Opinion issued March 17, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00276-CV

ST. PAUL MERCURY INSURANCE COMPANY, JOE TURNER, AND ALLIANCE CONSTRUCTION, INC., Appellants

V.

STEWART BUILDERS, LTD. D/B/A/ KEYSTONE SITEWORK AND D/B/A KEYSTONE CONCRETE, Appellee

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On Appeal from the 151st District Court
Harris County, Texas
Trial Court Case No. 2003-53202

MEMORANDUM OPINION

This appeal arises from a jury verdict in favor of a subcontractor in its construction contract claims against the general contractor. The general contractor,

Alliance Construction, Inc., and its CEO, Joe Turner,[1] appeal a judgment in favor of the subcontractor, Stewart Builders, Ltd. After a jury trial, the trial court rendered judgment for $737,315 for the unpaid portion of Stewart's bills, $498,142.13 in statutory 18% post-judgment interest, pre-judgment interest, $350,000 in attorneys' fees for trial, contingent attorneys' fees for appeal, and costs.

Turner and Alliance bring 16 issues attacking four aspects of the trial court's judgment: the sufficiency of the evidence to support a claim that Turner misapplied funds paid by the owner and held in trust for Stewart's benefit under the Texas Property Code; the submission of questions concerning, and the sufficiency of the evidence to support, Stewart's claim that Alliance breached the construction contracts by withholding final payment; the submission of questions concerning, and the sufficiency of the evidence to support, Stewart's claim that it substantially performed its contract obligations; and the award of interest and attorneys' fees. We conclude that the evidence is insufficient to support the claim for misapplication of trust funds, but sufficient to support the breach of contract claim. Because of our resolution of these issues, we do not reach the issues concerning substantial performance. We also conclude that the evidence is insufficient to support the award of 18% statutory post-judgment interest against Turner. Finally,

[1] St. Paul Mercury Insurance Company also appealed but later dismissed its appeal.

we conclude the issue of attorneys' fees should be remanded. We affirm in part, reverse and render in part, and remand for further proceedings not inconsistent with this opinion.

Background

Alliance is a commercial construction company that has built a number of different types of buildings and facilities. Alliance was hired by G.E. Packaged Power, L.P. ("GE") to design and build its Jacintoport Facility Expansions, including parking lots. Alliance as the general contractor entered into two separate contracts with Stewart as a subcontractor on September 12, 2002. Stewart is a construction company that, among other things, performs concrete work and site work, such as constructing parking lots. In the first contract, which the parties call the Concrete Subcontract, Alliance contracted with Stewart to complete all concrete work for the project. Stewart completed this work in October 2002, without any problems or complaints.

In the second contract, Alliance hired Stewart to complete site work, including the construction of two parking lots. The Site Work Subcontract was signed on behalf of Alliance by Turner in his capacity as CEO of Alliance. This contract is the focus of the parties' dispute.

Alliance's contract with GE included an incentive clause for early completion of the construction project. Stewart performed its parking lot

construction in two phases: phase one was the back parking lot and phase two was the front parking lot. Stewart began preliminary work on the back parking lot in late August 2002 before the final specifications were finished or the contract was signed. Alliance's engineer, the Murillo Company, received approval from Alliance and GE for the parking lot specifications on October 3, 2002. The specifications called for 2 inches of asphalt atop 10 inches of crushed limestone base, over 8 inches of lime-stabilized subbase. The parties refer to these specifications as the "2/10/8 specifications."

Alliance, through Murillo, performed periodic testing of the compaction and density of the soil and the layers of the materials used in the construction of the parking lots. Stewart's manager of its site work division testified that its crews would not move forward to the next phase of construction until Murillo's technician approved the density test results.

Stewart completed construction of the back lot on November 11, 2002. On November 20, 2002, while Stewart was working on the front parking lot, the first problems were reported in the back lot. Asphalt cracked and the lot developed numerous potholes. According to Stewart's manager, potholes were "popping up in a unique frequency." Stewart first patched a pothole in "mid to late November" and thereafter repeatedly returned to the back lot to repair or patch potholes as they appeared.

Stewart completed construction of the front lot on December 19, 2002. The front lot was first patched just two days later on December 21, 2002. Stewart patched the two lots approximately 36 times in about six weeks.

In early February 2003, Stewart and Alliance jointly engaged an independent third-party engineering company, Atser, to determine the cause of the continuing failures. Atser determined that the immediate cause of the failures was water damage. Stewart then hired Atser to determine the source of the water. In April 2003, over four months after the first failure in the back parking lot, the parties learned that another subcontractor had found and repaired a water supply line located under the parking lot that had been leaking for an unknown period of time.

