Affirmed; Opinion Filed March 12, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01283-CV

WHOA USA, INC., Appellant
V.
REGAN PROPERTIES, LLC, Appellee/Cross-Appellant
V.
KURT DYKEMA, Cross-Appellee

On Appeal from the 219th Judicial District Court
Collin County, Texas
Trial Court Cause No. 219-04211-2011

MEMORANDUM OPINION

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

Appellant Whoa USA, Inc. ("Whoa") filed a trespass to try title claim against appellee Regan Properties, LLC ("Regan") seeking title and possession of a certain residential property in Plano, Texas ("the property"). Regan filed a counterclaim against Whoa for trespass to try title and asserted claims against a third-party defendant, Kurt Dykema, "contingent" on an unfavorable outcome on Regan's trespass to try title counterclaim. A bench trial was held. After Whoa rested its case, Regan and Dykema moved for judgment against Whoa on its trespass to try title claim. The trial court granted that motion for judgment and signed a final judgment in which it (1) ordered that Whoa take nothing on its claim for trespass to try title, (2) quieted title to the property in Regan, and (3) dismissed Regan's "contingent" claims against Dykema as moot.

In five issues on appeal, Whoa contends (1) the trial court erred by granting judgment in favor of Regan despite Whoa's objections under Texas Rules of Civil Procedure 93(2) and 94, *see* TEX. R. CIV. P. 93(2), 94; (2) the trial court did not "correctly apply the law to this trespass-to-try-title case"; and (3) the evidence is legally and factually insufficient "to support the presumed findings of fact." Additionally, Regan asserts on cross-appeal that if this Court reverses the trial court's judgment, this Court should also reverse the trial court's dismissal of Regan's "contingent claims" against Dykema.

We decide against Whoa on its first, second, fourth, and fifth issues. We need not reach Whoa's third issue or Regan's cross-issue. The trial court's judgment is affirmed.

I. FACTUAL AND PROCEDURAL CONTEXT

The record shows the following facts are not in dispute: (1) the property is located at 2701 Wickham Court in Plano; (2) in approximately October 2007, the property was purchased by LTA & Associates, LLC ("LTA"); (3) from the time of that purchase until early 2008, Quang Dangtran ("Dangtran") and his former wife, Tuyet Anh Le ("Le"), lived at the property; and (4) thereafter, Le moved to California and Dangtran continued residing at the property.

In its live pleading in this case, Whoa asserted in part (1) "Plaintiff, WHOA is a Texas Corporation whose address is 2701 Wickham Court, Plano, TX"; (2) LTA "conveyed the Property to WHOA on June 1, 2010 by a Warranty Deed" (the "Whoa Deed"); (3) "[t]he Whoa Deed was acknowledged and filed of record on June 28, 2010"; (4) although Le signed a June 30, 2010 deed that purported to convey the property from LTA to herself (the "Le Deed"), LTA "did not own any interest in the Property" at that time; (5) Regan claims title to the property by virtue of an August 2, 2011 trustee's deed, which is based on foreclosure of a deed of trust signed by Le on June 30, 2010, for the benefit of DHLC Mortgage, LLC ("DHLC")"; and (6) because LTA "transferred all of its interests in the Property to WHOA" before the Le Deed was signed,

"WHOA's title in the Property is superior to [Regan's] title, and its predecessor in interest, DHLC."

Regan filed a general denial answer and, as described above, asserted a counterclaim against Whoa for trespass to try title. In its counterclaim, Regan asserted in part (1) in June 2010, "LTA's managing member, [Le], conveyed the Property to herself by a General Warranty Deed and obtained a $150,000.00 mortgage from [DHLC]"; (2) on June 25, 2011, DHLC assigned Le's mortgage to Dykema; (3) subsequently, Le defaulted on the mortgage and Dykema foreclosed on the property; (4) on August 2, 2011, Regan purchased the property at a public auction; and (5) "[Regan's] title to the Property is superior to [Whoa's] claim of title to the Property." Additionally, Regan filed third-party claims against Dykema asserting that in the event the trial court determines Whoa has superior title to the property, Regan is entitled to recover the purchase price and pre-judgment interest from Dykema.

