Affirmed; Opinion Filed January 9, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00584-CV

MOHAMMED HARUN AND SPICE-N-RICE INDIAN TIFFIN RESTAURANT, Appellants
V.
SHARIF RASHID, Appellee

On Appeal from the 193rd Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-12-09394

MEMORANDUM OPINION

Before Justices Lang, Evans, and Schenck
Opinion by Justice Schenck

Mohammed Harun and Spice-N-Rice Indian Tiffin Restaurant ("Spice-N-Rice") appeal the trial court's judgment awarding Sharif Rashid actual and exemplary damages and attorney's fees on his breach-of-fiduciary-duty claims. In three issues, appellants assert the trial court erred in finding Harun and Rashid were partners in Spice-N-Rice and in awarding Rashid damages. We affirm the trial court's judgment. Because all issues are settled in law, we issue this memorandum opinion. TEX. R. APP. P. 47.4.

BACKGROUND

Harun and Rashid became acquainted in 2001. Harun was in the restaurant business, and Rashid was a technical analyst. In November 2008, Harun was interested in opening a new restaurant in Irving. Harun did not have the financial resources to get the venture off the

ground, so he approached Rashid to see if he was interested in funding the operation. Rashid was interested and invested $45,000 of his savings, and, when the business was in the need of additional funds, he took out a personal loan in the amount of $15,000 to cover expenses. In addition to infusing funds into the business, Rashid (a) assisted Harun in negotiating a lease for the restaurant, as Harun does not speak English fluently; (b) was a signatory on the restaurant's bank account; (c) hired a bookkeeper to handle the restaurant's accounting matters; (d) dealt with contractors on the build-out of the restaurant; (e) purchased furniture, equipment, and supplies for the restaurant; and (f) paid for advertising. In the fall of 2010, the bookkeeper Rashid hired distanced herself from Huran, Rashid, and Spice-N-Rice expressing her concern that Huran may have improperly reported Spice-N-Rice's income on his tax return. Shortly thereafter, Huran removed Rashid as a signatory on Spice-N-Rice's bank account and blocked his access to the account and the restaurant's premises.

On August 21, 2012, Rashid filed suit against appellants alleging the existence of a partnership between Huran and Rashid to operate the Spice-N-Rice restaurant, and asserting claims of breach of fiduciary duty and breach of contract, and seeking actual and exemplary damages, and attorney's fees. Rashid later amended his pleadings to include claims of conversion and fraud. Appellants generally denied Rashid's allegations and specifically denied that Rashid had ever been a partner in Spice-N-Rice.

On January 19, 2016, the case proceeded to trial before the court. On February 16, 2016, the trial court entered a judgment awarding Rashid actual damages of $36,000—the difference between Rashid's investment of $60,000 and the approximate amount that Rashid had been repaid—exemplary damages of $36,000, and attorney's fees of $79,768.64, along with prejudgment and post-judgment interest and costs. No findings of fact and conclusions of law

were requested or entered. Appellants filed a motion for new trial, which was overruled by operation of law. This appeal followed.

DISCUSSION

Huran and Spice-N-Rice raise three issues challenging the sufficiency of the evidence to establish the existence of a partnership between Huran and Rashid and to support an award of damages. In response, Rashid notes the appellants failed to bring forward a complete record and urges this Court to presume the missing portions of the record support the trial court's judgment.[1] *See Bennett v. Cochran*, 96 S.W.3d 227, 229 (Tex. 2002) (per curiam). Regardless of which presumption applies—the presumption under rule 34.6(c)(4) of the Texas Rules of Appellate Procedure that we have all of the record necessary to analyze the sufficiency issues or the presumption the missing portion of the record is relevant and supports the trial court's judgment—the outcome in this case is the same. Consequently, we pretermit deciding whether appellants invoked the presumption that the record before us constitutes the entire record for purposes of reviewing the stated issues. *See* TEX. R. APP. P. 34.6(c)(4).

Appellants' first issue focuses on the existence of a partnership generally, and their second issue focuses on whether there was an agreement to share losses. Appellants do not specify whether they challenge the evidence of a partnership on legal or factual sufficiency grounds, and do not identify the standard of review to be applied in this case. Construing appellants' briefing liberally, we treat appellants' sufficiency complaint as a challenge to both the legal and factual sufficiency of the evidence. TEX. R. APP. P. 38.9. As detailed below, both fail under the record before us.

[1] Only the first two volumes and a portion of the third volume have been filed with this Court because appellants failed to pay for the entire record. Volume 1 is the master index. It indicates volumes 4 through 6 contain the exhibits admitted at trial, totaling approximately 110. Volume 2 contains opening statements, and testimony from Rashid and the bookkeeper he hired. Volume 3, as filed, contains the continuing testimony of Rashid and the testimony of Rashid's attorney on fees. It appears from the index to volume 3, that thereafter appellants called five witnesses to testify, the attorneys made closing arguments, and the trial court made a ruling following closing arguments.

