Affirmed and Opinion Filed June 8, 2018

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00435-CV

CECELIA TOLLETT, Appellant
V.
MPI SURFACE, LLC, Appellee

On Appeal from the County Court at Law No. 2
Dallas County, Texas
Trial Court Cause No. CC-16-01180-B

MEMORANDUM OPINION

Before Chief Justice Wright, Justice Francis, and Justice Brown
Opinion by Chief Justice Wright

This is a suit for breach of contract regarding the requirements under a groundwater contract between Cecilia Tollett, the landowner, and MPI Surface, LLC (MPI), the lessee. Tollett sued MPI on a groundwater contract. MPI counterclaimed, and the case was tried before the bench. The trial court rendered judgment for MPI, and Tollett appeals. We affirm.

BACKGROUND

On March 18, 2012, Cecelia Tollett and MPI entered into an exclusive groundwater sales contract ("the Agreement") that allowed for MPI to extract and sell groundwater from Tollett's land to third parties for use in the oil and gas industry. Paragraph 6 of the Agreement provided that MPI would pay Tollett a 25% royalty "of the gross sale proceeds collected by MPI from the sale of Water produced from the Lands." MPI drilled four water wells and constructed facilities

and improvements on Tollett's property at MPI's expense. MPI also installed a meter on each well. Between 2012 and 2016, MPI sold between three and four million dollars' worth of water under the Agreement, and MPI paid Tollett royalties on those sales. In 2013, Tollett installed four meters on the wells to conduct her own audit of MPI's water and disposal production. Tollett completed the audit in 2014, and the parties resolved all issues raised by the audit.

The dispute at issue arose in the summer of 2015. On August 21, 2015, Tollett's attorney sent a letter to Michael Grella, owner of MPI, demanding payment for late royalties from June 2015. The letter stated MPI had until August 31, 2015 at 11:59 p.m. or the Agreement would terminate at that time at Tollett's "sole and unfettered discretion" without further notice. Tollett locked the control panel to the wells when MPI failed to pay the outstanding balance by the deadline. Tollett removed the padlock and agreed to suspend the termination when MPI paid the remaining balance on September 1, 2015.

On March 3, 2016, Tollett's daughter, Seana Tollett[1], called Grella about MPI's failure to pay royalties for December 2015 and January 2016. Seana then unilaterally terminated the contract, alleging late payment of the December 2015 and January 2016 royalty payments[2] and MPI's failure to provide metering statements as material breaches. She had the wells locked and denied MPI access to the property to remove its equipment. She based her complaints on paragraphs 6 and 12 of the Agreement.

Paragraph 6 provided that MPI would pay Tollett 25% of the gross sale proceeds collected by MPI from water sales produced from Tollett's property and that Tollett "shall be entitled to royalties due on the same day of each month in which sale proceeds are collected by MPI."

[1] Seana Tollett has power of attorney for her mother, appellant Cecelia Tollett.

[2] Ultimately, MPI made the royalty payments, making the December 2015 payment in March 2016 and the January 2016 payment in April 2016.

Paragraph 6 also provided that failing to timely and fully pay the royalties "shall be considered a material breach and [Tollett] may terminate the Agreement in her sole and unfettered discretion."

Paragraph 12 of the Agreement set out the parties' agreement regarding metering. Under that provision, MPI was required to "establish and maintain a point of sale meter for all wells for purposes of recording water sales and disposal water." Paragraph 12 also provided that MPI "shall as part of its monthly statements to [Tollett] report the meter reading at the beginning of each month, and meter reading at the end of each month." Tollett had the right to install her own meters to audit MPI's water and disposal production. Paragraph 12 provided that "MPI's failure to timely and fully meter the water sales and disposal water shall be considered a material breach" and Tollett "may terminate the Agreement in her sole and unfettered discretion."