Whoa and Dykema filed general denial answers to Regan's counterclaim and third-party claims, respectively. Also, Dykema asserted a defense that "[t]here is no delivery of the deed by [Dangtran] on behalf of [LTA] to Plaintiff."

At trial, Dangtran testified in part (1) he created LTA in 2006 to protect his financial privacy and (2) he was the manager of LTA and Le was a "managing member." Additionally, Dangtran testified as follows:

> Q. At the time that you decided to transfer the property from LTA to WHOA, WHOA USA Inc., did you have any interest in a corporation named WHOA USA Inc.?
>
> A. Yes.
>
> Q. And where was it incorporated?
>
> A. In California.
> . . . .

> Q. So, Mr. Dangtran, at the time that you transferred title as a manager of LTA to WHOA USA Inc., did you have a Texas corporation of WHOA USA Inc. in existence?
>
> A. No.
>
> Q. WHOA USA Inc. of Texas was formed in December, 2011; is that correct?
>
> A. Yes.

Dangtran testified he filed this lawsuit on October 5, 2011, to "protect the subject property on behalf of WHOA USA, Inc." because "an eviction had been lodged against the property." He stated that at approximately that same time, he (1) "determined that WHOA USA Inc. was suspended in California" and (2) "hired an attorney to form a corporation in Texas" because "it's cheaper to do it here." Further, Dangtran stated in part,

> Q. So subsequently when did you transfer the asset that belonged to WHOA USA Inc. of California to WHOA USA Inc. of Texas?
>
> A. The moment that I transferred the property to—when I recorded the deed in 2010.
>
> Q. Well, my point is this. When you—when you recorded the deed June 28th, 2010, WHOA USA Inc. of Texas did not yet exist; correct?
>
> A. No.
>
> Q. After WHOA USA Inc. of Texas came into existence did you then transfer the asset from the California WHOA to the Texas WHOA?
>
> A. Yes, sir.
>
> Q. So your Texas—the WHOA of Texas, if I can abbreviate it, is the same name as the WHOA of California, correct?
>
> A. Yes.

On cross-examination, Dangtran testified as follows:

> Q. . . . Plaintiff WHOA is a Texas corporation whose address is 2701 Wickham Court, Plano, Texas; is that correct?
>
> A. Correct.
> . . . .

> Q. At what point—when did you create a deed transferring the property from your California WHOA to the plaintiff in this case?
>
> A. In 2010.
>
> Q. When?
>
> A. June.
> . . . .
> Q. Is that the same deed we've been talking about throughout this suit?
>
> A. Yes.
> . . . .
> Q. Is there a deed from WHOA to WHOA, WHOA California to WHOA Texas?
>
> A. No.
>
> Q. Are there articles of merger between the California corporation and the Texas corporation?
>
> A. No.
> . . . .
> Q. And this is the final question, Mr. Dangtran. Have you produced any documentation that shows any transfer of the ownership, the assets, the property, of the California corporation to the Texas corporation?
>
> A. There is no formal transfer in the sense, like, to my—when I do a deed transfer, I move here, it's transferred.

The exhibits admitted into evidence at trial included, among other things, the Whoa Deed, the Le Deed, and documents pertaining to the 2011 incorporation of Whoa in Texas and the foreclosure described above. The Whoa Deed describes the grantee as "WHOA USA INC" and states that the grantee's mailing address is 2701 Wickham Court, Plano, Texas.

