Opinion issued November 18, 2010.

In The

Court of Appeals

For The

First District of Texas

NO. 01-08-00918-CV

RASA FLOORS, L.P., Appellant

V.

SPRING VILLAGE PARTNERS, LTD., Appellee

On Appeal from the County Civil Court at Law No. 1
Harris County, Texas
Trial Court Case No. 908373

MEMORANDUM OPINION

As part of a renovation project, an apartment complex owner hired a contractor to install new wood and tile floors in apartment units. When the owner failed to pay the contractor's invoices for the floor installations, the contractor sued

on a sworn account, and alternatively for breach of contract or recovery in quantum meruit. The apartment owner countersued for breach of contract, breach of warranty, and fraud.

A jury found neither party liable under a contract. It awarded no damages under the owner's fraud claim. But it awarded $5,000 in damages to the apartment owner for breach of warranty and $29,000 to the contractor under its quantum meruit claim. The trial court disregarded the jury's quantum meruit finding, and refused to offset it against the warranty damages, which would have resulted in a judgment for the contractor. The trial court entered judgment on the verdict to the apartment owner for the $5,000 for breach of warranty, but refused to award it attorney's fees.

The contractor appeals, claiming that it should have judgment on its pleading for a sworn account, and that the breach of warranty finding is not supported by legally sufficient evidence. Alternatively, it claims that it should recover its quantum meruit damages, offset by the jury's breach of warranty damage finding should we find it legally sufficient, plus its attorney's fees. The apartment owner also appeals, requesting that it be awarded its attorney's fees on its breach of warranty claim.

We conclude that the contractor is not entitled to judgment on its sworn account pleadings and that legally sufficient evidence supports the jury's finding

for breach of warranty. We further conclude that the trial court erred in disregarding the jury's finding in quantum meruit, and that the contractor was entitled to judgment on that finding, offset by the warranty damages. We affirm in part, reverse in part, and remand the case to the trial court for entry of a new judgment and for reconsideration of attorney's fees in light of our rulings.

BACKGROUND

Spring Village Partners, Ltd. owns an apartment complex on Chimney Rock in the southwest area of Houston. The complex had fallen into disrepair, and Spring Village hired Rasa Floors, L.P. to assist in apartment renovations by replacing the existing flooring in some of the apartments with vinyl plank flooring. Rasa installs flooring exclusively in apartment complexes, has operations throughout the state, and installs flooring in about three to five thousand apartment units each month. Joe Slaughter, Rasa's principal, bid $1.50 per square foot to install the flooring.

Upon completion of the work, Rasa presented invoices to Cecilia Lascu, a principal of Spring Village. She reviewed the invoices and found them to be excessive in light of the size of the job. For example, Rasa charged $1900 for a 500-square-foot apartment, $400 more than the bid price. Concerned about the bills, she asked a maintenance worker to measure the apartment square footage. His measurements confirmed to her that the invoices averaged about 30% more

than the $1.50 per square foot that Slaughter bid for the project. She testified that a similar issue arose from Rasa's installation of carpet at the apartments, but when she pointed out the discrepancy, Rasa issued new invoices for the correct amount. Spring Village's apartment manager at the time also testified that she signed work orders for particular apartments, but those orders never included a bid price. She also attended the meeting during which Slaughter and Lascu agreed on a price and remembered it to be $1.50 per square foot, installed.

In contrast, Rasa argued at trial that it faxed a written bid to the property before it installed the flooring that reflected the invoiced prices. It pointed out that it charges additional fees often associated with a flooring project, for services like removing old flooring, cutting around bath fixtures, preparing the floor, and moving appliances. Michael Rasa, the president and chief executive of Rasa, testified that these fees are in addition to the square footage installation price, and that no flooring company could make a profit based on a quote of $1.50 per square foot if the quote included these other services at no charge. In addition, each job results in a certain percentage of "waste plank" that factors into the square footage calculation. It is customary in the industry to include the waste plank in the square footage numbers.