GE withheld $1,142,300 from the payments specified in its contract with Alliance due to the problems with the parking lots. Alliance, in turn, did not make full payments to Stewart. Alliance had previously made some progress payments to Stewart, so only $468,802 remained to be paid to Stewart under the Site Work Subcontract and $268,513 under the Concrete Subcontract.[2] Relying on a cross-default provision in the Concrete Subcontract, Alliance withheld payments under that subcontract even though Stewart had satisfactorily performed under it.[3] Thus, a total of $737,315 was not paid to Stewart. Because GE had withheld $1,142,300,

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[2] The total amount of the Concrete Subcontract was $1,215,500. The total amount of the Site Work Subcontract was $908,937.

[3] Stewart does not contend that the cross-default provision was inapplicable. Its complaint was that it performed and was entitled to payment.

Alliance also did not pay other subcontractors, the quality of whose work was not in dispute.

Stewart filed suit for the unpaid amounts under the subcontracts. Stewart sued Alliance, Turner, and GE. Alliance filed a counterclaim against Stewart for breach of the Site Work Subcontract. After Stewart filed suit, Alliance settled with GE. The settlement allocated the $1,142,300 contract balance as follows:

- $422,950 for non-affected subcontractors and these amounts were paid directly to subcontractors using joint checks;
- $358,215 paid by G.E. to another company to repair the front parking lot;
- $261,135 withheld by G.E. to repair the back parking lot; and
- $100,000 withheld by G.E. for legal fees and other costs.

Turner testified that Alliance agreed to this arrangement in order to pay the subcontractors who were not involved in the parking lot dispute.

At trial the issue of whether Stewart complied with the specifications was contested. The parties presented competing expert witnesses and numerous fact witnesses. Donald Stewart, a co-owner and vice president of Stewart, acknowledged that a report from Murillo on November 19, after the back lot had been paved, stated that the back lot did not have the required 8 inches of lime-stabilized subbase. He claimed that Alliance knew the results of the report and waived compliance with this specification. Stewart's expert, Fred Martinez from

Atser, opined that the problems with the lots were caused by water leaks on the property. Martinez admitted, however, that sample measurements taken in the lots did not all meet the 2/10/8 specifications. For example, several of the test pits had an asphalt thickness of less than two inches and several pits had less than 10 inches of crushed limestone. Additionally, Atser did not test the depth of the lime-stabilized subbase. Alliance's expert, James Hanks Jr., testified that Stewart did not comply with the specifications for all three layers for both lots and attributed the failures of both parking lots in part to these deficiencies.

Alliance also contended that Stewart constructed the lots while the soil was wet. Stewart's site work manager said the heavy rain in October 2002 caused a month delay. He testified that when the site was wet, the crew could not perform much work other than efforts to help dry the site. Nevertheless, Alliance would not move Stewart's completion date from the end of December. Despite the time issues, Stewart's site work manager and operating foreman both stated that Murillo's density testing examined the wetness of the soil and the limestone base and that they did not work if the test results indicated the materials were too wet.

After hearing the evidence, the jury found that: Stewart substantially performed its obligations to Alliance under the Site Work Subcontract; Alliance failed to comply with its obligations to Stewart under provisions of the Site Work Subcontract; Turner misapplied trust funds from the Concrete and Site Work

Subcontracts; and Alliance did not act in good faith in withholding payment from Stewart. The jury question directed at Alliance's counterclaim for breach of contract was not reached because it was predicated on the jury finding that Stewart did not substantially perform the Site Work Subcontract. The jury found damages for Stewart in the amounts remaining under the Site Work Subcontract; it was not asked for damages for breach of the Concrete Subcontract. The jury also found that Stewart's work included defects that occurred before December 20, 2002, which was the day after Stewart finished the front lot.

Post-trial, the trial court entered a finding that stated

> The Court makes the following express finding, pursuant to Rule 279 of the Texas Rules of Civil Procedure. Such finding is made in support of, but prior to rendering, final judgment in this cause.
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> 1. The cost of remedying any deficiency in the construction of the parking lot to bring the lot from substantial to complete performance is zero.