After Whoa rested its case, Regan and Dykema moved for judgment on several grounds, including that the Whoa Deed is "void" because, based on the assertions described above in Whoa's live pleading, the grantee was a Texas corporation that "was not in existence at the time of the conveyance." Whoa responded in part,

> There is nothing in the pleadings, nothing in the discovery, to identify the grantee as a California corporation. And that is because of oversight. . . . It's a pleading defect. . . . In this particular instance there is a Rule that applies whenever a party,

> whenever a party, does not have legal capacity to sue, or whenever a party has no right or entitlement to recover, there's a duty on the defendant to raise it.

Following the parties' arguments respecting the motion for judgment, the trial court stated in part, "The only evidence from a witness was the evidence from Mr. Dangtran who the Court finds to be completely not credible. . . . And if his testimony is to be the basis for WHOA's claims for recovery here, then it's insufficient." The trial court granted the motion for judgment and signed the final judgment described above. Whoa filed a motion for new trial based on arguments substantially similar to those asserted by it at trial, which motion was denied by the trial court. This appeal timely followed.

II. WHOA'S ISSUES

A. Standard of Review

The trial court, as the fact-finder in a bench trial, may rule on the factual and legal issues at the close of the plaintiff's case in chief. *Bledsoe Dodge, L.L.C. v. Kuberski*, 279 S.W.3d 839, 841 (Tex. App.—Dallas 2009, no pet.) (citing *Qantel Bus. Sys., Inc. v. Custom Controls Co*., 761 S.W.2d 302, 304 (Tex. 1988)). "In doing so, the trial court is presumed to have ruled on both the sufficiency of the evidence and on the weight of the evidence and credibility of the witnesses." *Id*. The trial court's legal determinations are subject to de novo review. *First Trust Corp. TTEE FBO v. Edwards*, 172 S.W.3d 230, 233 (Tex. App.—Dallas 2005, pet. denied). When, as here, a trial court does not issue findings of fact and conclusions of law after a bench trial, all facts necessary to support the judgment and supported by evidence are implied. *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002). If the appellate record includes the reporter's record, as it does here, the trial court's implied fact findings are subject to legal and factual sufficiency challenges. *Id*.

When a party challenges the legal sufficiency of the evidence supporting an adverse finding on an issue on which the party had the burden of proof, it must show the evidence establishes all

vital facts as a matter of law. *See, e.g., 701 Katy Bldg., L.P. v. John Wheat Gibson, P.C.*, No. 05-16-00193-CV, 2017 WL 3634335, at *5 (Tex. App.—Dallas Aug. 24, 2017, pet. denied) (mem. op.) (citing *PopCap Games, Inc. v. MumboJumbo, LLC*, 350 S.W.3d 699, 710 (Tex. App.—Dallas 2011, pet. denied)). We credit evidence favorable to the finding if reasonable jurors could and disregard contrary evidence unless reasonable jurors could not. *Id*. (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005)). If there is no evidence to support the finding, we review the entire record to determine if the contrary proposition is established as a matter of law. *Id*. We sustain the issue only if the contrary proposition is conclusively established. *Id*.; *see also City of Keller*, 168 S.W.3d at 827 ("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."). "When reviewing an assertion that the evidence is factually insufficient to support a finding, we set aside the finding only if, after considering and weighing all of the evidence in the record pertinent to that finding, we determine that the credible evidence supporting the finding is so weak, or so contrary to the overwhelming weight of all the evidence, that the answer should be set aside and a new trial ordered." *Radiant Fin., Inc. v. Bagby*, No. 05-16-00268-CV, 2017 WL 2927825, at *3 (Tex. App.—Dallas July 10, 2017, pet. denied) (mem. op.) (citing *Crosstex N. Tex. Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580, 615 (Tex. 2016)). In a bench trial, the trial court is the sole judge of the credibility of witnesses. *See, e.g.*, *City of Keller*, 168 S.W.3d at 819; *Slicker v. Slicker*, 464 S.W.3d 850, 858 (Tex. App.—Dallas 2015, no pet.). "The judge may take into consideration all the facts and surrounding circumstances in connection with the testimony of each witness and accept or reject all or any part of that testimony." *Weisfield v. Tex. Land Fin. Co.*, 162 S.W.3d 379, 380–81 (Tex. App.—Dallas 2005, no pet.). As long as the evidence falls "within the zone of reasonable disagreement," we will not substitute our judgment for that of the fact-finder. *City of Keller*, 168 S.W.3d at 822.

