

Opinion issued October 29, 2009



In The  
**Court of Appeals**  
For The  
**First District of Texas**

---

NO. 01-07-01004-CV

---

**LEE-WAY PRINCE ENTERPRISES, LLC, Appellant**

**V.**

**QAI ASSURANCE, INC. and ARTHUR KWOK, Appellees**

---

---

**On Appeal from the 269th District Court  
Harris County, Texas  
Trial Court Cause No. 2006-00092**

---

---

**MEMORANDUM OPINION**

In July 2000, Lee-Way Prince Enterprises, LLC (Prince) purchased property located at 9111 Katy Freeway (the property) from QAI Assurance, Inc. and Arthur

Kwok (collectively, QAI). Under their agreement, QAI continued to manage the property until its sale to a third party in February 2004. Before the sale, the parties met to adjust the amounts paid and owed between them, which QAI recorded in a document entitled “Cash Flow for 9111 Katy Freeway Building” (cash flow statement).

After the sale, a dispute arose between QAI and Prince. Prince sued QAI for breach of contract, fraud, promissory estoppel, negligence, and conversion based on QAI’s alleged conduct during the management period. QAI countersued for promissory estoppel, contending that Prince had agreed that the cash flow statement contained the final accounting and settlement between the parties concerning the property. QAI also sought a declaration that the cash flow statement was a valid and enforceable settlement agreement.

After a bench trial, the trial court entered a take-nothing judgment on Prince’s claims, and awarded QAI damages and attorney’s fees. Prince appeals these rulings.

Prince contends that the trial court erred in awarding QAI its attorney’s fees because Texas law does not authorize an award of fees based on a promissory estoppel claim, and because the amount of fees awarded is unreasonable.<sup>1</sup> In

---

<sup>1</sup> In its appellate briefing, Prince also challenged the enforceability of the cash flow statement under the statute of frauds, but conceded this issue at oral argument. We note that Prince did not raise the statute of frauds as an affirmative defense in the

addition, Prince complains that the trial court should have dismissed QAI's counterclaim as improperly filed. With respect to its own claims, Prince contends that the trial court erred in rejecting its fraud claim. We conclude that sufficient evidence supports the trial court's findings and that it awarded attorney's fees pursuant to an enforceable agreement. We therefore affirm.

### **BACKGROUND**

In 2000, QAI transferred the property to Prince. In exchange for the deed of trust, Prince paid \$250,000 to QAI and executed a purchase money promissory note payable to QAI in the original principal amount of \$695,500.00 plus interest. The promissory note obligated Prince to make a monthly payment of \$5,975.41, plus "a sum equal to 1/12 of the annual amounts as reasonably estimated by payee of taxes and premiums for insurance on the property." The deed of trust provided:

If grantor fails to perform any of grantor's obligations under the note and/or deed of trust described above, beneficiary may perform those obligations, advance funds required, and then be reimbursed by grantor on demand for any sum so advanced, including attorney fees, plus interest on those sums, from the dates of payment at the highest legal rate. The sums to be reimbursed shall be secured by this deed of trust.

Arthur Kwok, QAI's principal, testified that QAI had agreed to make Lee-Way's monthly note payment from the revenues, but only when enough was left in

---

trial court, nor was the issue tried by consent. *See* TEX. R. CIV. P. 67, 92, 94; *Double Ace, Inc. v. Pope*, 190 S.W.3d 18, 28 (Tex. App.—Amarillo 2005, no pet.); *Karbalai v. Solhjoui*, No. 01-01-00371-CV, 2003 WL 1848448, at \*4 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

the account after payment of the underlying note and the operating expenses. Usually, Kwok explained, the revenues fell short of the monthly amount due on the note. Prince also admitted that it did not make the regular monthly rent payment due for the office space in the property.

When QAI transferred the property to Prince, QAI also agreed to manage the property in exchange for a fee of four percent of the gross collected monthly rental income. The parties did not put this agreement in writing. QAI paid the monthly operating expenses out of a checking account it maintained for that purpose, which QAI opened with its own funds. Prince did not advance any funds for building operations. QAI provided Prince with building management expense and revenue reports approximately every six months. In January 2004, Prince demanded access to QAI's management records in anticipation of a sale of the property in late February 2004. QAI made the records available for Prince to review.

Shortly before the sale, QAI prepared the cash flow statement, in which it itemized the amounts Prince owed for operating expenses, management fees, and principal, penalties, and penalty interest on the note. Kwok testified that QAI waived administrative expenses and default charges in the cash flow statement as part of the agreement between QAI and Prince to settle their disputes arising out of their business relationship.

The bottom of the cash flow statement contains the handwritten word

“Agreed”, followed by the date (February 20, 2004) and the signatures of Prince’s principal, Wayman Prince, and Arthur Kwok. At the closing, which took place five days after the parties signed the cash flow statement, Prince received payment of close to \$299,000, nearly \$49,000 more than his initial investment in the property.

