REVERSE and RENDER; and Opinion Filed May 2, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01176-CV

JIK CAYMAN BAY EXCHANGE LLC, JIK ARBORS LLLP, AND JKT EXCHANGE LLC, Appellants
V.
OLIVER MEDINA AND RICHARD SIMPSON, Appellees

On Appeal from the County Court at Law No. 5
Dallas County, Texas
Trial Court Cause No. CC-13-03572-E

MEMORANDUM OPINION

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

A jury found that appellants JIK Cayman Bay Exchange LLC, JIK Arbors LLLP, and JKT Exchange LLC (collectively, JIK) fraudulently induced appellees Oliver Medina and Richard Simpson to enter into residential leases at The Arbors of Las Colinas (the Arbors), and jurors awarded appellees actual and exemplary damages and attorney's fees. JIK challenges the sufficiency of the evidence supporting each element of appellees' fraud claim and the damages awarded them. Alternatively, JIK challenges the provision of the trial court's judgment making JIK's liability for the exemplary damages award joint and several. We conclude the evidence is insufficient to support the fraud verdict, so we reverse the trial court's judgment and render judgment that appellees take nothing.

Background

Simpson moved into an apartment at the Arbors in July 2006; Medina moved into his apartment there in September 2011. On December 3, 2012, a fire destroyed their apartment building. The fire started in the apartment of another tenant in the same building, Mohsin Zia. It destroyed all of appellees' personal possessions.

At the heart of this case is a lease provision requiring all tenants to have a renter's liability insurance policy with limits of at least $100,000. Appellees allege that unidentified leasing agents working for JIK told them before they moved in that all tenants were required to carry this insurance, that JIK enforced the insurance requirement, and that if a tenant were discovered not to have the required insurance, he would be evicted in three days. The agents assured appellees that the insurance provision allowed the Arbors to attract "a better clientele" and to keep out "riffraff" and "bad people that didn't like to have insurance." Appellees contend that they leased their apartments and renewed those leases in reliance on JIK's representations. After the fire, all parties learned that Zia had allowed his insurance coverage to lapse several months earlier.

Appellees sued JIK, contending they were fraudulently induced to lease their apartments by misrepresentations and false promises concerning the insurance requirement and how it would be enforced. The jury found in appellees' favor, awarding actual and exemplary damages to both Simpson and Medina. JIK appeals.

Fraud in the Inducement

The trial court's charge on appellees' fraud in the inducement claim asked jurors whether JIK committed fraud against appellees and instructed that fraud could take two forms: (1) a false representation of a past or existing material fact, made to a person to induce that person to enter into a contract, and relied upon by that person in entering into that contract; or (2) a false material promise to do an act, made with the intention of not fulfilling it, for the purpose of inducing a person to enter into a contract, and relied upon by that person in entering into that contract. The

charge also asked the jury to determine the amount necessary to compensate appellees for their "damages, if any, that were proximately caused by such fraud."

Misrepresentations or False Promises

In its first issue, JIK contends that there are seven bases for concluding that no evidence supports the jury's fraud findings.[1] The first of these bases is JIK's contention that no evidence establishes that any representation or promise allegedly made by the leasing agents was false. Appellees' theories of misrepresentation and false promises were based on similar allegations. They contend that representatives of the Arbors told them:

(1) all tenants were required to have $100,000 in liability insurance;

(2) the Arbors enforced this requirement; and

(3) if the Arbors discovered a tenant was not abiding by the requirement, the tenant would be evicted in three days.

It was appellees' burden at trial to prove these representations were false. *Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co.*, 51 S.W.3d 573, 577 (Tex. 2001). We do not challenge the credibility of appellees, who testified these representations were made; credibility was an issue for the jury. *Golden Eagle Archery v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003). However, we conclude that, assuming JIK made the representations above, appellees failed to offer legally sufficient evidence that the representations were false.