When findings of fact and conclusions of law were not requested or filed following a bench trial, the judgment can be affirmed on any theory supported by the pleadings and evidence. *Weisfield*, 162 S.W.3d at 381.

B. Applicable Law

"A trespass to try title action is the method of determining title to lands, tenements, or other real property." TEX. PROP. CODE ANN. § 22.001 (West 2014). "To prevail in a trespass-to-try-title action, a plaintiff must usually (1) prove a regular chain of conveyances from the sovereign, (2) establish superior title out of a common source, (3) prove title by limitations, or (4) prove title by prior possession coupled with proof that possession was not abandoned." *Martin v. Amerman*, 133 S.W.3d 262, 265 (Tex. 2004) (citing *Plumb v. Stuessy*, 617 S.W.2d 667, 668 (Tex. 1981)). "The pleading rules are detailed and formal, and require a plaintiff to prevail on the superiority of his title, not on the weakness of a defendant's title." *Id*. Further, "in Texas, a deed is void if the grantee is not in existence at the time the deed is executed." *Parham Family Ltd. P'ship v. Morgan*, 434 S.W.3d 774, 787 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (citing *Lighthouse Church of Cloverleaf v. Tex. Bank*, 889 S.W.2d 595, 600 (Tex. App.—Houston [14th Dist.] 1994, writ denied)).

"[C]apacity is a procedural issue addressing the personal qualifications of a party to litigate." *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 847 (Tex. 2005). "[A] party has capacity when it has the legal authority to act, regardless of whether it has a justiciable interest in the controversy." *Id*. (quoting *Nootsie, Ltd. v. Williamson Cty. Appraisal Dist*., 925 S.W.2d 659, 661 (Tex. 1996)). Pursuant to Texas Rule of Civil Procedure 93(2), a defendant who asserts a plaintiff "is not entitled to recover in the capacity in which he sues" must raise the matter by verified pleading unless the truth of such matter appears of record. TEX. R. CIV. P. 93(2). Failure

to file a verified plea as required by Rule 93(2) generally waives a party's right to complain about the issue. *See White v. Harrison*, 390 S.W.3d 666, 678 (Tex. App.—Dallas 2012, no pet.).

C. Application of Law to Facts

In its first issue, Whoa asserts the trial court "err[ed] by granting Defendant's motion for judgment." Whoa's other four issues assert specific grounds respecting that alleged error, including (1) granting of judgment for Regan despite Whoa's "objections" under Texas Rules of Civil Procedure 93(2) and 94; (2) failure to "correctly apply the law to this trespass-to-try-title case"; and (3) legal and factual insufficiency of the evidence "to support the presumed findings of fact."

We begin by addressing Whoa's second issue, in which it contends the trial court "erred when it granted Regan's motion for judgment that Whoa's deed was void because Regan did not to file a Rule 93(2) defense." According to Whoa, (1) "[r]ule 93(2) is applicable to the facts of this case because two corporations exist by the same name, 'Whoa USA, Inc.'"; (2) "the case began in 2011 as a suit by Whoa CA" and, in approximately 2015, "the pleadings changed the named plaintiff"; (3) "Plaintiff's new counsel amended its petition in March 2015, and mistakenly pleaded that Whoa TX was the grantee of the Whoa Deed"; (4) "[a]fter the mistaken amendments of Plaintiff's petition, it was incumbent upon Defendant Regan to either contest or waive Whoa TX's alleged entitlement to recover in the capacity it alleged under the Whoa deed, especially in light of the apparent successor-in-interests issue"; and (5) "[s]ince Regan waived any contention that Whoa TX was not entitled to recover in the capacity in which it sued, judgment based on Regan's motion for judgment that Whoa's deed was void at the time of title transfer from LTA to Whoa USA, Inc., should be reversed." In support of its argument, Whoa cites *Pledger v. Schoellkopf,* 762 S.W.2d 145, 146 (Tex. 1998), and a case relying thereon, *CHCA East Houston, L.P. v. Henderson*, 99 S.W.3d 630, 634 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

