Dismissed and Opinion Filed May 3, 2018

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00784-CV

TONYA PARKS AND PARKS REALTY FIRM, LLC, Appellants
V.
AFFILIATED BANK, Appellee

On Appeal from the County Court at Law No. 3
Dallas County, Texas
Trial Court Cause No. CC-15-04540-C

MEMORANDUM OPINION

Before Justices Lang-Miers, Fillmore, and Stoddart
Opinion by Justice Fillmore

Tonya Parks and Parks Realty Firm, LLC (PRF) appealed from a trial court order signed by the Honorable Sally Montgomery that dismissed appellants' claims against Affiliated Bank pursuant to the Texas Citizens Participation Act, *see* TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001–.011(West 2015) (the TCPA), and awarded Affiliated Bank $29,876.40 in attorneys' fees. The record, however, reflects that Parks, individually and on behalf of PRF, orally agreed on the record not to appeal the order. Because Judge Montgomery did not modify the order to reflect that agreement, we abated this appeal and remanded the case to the trial court for a determination of whether Parks, individually and on behalf of PRF, voluntarily entered into an

agreement under rule of civil procedure 11,[1] pursuant to which appellants forfeited their right to bring this appeal, and whether any agreement was enforceable.

The Honorable Ted Akin conducted an evidentiary hearing and determined Parks agreed in open court not to appeal the order dismissing appellants' claims and the agreement was enforceable pursuant to rule of civil procedure 11. Appellants filed a supplemental brief asserting (1) this Court erred by abating this appeal because any agreement made by Parks is unenforceable due to Judge Montgomery's violation of appellants' right to procedural due process, and (2) Judge Akin abused his discretion by entering findings of fact and conclusions of law when there had not been a trial and by determining Parks did not enter into the agreement due to coercion or duress, the agreement was enforceable, Affiliated Bank complied with the agreement, and appellants breached the agreement. We dismiss this appeal.

Background

Appellants sued Joshua A. Campbell and his former employer, Affiliated Bank, asserting a number of causes of action based on an internet posting by Campbell concerning Parks's work as a real estate agent. Campbell filed a motion to dismiss under the TCPA on grounds the claims against him were based on statements he made in connection with a matter of public concern and appellants could not establish by clear and specific evidence a prima facie case for each essential element of their claims. Campbell requested the dismissal of the claims against him and the award of reasonable attorneys' fees. At the hearing on Campbell's motion, Affiliated Bank argued it "should be included as far as being dismissed" because there was no evidence to support the causes of action asserted against it. Affiliated Bank also requested that it be awarded attorneys' fees pursuant to the TCPA. On March 24, 2016, Judge Montgomery signed an Order on Defendant

[1] Rule of civil procedure 11 states that, unless otherwise provided in the rules of civil procedure, "no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record." TEX. R. CIV. P. 11.

Joshua Campbell's Motion to Dismiss (the March 24th Order), dismissing with prejudice appellants' claims against both Campbell and Affiliated Bank and awarding $62,297.50 to Campbell and $29,876.40 to Affiliated Bank for court costs, reasonable attorneys' fees, and other expenses incurred in defending the litigation.

Appellants filed a motion for new trial. At the hearing on the motion, the parties agreed on the record that (1) Campbell and Affiliated Bank would not seek to recover the fees and expenses awarded in the March 24th Order, and (2) appellants would not appeal the March 24th Order. However, Parks subsequently filed a pro se notice of appeal for both herself and PRF. Affiliated Bank moved to dismiss the appeal based, in part, on Parks's agreement not to appeal the March 24th Order.[2] Parks and PRF responded Parks was "coerced by the trial court" into non-suiting their claims under "extreme duress."

After retaining counsel, appellants filed an appellate brief arguing in four issues that the trial court erred by dismissing appellants' claims against Affiliated Bank and the dismissal violated appellants' right to procedural due process. Following oral argument, we abated this appeal and remanded the case to the trial court for findings relating to whether Parks, individually and on behalf of PRF, voluntarily entered into an agreement under rule of civil procedure 11, pursuant to which appellants forfeited their right to bring this appeal, and whether any agreement was enforceable.