The first alleged representation:
All tenants were required to have $100,000 in liability insurance

It is undisputed that all three contracts at issue in this case—Medina's, Simpson's, and Zia's—required the tenant to maintain a renter's liability policy with a minimum limit of liability of $100,000. Witnesses testified that the leases used by the Arbors for all tenants were standard

[1] The jury made separate findings of fraud in favor of Medina and Simpson. The parties brief those findings together, as if the evidence supporting them is identical, except for the damages claimed by each appellee. We do not reach the issues involving individual damages. Accordingly, we shall treat the jury's findings in favor of the appellees' separate issues as involving the same evidence.

Texas Apartment Association forms that contained the insurance requirement. Appellees offered no evidence that this first representation was false.

The second alleged representation:
The Arbors enforced the requirement that all tenants have $100,000 in liability insurance

Again, it is undisputed that the Arbors' policy was to require proof of a tenant's compliance with the insurance requirement when the tenant moved in and whenever the tenant renewed his lease. Simpson testified that this was the procedure throughout his four-year tenancy: the Arbors required a copy of his declaration page each time he renewed his lease; he would contact his insurance agent and have the agent fax a copy of the page to the Arbors. Medina testified that he obtained his insurance through an eRenters program associated with the Arbors. He applied for the insurance online, and the Arbors received a confirmation of his policy in September 2011 before he moved in, and then again in September 2012 when he moved to a different apartment in the complex. Thus, as to both appellees, the evidence was undisputed that JIK enforced the insurance requirement according to its policy: at the origin of the tenant's lease and at each lease renewal.

Appellees offered evidence that Zia's insurance had lapsed because of nonpayment during the second six-month term of his lease. However, JIK offered evidence from Zia's insurer that he did have an appropriate policy in effect when he moved into the Arbors in February 2012 and when he renewed his first six-month lease on August 13, 2012. The appellees argue that JIK should have enforced the policy more vigorously—either by requiring proof of insurance more often or by maintaining a different enforcement system, e.g., by having the Arbors named as a co-insured on the renter's policy. If JIK had done so, appellees contend, then it would have discovered that Zia's policy had lapsed.

A representation is not fraudulent unless the speaker knew it was false when it was made or the speaker made it recklessly without knowledge of the truth. *Johnson & Higgins of Tex., Inc.*

v. Kenneco Energy, Inc., 962 S.W.2d 507, 526 (Tex. 1998). Likewise, a promise of future performance is not fraudulent unless the promise was made with no intention of performing at the time it was made. *Aquaplex, Inc. v. Rancho La Valencia, Inc.*, 297 S.W.3d 768, 774 (Tex. 2009). In this case, appellees offered no evidence that JIK did not intend to enforce the insurance requirement at the time its representatives assured appellees that it would enforce it. To the contrary, both appellees testified that the policy *was* enforced as to them. And as to Zia, they contend only that the policy was not enforced well enough. This argument, however, cannot establish that the leasing agents' representation—that the Arbors enforced the insurance requirement—was false. Instead, it is an argument that the Arbors was negligent: that its enforcement policy was insufficient and that it should have known Zia's policy had lapsed. "Texas courts do not allow plaintiffs to convert what are really negligence claims into claims for fraud." *Murphy v. Gruber*, 241 S.W.3d 689, 693 (Tex. App.—Dallas 2007, pet. denied). We conclude there is no evidence that a representation or promise that JIK would enforce the insurance requirement was false when made so as to support appellees' claim of fraudulent inducement.

The third representation:
A tenant violating the insurance requirement would be evicted in three days

Once again, the evidence is undisputed that JIK discovered after the fire occurred that Zia was not complying with the insurance requirement. And again, an argument that JIK *should have* discovered the lapse is an allegation of negligence, not fraud. But in this third representation, appellees' focus is on the action JIK would have taken had it learned of the lapse. JIK's evidence (addressed in more detail in the discussion below on causation) acknowledged that when it learned a tenant was in default on any lease provision, its policy was to allow the tenant seven days to come into compliance. Then, if the tenant refused to cure the default, the Arbors issued a three-day notice to vacate the premises.

Appellees conceded at trial that their leases stated that a tenant in default *may* be evicted, thus allowing for the cure period to avoid eviction when possible. Although appellees appear to argue on appeal that the seven-day cure policy runs afoul of the "eviction-in-three-days" representation, counsel for appellees argued in closing:

> And we heard the testimony. Nobody's asking to evict people instantly. You give them a little notice. You give them seven days to cure the problem. If they don't cure it, out they go. And this didn't happen in this case.