Joe Slaughter, the Rasa sales representative that sold the flooring to Spring Village testified that he never offered to sell the planking for $1.50 per square foot,

installed. Instead, he offered to measure the units and submit a written formal bid proposal. He also took issue with the measurements provided by Lascu for the apartments in question, pointing out errors in calculating square footage, or areas that should have been included in the Spring Village version of the measurements but were not.

Lascu believed the written bids were in error and introduced cell phone records that demonstrated her efforts to contact Rasa in an attempt to rectify the error. Rasa proceeded with the installation without a signed authorization on the written bid.

Lascu also complained that Rasa did a shoddy job installing the vinyl planking. It did not "finish" the plank ends that butted against the walls, and it damaged the apartments in the installation process. She hired another contractor to repair the damage, whom she paid $1,650. In a letter to Rasa, she demanded that it provide supporting documentation for its invoices, and notified it of the problems with the flooring. After efforts to settle the account failed, Rasa placed a lien on the property and filed suit.

After a two day trial, the jury found that the parties had an agreement to install floors and that Spring Village would pay the price quoted in the bids. The jury found that both parties failed to comply with the agreement, but that their failure to comply with the agreement was excused. Because the trial court

predicated damages for breach of contract on compliance with the agreement, the jury awarded no damages to either party for breach of contract. In a separate set of questions, it found that Rasa had failed to comply with a warranty based on (1) an express warranty, (2) a warranty of suitability of the flooring materials, or (3) failing to perform services in a workmanlike manner. The jury awarded Spring Village $5,000 in damages for this breach. With respect to Rasa's claim for quantum meruit, the jury found that Rasa performed compensable work at a reasonable value of $30,000.

The trial court rendered judgment on the jury's verdict for Spring Villages's warranty claim, but did not award attorney's fees. It disregarded the jury findings favoring Rasa's quantum meruit claim. It discharged a statutory mechanic's lien that Rasa had placed in the real property records against the apartment complex property. Both parties appeal the judgment.

DISCUSSION

Sworn Account

Part of the dispute on appeal concerns the pleadings. Rasa sued on a sworn account, and attached a sworn statement of account for the services it rendered. The account balance reflects that Spring Village owes Rasa $50,093. In its amended answer and counterclaim, Spring Village denied that it owes the charges, and included a verfication from Lascu. She verified the answer and counterclaim

with the following recital: "I have personal knowledge of the facts contained in Plaintiff/Counter-Defendant's Answer and Verified Denials and each fact is true and correct." The verification is signed, and coupled on the following page with an acknowledgment that "the person whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her authorized capacity and that by her signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument." The acknowledgment is notarized by a Los Angeles County notary. Though her signature verifies the answer and is notarized, Lascu does not swear to the truth of the answer under penalty of perjury.

Rasa contends that we should reverse the judgment and render judgment on the pleadings in its favor for $39,492.25, plus attorney's fees, because Spring Village never properly denied Rasa's request for judgment on a sworn account. It contends that Lascu's verification does not comply with Texas Rule of Civil Procedure 185 because a notary did not attest to it. We disagree. The acknowledgment plainly refers to the verification signature in the incorporated document of nine pages.

Spring Village further contends that the verification is inadequate because it is not under oath; that is, Lascu's signature is acknowledged, but she does not swear to the truth of the answer. We agree, but conclude that this defect does not

warrant reversal because the status of the sworn account was tried to the jury by consent.

Rasa did not object to the submission of the breach of contract question to the jury, which asked:

> Did Rasa Floors, L.P. and Spring Village Partners, Ltd. agree that Rasa Floors, L.P. would provide and install carpet and planking to Spring Village Partners, Ltd. as requested from time to time by Spring Village Partners, Ltd. and for which Spring Village Partners, Ltd. would pay the prices therefore as quoted in its written bids to Spring Village?

Nor did Rasa object to the submission that asked whether Spring Village had failed to comply with the agreement.