In compliance with our order, Judge Akin conducted an evidentiary hearing on February 16, 2018. Judge Akin admitted into evidence pleadings from the underlying proceedings as well as the transcript of the hearing on appellants' motion for new trial. Parks also testified about the hearing on appellants' motion for new trial and her state of mind at the time she agreed to the

[2] On December 2, 2016, we dismissed appellant's appeal against Campbell because the notice of appeal was untimely as to him.

settlement. On February 26, 2018, Judge Akin entered findings of fact and conclusions of law. Judge Akin specifically found:[3]

1. Parks is at least forty-two years old, has a B.B.A. degree from the University of North Texas, is a licensed realtor, owns and operates her own company, and is a sophisticated businesswoman;

2. In the underlying case, appellants' motion for new trial was heard on June 13, 2016, more than seventy-five days after the March 24th Order was signed;

3. Appellants were represented by counsel during the hearing, and appellants counsel was among the counsel who represented to Judge Montgomery that appellants' motion for new trial had been overruled by operation of law;

4. During the hearing, Judge Montgomery directed the parties to confer regarding potential settlement at three separate junctures, including one break that lasted for more than thirty minutes;

5. After the final break, during which Parks conferred with her counsel, the parties announced they had reached an agreement;

6. Counsel for all parties agreed on the record that Campbell and Affiliated Bank would forego seeking to recover the attorneys' fees awarded in the March 24th Order in exchange for a "full waiver of any appeal or further filings" by appellants;

7. The agreement constituted a "dismissal with prejudice" with appellants "giving a full and complete release of all claims" against Affiliated Bank and Campbell;

8. Defense counsel requested that Parks give her verbal assent to the agreement on the record;

9. Appellants' counsel "made it clear to his client that it was her decision, stating 'I'm not telling you what to do. I'm not pressuring you. It's your decision'";

10. After Parks expressed reluctance about the agreement, Judge Montgomery asked her whether she was going to dismiss the case with prejudice;

11. Parks stated "whatever you guys want," and Judge Montgomery advised Parks that she was the only one who could make the agreement and Judge Montgomery could not do it for her;

12. Parks responded that she would accept the settlement, but indicated she had been "put in this position" and had not had the "representation she wanted to have";

[3] The numbering of the findings set out in this opinion do not correspond with the numbering of the findings in Judge Akin's findings of fact and conclusions of law.

13. Judge Montgomery advised Parks that she needed to say yes or no to the agreement and that Judge Montgomery could not make the choice for her;

14. Parks "tried to claim she was 'forced' to accept the settlement," and Judge Montgomery cautioned her that the settlement "would not hold" under those circumstances;

15. Parks stated in open court, "I accept the deal";

16. Affiliated Bank and Campbell complied with the agreement and did not pursue collection of the attorneys' fees awarded in the March 24th Order; and

17. Appellants breached the agreement by filing a notice of appeal.

Judge Akin concluded Parks did not enter into the agreement due to coercion or duress from her counsel, the other parties, or Judge Montgomery, and the parties' agreement was enforceable under rule of civil procedure 11.

We granted appellants' request to file supplemental briefing, but specifically limited the supplemental briefing to "issues relating to the trial court's rulings on objections at the February 16, 2018 hearing and the trial court's February 27, 2018 findings of fact and conclusions of law." Appellants filed a supplemental brief complaining in six issues, numbered five through ten, that this Court erred by abating this appeal because any agreement made by Parks was unenforceable due to Judge Montgomery's violation of appellants' right to procedural due process and Judge Akin abused his discretion by (1) entering findings of fact and conclusions of law in a case in which there was not a trial, and (2) determining Parks did not enter into the rule 11 agreement due to coercion or duress, the rule 11 agreement was enforceable, Affiliated Bank and Campbell complied with the agreement, and appellants breached the agreement.

Abating the Appeal

In their fifth issue, appellants complain this Court erred by abating this appeal and remanding the case to the trial court for findings pertaining to any agreement between the parties. This complaint is outside the limited scope of issues on which we allowed supplemental briefing. Accordingly, we will not address appellants' fifth issue.

