Partially Affirmed; Reversed and Remanded and Opinion Filed March 29, 2022

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-20-00461-CV

TEXAS CHAMPPS AMERICANA, INC., JILA DEVELOPMENT, LLC D/B/A SAL'S MART, HAMID AZARI, AND SHEILA T. INGRAM, LLC, Appellants
V.
COMERICA BANK, A TEXAS BANKING ASSOCIATION, Appellee

On Appeal from the 193rd Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-16-08857

OPINION

Before Justices Pedersen, III, Goldstein, and Smith
Opinion by Justice Pedersen, III

Appellants Texas Champps Americana, Inc., Jila Development, LLC d/b/a Sal's Mart, Hamid Azari, and Sheila T. Ingram, LLC appeal from a final judgment ordering appellants take nothing as to their counterclaims against appellee Comerica Bank, a Texas Banking Association, and awarding Comerica $1,834,651.57 as a result of (1) appellants Texas Champps's and Jila Development's breach of a promissory note and (2) appellants Azari's and Ingram's breach of personal

guarantees that originated in 2007 with Sterling Bank and were subsequently acquired by Comerica.

Appellants present the following nine issues on appeal: (1) Comerica failed to prove by legally and factually sufficient evidence that it was the owner and holder of the note and guarantees; (2) the judgment amount is not supported by the pleadings; (3) the trial court erred when it admitted specific agreements into evidence; (4) the trial court erred when it struck appellants' jury demand; (5) Comerica is barred from recovery because it breached its duty of good faith and fair dealing; (6) the denial of appellants' defenses and counterclaims was not supported by legally or factually sufficient evidence; (7) the trial court's conclusion that any agreements between Comerica and the Small Business Administration did not create any rights or benefits of appellants against Comerica was improper; (8) the trial court erred when it awarded attorney's fees; and (9) the trial court's statements were improper and denied appellants due process. Because we sustain appellants' eighth issue, we reverse the judgment as to its award of attorney's fees and remand this case to the trial court. We otherwise affirm the trial court's judgment.

I. BACKGROUND

Comerica sued appellants to recover on a promissory note in the amount of $1,550,000. Comerica alleged appellants defaulted on the loan and that it was entitled to $1,524,085.28, the balance of the note including interest as of May 18, 2016. Appellants brought a countersuit against Comerica alleging a variety of

claims. Those claims relevant to this appeal include breach of contract; breach of fiduciary duty, specifically the duty of good faith and fair dealing based on a special relationship; and fraud. In their counterclaims, appellants generally argued that the bank should never have approved the loan and that the bank's actions were not commercially reasonable or consistent with prudent lending standards. Appellants also raised numerous affirmative defenses.

After several hearings regarding the enforceability of jury-waiver provisions in the loan documents, the trial court struck appellants' jury demand and the case proceeded to a bench trial. The evidence at trial showed that Texas Champps and Jila Development executed a promissory note with Sterling Bank on November 8, 2007. The promissory note was for a Small Business Administration (SBA) loan in the amount of $1,550,000. Azari and Jila Tajik signed the note as members of Jila Development, and Azari signed as president and secretary of Texas Champps. Azari also executed an unconditional personal guarantee, and Azari and Tajik executed an unconditional guarantee on behalf of Sheila T. Ingram, LLC. The loan was secured by a deed of trust for the property appellants were purchasing with the loan—a gas station in Lewisville, Texas. Azari and Tajik executed the deed of trust and security agreement as members of Jila Development. Azari executed a separate security agreement as president of Texas Champps. The promissory note was modified in September 2008 to increase the principal amount of the note to $1,705,000.

In 2009, appellants executed a modification, renewal, and extension agreement. The operation of the convenience store was also sold in 2009 for approximately $400,000. A separate loan, in the amount of $189,000, was paid off with a portion of the proceeds, and Texas Champps and Jila Development were allowed to keep the remainder of the proceeds.

After a bench trial, the trial court found in favor of Comerica and against appellants. Appellants' motion for new trial was overruled by operation of law, and this appeal followed.

II. SUFFICIENCY OF THE EVIDENCE

Appellants challenge the legal and factual sufficiency of the evidence to support several of the trial court's findings of facts and conclusions of law. When a party challenges the legal sufficiency of the evidence to support an adverse finding on which it did not have the burden of proof, the party must demonstrate that no evidence supports the finding. *Graham Cent. Station, Inc. v. Pena*, 442 S.W.3d 261, 263 (Tex. 2014) (per curiam). In determining whether the evidence is legally sufficient to support the challenged finding, we review the evidence in the light most favorable to the finding. *City of Keller v. Wilson*, 168 S.W.3d 802, 807, 827 (Tex. 2005). We must credit favorable evidence if a reasonable factfinder could and disregard contrary evidence unless a reasonable factfinder could not. *Id.* Anything more than a scintilla of evidence is legally sufficient to support the challenged finding. *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960

S.W.2d 41, 48 (Tex. 1998). 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 that the evidence establishes all vital facts in support of the issue as a matter of law. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001) (per curiam).

When a party attacks the factual sufficiency of the evidence pertaining to a finding on which the party did not have the burden of proof, we may set aside the finding only if, after considering all the evidence, it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986) (per curiam); *Harris Cty. v. Coats*, 607 S.W.3d 359, 380–81 (Tex. App.—Houston [14th Dist.] 2020, no pet.). The amount of evidence necessary to affirm a judgment is far less than the amount necessary to reverse. *Coats*, 607 S.W.3d at 381.