The trial court did not, and was not asked to, make any finding under Rule 279 on whether Alliance breached the Concrete Subcontract or the amount of damages for breach of the Concrete Subcontract, and these issues were not submitted to the jury. The trial court then rendered judgment in favor of Stewart and against Turner and Alliance, jointly and severally, awarding Stewart the following damages: (1) $268,513, the unpaid balance of the Concrete Subcontract; (2) $468,802, the unpaid balance of the Site Work Subcontract; (3) $498,142.13 in statutory interest

for failure to pay Stewart promptly; (4) attorneys' fees through trial in the amount of $350,000; and (5) pre-judgment interest, costs, and contingent appellate attorneys' fees.

The jury answered three questions relating to the amount of Stewart's damages. Question 4 asked the amount of damages for Stewart's loss from "the misapplication of trust funds from the Concrete Subcontract," to which the jury answered $268,513. In response to Question 19, the jury found $468,802 for damages for "the misapplication of trust funds under the Site Work subcontract." In response to Question 11, the jury found $468,802 for Alliance's "failure to comply with the Site Work Subcontract." Each of these questions was conditioned on the jury's answers to various predicate questions. We will address each damages question and its predicates in turn.

Standard of Review

We review the trial court's submission of instructions and jury questions for an abuse of discretion. *Moss v. Waste Mgmt. of Tex., Inc.*, 305 S.W.3d 76, 81 (Tex. App.—Houston [1st Dist.] 2009, no pet.). A trial court abuses its discretion when it acts in an arbitrary or unreasonable manner, or if it acts without reference to any guiding rules or principles. *Id.* A trial court has wide discretion in submitting instructions and jury questions. *Id.*

This standard of review, however, may encompass another standard, depending on the nature of the complaint concerning the charge. *Block v. Mora*, 314 S.W.3d 440, 444–45 (Tex. App.—Amarillo 2009, pet. dism'd) (citing W. Wendell Hall, *Standards of Review in Texas*, 38 St. Mary's L.J. 47, 195–200 (2006)). In this appeal, Turner and Alliance contend that no evidence supported the submission of several questions to the jury. In a no evidence, or legal insufficiency, review, "[t]he final test . . . must always be whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review." *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). "[L]egal-sufficiency review in the proper light must credit favorable evidence if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not." *Id.* "If the evidence . . . would enable reasonable and fair-minded people to differ in their conclusions, then jurors must be allowed to do so." *Id.* at 822. "A reviewing court cannot substitute its judgment for that of the trier-of-fact, so long as the evidence falls within this zone of reasonable disagreement." *Id*. Although the reviewing court must consider evidence in the light most favorable to the verdict, and indulge every reasonable inference that would support it, if the evidence allows only one inference, neither jurors nor the reviewing court may disregard it. *Id.*

Misapplication of Trust Funds

In his first, second, third, and fourth issues, Turner contends that there is no evidence to support the jury's answers concerning misapplication of trust funds because no evidence shows that trust funds existed, Turner controlled trust funds, Turner diverted trust funds, or Turner was a trustee.

A. The jury charge concerning misapplication of trust funds

The jury was asked two series of questions concerning the misapplication of trust funds: one for the Concrete Subcontract and one for the Site Work Subcontract. In the first series, the jury was asked whether Turner "misapplied trust funds from the Concrete Subcontract for which Stewart Builders was an intended beneficiary." In the second series, the jury was asked whether Turner misapplied trust funds from the Site Work Subcontract. The jury answered "yes" to both questions. There were two damages questions, each predicated on an affirmative answer to the questions concerning misapplications of trust funds: the first asked the jury to find an amount "for [Stewart's] loss, if any, resulting from the misapplication of trust funds from the Concrete Subcontract" and the second for the loss from misapplication of trust funds from the Site Work Subcontract. The jury found damages of $268,513, the unpaid balance of the Concrete Subcontract, for the first and $468,802, the unpaid balance under the Site Work Subcontract, for the second.

B. Sufficiency of the evidence to show Turner was a trustee

In his third issue, Turner contends that there is no evidence to show that he was a trustee as defined by the jury charge. The two liability questions asked, "Did Mr. Turner misapply trust funds from the [contract in question—either the Concrete Subcontract or the Site Work Subcontract] for which Stewart Builders was an intended beneficiary?" The jury was instructed that "[a] trustee who, intentionally or knowingly, directly or indirectly retains, uses, disburses, or diverts trust funds without first fully paying all current or past due obligations incurred by the trustee to the beneficiaries of the trust funds, has misapplied the trust funds." This language closely follows the statutory language of section 162.031(a) of the Texas Property Code. *See* TEX. PROP. CODE ANN. § 162.031(a) (West Supp. 2010).