Although Rasa raised the issue of the defective answer to the sworn account in pre-trial filings and in its post-verdict motions, it did not object on that basis in its motion for directed verdict, nor to the submission of the issue of Spring Village's failure to pay on the contract to the jury. By calling its director of credit and accounts receivable as a witness, Rasa affirmatively adduced evidence at trial about the status of Spring Village's account, including the account balances over time and the amount outstanding owed to it. It thereby tried the issue by consent. *See S.W. Resolution Corp. v. Watson*, 964 S.W.2d 262, 264 (Tex. 1997) (holding that issue may be tried by consent where there is both failure to object to testimony and failure to object to submission to jury); *LaStrada-San Felipe, Ltd. v. ATW*

Plumbing Serv., Inc, No. 01-03-00547-CV, 2004 WL 1277580, at *6 (Tex. App.—Houston [1st Dist.] June 10, 2004, no pet.) (memo op., notdesignated for publication) (holding that "even if there were a pleading defect," defensive issue was tried by consent); *Kahn v. Carlson*, No. 05-98-01415-CV, 2001 WL 428710, *2 (Tex. App.—Dallas Apr. 27, 2001, no pet.) (not designated for publication) ("[W]hile we acknowledge that [defendant] should have filed a verified denial, we conclude the breach of contract issue was tried by consent and without objection."). Having tried the issue to the jury, Rasa may not seek judgment on the pleadings on appeal. We hold that Rasa has not shown that it is entitled to judgment on its sworn account pleadings.

Breach of Warranty

Lascu testified that Slaughter offered her Rasa's lifetime warranty on the product and installation of the plank. Slaughter disagreed, testifying that Rasa offers a lifetime warranty on carpet installation, but only a thirteen month warranty on the plank, and that, in any event, he and Lascu never had a conversation about warranties. The thirteen month warranty was in effect at the time of trial, but Slaughter noted that Lascu would have to pay the invoices for that warranty to be effective. Rasa contends that the evidence is legally and factually insufficient to uphold the jury's verdict for breach of warranty because Lascu's testimony about a

warranty lacks detail and because Lascu did not rely on any warranty in deciding to purchase the flooring from Rasa.

In reviewing the legal sufficiency of the evidence, we view the evidence in the light most favorable to the verdict, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *See City of Keller v. Wilson*, 168 S.W.3d 802, 807 (Tex. 2005). The evidence is legally insufficient when there is a complete absence of evidence of a vital fact or the evidence offered to prove a vital fact is no more than a mere scintilla. *Id.* at 810. More than a scintilla of evidence exists if the evidence supporting the finding, as a whole, "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997) (quoting *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499 (Tex. 1995)).

The parties offered photographs of the installed planking that revealed defects in some places. In addition, a representative from Reader's Wholesale inspected the apartments approximately nine months after its installation. He testified that the planking had been installed in a good and workmanlike manner. But, in certain units, he acknowledged a few gaps at the ends of some flooring and some "lifting" of the planking, where it no longer adhered to the floor. He attributed this to moisture intrusion. He admitted that the floor adhesive was

ordinarily designed to last 5 years, when properly installed. Rasa's own representative, Slaughter, acknowledged that the flooring carried with it a minimum of a thirteen month warranty. In addition, Lascu testified that she believed that Rasa would properly install the floors, and that she withheld payment for Rasa's work due to problems with the installation. We hold that such evidence is legally and factually sufficient to support a claim for breach of warranty. *See Emerson Elec. v. Am. Permanent Ware*, 201 S.W.3d 301, 312 (Tex.App.—Dallas 2006, no pet.) (holding that, though disputed, testimony about request for one year warranty supported jury's finding that installer of heating element provided such warranty).

Rasa also complains that the trial court's instruction to the jury for breach of warranty was defective because it included the implied warranties for a particular purpose and for performing services in a good and workmanlike manner. The trial court also submitted a claim for breach of express warranty, but Rasa does not complain about it on appeal. Rasa concedes on appeal that the evidence at trial supports the submission of each of these types of warranty claims, but objects to the jury instructions because it contends that Spring Village never pleaded claims for breach of any implied warranty.