In a nonjury trial, the trial court is the sole judge of the credibility of the witnesses and may resolve any inconsistencies in the testimony as well as determine the weight of the evidence. *Shaw v. Cty. of Dallas*, 251 S.W.3d 165, 169 (Tex. App.—Dallas 2008, pet. denied) We review the trial court's legal conclusions de novo to determine whether the court correctly drew the legal conclusion from the facts presented. *Id.* We will first address appellants' challenge to the findings on which they did not have the burden of proof. Thereafter, we will address their challenge to the findings on which they did have the burden of proof.

III. ANALYSIS

Issue One: Whether Evidence Was Sufficient to Prove Comerica Was Holder of Note and Guarantees

In their first issue, appellants argue that the evidence was legally and factually insufficient to prove that Comerica was the owner and holder of the note and guarantees. Appellants' argument rests on the contention that Comerica failed to prove (1) that a merger between it and Sterling occurred and (2) that, as a result of the merger, Comerica acquired the note and guarantees from Sterling. Appellants further contend there was no evidence to show Sterling still owned the note and guarantees when the alleged merger took place. Specifically, appellants challenge the sufficiency of the evidence to support the following findings of fact and conclusions of law:

Findings of Fact

> (6) Sterling Bank merged with and into Comerica Bank, effective July 28, 2011, and Comerica Bank is the sole surviving entity.
>
> (7) Comerica Bank is the owner and holder of the Note and Guarantees.

Conclusions of Law

> (1) Effective July 28, 2011, Sterling Bank merged with and into Comerica Bank, with Comerica Bank the sole surviving entity.
>
> (2) Comerica Bank is and was at all pertinent times, the legal owner and holder of the Note.

(3) Comerica Bank is and was at pertinent times, the legal owner and holder of the Guarantees.

To recover on a promissory note, the plaintiff must prove: (1) the note in question; (2) the defendant signed the note; (3) the plaintiff is the owner or holder of the note, and (4) a certain balance is due and owing on the note. *Bean v. Bluebonnet Sav. Bank FSB,* 884 S.W.2d 520, 522 (Tex. App.—Dallas 1994, no writ). A party appealing from a nonjury trial in which the trial court made findings of fact should direct its attack on the sufficiency of the evidence to support specific findings of fact, rather than to the judgment generally. *Shaw*, 251 S.W.3d at 169.

The certificate of merger—which was introduced into the evidence—provides that the articles of merger between Sterling and Comerica "have been received" by the Texas Department of Banking and "are found to conform to law." The certificate of merger further provides that it was effective as of July 28, 2011, at 12:02 a.m. Appellants contend that certificate of merger merely shows that the banks entered into a merger agreement and "will" merge, but does not show that the banks had merged. We disagree.

The certificate of merger conveys that, as of July 28, 2011, the department of banking recognized a merger of Sterling into Comerica. *See, e.g.*, *Peterson, Goldman & Villani, Inc. v. Anchor Holdings, LP*, 584 S.W.3d 556, 566 (Tex. App.—Fort Worth 2019, pet. denied) (merger takes effect on acceptance of filing of certificate of merger). Additionally, appellants' expert testified that he was aware

Sterling merged with Comerica in 2011. Even if the evidence is sufficient to show a merger, appellants nevertheless argue that there was no evidence to show that Comerica acquired the note and guarantees as a result of the merger because (1) no one from the bank testified that the note was acquired during the merger and (2) the merger agreement was not offered into evidence.

Comerica asserts in response that, under Texas Business Organizations Code §10.008, the merger itself is sufficient to show Comerica acquired the note and, thus, evidence of transfer or assignment was unnecessary. Section 10.008 provides in part:

> [A]ll rights, title, and interests to all real estate and other property owned by each organization that is a party to the merger is allocated to and vested, subject to any existing liens or other encumbrances on the property, in one or more of the surviving or new organization as provided in the plan of merger without . . . any transfer or assignment having occurred[.]

TEX. BUS. ORGS. CODE ANN. § 10.008(a)(2). However, it is the plan of merger that sets out the rights, titles, and interests to be allocated to and vested in the surviving entity. *Id.* If the plan of merger does not provide for the allocation and vesting of the right, title, and interest in any particular real estate or other property, the unallocated property is owned by the surviving organization. *Id.* § 10.008(b). Here, Comerica did not present the plan of merger to the trial court.

Nonetheless, Comerica did offer other evidence to show that it acquired the note and guarantees. Omario Bill Martinez, Jr., Vice President Special Assets of

Comerica, testified that Comerica kept most loan documents in Michigan in a collateral vault. He was the loan officer assigned to the loan at issue here and had been assigned since approximately the fourth quarter of 2017. Martinez testified that he retrieved a copy of the loan documents from the collateral vault and that it was his usual practice to rely upon such copies of loan documents. He reviewed the note, deed of trust, security agreements, note modifications, guarantees, and other documents related to the loan transactions. Martinez testified that Plaintiff's Exhibit No. 1—a copy of the SBA note in the amount of $1,550,000—was a true and correct copy of the note based upon his review of the original. Although Martinez had not viewed the originals of the guarantees, he testified (1) that they were true and correct copies from the vault and (2) that he relied on them as business records.