The jury charge definition of trustee did not follow the statutory definition. In the jury charge, "trustee" was defined as "an owner, contractor, or subcontractor who receives trust funds or who has control or direction of trust funds." The Texas Property Code definition is different: "A contractor, subcontractor, or owner *or an officer, director, or agent of a contractor, subcontractor, or owner*, who receives trust funds or who has control or direction of trust funds, is a trustee of the trust funds." TEX. PROP. CODE ANN. § 162.002 (West 2007) (emphasis added). Nevertheless, because no party objected to this instruction, we apply the definition actually given to the jury in reviewing the sufficiency of the evidence. *Wal-Mart*

Stores, Inc. v. Sturges, 52 S.W.3d 711, 715 (Tex. 2001) (holding incorrect statement of law in charge is used to review sufficiency of the evidence in absence of objection).

There is no evidence that Turner was "an owner, contractor, or subcontractor under a construction contract for the improvement of specific real property." It is uncontroverted that Alliance was the contractor, Stewart the subcontractor, and GE the owner. Turner signed the contract in his capacity as CEO of Alliance, not in his individual capacity. Although Turner may have been "an officer, director, or agent of a contractor," *see* TEX. PROP. CODE ANN. § 162.002, the jury was not given a definition that included an officer, director, or agent of a contractor as a trustee. In addition, the jury charge defined a misapplication of trust funds as a trustee not fully paying "obligations incurred *by the trustee*." (Emphasis added). There is no evidence that Turner individually owed any contractual obligations to Stewart. Therefore, we conclude that no evidence supports the jury's finding that Turner, individually, was a trustee who misapplied trust funds. There was no trust fund jury question submitted for Alliance, and therefore no basis for finding Alliance liable for misapplication of trust funds.

We sustain Turner's third issue. Because we sustain this issue, we need not address the first, second, and fourth issues that present alternative arguments concerning the misapplication of trust funds.

Breach of Contract

In its tenth, eleventh, twelfth and thirteenth issues, Alliance raises various challenges concerning the trial court's submission of Question 5 and related questions concerning Stewart's breach of contract claim on the Site Work Subcontract.

A. The jury charge concerning breach of Site Work Subcontract

The jury found in answer to Question 5(a) that Alliance failed to comply with its obligations to Stewart under the Site Work subcontract by "failing to pay contract balances." In Question 7, the jury was asked if Alliance's failure to comply was excused by Stewart's prior material breach or by Stewart's misrepresentation or concealment of material facts. The jury was also instructed that Alliance's failure to comply was not excused if Stewart substantially performed the Site Work Subcontract. The jury found that Alliance's failure to comply was not excused. In answer to Question 11, which was predicated on findings of breach (Question 5(a)) and no excuse (Question 7), the jury found that Stewart's damages for Alliance's failure to comply were in the amount of $468,802, the amount that remained unpaid on the Site Work Subcontract.

B. Sufficiency of the evidence to show breach of Site Work Subcontract

In its tenth issue, Alliance asserts the trial court erred by submitting Question 5(a) to the jury because there is "no evidence or insufficient evidence of

strict performance or 'full performance.'" Alliance argues Question 5(a) should not have been submitted because recovery of the full contract balance by Stewart requires full performance. In other words, Alliance asserts that Question 5(a) is not a correct statement of the law concerning breach of contract.[4] The jury was

[4] Under the common law, strict or full compliance with the terms of a construction contract was required before a party could recover for the failure of the other party to pay. *Dobbins v. Redden*, 785 S.W.2d 377, 378 (Tex. 1990); *Vance v. My Apartment Steak House of San Antonio, Inc.*, 677 S.W.2d 480, 481 (Tex. 1984); *Atkinson v. Jackson Bros.*, 270 S.W. 848, 850 (Tex. Comm'n App. 1925, holding approved). In building or construction contracts, however, this rule has been modified by the doctrine of substantial performance. *Vance*, 677 S.W.2d at 481. The doctrine of substantial performance is an equitable doctrine that allows a contractor who has substantially completed a construction contract to sue on the contract rather than having to rely on a cause of action for quantum meruit. *Id.* at 482. The doctrine of substantial performance recognizes that the contractor has not completed construction and, therefore, is in breach of the contract. *Atkinson*, 270 S.W. at 851. "[W]hen a breaching [party] brings suit to recover for his substantial performance and the owner alleges remediable defects in the construction, the [party] is required to prove that he did substantially perform, the consideration due him under the contract, and the cost of remedying the defects due to his errors or omissions." *Vance*, 677 S.W.2d at 483.