In a letter dated June 3, 2005, Prince notified QAI that it had retained a certified public accountant to perform an independent audit of QAI’s reported management expenses.<sup>2</sup> After outlining perceived discrepancies concerning the amount expended on certain items, Prince made a formal demand that QAI pay \$41,970.25. Prince further informed QAI that it was auditing the rental income for the property and would send the results of that audit to QAI when completed. On June 23, 2005, Prince sent another letter to QAI informing it that the rental income audit revealed additional amounts owed to Prince, and increased its formal demand to a total of \$286,968.12.

After a bench trial on Prince’s various claims and QAI’s promissory estoppel counterclaim, the trial court entered a take-nothing judgment on Prince’s claims and awarded QAI \$31,236.04 in damages plus \$154,976.28 in attorney’s fees, including appellate attorney’s fees conditioned on QAI’s success on appeal.

The trial court made findings of fact and conclusions of law, in which it

---

<sup>2</sup> Prince admitted to the trial court that it had not retained a CPA to perform the audit, but rather, Wayman Prince performed the audit himself.

found that Prince promised QAI that he accepted and agreed to the amounts reflected on the cash flow statement as the final accounting and settlement between the parties concerning the property. Similarly, it found that QAI accepted and agreed to a final settlement payment of \$835,676.03, the amount reflected on the statement.

## DISCUSSION

### *Standard of review*

Prince challenges the trial court's findings of fact concerning its own common-law fraud claim as well as the trial court's legal conclusions concerning QAI's counterclaims. "In an appeal from a bench trial, a trial court's findings of fact have the same weight as a jury's verdict." *HTS Servs., Inc. v. Hallwood Realty Partners, L.P.*, 190 S.W.3d 108, 111 (Tex. App.—Houston [1st Dist.] 2005, no pet.); *Lee v. Lee*, 981 S.W.2d 903, 905 (Tex. App.—Houston [1st Dist.] 1998, pet. denied). Thus, when an appellant challenges the trial court's findings of fact, we review the sufficiency of the evidence supporting the findings by applying the same standards that we use in reviewing the legal or factual sufficiency of the evidence supporting jury findings. *Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994).

A legal sufficiency evidentiary challenge on an issue on which an appellant bears the burden of proof requires the appellant to demonstrate that the evidence

conclusively established all vital facts to support the issue. *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989); *Solares v. Solares*, 232 S.W.3d 873, 878–79 (Tex. App.—Dallas 2007, no pet.). Evidence is conclusive “only if reasonable people could not differ in their conclusions, a matter that depends on the facts of each case.” *City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005).

When a party is challenging the factual sufficiency of a finding regarding an issue upon which that party had the burden of proof, that party must demonstrate that the adverse finding is against the great weight and preponderance of the evidence. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001). The trial court, as fact finder, is the sole judge of the credibility of the witnesses. *HTS Servs.*, 190 S.W.3d at 111; *see also City of Keller*, 168 S.W.3d at 819. Consequently, we may not displace a finding simply because we would reach a different answer on the evidence. *See Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 407 (Tex. 1998).

We review de novo a trial court’s conclusions of law, and uphold them on appeal if the judgment can be sustained on any legal theory supported by the evidence. *BMC Software Belgium v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002); *In re Moers*, 104 S.W.3d 609, 611 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

### ***Attorney’s fees challenge***

#### *Basis for fee award*

Prince contends that the trial court erred in awarding QAI its attorney's fees because Texas law does not allow an award of attorney's fees based on a claim of promissory estoppel. Prince recognizes that Texas courts currently are split on this issue. Compare *Doctors Hosp. 1997, L.P. v. Sambuca Houston, L.P.*, 154 S.W.3d 634, 635–38 (Tex. App.—Houston [14th Dist.] 2004, pet. abated) (holding that attorney's fees are not recoverable under Tex. Civ. Prac. & Rem. Code § 38.001(8) for promissory estoppel claim because such claims presuppose no “oral or written contract”) (quoting *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 226 (Tex. 2002) (“promissory estoppel doctrine presumes no contract exists”)) with *Preload Tech., Inc. v. A.B. & J. Constr. Co.*, 696 F.2d 1080, 1094–95 (5th Cir. 1983) (upholding attorney's fees awarded under Texas law for promissory estoppel claim); *Traco, Inc. v. Arrow Glass Co.*, 814 S.W.2d 186, 194–95 (Tex. App.—San Antonio 1991, writ denied); *Safe Env't v. Pelzel & Assocs., Inc.*, No. 03-09-00721-CV, 1999 WL 815819, at \*31999 Tex. App. LEXIS 7628 (Tex. App.—Austin 1999, no pet.) (mem. op.).

Our precedent on this issue is contrary to the Fourteenth Court of Appeals' decision in *Sambuca*. See *Adams v. Petrade Int'l*, 754 S.W.2d 696, 720 (Tex. App.—Houston [1st Dist.] 1988, writ denied). Nevertheless, we need not reconsider our position, because the trial court's judgment does not specify the theory under which fees were awarded, and the trial court's findings of fact and



conclusions of law provide a contractual basis for the attorney's fee award.