Comerica further offered, without objection, a document titled, "U.S. Small Business Administration Lender's Transcript of Account." The transcript was admitted as Plaintiff's Exhibit No. 32 and lists (1) the name of the lender as Comerica, (2) the borrower as Jila Development, and (3) the amount of the loan as $1,705,000. The transcript details the payment history on the loan dating back to 2007 and shows that the last payment on the loan was made on May 11, 2016, bringing the unpaid principal balance to $1,403,328.73. Martinez testified the current amount of unpaid interest was $380,203.68 and the amount for late charges was $51,119.57. According to Martinez, the total amount owed under the note was $1,834,651.98.

The evidence showed that Azari spoke with Charles Prack, Vice President of Comerica, beginning in 2012 through 2015 regarding the loan and whether any modifications could be made on the loan to assist appellants in making payments. Comerica's possession of the loan documents and its management of the loan is some evidence that it was the owner and holder of the note. Moreover, there is no evidence to the contrary. Appellants do not dispute that they signed the promissory note or guarantees with Sterling and there is no evidence that Sterling sold or transferred the note and guarantees prior to merging with Comerica.

In viewing the evidence in the light most favorable to the challenged findings, we conclude that more than a scintilla of evidence existed to support the trial court's findings that Sterling merged with and into Comerica, effective July 28, 2011, that Comerica Bank was the sole surviving entity, and that Comerica Bank was the owner and holder of the note and guarantees. *See Formosa Plastics*, 960 S.W.2d at 48. When reviewing the entire record, as we must, the evidence supporting the merger and ownership findings is not so weak as to make the findings clearly wrong and manifestly unjust. *See Cain*, 709 S.W.2d at 176. Therefore, we conclude that the evidence was both legally and factually sufficient to support the trial court's findings that Sterling merged with Comerica and that Comerica owned the note and guarantees. We overrule appellants' first issue.

Issues Five, Six, and Seven: Appellants' Cross Claims

In issues five, six, and seven, appellants argue Comerica should have been barred from recovery on its claim against appellants for breach of the promissory note and guarantees because Comerica breached its duty of good faith and fair dealing and first breached the terms of the promissory note by failing to adhere to the SBA guidelines. Within these three issues, appellants attack the legal and factual sufficiency of the evidence to support the following conclusions of law:

Conclusions of Law

> (7) Comerica Bank had no duty or obligation to Texas Champps, Jila, Azari and Sheila T. Ingram, LLC to cause the portion of the proceeds (of the sale of the collateral by Texas Champps) retained by Texas Champps, to be applied to the amounts owing on the Note.
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> (9) There was no fiduciary or special relationship between Comerica Bank and Texas Champps, Jila, Azari and Sheila T. Ingram, LLC.
>
> (10) Texas Champps, Jila, Azari and Sheila T. Ingram, LLC's claims for fraud are barred by contractual disclaimers in the Note, Guarantees, Modification of Promissory Note, and Modification, Renewal and Extension Agreement.
>
> (13) Comerica Bank made no material, false representations to Texas Champps, Jila, Azari and Sheila T. Ingram, LLC.
>
> (14) Texas Champps, Jila, Azari, and Sheila T. Ingram, LLC are not beneficiaries of any obligations of Comerica Bank to the U.S. Small Business Administration ("SBA"), and any agreements between Comerica Bank and the SBA, including the Authorization (SBA 7(A) Guaranteed Loan) do not create any rights or benefits of Texas Champps, Jila, Azari, and Sheila T. Ingram, LLC against Comerica Bank.

Appellants do not challenge the trial court's findings of fact and conclusions of law that they released and waived their claims and defenses against Comerica through March 8, 2009, based on provisions in the 2008 and 2009 modification agreements. Unchallenged findings of fact are binding on the parties and the appellate court. *Rich v. Olah*, 274 S.W.3d 878, 884 (Tex. App.—Dallas 2008, no pet.).

Appellants argue that their expert, Vaughan Pearson, established that Comerica failed to adhere to and observe reasonable commercial standards, failed to adhere to commercially reasonable lending and banking practices, failed to adhere to the SBA authorizations that were incorporated into the loan documents, failed to adhere to banking guidelines, and generally failed to deal in good faith with appellants.

We first review the record for evidence that supports the finding, while ignoring contrary evidence. *Dow Chem. Co.*, 46 S.W.3d at 241. If there is no evidence to support the finding, we examine the record to determine if the contrary position is established as a matter of law. *Id.* If the contrary position is conclusively established, the party's challenge to the legal sufficiency should be sustained. *Id.* "Evidence is conclusive only if reasonable people could not differ in their conclusions." *City of Keller*, 168 S.W.3d at 816. When a party attacks the factual sufficiency of the evidence supporting an adverse finding on an issue on which the party has the burden of proof, the party must show that the adverse finding is so

against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. *Dow Chem. Co.*, 46 S.W.3d at 242.

The Supreme Court of Texas has not recognized that an implied covenant of good faith and fair dealing exists in every contract but, instead, has recognized that such duty "may arise as a result of a special relationship between the parties governed or created by a contract." *Arnold v. Nat'l Cty. Mut. Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987). "Special relationships arise where there is an element of trust necessary to accomplish the goals of the undertaking or when the courts have declared the existence of a special relationship because of imbalance of bargaining power," such as between an insurer and its insured. *Cent.l Sav. & Loan Ass'n v. Stemmons Nw. Bank*, 848 S.W.2d 232, 239–40 (Tex. App.—Dallas 1992, no writ) (no special relationship between beneficiary and issuer of letter of credit). Generally, the courts have not found a special or fiduciary relationship between a lender and a borrower. *See Herndon v. First Nat. Bank of Tulia*, 802 S.W.2d 396, 399 (Tex. App.—Amarillo 1991, writ denied) (op. on reh'g) ("we are unaware of any Texas cases holding that a duty of good faith and fair dealing exists between a lending institution and its borrower"); *Nance v. Resolution Trust Corp.*, 803 S.W.2d 323, 333 (Tex. App.—San Antonio 1990, writ) (concluding no special relationship between lender and borrower to create duty of good faith and fair dealing; not a fiduciary relationship and no evidence of long-standing personal or social relationship between the parties or an imbalance of bargaining power); *Thomas v.*