The doctrine of substantial performance overlaps with the requirement that the breach of a contract must be material. *See Gentry v. Squires Const., Inc.*, 188 S.W.3d 396, 403 n.3 (Tex. App.—Dallas 2006, no pet.). "[T]he doctrine assumes, if there is substantial performance, the breach is immaterial." *Gentry*, 188 S.W.3d at 403 n.3. In construction disputes between a contractor and owner,

> it is common to state the issue, not in terms of whether there has been an uncured material failure by the contractor, but in terms of whether there has been substantial performance by him. This manner of stating the issue does not change its substance, however, and the rule stated in this Section [requiring "there be no uncured material" breach by the other party] also applies to such cases. If there has been substantial although not full performance, the building contractor has a claim for the unpaid balance and the owner has a claim only for damages. If there has not been substantial

not, however, given a question, definition, or instruction concerning full performance. At the charge conference, Turner and Alliance objected to the submission of Question 5(a) because "there is no evidence that [Alliance] failed to pay the contract balance unjustifiably."[5] This objection was overruled. Alliance

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> performance, the building contractor has no claim for the unpaid balance, although he may have a claim in restitution (§ 374). The considerations in determining whether performance is substantial are those listed in § 241 for determining whether a failure is material.
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> RESTATEMENT (SECOND) OF CONTRACTS § 237 cmt. d.
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> Thus, substantial performance may be raised by a party seeking to recover on a contract that was not fully performed or may be raised as the defensive issue of prior material breach by the party defending a breach of contract action.
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> In a substantial performance claim, the contractor must prove three elements to prevail: its substantial performance, the amount unpaid under the contract, and "the cost of remedying the defects due to his errors or omissions." *Vance*, 677 S.W.2d at 483; *see also Weitzul Constr., Inc. v. Outdoor Environs*, 849 S.W.2d 359, 363 (Tex. App.—Dallas 1993, writ denied). Thus, the doctrine of substantial compliance excuses some contractual deviations or deficiencies. *Burtch v. Burtch*, 972 S.W.2d 882, 889 (Tex. App.—Austin 1998, no pet.). If defects in the contractor's performance are demonstrated, and the owner as a result of those defects paid only a portion of the contract amount, the cost of remedying the defects "is credited against the balance of" the contractor's unpaid balance. *Vance*, 677 S.W.2d at 482.
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> Here, the jury found that Stewart had substantially performed (Question 1) and that Stewart did not commit a prior material breach (Question 7). Submitting both questions that overlapped created some of the confusion in the charge because there are different measures of damages and different burdens of proof for the two doctrines.

[5] Turner and Alliance further objected that Question 5(a) "will create a potential conflict with Question Number 1 [the substantial performance question]." This objection was overruled, and there was no conflict in the jury's answers.

did not request a definition or instruction regarding strict performance or full performance. Alliance also did not object that the measure of damages in Question 11 was incorrect or that it should include an offset for cost of repairs.

Absent an objection or requested definition or instruction made to the trial court informing it that the proposed charge incorrectly states the law, we must measure the sufficiency of the evidence based on the charge given. *Wal-Mart Stores, Inc.*, 52 S.W.3d at 715 (holding review of sufficiency of evidence is made against charge given, even if incorrect statement of law, in absence of objection). Alliance did not object to the charge for failing to ask the jury concerning full performance or failing to inform the jury about full performance by definition or instruction. We therefore must measure the sufficiency of the evidence against the charge given. *See id.* Here, the charge simply asks whether Alliance failed to pay Stewart. The evidence is undisputed that Alliance did not.[6] Alliance admits the

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[6] Indeed, Alliance argues that "[t]his undisputed fact should not have been submitted to the jury." While this jury question may have been unnecessary, it was not harmful if it was undisputed. The root of the problem with the charge on the contract issues was that the charge asked about this same cause of action in two different variations. The jury questions pertinent to the substantial performance and breach of contract claim are set forth in the Appendix.

A substantial performance question (Question 1) was submitted but there was no damages question tied directly to that question (one damages question, Question 19, was predicated on an affirmative finding of substantial performance, but it inquired only about damages from misapplication of trust funds). A failure to comply question (Question 5(a)) and a question that included substantial performance in it (Question 6) were also submitted, but the damages question (Question 11) predicated on the findings from those two questions did not inquire

balance of $468,802 was not paid, instead relying on the argument that Stewart is not entitled to the full amount based on it having only substantially performed the contract, not fully performing it. We, therefore, conclude that there is some evidence to support the jury's answer to Question 5(a).