Texas follows a "fair notice" standard for pleading. *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 896 (Tex. 2000); TEX. R. CIV. P. 47(a)

(a pleading "shall contain ... a short statement of the cause of action sufficient to give fair notice of the claim involved..."). The "fair notice" requirement of Texas pleading relieves the pleader of the burden of pleading evidentiary matters with meticulous particularity. *Bowen v. Robinson*, 227 S.W.3d 86, 91 (Tex.App.—Houston [1st Dist.] 2006, pet. denied). In determining whether a pleading is adequate, we examine whether an opposing attorney of reasonable competence, on review of the pleadings, can ascertain the nature and the basic issues of the controversy and the testimony probably relevant. *Id*. The notice pleading standard serves to give the opposing party information sufficient to enable him to prepare a defense. *Roark v. Allen*, 633 S.W.2d 804, 810 (Tex. 1982).

In its amended petition, Spring Village alleged: "Rasa represented to Spring Village that its work was accompanied by a life-time warranty. There were numerous defects in the material and workmanship provided by Rasa. Spring Village made a valid warranty claim to Rasa. Rasa's refusal to perform the warranty work constitutes a breach of warranty." In the factual background section, incorporated by reference in the breach of warranty claim, Spring Village further noted that "Rasa did not install the promised vinyl plank but used a differently material and/or different color of material." We hold that the reference to defective materials and workmanship, as well as the reference to unsuitable materials, sufficiently notified Rasa that Spring Village was complaining about the

implied warranties of fitness for a particular purpose and of good workmanship. Because the pleading sufficiently notified Rasa of these theories, and the evidence supports their submission, we hold that the trial court did not abuse its discretion by submitting these implied warranties, together with the express warranty, for the jury's consideration.

Quantum Meruit and Offset

The charge asked the jury to decide the reasonable value of the flooring work Rasa did for Spring Village under a quantum meruit theory. The jury awarded $30,000. In its motion for judgment, Rasa requested that the trial court render a judgment for $30,000, less the $5,000 awarded to Spring Village for breach of warranty. No party objected to the submission of the quantum meruit issue, nor argued that the jury's answers were fatally conflicting. The trial court disregarded the jury findings favoring Rasa's quantum meruit claim and denied Rasa's motion for judgment.

Texas Rule of Civil Procedure 302 governs the entry of judgment when both parties are awarded damages, and a party seeking judgment has pleaded a right to offset. Rule 302 states: "If the defendant establishes a demand against the plaintiff upon a counterclaim exceeding that established against him by the plaintiff, the court shall render judgment for the defendant for such excess." Here, Spring Village and Rasa asserted claims against each other. Each established that the

other owed it damages. The amount of Rasa's damages exceeded the amount of Spring Village's damages found by the jury. The trial court thus should have offset the damages findings and awarded the net amount in judgment to Rasa. We hold that the trial court erred in disregarding Rasa's motion for judgment and request for offset. The proper judgment on the jury verdict, net of offset, is $25,000 to Rasa in actual damages.

Spring Village responds that Rasa is not entitled to judgment on its quantum meruit claim because the jury found a valid contract and refused to award damags under that contract. Thus, Spring Village argues, Rasa's quantum meruit claim is barred by the jury's findings on the breach of contract claim. It further contends that equity bars Rasa's claim because the jury found that Rasa committed fraud against Spring Village, though it awarded no damages. We disagree with both contentions.