Regan and Dykema respond that they did not challenge Whoa's capacity and therefore rule 93(2) is inapplicable. According to Dykema, (1) "Whoa California has no current ownership interest in the Property," regardless of whether Whoa was the grantee of the Whoa Deed or Whoa California was the grantee of the Whoa Deed and subsequently transferred the Property to Whoa; (2) "[t]hus, any trespass to try title action in which title to the Property is at issue does not belong to Whoa California"; and (3) "Regan and Dykema have simply demonstrated that Whoa cannot succeed on the merits of this case, which is not a challenge to capacity." Further, Regan asserts in part that it "does not argue, and has not argued, that Whoa lacked the authority to try its suit to determine ownership over the Property, but merely that Whoa has failed to meet its burden on the merits of its claim." Specifically, according to Regan, (1) "because Dangtran testified that Whoa was the correct plaintiff, and that the suit was intended to establish ownership of the Property by Whoa, no capacity defense was warranted or appropriate," and (2) "Whoa simply failed at trial on the merits of its case because it could not prove superior title based on an invalid deed."

In *Pledger*, an individual, R.L. Pledger, was sued in an action pertaining to a guaranty agreement and asserted cross-claims against several other defendants. *See* 762 S.W.2d at 145. After a jury found in Pledger's favor on his cross-claims, the court of appeals reversed. Specifically, the court of appeals concluded (1) Pledger's causes of action were not individual causes of action, but rather belonged to a corporation in which he was a shareholder, and (2) no verified denial by the cross-claim defendants was required because rule 93(2) "applies only when a party is seeking recovery *in a representative capacity*." *Id*. at 145–46 (emphasis original). Without reaching the question of to whom the causes of action belonged, the supreme court concluded Pledger was entitled to recover because of the failure of the cross-claim defendants to comply with rule 93(2). *Id*. at 146. The supreme court stated in part (1) that rule "is not limited to cases of representative capacity only" and (2) "[w]hen capacity is contested, Rule 93(2) requires

that a verified plea be filed anytime the record does not affirmatively demonstrate the plaintiff's or defendant's right to bring suit or be sued in whatever capacity he is suing." *Id.*

CHCA East Houston involved a lawsuit filed against a lessee, Henderson, by a lessor, Sunbelt, Inc. *See* 99 S.W.3d at 632. Sunbelt's causes of action pertained to payments by Henderson under two consecutive leases. *Id*. Sunbelt was a party to the second lease. *Id*. However, the parties to the first lease were Henderson and an alleged predecessor-in-interest of Sunbelt. *Id*. The trial court concluded Sunbelt lacked "standing" to enforce the first lease. *Id*. However, the court of appeals disagreed, concluding rule 93(2) applied. *Id.* at 634. The court of appeals reasoned (1) "[b]ecause [defendant Henderson] objects that Sunbelt, Inc. was not a proper party," the allegation is one of "misidentification," *id*. at 632, and (2) "the Texas Supreme Court has approved the application of Rule 93 to other situations involving confusion among parties that are separate entities" *id*. at 634 (citing *Pledger*, 762 S.W.2d at 146).