On March 9, 2016, Tollett sued MPI for breach of contract based on her allegations that MPI failed to timely and fully pay December 2015 and January 2016 royalty payments and failed to timely and fully meter all water production as required by the Agreement. MPI answered, pleading waiver as an affirmative defense and also alleging course of dealings, asserting it never complied with either provision Tollett was claiming it breached. MPI also counterclaimed for breach of contract, alleging Tollett wrongfully terminated the contract and it suffered damages from the lock-out and costs associated with obtaining a comparable contract.

MPI prevailed on its counterclaim, with the trial court finding MPI was the non-breaching party and awarding MPI damages and attorney's fees. The trial court entered a take nothing judgment against Tollett, finding Tollett failed to meet her burden to prove that MPI committed a material breach of its royalty payment obligations and contractual requirement to separately meter pit sales. The trial court further found Tollett waived her right to declare breach of those obligations "by the course of dealings between the parties."

On appeal, Tollett raises six general and ten specific issues. Those challenges, however, encompass four arguments: (1) the Agreement is unambiguous, (2) MPI materially breached the Agreement by paying the December 2015 and January 2016 royalty payments late; (3) MPI materially breached the Agreement by failing to meter pit sales[3] and provide monthly metering reports; and (4) those material breaches entitled Tollett to terminate the Agreement. Tollett also specifically challenges findings of fact and conclusions of law numbers 15, 19, 20, 21, 22, 23, 24, and 29.[4]

STANDARD OF REVIEW

The trial court's findings of fact following a bench trial have the same weight as a jury verdict upon jury questions. *Inwood Nat'l Bank v. Wells Fargo Bank, N.A.*, 463 S.W.3d 228, 234–35 (Tex. App.—Dallas 2015, no pet.) (citing *Anderson v. City of Seven Points*, 806 S.W.2d 791, 794 (Tex. 1991)). We review the trial court's findings for legal and factual sufficiency of the evidence under the same standards as are applied to review of jury verdicts. *Id.* In reviewing the legal sufficiency of the evidence to support a trial court's finding of fact, we view the evidence in the light most favorable to the finding, crediting favorable evidence if a reasonable fact finder could and disregarding contrary evidence unless a reasonable fact finder could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). We must assume the trial court made all reasonable inferences in favor of its findings. *Ford Motor Co. v. Castillo*, 444 S.W.3d 616, 621 (Tex. 2014). We will not disturb a finding for factual insufficiency unless the finding is so against the great weight and preponderance of the evidence that it is clearly wrong and manifestly unjust. *Inwood Nat'l*, 463 S.W.3d at 234–35 (citing *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001)

[3] A pipe pumps the water into a pit or pond accessible from the surface. For pit sales, a customer of MPI would drive up to the pit of groundwater and transfer water from the pit to the truck.

[4] The trial court does not differentiate between findings of fact and conclusions of law. For ease of reference, we will refer to all as findings of fact even if a certain finding of fact is actually a conclusion of law.

(per curiam)). We defer to unchallenged findings of fact that are supported by some evidence. *Tenaska Energy, Inc. v. Ponderosa Pine Energy, LLC*, 437 S.W.3d 518, 523 (Tex. 2014).

The trial court has no discretion in determining what the law is or applying the law to the facts. *City of Keller*, 168 S.W.3d at 827. Accordingly, we review the trial court's conclusions of law de novo. *Id.*; *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002). We will uphold the trial court's judgment, even if we determine a conclusion of law is erroneous, if the judgment can be sustained on any legal theory supported by the evidence. *Inwood Nat'l*, 463 S.W.3d at 235.

DISCUSSION

On appeal, Tollett argues that she is entitled to judgment as a matter of law on her breach of contract claim and that the judgment in favor of MPI should be reversed. She maintains that MPI materially breached the Agreement by failing to comply with the Agreement's royalty payment provision and with the Agreement's metering provision. First, Tollett asserts that paragraph 6 required MPI to pay her royalties on the same day that MPI received a payment from a sale (i.e., the same-day-pay argument). As for the metering provision, Tollett argues that MPI failed to meter pit sales. Instead of using meters, MPI allowed its customers to operate from an honorary system in which their customers would drive up to a pit, pump water into their trucks, fill-out a ticket indicating the amount of water they pumped, and then drop it in a box for MPI to bill them. Tollett maintains she was very concerned about this honorary system because she wanted to ensure the accuracy of production for purposes of her royalty. Both parties agree MPI never metered pit sales. Tollett contends each of those failures were "agreed material breach[es]" under the Agreement, permitting her to terminate the contract "in her sole and unfettered discretion."