First City, Texas-Bryan, No. B14-91-00047-CV, 1992 WL 133823, at *4 (Tex. App.—Houston [14th Dist.] June 18, 1992, no writ) (not designated for publication) (concluding that appellants' assertion that they subjectively trusted one of the bankers and took his advice was not enough to raise a fact issue regarding whether a special, confidential, or fiduciary relationship existed between the parties as debtor and creditor). A special relationship may exist when there is excessive lender control or influence in the borrower's business activities. *Farah v. Mafrige & Kormanik, P.C.*, 927 S.W.2d 663, 675 (Tex. App.—Houston [1st Dist.] 1996, no writ).

The evidence presented here does not establish a special relationship between the parties. There is no evidence that appellants had a long-standing relationship with Sterling or Comerica. Azari testified that he called multiple banks to see if he could get a commercial loan to start a new business after selling his ice cream shops. Other banks declined to extend him a loan. Azari testified that Sterling's business development officer—Kenneth M. Byrd—told him to buy a gas station, put in a deli, and then sell the operations of the gas station. However, Byrd testified that he and Azari discussed various businesses that Azari and his mother might be interested in buying. Byrd testified he did not suggest any specific business to buy. Byrd provided him with a website on which he could look at available convenience stores, but Byrd did not suggest a particular location to buy or have any involvement in the purchase price negotiations. Byrd testified that Azari called him and asked about taking out an additional loan to put in a deli. Byrd explained that Azari brought up selling the

business because he was struggling. Byrd had already left Sterling at that time but gave Azari the name of a brokerage firm.

Additionally, Azari testified a gas station "always looked very appealing because it's a big operation when you look at [it] from the outside," and he acknowledged that the seller was available to assist him during the ownership transition. Byrd testified that Azari told him he had a family member who owned twelve convenience stores and was very familiar with how they operate. When Pearson was asked whether Byrd took on some role beyond a banker in the sale of the operations, he responded:

> Well that would be a legal issue. He might have come close. He probably suggested; but from the testimony of Mr. Azari, Mr. Azari took Mr. Byrd's advice and trusted Mr. Byrd's advice. He had no other place to turn.

The trial court was free to believe Byrd's testimony and disbelieve Azari's. Furthermore, even if Byrd did make those suggestions and Azari relied on his advice, such conduct occurred prior to March 2009[1] and does not amount to excessive lender control over the appellants' business activities. *See Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962) ("mere subjective trust alone is not enough to transform arms-length dealing into a fiduciary relationship"); *Thomas*, 1992 WL 133823, at *4.

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[1] Appellants do not challenge Conclusion of Law No. 6, which provides: "Texas Champps, Jila, Azari and Sheila T. Ingram, LLC released and waived any and all of their claims and causes of action against Comerica Bank, through March 8, 2009 (the effective date of the Modification, Renewal, and Extension Agreement)."

Moreover, there is no evidence that Comerica attempted to exercise any control over appellants' business activities after March 2009.

Appellants also contend that the Texas Business and Commerce Code imposes an obligation of good faith and fair dealing in every contract. However, the Supreme Court of Texas has held that the failure to act in good faith under the code does not provide for a separate cause of action based in tort but rather gives rise to a cause of action for breach of contract. *N. Nat. Gas Co. v. Conoco, Inc.*, 986 S.W.2d 603, 606–07 (Tex. 1998) (citing former section 1.203, currently section 1.304). Based on the evidence before it, the trial court correctly concluded in its Conclusion of Law No. 9 that the parties did not have a special or fiduciary relationship.

Appellants assert that Comerica breached the contract by failing to comply with the SBA guidelines and requirements, which appellants contend were part of the loan documents. Appellants' trial expert testified that Comerica failed to follow the SBA's standard operating procedures providing lenders have an obligation to help entrepreneurs start, build, and grow a viable business and to maximize the recovery if the borrower defaults on the loan. He further opined that Comerica should have requested financials for quarterly review, been creative in structuring a "workout," and directed appellants to free management, planning, and counseling resources through the Service Corporation of Retired Executives (SCORE) or the Small Business Development Corporation (SBDC). He concluded that Comerica

"performed one of the worst handling[s] of any loan relationship in my 40 years of working with these types of facilities."

Regardless of whether the SBA authorization and standard operating procedures are part of the loan documents as appellants assert, the authorization itself provides: "The Authorization is between Lender and SBA and creates no third party rights or benefits to Borrower." Based on the evidence presented, the trial court correctly concluded that any agreements between Comerica and the SBA, including the authorization, did not create any rights or benefits for appellants against Comerica.