Unlike *Pledger* and *CHCA East Houston*, the case before us does not involve a party's contention that its opponent is not a proper party or that a claim filed by its opponent belongs to another. *See Pledger*, 762 S.W.2d at 146; *CHCA East Houston*, 99 S.W.3d at 634. Therefore, we do not find those cases instructive. Further, the record does not show Regan or Dykema challenged Whoa's "authority" respecting its claim. *See Austin Nursing Ctr.*, 171 S.W.3d at 847. On this record, we conclude Regan and Dykema did not "waive" any of their contentions in this case by not filing a verified pleading respecting capacity. *See id.*; *see also In re I.A.B.*, No. 05-17-00497-CV, 2017 WL 5197105, at *5 (Tex. App.—Dallas Nov. 10, 2017, no pet.) (mem. op.) (in lawsuit challenging stepfather's adoption of child, grandmother's contention that stepfather did not satisfy requirements for adoption did not implicate his capacity and did not require verified pleading pursuant to rule 93(2)). We decide Whoa's second issue against it.

In its third issue, Whoa asserts the trial court "erred when it granted Regan's motion for judgment that Whoa's deed was void because Regan did not file an applicable Rule 94 defense." According to Whoa, (1) "[r]ule 94 requires a party to plead any matter constituting an avoidance or affirmative defense," *see* TEX. R. CIV. P. 94; (2) "Whoa TX did not plead delivery of the Whoa Deed, but instead relied upon a presumption in law that the deed was delivered"; and (3) "[s]ince Plaintiff did not plead delivery, Defendant's general denial is insufficient to deny delivery, and a legal defense that the deed could not, as a matter of law, be delivered must have been raised as an affirmative defense." Regan and Dykema respond in part that "[a]ny ruling concerning delivery is of no consequence" because "the Final Judgment of the trial court is independently supported by other pleadings and evidence." As described below, delivery of the Whoa Deed is not material to any of this Court's conclusions in this opinion. Therefore, we do not address the merits of Whoa's third issue. *See* TEX. R. APP. P. 47.1.

Next, we address Whoa's fifth issue, in which it challenges the legal and factual sufficiency of the evidence to support the judgment. As to legal sufficiency, Whoa contends it "conclusively established all vital facts" to support its trespass to try title action because it "established title in Whoa USA, Inc. from a common source." Regan and Dykema respond in part that there is legally sufficient evidence in the record to support the trial court's judgment on the ground that the Whoa Deed was void because the grantee did not exist.

As a threshold matter, Whoa contends evidence that the Whoa Deed was void "should not be considered as a matter of law to support the presumed finding" because "relief upon such evidence is disallowed under Rules 93(2) & 94 . . . and . . . is not applicable in this statutory trespass case for lack of pleadings" as asserted in Whoa's second, third, and fourth issues. However, as described above, (1) Whoa's second issue is decided adversely to Whoa and (2) Whoa's assertions in its third issue are immaterial to our conclusions in this appeal. Further, as

described below, we disagree with Whoa's position in its fourth issue respecting "lack of pleadings." We decline to exclude any evidence in the record from consideration. *See City of Keller*, 168 S.W.3d at 827.

According to Regan and Dykema, "the Whoa Deed was void because Whoa was not formed until December 2011." Further, Regan and Dykema assert (1) based on "facts pleaded unequivocally in its live petition," Whoa "judicially admitted that it was the grantee of the Whoa Deed, and thus is barred from disputing that fact," and (2) regardless, "testimony by Dangtran attempting to controvert those admissions" did not conclusively prove Whoa's claim.