Authority to Enter Findings of Fact and Conclusions of Law

In their sixth issue, appellants assert Judge Akin abused his discretion by entering findings of fact and conclusions of law because findings of fact and conclusions of law may be made only pursuant to rules of civil procedure 296 through 299a following a bench trial. Rule of civil procedure 296 provides that "[i]n any case tried in the district or county court without a jury, any party may request the court to state in writing its findings of fact and conclusions of law." TEX. R. CIV. P. 296. "A case is 'tried' when the court's judgment is based on an evidentiary hearing containing conflicting testimony." *R.H. v. Smith*, 339 S.W.3d 756, 761 (Tex. App.—Dallas 2011, no pet.); *see also Shanklin v. Shanklin*, No. 13-15-00392-CV, 2016 WL 3962707, at *2 (Tex. App.—Corpus Christi July 21, 2016, no pet.) (mem. op.). "Findings and conclusions are appropriate if there is an evidentiary hearing and the trial court is called upon to determine questions of fact based on conflicting evidence." *Ezy-Lift of Ca., Inc. v. EZY Acquisition, LLC*, No. 01-13-00058-CV, 2014 WL 1516239, at *3 (Tex. App.—Houston [1st Dist.] Apr. 17, 2014, pet. denied) (quoting *Int'l Union, United Auto., Aerospace Agric. Implement Workers of Am.-UAW v. Gen. Motors Corp.*, 104 S.W.3d 126, 129 (Tex. App.—Fort Worth 2003, no pet.)).

Judge Akin held an evidentiary hearing to determine whether there was an agreement between the parties and whether any agreement was enforceable, and conflicting evidence was presented at the hearing. Accordingly, Judge Akin did not err by entering findings of fact and conclusions of law. *See My Three Sons, Ltd. v. Midway/Parker Med. Ctr., L.P.*, No. 05-15-01068-CV, 2017 WL 2351082, at *7 (Tex. App.—Dallas May 31, 2017, no pet.) (mem. op.) (noting trial court is permitted to make findings of fact and conclusions of law following evidentiary hearing); *R.H.*, 339 S.W.3d at 761 (concluding that, on proper request of party, trial court was required to make findings of fact and conclusions of law following hearing on motion at which conflicting evidence was presented). We resolve appellants' sixth issue against them.

Findings of Fact and Conclusions of Law

In their seventh through tenth issues, appellants argue Judge Akin abused his discretion by ruling Parks did not enter into the settlement agreement due to coercion or duress, the agreement is enforceable pursuant to rule of civil procedure 11, Affiliated Bank and Campbell complied with the agreement, and appellants breached the agreement.

Standard of Review

Findings of fact entered in a case tried to the court have the same force as a jury verdict upon questions. *Anderson v. City of Seven Points*, 806 S.W.2d 791, 794 (Tex. 1991); *Scott Pelley P.C. v. Wynne*, No. 05-15-01560-CV, 2017 WL 3699823, at *8 (Tex. App.—Dallas Aug. 28, 2017, pet. denied) (mem. op.). We thus review findings of fact by the same standards that are applied in reviewing the legal and factual sufficiency of the evidence supporting a jury finding. *Anderson*, 806 S.W.2d at 794; *Scott Pelley P.C.*, 2017 WL 3699823, at *8. Unchallenged findings of fact are binding on this Court unless the contrary is established as a matter of law or there is no evidence to support the finding. *Walker v. Anderson*, 232 S.W.3d 899, 907 (Tex. App.—Dallas 2007, no pet.); *see also Tenaska Energy, Inc. v. Ponderosa Pine Energy, LLC*, 437 S.W.3d 518, 526 (Tex. 2014) (concluding unchallenged findings supported by some evidence were binding on appellate court); *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 696 (Tex. 1986).

We review the trial court's conclusions of law de novo. *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 794–95 (Tex. 2002); *Credit Suisse AG v. Claymore Holdings, LLC*, No. 05-15-01463-CV, 2018 WL 947902, at *4 (Tex. App.—Dallas Feb. 20, 2018, no pet. h.) (mem. op.). We may not reverse a trial court's conclusion of law unless it is erroneous as a matter of law. *Credit Suisse AG*, 2018 WL 947902, at *4.