The evidence also supported the trial court's Conclusion of Law No. 7— "Comerica Bank had no duty or obligation to Texas Champps, Jila, Azari and Sheila T. Ingram, LLC to cause the portion of the proceeds (of the sale of the collateral by Texas Champps) retained by Texas Champps, to be applied to the amounts owing on the Note." Appellants' trial expert acknowledged that the security agreement did not prohibit the bank from allowing the borrower to sell and keep the proceeds. Specifically, the security agreement provides in pertinent part that the "[l]ender *may* apply proceeds of the disposition of Collateral to the Obligations in any manner elected by Lender and permitted by the [Uniform Commercial] Code" (emphasis added); it does not require that the lender *must* apply the proceeds to the loan obligations.

As to the trial court's Conclusions of Law Nos. 10 and 13 regarding their crossclaim for fraud, appellants direct us to no evidence of a material misrepresentation made by Comerica after 2009 that is not also encompassed by their arguments that Comerica failed to adhere to SBA guidelines and requirements when managing the loan. Appellants contend Comerica lied about working with them in terms of a modification of the note and misrepresented that it would send a forbearance agreement. But even if such were true, Comerica's conduct does not amount to fraud, nor can the failure of Comerica to modify the loan or offer forbearance be said to have caused appellants injury distinct from their breach of the note. A cause of action for fraud requires proof of (1) a material misrepresentation (2) that was either known to be false when made or was asserted without knowledge of its truth, (3) which was intended to be acted upon, (4) which was relied upon, and (5) which caused injury. *Dow Chem. Co.*, 46 S.W.3d at 242.

Although Azari testified that he never received a forbearance agreement after one had been discussed, Martinez testified that the loan documents showed that he refused to sign a forbearance agreement. The trial court was the sole judge of the credibility of the witnesses and was free to disbelieve Azari. Moreover, there is no evidence that Azari relied upon such representation and that it caused him injury. Until appellants executed a modification or forbearance agreement, they were not released from their payment obligations under the note.

We conclude the trial court correctly drew the challenged legal conclusions (Nos. 7, 9, 10, 13, and 14) from the evidence presented. *Shaw*, 251 S.W.3d at 169. The record provides evidence to support each of the conclusions, and Appellants did not conclusively prove that there was a special or fiduciary relationship, that Comerica made a material false misrepresentation that caused injury, or that Comerica's failure to adhere to the SBA standards and requirements created a right or benefit for appellants that gave rise to a cause of action, such as breach of contract, against Comerica. Appellants' fifth, six, and seventh issues are overruled.

Issue Two: Whether the Pleadings Supported the Judgment

In their second issue, appellants argue that the pleadings do not support judgment because Comerica sought only to recover on the original promissory note in the original principal amount of $1,550,000 and made no mention of the two modification agreements.

Comerica's original petition states, "Comerica brings this action on promissory note in the amount of $1,550,000 from Champps and Jila to Sterling Bank." The $1,550,000 principal amount is listed several times, but the petition also alleges, "The Loan was modified by loan modification agreements." Furthermore, the petition sought to recover unpaid principal in the amount of $1,410,828.73. Martinez testified the amount of unpaid principal owed was $1,403,328.73, which is an amount of unpaid principal less than that sought in the original petition.

Even if we assumed Comerica's original petition was not sufficiently broad to include an alleged breach of the promissory note as modified by the 2008 and 2009 modification agreements and did not seek to recover an amount based on the full principal amount of $1,705,000, we conclude the issue was tried by consent. *See* TEX. R. CIV. P. 67 ("When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."). To determine whether an issue was tried by consent, we examine the record not for evidence of the issue, but rather for evidence of trial of the issue. *Case Corp. v. Hi-Class Bus. Sys. of Am., Inc.*, 184 S.W.3d 760, 771 (Tex. App.—Dallas 2005, pet. denied). "A party's unpleaded issue may be deemed tried by consent when evidence on the issue is developed under circumstances indicating both parties understood the issue was in the case, and the other party failed to make an appropriate complaint." *Id.*

Throughout the trial, including in opening statements, Comerica contended that appellants breached a promissory note in the amount of $1,705,000 as modified and that $1,403,328.73 was still owed in principal. Appellants did not object to Comerica's opening statement, to the admission of the lender's transcript (which shows the total loan amount to be $1,705,000 and, thus, necessarily includes the loan modifications), or to Martinez's testimony that calculated the unpaid principal owed ($1,403,328.73) from the full principal amount of $1,705,000. Appellants also did not contest Comerica's summation of the evidence, including that the amount owed

was based on the note as modified. And, even though appellants objected to the admission of the modification agreements, appellants' objections were limited to authenticity on the grounds that Martinez had not reviewed the originals. Appellants raised no complaint that the modification agreements were irrelevant to the allegation of breach of the original promissory note or otherwise complained that Comerica was seeking recovery on the note beyond what it had pleaded. In fact, appellants relied on the modification agreements as part of their claims against Comerica, including that they were tricked into signing them.

Because the amount of unpaid principal sought in Comerica's original petition was more than the amount sought at trial and because the full loan amount of $1,705,000 was tried by consent, we overrule appellants' second issue.

Issue Three: Admission of Modification Agreements and Personal Guarantees

Appellants argue in their third issue that the trial court erred in admitting the modification agreements and personal guarantees because Comerica did not properly authenticate the documents as Martinez had not seen the originals of the documents and, therefore, could not testify that they were true and correct copies of the original.

We review a trial court's evidentiary rulings for abuse of discretion. *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998). A trial court abuses its discretion when it acts arbitrarily or without regard to any guiding rules or principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42

(Tex. 1985). We must uphold the trial court's evidentiary ruling if it is correct under any legal theory. *Malone*, 972 S.W.2d at 43.