The cure provision would have allowed a tenant who had defaulted by oversight or mistake, but who was the kind of person who "like[d] to have insurance," to come into compliance and remain among like-minded tenants at the Arbors. But if the tenant's default was not cured, then the tenant would be removed from the premises in three days. Appellees offered no evidence that this policy would not have been followed had JIK discovered Zia's lapse. We conclude that there is no evidence this representation was false when made.

We conclude that appellees failed to offer evidence that would allow reasonable and fair-minded people to conclude that any of the three representations were false when made. *City of Keller v.* Wilson, 168 S.W.3d 802, 827 (Tex. 2005). Appellees' fraud claims fails on this basis alone. We sustain the portion of JIK's first issue arguing that there was legally insufficient evidence of a false representation or false promise.

Damages Proximately Caused

JIK also argues in its first issue that there is no evidence that any statements or promises made by its agents were the proximate cause of appellees' injuries. We agree. Indeed, even assuming for purposes of this discussion that one or more of JIK's statements were false, a reasonable juror would have to conclude that any false statement was too attenuated to have been a legal cause of the appellees' losses. The fire that destroyed their possessions was so far removed from any JIK statement that it vitiated any causal connection between that statement and the damages incurred by appellees.

Appellees pleaded and offered evidence of the possessions they lost in the fire—from clothing and household goods to musical instruments and family heirlooms. To recover damages for these losses, appellees had to prove the losses were proximately caused by JIK's wrongful conduct. *Defterios v. Dallas Bayou Bend, Ltd.*, 350 S.W.3d 659, 664 (Tex. App.—Dallas 2011, pet. denied). Proximate cause includes two elements: cause in fact and foreseeability. *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 477 (Tex. 1995). We conclude that appellees proved neither.

Cause in Fact

Appellees argue that JIK failed to monitor compliance with the insurance requirement and, thus, failed to discover that Zia's policy had lapsed. They contend that their losses flowed directly from JIK's misrepresentation that it would evict a tenant without the required insurance coverage. Because JIK failed to learn of Zia's lapsed policy and failed to evict him, Zia remained as a tenant at the Arbors, and the fire that began in his apartment destroyed appellees' possessions.[2]

JIK offered testimony establishing that the leases at issue allowed a delinquent tenant an opportunity to cure the default. The record indicates that it was the policy at the Arbors to allow a tenant in default—for whatever reason—seven days to come into compliance. Only if the tenant refused to cure the default would the Arbors issue its three-day notice to vacate the premises. Thus, we cannot know with certainty what Zia would have done had the Arbors learned of his default. Whether he would have cured the default by obtaining insurance or would have allowed himself to be evicted is a matter for speculation. And cause in fact cannot be established by mere conjecture, guess, or speculation. *Doe*, 907 S.W.2d at 477.

[2] Appellees also argue that, in the exemplary-damages portion of the trial, JIK's corporate representative "testified unequivocally that the Arbors defrauded Appellees and proximately caused their damages," and that evidence establishes the element of causation. We will not consider evidence that was not before the jury when it rendered its verdict. "The final test for legal sufficiency must always be whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review." *City of Keller*, 168 S.W.3d at 827.

In addition, cause in fact cannot be established when the defendant's tortious conduct does no more than furnish a condition that makes the injuries possible. *IHS Cedars Treatment Ctr. of DeSoto, Tex., Inc. v. Mason*, 143 S.W.3d 794, 799 (Tex. 2004). Appellees argue that if JIK had discovered Zia's lapsed insurance and evicted him immediately, he would not have been present at the Arbors to start the fire months later. But the Texas Supreme Court has held that when an allegedly tortious act merely results in a plaintiff's presence at a location, but entirely different conduct causes him injury at that location, the injury is too attenuated from the defendant's original conduct to constitute the cause in fact of that injury. *Id.*

We conclude that no representation made by JIK was the cause in fact of appellees' injuries. For this reason as well, the jury's verdict on fraud is not supported by sufficient evidence.