Spring Villages's first argument is unavailing because it accepted services and materials from Rasa, and thus Rasa was not barred from seeking a quantum meruit recovery in the alternative to its breach of contract claim. As a general rule, a party seeking to recover the equivalent value of services and materials provided to another can recover in quantum meruit only if there is no express contract for those services and materials. *Murray v. Crest Constr., Inc.*, 900 S.W.2d 342, 345 (Tex. 1995); *Truly v. Austin*, 744 S.W.2d 934, 936 (Tex. 1988). An exception

exists in construction cases, however, which permits a breaching plaintiff to recover in quantum meruit for the value of services and materials rendered, less any damage suffered by the defendant. *Murray*, 900 S.W.2d at 345; *Truly*, 744 S.W.2d at 937; *Chilton Ins. Co. v. Pate & Pate Enters., Inc.*, 930 S.W.2d 877, 889 (Tex. App.—San Antonio 1996, writ denied). The key to the right to recover in such cases is the acceptance, use, and enjoyment of the benefits conferred. *Truly*, 744 S.W.2d at 937; *Chilton*, 930 S.W.2d at 889. Here, the jury awarded Rasa the fair value of the work it performed. When offset by the damages Spring Village sustained due to Rasa's breach of warranty, we hold that Rasa is entitled to a quantum meruit recovery as an alternative to a contract recovery. *See Murray*, 900 S.W.2d at 345; *Chilton*, 930 S.W.2d at 889.

As to the latter argument, the jury's refusal to award damages for any misrepresentation, together with its award in favor of Rasa on its quantum meruit claim, undercuts Spring Village's equity argument. Spring Village points to no specific inequitable conduct, and it acknowledged at trial that it received a good bit of flooring work and never made payment on it. Although the jury concluded that some of this work was not compensable work, and that Spring Village was entitled to compensation for necessary warranty repairs, it also concluded that Rasa should be compensated for the work it performed. We decline to disturb the jury's verdict on the basis of equity on this record.

Attorney's Fees

Rasa contends that it is entitled to attorney's fees on its quantum meruit claim because it is the prevailing party, even after considering the offsetting award to Spring Village. Attorney's fees are recoverable in a cause of action for quantum meruit. TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (Vernon 2008). We remand the case to the trial court to consider the reasonable and necessary fees, given the recovery in the case.

Cross-Appeal

Spring Village cross-appeals the trial court's judgment. It contends that it was entitled to its attorney's fees for its breach of warranty claim. And, as the parties stipulated to attorney's fees in the amount of $24,211.11, Spring Village should recover that amount plus the $5,000 that the jury awarded to it on its breach of warranty claim, plus interest and costs of court.

The trial court correctly declined to award attorney's fees to Spring Village. It is not the prevailing party because the amount of loss resulting from Rasa's breach of warranty is exceeded by the amount the jury found that Spring Village owes Rasa on its quantum meruit claim, an amount that Spring Village does not contest on appeal. We hold that the trial court did not err in denying Spring Village's request for attorney's fees. *See Green Int'l, Inc. v. Solis*, 951 S.W.2d

384, 390 (Tex. 1997) (holding that to recover attorney's fees under Chapter 38 of Civil Practice and Remedies Code, one must recover actual damages).

CONCLUSION

We conclude that Rasa is not entitled to judgment on its sworn account pleadings because it tried by consent the issue of the amount owed. We conclude that legally and factually sufficient evidence supports the jury's verdict for breach of warranty, and that the amount the jury awarded in damages is not against the great weight and preponderance of the evidence. We therefore affirm the judgment to the extent it agrees with the jury's verdict on Spring Village's breach of warranty claim.

We conclude that Rasa's quantum meruit award is not barred by its failure to secure damages for breach of contract or by equity, and conclude that Rasa is entitled to judgment on its offsetting quantum meruit award, as its award exceeds Spring Village's award. We therefore reverse the judgment to the extent it disregards the jury's quantum meruit award in favor of Rasa and fails to offset that award against the damages finding in favor of Spring Village.

Finally, given this changed outcome, we conclude that Rasa is entitled to an award of reasonable and necessary attorney's fees. We therefore remand the case to the trial court to enter a new judgment in light of our rulings and to consider

Rasa's request for reasonable and necessary attorney's fees, together with interest and costs of court.

Jane Bland
Justice

Panel consists of Justices Higley, Bland, and Massengale.