Duress or Coercion

Citing to paragraphs twenty-five and twenty-eight of Judge Akin's findings of fact and conclusions of law, appellants argue in their seventh issue that the "trial court abused its discretion in ruling that Parks, individually and on behalf of PRF, did not enter into the rule 11 agreement due to coercion or duress[.]'" The standard of review relied on by appellants is not applicable to our review of either the trial court's findings of fact or conclusions of law. *See BMC Software Belgium, N.V.*, 83 S.W.3d at 794–95; *Anderson*, 806 S.W.2d at 794. However, whether an agreement is voluntary is generally a question of law. *See Tower Contracting Co., Inc. of Tex. v. Burden Bros, Inc.*, 482 S.W.2d 330, 335 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.) ("What constitutes duress is a question of law but whether the facts exist to make up the elements of duress may be an issue of fact."); *see also Dallas Cty. Cmty. Coll. Dist. v. Bolton*, 185 S.W.3d 868, 880 (Tex. 2005) ("Where the facts are undisputed, determination of whether a payment is voluntary or involuntary is a question of law."); *Park Plaza Solo, LLC v. Benchmark-Hereford, Inc.*, No. 07-16-00004-CV, 2016 WL 6242824, at *2 (Tex. App.—Amarillo Oct. 24, 2016, no pet.) (mem. op.) ("[W]hether or not circumstances of duress are established is generally a question of fact, but whether established facts constitute duress is a matter of law to be determined by the court."). Paragraphs twenty-five and twenty-eight of Judge Akin's findings of fact and conclusions of law state "[t]here was no coercion," and "[t]here was no coercion or duress." We conclude these are conclusions of law that we review de novo.

"Coercion exists when a party by the unlawful conduct of another, is induced to enter into a contract which deprives him of the exercise of his free will." *Man Indus. (India), Ltd. v. Midcontinent Express Pipeline, LLC*, 407 S.W.3d 342, 367 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (quoting *Metro-Goldwyn-Mayer Distrib. Corp. v. Cocke*, 56 S.W.2d 489, 491 (Tex. Civ. App.—Amarillo 1933, no writ). Generally, under Texas law, the term "duress" rather than "coercion" is used when parties are seeking to avoid a contract. *Id.* "A common element of

duress in all its forms (whether called duress, implied duress, business compulsion, economic duress or duress of property) is improper or unlawful conduct or threat of improper or unlawful conduct that is intended to and does interfere with another person's exercise of free will and judgment." *Bolton*, 185 S.W.3d at 878–79; *see also McCord v. Goode*, 308 S.W.3d 409, 413 (Tex. App.—Dallas 2010, no pet.). "The threat must be imminent and the party must have no present means of protection." *McCord*, 368 S.W.3d at 413. Further, "[d]uress must be shown from the acts or conduct of the party accused of duress, not the emotions of the purported victim." *Id*. There can be no duress when the threatened conduct is not unlawful. *In re C.E.W.*, No. 05-14-00459-CV, 2015 WL 5099336, at *3 (Tex. App.—Dallas Aug. 31, 2015, pet. denied).

Appellants argue they established Parks entered into the agreement under duress because Judge Montgomery falsely represented that she no longer had jurisdiction to grant appellants' motion for new trial and threatened to leave an "unlawful judgment" in place and sanction appellants for bringing a frivolous lawsuit if Parks did not agree to settle the case; these "threats" were "of such a character as to destroy the free agency" of Parks to refuse the settlement; and these "threats" "overcame Parks'[s] will and caused her to do that which she would not otherwise have done."

Judge Akin found that Parks was at least forty-two years old, has a college degree, runs her own business, and is a sophisticated businesswoman. He also found that Parks was represented by counsel at the motion for new trial hearing, had an opportunity to confer with her counsel about the proposed settlement agreement on multiple occasions, was cautioned by Judge Montgomery that she was the only one who could make the decision to accept the offer of Campbell and Affiliated Bank to settle the case, and agreed in open court to the settlement. These facts are supported by evidence admitted at the hearing, including the transcript of the motion for new trial

hearing and Parks's testimony.[4] The record also reflects that, although she was highly emotional at the hearing on the motion for new trial, Parks understood the consequences of accepting or refusing the settlement and agreed to the settle in order to avoid a "$96,000 judgment" against her.