Specifically, the trial court found that

23. On February 20, 2004, plaintiff and defendants agreed to resolve their disputes by applying a credit from QAI in favor of plaintiff in the amount of \$31,236.04 as reflected in the Cash Flow Statement rather than escrowing the sales proceed from Houston PARS properties at closing.
24. On February 20, 2004, plaintiff and defendants executed the Cash Flow Statement . . . that identified the agreed upon income, expense and management fee figures for the Property during the Management Period.
25. The Cash Flow Statement also identified the agreed upon principal balance plaintiff owed QAI on the Note as of February 20, 2004.
26. The Cash Flow Statement also identified the agreed upon default interest, penalties and penalty interest that had accrued under the Note as of February 20, 2004.

The trial court concluded that

41. By executing the Cash Flow Statement as "agreed," plaintiff promised that it would accept \$31,236.04 to resolve plaintiff's disputes with defendants concerning all matters between the parties with respect to the property including amounts owed by plaintiff to defendants under the Note.

.....

44. Plaintiff failed to abide by its promise that plaintiff would accept \$31,236.04 to resolve plaintiff's disputes with defendants concerning all matters between the parties with respect to the Property including amounts owed by plaintiff to defendants under the Note caused defendants to suffer damages in the amount of \$41,236.04 plus reasonable attorney's fees and expenses.
45. Defendants incurred reasonable attorney's fees and expenses in

the amount of \$154,976.28 as a result of plaintiff's failure to abide by its promise that plaintiff would accept \$31,236.04 to resolve plaintiff's disputes with defendants concerning all matters between the parties with respect to the Property including amounts owed by plaintiff to defendants under the Note.

In its counterclaim, QAI sought its attorney's fees as relief. The trial court's findings of fact and conclusions of law support an award of attorney's fees under the Civil Practice and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 38.001(8) (Vernon 2008) (allowing for recovery of reasonable attorney's fees on claim for oral or written contract). The findings identify an agreement among the parties; Prince's breach of that agreement; and damages incurred by QAI resulting from that breach. The issue of whether the cash flow statement was a settlement agreement, the breach of which would support an award of attorney's fees, was tried by consent. *See* TEX. R. CIV. P. 67. Prince does not challenge any of the trial court's findings of fact and conclusions of law. We conclude that the fee award does not rest on a promissory estoppel theory. We hold that the applicable statutory authority and the evidence support the trial court's award of attorney's fees.

#### *Excessiveness*

Prince also challenges the attorney's fees award as "exorbitant" and "extraordinarily excessive." This challenge, however, is conclusory. Prince fails to cite any authority in support of its contention and does not identify as error any

specific trial court finding in support of the attorney's fees award. We therefore hold that Prince has waived this issue due to inadequate briefing. *See* TEX. R. APP. P. 38.1(i).

***Sufficiency of evidence in support of common-law fraud claim***

Prince next contends that the trial court erred in rejecting its fraud claim because Prince justifiably relied on the material misrepresentations contained in the cash flow statement, and QAI knew that the statement was false and intended for Prince to rely on it. We construe Prince's contention as one of factual sufficiency, *i.e.*, that the trial court's dismissal of his common-law fraud claim is against the great weight and preponderance of the evidence.

To prevail on a fraud claim, a plaintiff must prove that (1) the defendant made a material representation that was false; (2) the defendant knew the representation was false or made it recklessly as a positive assertion without any knowledge of its truth; (3) the defendant intended to induce the plaintiff to act upon the representation; and (4) the plaintiff actually and justifiably relied on the representation, which caused injury. *Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co.*, 51 S.W.3d 573, 577 (Tex. 2001); *Hartford Fire Ins. Co. v. C. Springs 300, Ltd.*, 287 S.W.3d 771, 781 (Tex. App.—Houston [1st Dist.] 2009, pet. denied).

Prince attacks the figures contained in the cash flow statement as inaccurate and false, and quotes verbatim from his testimony concerning the calculations of

mortgage loan interest, penalty, and penalty interest listed in the statement. The trial court found that QAI did not make a material, false representation to Prince with respect to any of these categories. The record reveals that the trial court made those findings by crediting the testimony of Arthur Kwok over the conflicting testimony of Wayman Prince. We may not disturb the trial court's credibility determinations. *See City of Keller*, 168 S.W.3d at 819; *HTS Servs.*, 190 S.W.3d at 111. As a result, we hold that factually sufficient evidence supports the trial court's take-nothing judgment on Prince's common-law fraud claim.

### **CONCLUSION**

We conclude that Texas law and the evidence support the trial court's award of attorney's fees to QAI. We further conclude that the evidence is factually sufficient to support the trial court's rejection of Prince's common-law fraud claim. We therefore affirm the judgment of the trial court.

Jane Bland  
Justice

Panel consists of Chief Justice Radack and Justices Bland and Massengale.