Martinez testified that he was familiar with Comerica's system of recordkeeping and that most of the bank's documents were kept in Michigan in a collateral vault. He retrieved a copy of the guarantees (Plaintiff's Exhibit Nos. 2 and 3) and modification agreements (Plaintiff's Exhibit Nos. 8 and 9) from the collateral vault. Martinez further testified that it was his usual practice to rely upon copies of documents retrieved from the collateral vault as accurate business records.

Rule 1003 provides: "A duplicate is admissible to the same extent as the original unless a question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate." TEX. R. EVID. 1003. Appellants did not directly raise a question about the "original's authenticity" or assert that admission was "unfair" under the circumstances. *See id.* Instead, appellant's complaint was that Martinez had not viewed the original so he could not say that the guarantees and modifications offered for admission were "true and correct" copies. But, Martinez testified that he was familiar with Comerica's recordkeeping, that Comerica kept its loan documents in a vault in Michigan, that it was his practice to retrieve documents from the vault in Michigan, that it was his practice to rely on such documents as accurate business records, and that the guarantees and modifications being offered were part of the loan file for the loan at issue.

Appellants never denied that they executed the guarantees or modification agreements or executed some other guarantee or modification agreement than those that were being offered. *See* TEX. R. CIV. P. 93(7) (in the absence of a sworn plea denying execution of the written instrument, "the instrument shall be received in evidence as fully proved"). Based on Martinez's testimony and appellants' lack of sworn denial, the trial court could have concluded that the documents were what Comerica purported them to be and were admissible. Therefore, we cannot say that the trial court abused its discretion by admitting the guarantees and modification agreements. We overrule appellants' third issue.

Issue Four: Whether the Trial Court Erred in Striking Appellants' Jury Demand

In their fourth issue, appellants contend that the trial court erred in not allowing them to present their case to a jury. Specifically, they argue that Comerica's delay in filing a motion to strike their jury demand should have precluded the trial court's granting of Comerica's motion. In addition, appellants assert that the parties agreed to a trial by jury prior to Comerica filing a motion to strike their jury demand and that appellants were not only entitled to rely on such agreement, but that Comerica also waived its right to contest a jury trial. Further, appellants argue that the jury waiver provision contained in the second modification agreement was procured by fraud, trickery, or conceit.

Appellants fail, however, to acknowledge that the deed of trust and security agreements executed on November 8, 2007, contained jury waiver provisions. Section 5.27 of the deed of trust provided:

> Section 5.27 Waiver of Right to Trial by Jury. GRANTOR HEREBY IRREVOCABLY AND UNCONDITIONALLY WAIVES ALL RIGHT TO TRIAL BY JURY IN ANY ACTION, SUIT, PROCEEDING, OR COUNTERCLAIM THAT RELATES TO OR ARISES OUT OF ANY OF THE LOAN DOCUMENTS OR THE ACTS OR FAILURE TO ACT OF OR BY HOLDER IN THE ENFORCEMENT OF ANY OF THE TERMS OR PROVISIONS OF THIS DEED OF TRUST OR THE OTHER LOAN DOCUMENTS.

And subsection M of section 8 of the security agreements provided:

> M. DEBTOR HEREBY IRREVOCABLY AND UNCONDITIONALLY WAIVES ALL RIGHT TO TRIAL BY JURY IN ANY ACTION, SUIT, PROCEEDING, OR COUNTERCLAIM THAT RELATES TO OR ARISES OUT OF ANY OF THE LOAN DOCUMENTS OR THE ACTS OR FAILURE TO ACT OF OR BY LENDER IN THE ENFORCEMENT OF ANY OF THE TERMS OR PROVISIONS OF THIS SECURITY AGREEMENT OR THE OTHER LOAN DOCUMENTS.

Appellants do not assert that these jury waiver provisions were procured by fraud, trickery, or conceit. Appellants do not otherwise challenge the voluntariness of these provisions on appeal.

The 2009 modification agreement, referenced by appellants, contained the following jury waiver provision:

> THE PARTIES TO THIS AGREEMENT HEREBY, UNCONDITIONALLY AND VOLUNTARILY, WITH AND UPON THE ADVICE OF COUNSEL, WAIVE, RELINQUISH AND FOREVER FORGO THE RIGHT TO A TRIAL BY JURY IN ANY ACTION OR PROCEEDING BASED UPON, OR ARISING OUT OF, OR IN ANY WAY RELATING TO THIS AGREEMENT.

Comerica cited to each of the three provisions in its motion to strike appellants' jury demand. By failing to address each of the provisions on appeal, appellants have

waived their argument that the trial court erred by granting Comerica's motion to strike based on the ground that the provisions were not made voluntarily. *See In re Bank of Am., N.A.*, 278 S.W.3d 342, 343–46 (Tex. 2009) (per curiam) (burden shifts to party opposing jury waiver to prove waiver was not voluntarily made when waiver provision is conspicuous).

Appellants also assert that Comerica waived its right to rely on these jury waiver provisions and contest a jury trial because the parties submitted a proposed Agreed Amended Discovery Control Plan and Scheduling Order that provided: "Jury Trial: SET ON SEPTEMBER 10, 2018 AT 9:00 A.M." We disagree that this document constitutes an agreement by the parties to submit this case to a jury. When the trial court received the agreed scheduling order from the parties, the court marked out the word "jury"—indicating the court's understanding that the case was to be tried to the bench. The trial court signed the agreed scheduling order on October 10, 2017. At that time, appellants had neither made a jury demand nor paid a jury fee; Appellants did not do so until October 19, 2017.