MPI, in contrast, maintains that the royalty payments are due on the 20th day of the month following the previous month's collection of sale proceeds. According to MPI, it had the entire

month to collect proceeds from its customers and the royalty payments from those proceeds were due to Tollett by the 20th day of the following month. Additionally, MPI interpreted paragraph 11[5] of the Agreement as providing it a 60-day grace-period after that due date in which to pay Tollett's royalty. With respect to the metering provision, MPI argues that it installed meters on all four of its wells, and Tollett never complained or made a demand regarding MPI's failure to meter pit sales.

I. Royalty payments under Paragraphs 6 and 11

The trial court found that the royalty payment provision is ambiguous. However, Tollett contends the provision is unambiguous and MPI materially breached the contract by making late royalty payments. In support, Tollett cites two provisions in paragraph six of the contract: (1) "Landowner shall be entitled to royalties due on the same day of each month in which sale proceeds are collected by MPI"; and (2) "Failure to timely and fully pay Landowner royalties then due shall be considered a material breach and Landowner may terminate the Agreement in her sole and unfettered discretion." Tollett contends the royalty clause requires MPI to pay her the 25% royalty payment the same day it collects proceeds from its customers. It is undisputed that since the inception of the Agreement, MPI never paid Tollett on the same day it collected sale proceeds from its customers. Rather, MPI strived to make monthly royalty payments on the 20th of each month following the month in which MPI collected sale proceeds, which was in accordance with its interpretation of paragraph 6's requirement that payments be due the same day of each month and with paragraph 11's grace-period. To support its interpretation, MPI presented its business records that reflected when each month's royalty payment was due and when it was actually paid,

[5] Paragraph 11 stated, in pertinent part, "Notwithstanding anything to the contrary contained herein, this Agreement may be terminated by Landowner should MPI be found to be in material breach of the Agreement, including but not limited to, being more than sixty (60) days late in payment for any and all royalties that are due Landowner."

using pluses and minuses to indicate how many days before or after the 20th of the month each payment was made.

Whether a contract is ambiguous is a question of law, which we review de novo. *Dynegy Midstream Services, Ltd. P'ship v. Apache Corp.*, 294 S.W.3d 164, 168 (Tex. 2009); *D Design Holdings, L.P. v. MMP Corp.*, 339 S.W.3d 195, 201 (Tex. App.—Dallas 2011, no pet.). "A contract is ambiguous when its meaning is uncertain and doubtful or is reasonably susceptible to more than one interpretation." *Heritage Resources, Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996). The interpretation of an ambiguous contract is a question of fact. *Royal Maccabees Life Ins. Co. v. James*, 146 S.W.3d 340, 346 (Tex. App.—Dallas 2004, pet. denied). Extrinsic evidence may be used to determine the meaning of an ambiguous contract. *Calce v. Dorado Exploration, Inc.*, 309 S.W.3d 719, 742 (Tex. App.—Dallas 2010, no pet.).

Paragraph 6 provided that MPI would pay Tollett 25% of the gross sale proceeds collected by MPI from water sales produced from water collected from Tollett's property and that Tollett "shall be entitled to royalties due on the same day of each month in which sale proceeds are collected by MPI." We agree with the trial court that this provision is ambiguous. The ambiguity stems from the word "collected" in the phrase "in which sales proceeds are collected by MPI." This word creates a temporal discrepancy, or uncertainty, as to when MPI is required to pay because it does not set out when proceeds are considered collected by MPI. MPI collects (i.e. receives) sales proceeds from its customers on different days throughout the month and through various payment methods. Does MPI "collect" proceeds when it physically receives any form of payment (i.e., check, money order, credit card, cash) or when MPI deposits these payments, making the funds available for its use? Paragraph 6 does not tell us. This uncertainty is compounded by the statement that the royalties are due "on the same day of each month." MPI maintains that it was required to pay Tollett one combined royalty payment on the same day of

each month based on the language in the Agreement regarding the due date of its first royalty payment to Tollett.[6] Tollett, on the other hand, contends MPI must send her a royalty payment every day that it receives a payment from a customer. Accordingly, we conclude the royalty payment provision in the contract is ambiguous because the meaning of this provision is uncertain and doubtful and is reasonably susceptible to more than one interpretation.