The record shows the parties do not dispute that "WHOA USA Inc. of Texas was formed in December, 2011" and did not exist at the time the Whoa Deed was recorded in June 2010. Dangtran testified in part that "[a]fter WHOA USA Inc. of Texas came into existence," he "then transfer[red] the asset from the California WHOA to the Texas WHOA." However, Dangtran also testified (1) he "transfer[red] the asset that belonged to WHOA USA Inc. of California to WHOA USA Inc. of Texas" in 2010 "when I recorded the deed"; (2) he "create[d] a deed transferring the property from . . . California WHOA to the plaintiff in this case" in June 2010, i.e. the Whoa Deed; (3) there is no "deed from WHOA to WHOA, WHOA California to WHOA Texas" or "articles of merger between the California corporation and the Texas corporation"; and (4) "[t]here is no formal transfer in the sense, like, to my—when I do a deed transfer, I move here, it's transferred." As described above, "in Texas, a deed is void if the grantee is not in existence at the time the deed is executed." *Parham Family Ltd. P'ship*, 434 S.W.3d at 787. On this record, we conclude there is some evidence to support the trial court's implied finding that the Whoa Deed was the basis for Whoa's claim of superior title from a common source and that deed was void. *See Martin*, 133 S.W.3d at 265; *see also 701 Katy Bldg.*, 2017 WL 3634335, at *5. Moreover, based on that same evidence, we conclude the record does not show Whoa conclusively proved its claim. *701 Katy*

Bldg., 2017 WL 3634335, at *5. Accordingly, we conclude the evidence is legally sufficient to support the trial court's judgment. *See id*.

As to factual sufficiency, Whoa contends (1) "Plaintiff presented evidence that the deed was conveyed and delivered on the date of the deed to a California corporation known by the same name as Plaintiff, and all interests of the California corporation were assigned to Whoa TX when it was formed"; (2) "Defendant's arguments and admissions by Dangtran regarding the absence of records, does not constitute sufficient evidence to support a presumed finding"; and (3) "[t]he evidence that supports a presumed finding that Whoa CA interests were not assigned to Whoa TX is too weak, especially in light of the overwhelming evidence of the circumstances."

Regan and Dykema respond that the evidence is factually sufficient to support the trial court's judgment based on the same evidence described above respecting legal sufficiency. Specifically, Regan argues in part that the trial court's judgment could have been rendered on the basis that "there was a break in the chain of title through the California entity as already discussed," because there was "contradictory testimony as to how Whoa allegedly came to own the Property." Further, Regan asserts the record contains, at most, "conflicting evidence on which the trial court based its judgment, which is not enough to reverse a judgment for factual insufficiency."

As described above, in a bench trial, the trial judge "may take into consideration all the facts and surrounding circumstances in connection with the testimony of each witness and accept or reject all or any part of that testimony." *Weisfield*, 162 S.W.3d at 380–81. As long as the evidence falls "within the zone of reasonable disagreement," we will not substitute our judgment for that of the fact-finder. *City of Keller*, 168 S.W.3d at 822. The record shows Dangtran's testimony in this case respecting the transfer of the property was equivocal and included statements by him that the transfer on which Whoa relies to prove its superior title from a common source occurred in June 2010, i.e., before the plaintiff in this case existed. Any deed to a grantee not in

existence was void. *See Parham Family Ltd. P'ship*, 434 S.W.3d at 787. On this record, after considering and weighing all the evidence in the record pertinent to a finding that the transfer relied upon by Whoa to prove its case is void, we conclude the credible evidence supporting such finding is not so weak, or so contrary to the overwhelming weight of all the evidence, that the finding should be set aside and a new trial ordered. *See Crosstex*, 505 S.W.3d at 615. Accordingly, we conclude the evidence is factually sufficient to support the trial court's judgment. *See id*. We decide against Whoa on its fifth issue.

Last, we address Whoa's fourth issue, in which it contends the trial court "did not apply law applicable to this statutory action for trespass-to-try-title to the facts of this case, and instead applied law applicable to an equitable action to quiet title that was not pleaded by Defendant." According to Whoa, (1) it established "a prima facie case of trespass" because the evidence described above showed "title from a common source"; (2) consequently, "the burden shifted to Defendant to show superior title"; and (3) Defendant "did not plead an action to challenge Plaintiff's deed beyond the face of its title" and therefore should not have been able to seek and obtain the relief awarded in this case.