Comerica filed its motion to strike the jury demand on February 13, 2018, approximately four months after appellants paid the jury fee. Appellants argue that this delay should have precluded the trial court from striking their jury demand and cite to *Rivercenter Associates v. Rivera* for support. *See* 858 S.W.2d 366 (Tex. 1993). In *Rivercenter*, the court notes that "Rivercenter was sent notice on the day the jury demand was filed, yet for no apparent reason delayed filing its motion to

quash" by more than four months. *Id.* at 367. However, Rivercenter was seeking mandamus relief, a remedy largely controlled by equitable principles such as "that '[e]quity aids the diligent and not those who slumber on their rights." *Id.* (quoting *Callahan v. Giles*, 155 S.W.2d 793, 795 (Tex. 1941)) (change in original). Furthermore, Rivercenter had moved to set a trial date on the jury docket before filing its motion to quash. *Id.* The court denied Rivercenter's mandamus petition concluding, "Rivercenter has not shown diligent pursuit of any right to a non-jury trial." *Id.* at 367–68.

Here, a party is not seeking extraordinary mandamus relief against the trial court regarding its ruling on a motion to strike a jury demand as in *Rivercenter*. Thus, the same equitable principles do not control our review. And, unlike *Rivercenter*, Comerica provided a reason for its delay; it alleged the result was due to a lull in the case as settlement discussions were pending. The docket sheet does not reflect any filings by either party between the jury demand and the motion to strike. The docket sheet also shows that a non-jury trial was set for March 28, 2017, but was canceled.

Comerica's conduct does not show it intentionally relinquished its right to enforce the jury waiver provisions, nor is its conduct unequivocally inconsistent with claiming such right. *See In re Gen. Elec. Capital Corp.*, 203 S.W.3d 314, 316 (Tex. 2006) (waiver requires intent and, if not express, must be clearly demonstrated by the party's conduct and the surrounding facts and circumstances). Appellants' reliance on *In re PlainsCapital Bank* for the proposition that they relied on

Comerica's conduct is misplaced. *See* No. 05-20-00765-CV, 2021 WL 192102 (Tex. App.—Dallas May 13, 2021) (orig. proceeding) (mem. op.). In *In re PlainsCapital Bank*, it was the party who initially filed the jury fee and demand who later sought to remove the case from the jury docket; the opposing party relied on that jury demand and opposed its withdrawal. *Id.* at *1–2. This court concluded that Rule 220 of the Texas Rules of Civil Procedure prevented the trial court from withdrawing the demand because the adverse party objected to the withdrawal. *Id.* at *1, 3 ("[w]hen any party has paid the fee for a jury trial, he shall not be permitted to withdraw the cause from the jury docket over the objection of the parties adversely interested") (quoting TEX. R. CIV. P. 220). Here, there is no evidence that Comerica paid a jury fee and then later tried to withdraw the case from the jury docket. Thus, *In re PlainsCapital Bank* is inapplicable to this case.

We conclude the trial court did not err when it granted Comerica's motion to strike appellants' jury demand and denied appellants a trial by jury. We overrule Appellants' fourth issue.

Issue Eight: Whether Attorney's Fees Were Not Properly Segregated

In their eighth issue, appellants challenge the trial court's award of attorney's fees. Appellants argue that Comerica failed to properly segregate its recoverable attorney's fees from its unrecoverable fees—those that were earned in litigating appellants' motions to compel and motions for sanctions. Comerica does not contest that it was required to segregate its fees for these tasks. We agree that Comerica

failed to properly segregate its fees. We conclude the award of attorney's fees is not supported by sufficient evidence.

Generally, a party may not recover attorney's fees unless authorized by statute or contract. *Wells Fargo Bank, N.A. v. Murphy*, 458 S.W.3d 912, 915 (Tex. 2015). "[I]f any attorney's fees relate solely to a claim for which such fees are unrecoverable, a claimant must segregate recoverable from unrecoverable fees." *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 313 (Tex. 2006). The need to segregate fees is a question of law, which we review *de novo*. *Id.* at 312. However, the trial court's decision as to what fees were necessary to prove particular claims often turns on factual and credibility determinations, which we review under sufficiency standards, giving deference to the trial court's findings. *Id.* at 313; *see also Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 488–90, 94–96, 498, 501–02 (Tex. 2019).

The party seeking to recover attorney's fees bears the burden of proof. *Rohrmoos*, 578 S.W.3d at 484, 498. Attorneys do not have to keep separate time records for each particular claim. *Chapa*, 212 S.W.3d at 314. An opinion that a certain percentage of time was spent on the claim for which fees are recoverable or unrecoverable is sufficient. *Id.*

The supreme court has overturned fee awards where time estimates were based on generalities. *Rohrmoos*, 578 S.W.3d at 495–96 (citing *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 763 (Tex. 2012); *City of Laredo v. Montano*, 414 S.W.3d

731, 736 (Tex. 2013) (per curiam); *Long v. Griffin*, 442 S.W.3d 253, 255 (Tex. 2014) (per curiam)). In *Rohrmoos* and the cases cited therein, there was no evidence of the time spent on specific tasks. *Id.* "Without detail about the work done, how much time was spent on the tasks, and how he arrived at the $800,000 sum, [counsel]'s testimony lacks the substance required to uphold a fee award." *Id.* at 505.