This does not end our inquiry, however, because Tollett challenges the trial court's rejection of Tollett's same-day-pay interpretation (findings of fact 20, 21, and 23), its finding that paragraphs 6 and 11 refer to the timing for payment of royalties (finding of fact 19), and its finding that Tollett never made a written demand for same-day payments prior to March 9, 2016 (finding of fact 15). After reviewing the record, we conclude the evidence is legally and factually sufficient to support those findings of fact. The plain language of paragraph 6 and paragraph 11 supports MPI's interpretation of the deadline for royalty payments and the trial court's conclusion that both paragraphs refer to timing of royalty payments. The plain language also supports the trial court's determination that the same-day-pay interpretation is uncertain and doubtful. Further, the evidence shows that Tollett's same-day-pay interpretation was not supported by the conduct of the parties because MPI never made payments in accordance with Tollett's interpretation, and Tollett never demanded payment on a same-day basis prior to filing the underlying lawsuit. Indeed, the evidence shows that MPI made payments in accordance with its interpretation because MPI was not more than 60 days late in paying the December 2015 or January 2016 royalty payments. The trial court's findings of fact 15, 19, 20, 21 and 23 are not so against the great weight and preponderance of the evidence as to be manifestly unjust. We conclude that the evidence was sufficient to support the findings. In addition, the trial court correctly concluded that the Agreement should be construed

[6] Paragraph 6 of the Agreement, titled "Water Sales Royalty," provides, in pertinent part, "Landowner shall be entitled to the first payment of the non-participating royalty on or before the 20th day of the month following the month in which MPI is in receipt of sale proceeds from the sale of Water produced from the Lands."

against Tollett because Tollett's attorney drafted the Agreement. *See Cottman Transmission Sys., L.L.C. v. FVLR Enterprises, L.L.C.*, 295 S.W.3d 372, 377 (Tex. App.—Dallas 2009, pet. denied) (citing *Gonzalez v. Mission Ins. Co.*, 795 S.W.2d 734, 737 (Tex. 1990) (ambiguous provisions are construed against the drafter)). We, therefore, also sustain finding of fact 22.

To prevail on a breach of contract claim, a party must prove the following elements: (1) a valid contract; (2) the plaintiff's performance or tendered performance; (3) defendant's breach; and (4) damages suffered from that breach. *Woodhaven Partners, Ltd. v. Shamoun & Norman, L.L.P.*, 422 S.W.3d 821, 837 (Tex. App.—Dallas 2014, no pet.). On this record and applying the trial court's findings of fact, Tollett failed to establish that MPI breached the payment obligations of the Agreement. Moreover, Tollett does not challenge the trial court's determination that Tollett "failed to sustain her burden that MPI committed a material breach of its payment obligations under the Agreement." (Finding of fact 25). Similarly, Tollett does not challenge the trial court's finding that MPI was a "non-breaching party." (Finding of fact 32). We defer to unchallenged findings of fact that are supported by some evidence. *Tenaska Energy, Inc. v. Ponderosa Pine Energy, LLC*, 437 S.W.3d 518, 523 (Tex. 2014). The evidence supports findings of fact 25 and 32. As such, the evidence supports the judgment against Tollett regarding the royalty payments. We affirm the judgment on that issue.

I. The metering provision

As an independent basis for breach of contract, Tollett argues MPI materially breached the Agreement by intentionally failing to meter all water sales and by not providing meter readings in any of their sales reports. Those violations, according to Tollett, are an "agreed material breach" under the contract.