Regan and Dykema assert in part that because the Whoa Deed was "void, and not merely voidable," no separate claim to set aside that deed was required. Specifically, according to Dykema, (1) "[i]f Whoa could have established a valid conveyance from LTA (the common source) to Whoa, it would have made out a prima facie trespass to try title case, shifting to Regan the burden to show superior title under the common source"; (2) "[h]owever, Whoa failed to establish a chain of valid conveyances from the common source to Whoa" because "the Whoa Deed, an essential link in Whoa's chain of title, is void"; and (3) "[a]s a result, the trial court correctly determined that Whoa failed to prove its case and correctly rendered judgment in favor of Regan and Dykema."

"The rule has long been established in this State that where a deed is absolutely void, a suit at law in trespass to try title may be maintained to recover the land without setting the deed aside . . . ." *Slaughter v. Qualls*, 162 S.W.2d 671, 674 (Tex. 1942). Also, as described above, "in Texas, a deed is void if the grantee is not in existence at the time the deed is executed." *Parham Family Ltd. P'ship*, 434 S.W.3d at 787. In the case before us, to the extent Whoa argues it established a prima facie case of trespass to try title by merely submitting evidence of a chain of deeds from a common source, regardless of whether a deed was void, Whoa cites no authority to support that position and we have found none. *See Jones v. Mid-State Homes, Inc.*, 356 S.W.2d 923, 924 (Tex. 1962) ("Where the parties stipulate common source, the burden rests upon the plaintiff to connect each party with the common source, and to establish a superior title from such source."). Further, Whoa cites *Wilhoite v. Sims*, 401 S.W.3d 752, 760 (Tex. App.—Dallas 2013, no pet.), in support of its assertion that "an action to void a deed is not the same as a trespass case." However, *Wilhoite* did not involve a void deed, but rather addressed whether the quitclaim deed at issue in that case was "voidable by being obtained by fraud." *See id.* at 760. Therefore, we do not find that case instructive. On this record, we disagree with Whoa's position that the pleadings did not support the relief granted in this case. *See Slaughter*, 162 S.W.2d at 674; *Parham Family Ltd. P'ship*, 434 S.W.3d at 787.

We decide against Whoa on its fourth issue. Additionally, in light of our conclusions above, Whoa's first issue is decided against it.[1]

[1] In the last sentence of its reply brief in this Court, Whoa contends, without any argument or citations to authority, "Alternatively, if evidence of Whoa CA was not admissible consistent with Defendants' arguments of judicial admission, then Whoa TX had no standing to maintain its claim of title, and the cause of action should be dismissed for want of subject-matter jurisdiction." In light of our conclusions above, we do not reach the "arguments of judicial admission" of Regan and Dykema described above. Consequently, we need not address Whoa's "alternative" argument based thereon.

III. CONCLUSION

We decide against Whoa on its first, second, fourth, and fifth issues. We need not reach Whoa's third issue or the cross-issue asserted by Regan. The trial court's judgment is affirmed.

/Douglas S. Lang/
DOUGLAS S. LANG
JUSTICE

161283F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

WHOA USA, INC., Appellant

No. 05-16-01283-CV V.

REGAN PROPERTIES, LLC, Appellee/Cross-Appellant

V.

KURT DYKEMA, Cross-Appellee

On Appeal from the 219th Judicial District Court, Collin County, Texas
Trial Court Cause No. 219-04211-2011.
Opinion delivered by Justice Lang, Justices Fillmore and Schenck participating.

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

It is **ORDERED** that appellee/cross-appellant REGAN PROPERTIES, LLC recover its costs of this appeal from appellant WHOA USA, INC. It is further **ORDERED** that cross-appellee KURT DYKEMA recover his costs of cross-appeal from appellee/cross-appellant REGAN PROPERTIES, LLC.

Judgment entered this 12th day of March, 2018.