In conducting a legal-sufficiency review, we view the evidence in a light that tends to support the finding of the disputed facts and disregard all evidence and inferences to the contrary. *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 782 (Tex. 2001). We may sustain a legal-sufficiency, or no-evidence, point if the record reveals one of the following: (1) the complete absence of a vital fact; (2) the court is barred by rules of law or of 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 scintilla; or (4) the evidence established conclusively the opposite of the vital fact. *See Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 334 (Tex. 1998). If more than a scintilla of evidence exists, it is legally sufficient. *Lee Lewis Constr.*, 70 S.W.3d at 782. More than a scintilla of evidence exists if the evidence furnishes some reasonable basis for differing conclusions by reasonable minds about a vital fact's existence. *Id.* at 782–83.

In reviewing a factual-sufficiency point, we must weigh all of the evidence in the record before us. *Burnett v. Motyka*, 610 S.W.2d 735, 736 (Tex. 1980). Findings may be overturned only if they are so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986).

As to appellants' second issue—by which they complain about the alleged lack of evidence of an agreement to share losses—the Texas Business Organizations Code expressly provides that an agreement to share losses is not necessary to create a partnership. TEX. BUS. ORGS. CODE ANN. § 152.052(c) (West 2012). Partnership losses are charged against each partner in accordance with the partner's share. *Id.* § 152.202(b)(2). Moreover, and contrary to appellants' assertion, Rashid presented evidence that he and Huran agreed to share losses in the business.[2] Consequently, we rule against appellants on their second issue.

[2] Concerning rights to share in profits and losses, Rashid testified as follows:

Q. . . . what was the agreement about any profits the restaurant made?

In determining whether a partnership was created, we consider several factors, including (1) the parties' receipt or right to receive a share of profits of the business; (2) any expression of an intent to be partners in the business; (3) participation or right to participate in control of the business; (4) any agreement to share or sharing losses of the business or liability for claims by third parties against the business; and (5) any agreement to contribute or contributing money or property to the business. *See id.* § 152.052(a). Proof of each of these factors is not necessary to establish a partnership. *Ingram v. Deere*, 288 S.W.3d 886, 896 (Tex. 2009). We review the factors under the totality of the circumstances. *Id.* at 898.

Appellants assert the trial court's finding of a partnership is refuted by the bookkeeper's acknowledgement that no partnership existed. But appellants mischaracterize the testimony of the bookkeeper. The bookkeeper was testifying simply about what the paperwork showed and how that affected the papers she prepared. In addition, appellants ignore the bookkeeper's testimony that, notwithstanding the paperwork identifying the business as a sole proprietorship, she knew the business was supposed to be a partnership.

At trial, Rashid presented evidence through his testimony that: (a) Huran approached him indicating he had found a good location to open a restaurant and needed a partner to finance the operation; (b) Huran asked him to be his partner; (c) he and Huran were equal business partners in the restaurant; (d) he and Huran agreed to share equally in the profits and losses; (e) he and Huran met with the leasing agents to negotiate the lease of the restaurant space; (f) he and Huran had equal access to the restaurant's bank account; (g) he hired and communicated with the bookkeeper; (h) he was very involved in preparing paperwork for the restaurant; (i) he paid restaurant related bills, and purchased furniture and equipment for the restaurant; (j) he was not

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A. It would be shared 50/50.

Q. And losses?

A. Shared 50/50.

an employee of the restaurant or Harun, nor did he receive any pay for the work he performed on behalf of the restaurant; and (k) he invested approximately $60,000 in the business. We conclude the trial court's finding a partnership existed between Huran and Rashid is supported by more than a scintilla of evidence, and is not against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Accordingly, we overrule appellants' first issue.

Finally, in their third issue, appellants argue Rashid was not entitled to an award of damages because there was no partnership and thus there could be no breach of fiduciary duty. As we have concluded there is sufficient evidence Huran and Rashid were partners in Spice-N-Rice, we overrule appellants' third issue.

CONCLUSION

We affirm the trial court's judgment.

/David J. Schenck/
DAVID J. SCHENCK
JUSTICE

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JUDGMENT

MOHAMMED HARUN AND SPICE-N-RICE INDIAN TIFFIN RESTAURANT, Appellants

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SHARIF RASHID, Appellee

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Trial Court Cause No. DC-12-09394.
Opinion delivered by Justice Schenck.
Justices Lang and Evans participating.

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

It is **ORDERED** that appellee SHARIF RASHID recover his costs of this appeal from appellants MOHAMMED HARUN AND SPICE-N-RICE INDIAN TIFFFIN RESTAURANT.

Judgment entered this 9th day of January, 2018.