Based on the unchallenged findings and the evidence at the hearing before Judge Akin, we conclude Judge Akin did not err by determining Parks did not enter into the settlement agreement due to coercion or duress. We resolve appellants' seventh issue against them.

Enforceability of Rule 11 Agreement

Relying on *Rymer v. Lewis*, 206 S.W.3d 732 (Tex. App.—Dallas 2006, no pet.), appellants argue in their eighth issue that Judge Akin erred by concluding the rule 11 agreement entered into by the parties was enforceable. *Rymer* involved the appeal to the county court of a forcible detainer judgment in the amount of $5,000 in favor of Rymer's landlord. *Id.* at 733–34. Both Rymer and her landlord appeared pro se in the county court. *Id.* at 734 n.1. During the pendency of the appeal, Rymer paid $1,200 into the registry of the county court. *Id.* at 734. Rymer and her landlord subsequently agreed Rymer would vacate the property and the landlord would receive the $1,200. *Id.* at 734. Before an order memorializing the agreement was presented to the trial court, the landlord moved Rymer's property from the house into the garage. *Id.* Rymer alleged the landlord caused thousands of dollars of damage to the property. *Id.*

Rymer informed the trial court that she no longer consented to the original terms of the parties' agreement because the landlord had damaged her property. *Id.* After the trial court expressed concern about the landlord's actions, Rymer informed the trial court that she wanted the case dismissed to allow her to recover the money in the registry of the court. *Id.* The trial court stated the case was dismissed. *Id.* The landlord then asked what would happen to the money in

[4] In order to challenge Judge Akin's findings of fact, Parks was required to attack specific findings under the appropriate legal and factual sufficiency standards. *See Defense Resource Servs., LLC v. First Nat'l Bank of Cent. Tex.*, No. 10-14-00327-CV, 2015 WL 4064781, at *4 (Tex. App.—Waco July 2, 2015, pet. denied) (mem. op.). Because Parks has failed to do so and the referenced findings of fact are supported by the evidence, they are binding on this Court. *See Tenaska Energy*, 437 S.W.3d at 526; *Walker*, 232 S.W.3d at 907.

the registry of the court, and the trial court asked an attorney in the courtroom to mediate the parties' dispute. *Id.* The attorney subsequently informed the trial court the parties had "some sort of fact issues" that needed to be resolved concerning the property the landlord removed from the house. *Id.* Rymer told the trial court that she wanted the case dismissed and she would file another lawsuit for property damages. *Id.* The landlord indicated that Rymer could keep the $1,200 she paid into the registry of the court to "end this entire matter." *Id.* Rymer stated she was "not agreeing to not do anything later down the road." *Id.* at 735. The trial court indicated it was "going to let [the landlord] have the $1200, and I'll do an order right now. It's your choice." *Id.* Rymer responded, "I'll take the [$]1200, and we'll go –." *Id.* The trial court indicated it needed "to have an answer." *Id.* Rymer responded, "Okay, that's fine," and indicated she would "agree to what you're doing." *Id.*

The trial court signed a final judgment that stated the parties had reached an agreement on the record, all issues of fact and law were tried to the court, and "after receiving the evidence presented and the testimony of the witnesses," the trial court awarded possession of the house to the landlord and awarded Rymer the $1,200 from the registry of the court. *Id.* The judgment also stated Rymer would not pursue any cause of action against the landlord for issues relating to Rymer's personal property. *Id.* Rymer appealed, arguing the trial court acted improperly by forcing her to choose between relinquishing either the $1,200 in the registry of the court or her right to pursue a claim against her landlord for damages to her personal property. *Id.* at 736.