Foreseeability

An injury is shown to be foreseeable if a person of ordinary intelligence and prudence would have reasonably anticipated it under the circumstances. *Doe*, 907 S.W.2d at 478. Appellees assert that "a fire is the type of occurrence anticipated by and directly related to liability insurance," but appellees offered no evidence indicating that another tenant's lack of insurance would foreseeably lead to a greater risk of fire damage to one's own property. Nor did they offer evidence that another person's compliance with the insurance requirement would have foreseeably prevented their loss. Had Zia kept up his policy, the $100,000 payout—assuming the incident had been covered—would hardly have reimbursed all twenty-two tenants who lost their possessions in the Arbors fire. The record does not support a conclusion that a person of ordinary intelligence and prudence would have reasonably anticipated appellees' 2012 fire losses from JIK's alleged misrepresentations concerning all residents having liability insurance.

Appellees' foreseeability argument is rooted in JIK's "sales pitch" that the insurance requirement brought a better class of tenant to the Arbors: people who liked to have insurance.

Appellees contend that—absent the insurance requirement and its enforcement by JIK—an irresponsible tenant causing a fire would be foreseeable. Thus, they assert, they would never have moved to the Arbors if JIK had not promised them proper enforcement of the requirement. They suggest that because JIK knew its promises of enforcement were false, the injuries that befell appellees were foreseeable to it.

This argument depends on JIK's possession of information that appellees lacked. Because JIK knew how it enforced the insurance requirement, appellees' injuries were foreseeable to it; because appellees did not know, they moved in. However, the record shows that appellees knew, or could have inferred, this relevant information within a year after their own move-in dates: each tenant was required by lease to carry $100,000 in insurance; compliance was checked by JIK at move-in and renewal, but not more often; if a tenant allowed his insurance to lapse some months after move-in or renewal, JIK would not find out until the end of the current lease period; and, as a result, a tenant could live for some months at the Arbors while out of compliance with the insurance requirement. Once appellees were aware of how JIK actually enforced the insurance requirement, any injuries foreseeable to JIK were also foreseeable to appellees, and yet appellees remained as tenants at the Arbors.

The question of foreseeability, and proximate cause generally, is a practical inquiry based on common experience applied to human conduct. *City of Gladewater v. Pike*, 727 S.W.2d 514, 518 (Tex. 1987). As a practical matter, appellees did not change their conduct based on how JIK enforced the insurance requirement. We conclude that appellees' own conduct belies the foreseeability of their damages.

Appellees' fraud damages had to be foreseeable and directly traceable to JIK's wrongful act and result from it. *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 816 (Tex. 1997). No reasonable and fair-minded person could conclude that they were. *City of Keller*, 168

S.W.3d at 827. We sustain the portion of JIK's first issue arguing that there was legally insufficient evidence that any representation by JIK proximately caused appellees' injuries.

Conclusion

We conclude that the jury's fraud verdict is not supported by legally sufficient evidence.[3] We reverse the trial court's judgment, and we render judgment that appellees Medina and Simpson take nothing.

/Jason Boatright/
JASON BOATRIGHT
JUSTICE

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[3] Given this conclusion, we need not address JIK's remaining issue concerning the trial court's imposition of joint and several liability for the jury's exemplary damages award.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JIK CAYMAN BAY EXCHANGE LLC, JIK ARBORS LLLP, AND JKT EXCHANGE LLC, Appellants

No. 05-16-01176-CV V.

OLIVER MEDINA AND RICHARD SIMPSON, Appellees

On Appeal from the County Court at Law No. 5, Dallas County, Texas
Trial Court Cause No. CC-13-03572-E.
Opinion delivered by Justice Boatright.
Justices Lang-Miers and Myers participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** and judgment is **RENDERED** that:

Appellees Oliver Medina and Richard Simpson take nothing by their suit.

It is **ORDERED** that appellants JIK Cayman Bay Exchange LLC, JIK Arbors LLLP, and JKT Exchange LLC recover their costs of this appeal from appellees Oliver Medina and Richard Simpson.

Judgment entered this 2nd day of May, 2018.