The metering requirements under the contract are controlled by paragraph 12, which provides as follows:

> **Metering.** MPI, at its sole cost and expense, shall establish and maintain a point of sale meter for all wells for purposes of recording water sales and disposal water. MPI shall as part of its monthly statement to Landowner report the meter reading at the beginning of each month, and meter reading at the end of each month. Landowner reserves the right to install her own meter/s for purposes of auditing MPI's water and disposal production. MPI's failure to timely and fully meter water sales and disposal water shall be considered a material breach and Landowner may terminate the Agreement in her sole and unfettered discretion.

The metering provision is clear and neither party challenges its meaning. The parties also agree that MPI never complied with this provision because MPI did not meter pit sales or provide monthly metering statements. The evidence, therefore, shows that MPI breached the Agreement regarding metering. The trial court, however, found that Tollett, through course of dealing, waived her right to declare MPI in material breach as to royalty payments and metering. (Finding of fact 29). Tollett challenges that finding.

Waiver is the intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right. *Cont'l Casing Corp. v. Siderca Corp.*, 38 S.W.3d 782, 789 (Tex. App.—Houston [14th Dist.] 2001, no pet.). "Waiver is an affirmative defense that can be established by a party's express renunciation of a known right, or by silence or inaction for so long a period as to show an intention to yield the known right." *Id.* (citing *Tenneco Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 643 (Tex. 1996). "Even if time is of the essence by express stipulation in a contract, strict performance may be waived by the party entitled to insist on it. Such waiver may be written or oral, and it may be shown by circumstances or by course of dealing." *Carpet Services, Inc. v. George A. Fuller Co. of Tex.*, 802 S.W.2d 343, 346 (Tex. App.—Dallas 1990), *aff'd*, 82 S.W.2d 603 (Tex. 1992).

We conclude the evidence is legally and factually sufficient to support the trial court's finding that Tollett waived her right to claim material breach under both the royalty payment and metering provisions of the Agreement by course of dealing. Paragraph 23 of the Agreement states, "Time is of the essence in this Agreement." The contract explicitly states Tollett's right to

terminate the Agreement "in her sole and unfettered discretion." Tollett was, therefore, entitled to insist on strict performance, but did not do so. From the inception of the contract in March 2012 to the time Tollett filed the underlying suit in March 2016, MPI made late royalty payments, according to Tollett's interpretation, and never metered pit sales. Even after the 2014 audit, MPI failed to strictly perform metered pit sales under the terms of the Agreement and did not make royalty payments under Tollett's disputed same-day-pay interpretation. Tollett's continual failure to enforce these contract terms against MPI supports the trial court's determination that Tollett waived her right to deem MPI's failure to comply with those provisions a material breach and to terminate the contract. Accordingly, we affirm the trial court's judgment on this point.

II. **MPI's counterclaim**

To the extent Tollett's prayer that we reverse the judgment may be construed as a challenge to MPI's counterclaim, we affirm the judgment in favor of MPI on its counterclaim because Tollett failed to challenge findings of fact 30 through 39, which address and support MPI's counterclaim. Because these unchallenged findings are supported by some evidence and conclusively establish MPI's counterclaim for breach of contract, we affirm the judgment in favor of MPI on its counterclaim.

CONCLUSION

The evidence is legally and factually sufficient to support the trial court's judgment. Accordingly, we affirm the trial court's judgment.

/Carolyn Wright/
CAROLYN WRIGHT
CHIEF JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

CECELIA TOLLETT, Appellant	On Appeal from the County Court at Law No. 2, Dallas County, Texas
No. 05-17-00435-CV V.	Trial Court Cause No. CC-16-01180-B.
	Opinion delivered by Chief Justice Wright.
MPI SURFACE, LLC, Appellee	Justices Francis and Brown participating.

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

It is **ORDERED** that appellee MPI SURFACE, LLC recover its costs of this appeal from appellant CECELIA TOLLETT.

Judgment entered June 8, 2018.