We concluded there was no evidence to support the trial court's apparent conclusion that the $1200 would offset Rymer's claim for the damage to her property or to award relief to the landlord. *Id.* We noted the case had been dismissed when the landlord asked what would happen to the money in the registry of the court and, "[w]ithout saying so, the trial court essentially reopened the case after the landlord agreed to let Rymer have the $1200 if Rymer agreed to drop

all claims against him." *Id.* This required Rymer to "agree to forego any claim for damages she may have had against her landlord" in order to recover the $1,200. *Id.*

In this case, the hearing on appellants' motion for new trial was held more than seventy-five days after the March 24th Order, and counsel, including appellants' counsel, represented to Judge Montgomery that the order was final. Judge Montgomery did not reopen the case and did not make a decision about the value of appellants' claims without any evidence. Judge Montgomery gave the parties three opportunities to discuss settling the case and did not attempt to force a settlement by stating she would withhold money in the registry of the court from appellants or award any such money to the other side if Parks refused to settle the dispute. Finally, appellants, who were represented by counsel, did not relinquish any claims that could have been asserted against Affiliated Bank or Campbell in a subsequent lawsuit. Rather, appellants agreed not to appeal the March 24th Order in exchange for Affiliated Bank's and Campbell's agreement not to pursue the attorneys' fees awarded by the trial court in the March 24th Order. All parties waived a right relating to the March 24th Order in order to settle the dispute.

We conclude *Rymer* is distinguishable and does not control whether the agreement entered into by Parks is enforceable. We resolve appellants' eighth issue against them.

Compliance with Agreement

In their ninth and tenth issues, appellants assert Judge Akin abused his discretion by determining Affiliated Bank[5] complied with the parties' agreement and appellants breached the settlement agreement. However, we remanded this case for a determination of whether Parks, individually and on behalf of PRF, voluntarily entered into an agreement under rule of civil procedure 11, pursuant to which appellants forfeited their right to bring this appeal, and whether

[5] Appellants also complain Judge Akin abused his discretion by ruling Campbell complied with the rule 11 agreement. Campbell is no longer a party to this appeal. Accordingly, his conduct is not relevant to our analysis.

any agreement was enforceable. Any subsequent compliance with the agreement by either Affiliated Bank or appellants is not relevant to the issues before Judge Akin. Accordingly, we will not address appellants' ninth and tenth issues.

Conclusion

An agreement to settle a case is enforceable if it complies with rule 11. *Padilla v. LaFrance*, 907 S.W.2d 454, 460 (Tex. 1995); *In re Barton*, No. 05-17-00364-CV, 2017 WL 6275920, at *1 (Tex. App.—Dallas Dec. 11, 2017, orig. proceeding) (mem. op.). As relevant to this appeal, an agreement complies with rule 11 if the agreement is made in open court and entered of record. TEX. R. CIV. P. 11. Judge Akin found the parties' agreement to settle this case was made in open court and entered of record, and concluded the agreement was enforceable under rule 11. One of the terms of the agreement was that Parks and PRF forfeited their right to bring this appeal. *See Estate of Crawford*, No. 14-17-00703-CV, 2017 WL 5196309, at *2 (Tex. App.—Houston [14th Dist.] Nov. 9, 2017, pet denied) (mem. op.) (per curiam) ("The right to appellate review may be waived by agreement." (citing *Rodriguez v. Villarreal*, 314 S.W.3d 636, 645 (Tex. App.—Houston [14th Dist.] 2010, no pet.)). Because Parks and PRF entered into an enforceable rule 11 agreement pursuant to which they agreed not to appeal from the March 24th Order, we will enforce the terms of their agreement. *Estate of Crawford*, 2017 WL 5196309, at *2; *In re Marriage of Long*, 946 S.W.2d 97, 99 (Tex. App.—Texarkana 1997, no writ). Accordingly, we dismiss this appeal.

/Robert M. Fillmore/
ROBERT M. FILLMORE
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

TONYA PARKS AND PARKS REALTY FIRM, LLC, Appellants	On Appeal from the County Court at Law No. 3, Dallas County, Texas, Trial Court Cause No. CC-15-04540-C.
No. 05-16-00784-CV V.	Opinion delivered by Justice Fillmore, Justices Lang-Miers and Stoddart participating.
AFFILIATED BANK, Appellee	

In accordance with this Court's opinion of this date, the appeal is **DISMISSED**.

It is **ORDERED** that appellee Affiliated Bank recover its costs of this appeal from appellants Tonya Parks and Parks Realty Firm, LLC.

Judgment entered May 3, 2018.