Here, Comerica's counsel submitted a detailed time record (Plaintiff's Exhibit No. 87) consisting of twenty-two pages of time entries. Counsel testified that he was seeking $99,379 in attorney's fees, which did not encompass all of the entries in the time record because he was only seeking recovery of his fees, not associates' fees. He also testified that he had reduced the amount he was seeking by about twenty hours, or $5,000, to account for the time that he spent responding to the motions to compel and motions for sanctions. He testified this number was an estimate. However, he testified that he did not deduct the time for defending the three depositions that the trial court ordered after granting one of appellants' motions.

Although counsel submitted a detailed time record generally supporting the award for attorney's fees, our review of the time entries shows that counsel spent more than twenty hours defending the motions to compel and motions for sanctions. Thus, counsel's estimate was inaccurate. The trial court did not make specific findings with regard to the segregated portion of the fees but did find and conclude that Comerica's reasonable attorney's fees throughout trial were $99,379, the amount requested by Comerica. This finding is not supported by the record as

Comerica failed to segregate the full amount of unrecoverable fees from the recoverable fees.

"Unsegregated attorney's fees for the entire case are some evidence of what the segregated amount should be." *Id.* Therefore, we must remand the issue of attorney's fees to the trial court for a new trial. We sustain appellants' eighth issue.

Issue Nine: Whether the Trial Court's Statements Denied Appellants Due Process

In their ninth and final issue, appellants assert that the trial court's stated reason for its judgment was improper and denied appellants due process. At the hearing on appellants' motion for new trial, appellants' counsel asked the trial court why it made its decision:

> [APPELLANTS' COUNSEL]: Judge, nothing to add to the argument except that my client really wants to know why you made the decision you made. We kind of – we were kind of stunned of course by it, but we don't [know] why. You know you can share with that if you will, Judge. I'm not certainly up to – it's certainly up to the Court to make that disclosure if you are so inclined, Judge.
>
> THE COURT: Well, I can say this [counsel]. One of the things that I found particularly striking was when you testified as to your attorney's fees and that your client had actually paid you every single dime of your attorney fees and I thought, wow, well that's money he could have used to pay down his debt. So that was a -- that was particularly telling I believe in my mind as to his priorities with regard to the situation, so I can give you that information.
>
> [APPELLANTS' COUNSEL]: Well, we tried to settle, Judge, but we couldn't get any kind of negotiation, so we had to fight.
>
> THE COURT: Well, I mean, what he paid you like what, $400,000?

> [APPELLANTS' COUNSEL]: No, Judge.
>
> THE COURT: A lot in attorney's fees.
>
> [APPELLANTS' COUNSEL]: It was less than $200,000.
>
> THE COURT: But he paid you every single dime of that and that's what you represented to the Court and Mr. Azari was there and that was just kind of one of those things that I thought, well, you know that's money that could have been used to pay down a debt that he knew he had and he knew he had incurred, but that's just one thing that the Court kind of struck me when making my decision. Okay. Is there anything else?

Appellants argue that every litigant is afforded the right to retain an attorney to zealously defend him or her in court and that the trial court cannot attempt to deprive a litigant of his or her right to obtain counsel by using that fact as the reason for its judgment. We do not read the trial court's statements to be an attempt to deprive appellants of their right to obtain counsel. The trial court's response to appellants' inquiry appears to be a comment on Azari's credibility in claiming he was unable to pay on the note because of a lack of business due to the nearby competition and the failing economy. The trial court stated, "that's just one thing that . . . kind of struck me when making my decision." The trial court entered detailed findings of fact, which we have discussed at length above. There is no indication that the trial court did not carefully consider the testimony presented in issuing its judgment against appellants.

Appellants have failed to show that the trial court's statements denied them a fair trial or due process of law. We overrule appellants' ninth issue.

IV. CONCLUSION

Because Comerica failed to properly segregate its attorney's fees and the record does support an award of attorney's fees in the amount of $99,379, we reverse the trial court's judgment as to the attorney's fees award and remand the case to the trial court for a new trial on attorney's fees consistent with this opinion. We otherwise affirm the judgment of the trial court.

/Bill Pedersen, III//
BILL PEDERSEN, III
JUSTICE

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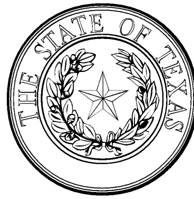
Honorable J. Smith, Concurring and Dissenting



Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

TEXAS CHAMPPS AMERICANA, INC., JILA DEVELOPMENT, LLC D/B/A SAL'S MART, HAMID AZARI, SHEILA T. INGRAM, LLC, Appellants

No. 05-20-00461-CV V.

COMERICA BANK, A TEXAS BANKING ASSOCIATION, Appellee

On Appeal from the 193rd Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-16-08857.
Opinion delivered by Justice Pedersen, III. Justices Goldstein and Smith participating—Justice Smith concurring in part and dissenting in part.

In accordance with this Court's opinion of this date, the judgment of the trial court is **PARTIALLY AFFIRMED**. We **REVERSE** the trial court's judgment as to the attorney's fees award and **REMAND** the case to the trial court for a new trial on attorney's fees consistent with this opinion. We otherwise **AFFIRM** the judgment of the trial court.

It is **ORDERED** that appellee COMERICA BANK, A TEXAS BANKING ASSOCIATION recover its costs of this appeal from appellants TEXAS CHAMPPS AMERICANA, INC., JILA DEVELOPMENT, LLC D/B/A SAL'S MART, HAMID AZARI, SHEILA T. INGRAM, LLC.

Judgment entered this 29th day of March, 2022.