rules of law or evidence from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove

a vital fact is no more than a mere scintilla, or (4) the evidence conclusively establishes the opposite of a vital fact. *Serv. Corp. Int'l v. Guerra*, 348 S.W.3d 221, 228 (Tex. 2011).

ANALYSIS

In his first issue Gossett argues that the evidence is insufficient to support the damages award for breach of the guaranty. More specifically, Gossett essentially argues that the evidence conclusively establishes the opposite—i.e., that he is not liable under the guaranty for PBG's prepetition debt because of the loan modification agreement. In response, appellees argue that the loan modification agreement did not relieve Gossett from his obligation to guarantee the balance due under the prepetition note.

Our resolution of Gossett's first issue hinges on the interpretation of the loan modification agreement. When parties disagree over the meaning of an unambiguous contract, we must determine the parties' intent by considering and examining the entire writing in an effort to give effect to the parties' intentions as expressed in the contract. *Seagull Energy E & P, Inc. v. Eland Energy, Inc.*, 207 S.W.3d 342, 345 (Tex. 2006); *Ascendant Anesthesia PLLC v. Abazi*, 348 S.W.3d 454, 459 (Tex. App.—Dallas 2011, no pet.). No single provision is given controlling effect; rather, all provisions are considered with reference to the whole instrument. *Tawes v. Barnes*, 340 S.W.3d 419, 425 (Tex. 2011).

Under the terms of the loan modification agreement, the parties "amended, revised, and modified" PBG's prepetition note by converting it into a "Restructured Note" with a different principal amount and different payment terms:

> As of the Effective Date, the Note, including all remaining amounts outstanding and owed under the Note, is hereby converted into the Restructured Note in the original principal amount of $680,421.19, amortized over a ten (10) year period, but maturing on December 3. 2016 ("Maturity Date"). The Note shall be payable in equal monthly installments of $7,031.78 by the 3rd calendar day of each month beginning January 3, 2014, with interest calculated on an actual/360 basis at the nondefault rate of 4.5% per annum, and default interest at the Maximum Rate, and a five percent (5%) late fee assessed on any unpaid amounts due under the Note

> upon the tenth (10) [sic] day following the due date for such unpaid amount. Upon the Maturity Date, all remaining unpaid amounts accrued and/or outstanding under the Restructured Note shall be due and payable.

Rather than execute a complete new set of loan documents, the parties also agreed that all liens and security interests granted in connection with the prepetition note would continue to secure PBG's repayment of the Restructured Note:

> The [Deed of Trust], Loan Agreement and any and all liens and security interests granted under the Loan Documents shall continue to secure the Restructured Note and be fully valid, perfected and enforceable without the need for any further action by any person or entity.

Likewise, the parties agreed that Gossett's guaranty would now apply to the Restructured Note:

> The Guaranty and its terms shall continue to guaranty PBG's performance of its obligations under the Restructured Loan Documents without the need for any further action by any person or entity, and the Guaranty is hereby renewed and ratified by Gossett for such purposes.

Reading the loan modification agreement as a whole and giving effect to each of its provisions, we conclude that it evidences the parties' intent to replace the prepetition note with the Restructured Note and for Gossett to guarantee the Restructured Note. Appellees argue that this interpretation conflicts with the plan of reorganization, because the last sentence of the "DISCHARGE" section of the plan reorganization states that "CONFIRMATION OF THE PLAN SHALL NOT IMPACT THE VALIDITY OR ENFORCEABILITY OF ANY PRE-PETITION GUARANTIES OF THE PRE-PETITION NOTE HELD BY TEXANS." We disagree. The statement in the plan of reorganization concerning the guaranty comports with a provision in federal bankruptcy law under which discharging the debt of a debtor (like PBG) generally does not affect the liability of a nondebtor (like Gossett) "concerning the same debt." *See* 11 U.S.C.A. § 524(e). But this case does not involve the "same debt." The material distinction in this case is that the prepetition note was "converted into the Restructured Note,"

and the parties agreed that Gossett would guarantee PBG's performance under the Restructured Note.[1]

Appellees also argue that Gossett "expressly agreed that the Plan and corresponding modification of the Original Note would not impact his pre-existing liabilities under the Original Note." But they do not cite the record to support this statement. And to the extent that they rely on the all-caps statement in the plan of reorganization stating that it did not impact the guaranty of the prepetition note, we do not agree that this statement evidences Gossett's express agreement to remain liable for the full amount due under the prepetition note once the note was converted to the Restructured Note.

In summary, we conclude that Gossett is not liable under the guaranty for PBG's prepetition note because the parties converted the prepetition note into the Restructured Note. As a result, the evidence is legally insufficient to support the award of damages for breach of the guaranty.

CONCLUSION

We resolve Gossett's first issue in his favor, reverse the award of damages as well as the corresponding award of attorneys' fees, and render a take-nothing judgment in favor of Gossett. As a result, we do not need to address Gossett's second issue concerning the sufficiency of the evidence supporting the award of attorneys' fees.

/Elizabeth Lang-Miers/
ELIZABETH LANG-MIERS
JUSTICE

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[1] In connection with that Restructured Note, the plan of reorganization states that PBG is entitled to two notices of default, each with a 30-day right to cure, and after a third default, Texans "shall be entitled to proceed with its rights and remedies," including foreclosure without notice. Appellees do not cite to or rely on any evidence concerning a default under the Restructured Note.

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JUDGMENT

JERRY GOSSETT, Appellant

No. 05-15-00022-CV V.

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Trial Court Cause No. DC-13-06137.
Opinion delivered by Justice Lang-Miers.
Justices Francis and Myers participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** and a take-nothing judgment is **RENDERED** in favor of appellant Jerry Gossett.

It is **ORDERED** that appellant Jerry Gossett recover his costs of this appeal from appellees National Credit Union Administration as Conservator for Texans Credit Union and Texans Credit Union.

Judgment entered this 28th day of July, 2016.