We overrule Alliance's tenth issue concerning Question 5(a). We therefore do not address Turner and Alliance's eleventh and twelfth issues concerning subsections (b) and (c) of Question 5.

C. Conflict in jury's answers

In its thirteenth issue, Alliance contends that the trial court erred in awarding damages of $468,802 for the breach of the Site Work Subcontract because a finding of full performance conflicts with the jury's answer to Question 9 that defective construction caused patching and repair work. Question 9 does not, however, inquire about the significance or quantity of the defects in the construction. Thus, the jury could have found that, although there were defects in construction, the defects were not significant enough to constitute a material breach.

Alliance also argues that there is an inconsistency between the answers to Question 5(a) and Questions 5(b) and 5(c) because, if Stewart had fully performed

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about the amount of an offset for repairs—the damages were defined as the unpaid balance on the contract. Given the two questions that were predicates to this damage question, Alliance needed to object that the damages question should have included an offset for the cost of repairs. Alliance did not make this objection.

to be entitled to the full payment under the Site Work Subcontract, there would be no need for Stewart to cure or perform warranty work. But this claimed error (as well as the claimed error for an inconsistency between Questions 7 and 9) was not preserved. To preserve error that the jury's findings conflict or are inconsistent, the complaining party must raise an objection in the trial court before the jury is discharged. *Oyster Creek Fin. Corp. v. Richwood Inv. II, Inc.*, 176 S.W.3d 307, 324 (Tex. App.—Houston [1st Dist.] 2004, pet. denied); *see also Kennedy Ship & Repair, L.P. v. Pham*, 210 S.W.3d 11, 24 (Tex. App.—Houston [14th Dist.] 2006, no pet.). Alliance did not object that the jury's findings were in conflict. Therefore, the issue of whether the findings conflicted is not preserved for review. *See Oyster Creek Fin. Corp.*, 176 S.W.3d at 324.

We overrule Alliance's thirteenth issue.

D. Breach of the Concrete Subcontract

As discussed above, it is undisputed that Stewart fully and satisfactorily performed under the Concrete Subcontract. Thus, this issue did not need to be submitted to the jury. *See Bank of Texas v. VR Elec., Inc.*, 276 S.W.3d 671, 677 (Tex. App.—Houston [1st Dist.] 2008, pet. denied). The only issue in dispute was whether Alliance properly withheld payment for the Concrete Subcontract based on a breach of the Site Work Subcontract. Because the jury found that Alliance breached and that breach was not excused by a prior material breach by Stewart,

the jury resolved this issue against Alliance. Therefore, the trial court's judgment against Alliance for $268,513 for the unpaid balance of the Concrete Subcontract may be upheld on this undisputed evidence. *See Bank of Texas*, 276 S.W.3d at 677 ("[W]hen the evidence conclusively establishes a claim, the claim may be part of the judgment, even if no jury question on the claim was submitted.").

Substantial Performance

In their sixth, seventh, eight, and ninth issues, Turner and Alliance raise several arguments concerning the trial court's award of $468,802 in damages for substantial performance. We have already concluded that Stewart is entitled to recover for breach of the Site Work Subcontract. We therefore do not address Turner and Alliance's issues six, seven, eight, and nine.

Interest on the Damages Award

In their fifteenth and sixteenth issues, Alliance and Turner contend that there is no evidence to support a finding that Alliance or Turner violated the prompt-pay provisions of the Texas Property Code. *See* TEX. PROP. CODE ANN. §§ 28.001–.10 (West 2000). Under the Texas Property Code, a contractor must promptly pay a subcontractor after receiving payment from the owner. *See id.* § 28.002(b). Section 28.004 of the Texas Property Code provides for 18% interest on payments not paid as required by section 28.002. *Id.* § 28.004(a), (b).

A. Sufficiency of the evidence that Alliance received payment from GE

In their fourteenth issue, Alliance and Turner argue that the trial court erred in submitting Question 16 to the jury because there is no evidence that Alliance received payment from GE. According to Alliance and Turner, the settlement with GE involved payments to Alliance and Alliance's other subcontractors, not to Alliance alone and those payments were solely for the other subcontractors' work. One requirement for the award of the statutory 18% interest is that the contractor "receives a payment" from the owner but does not pay its subcontractor. *See id.* § 28.002(b). If the contractor receives such a payment but fails to pay a subcontractor for its work, the contractor is liable under section 28.002.

The statute further provides an exception that the contractor may withhold a disputed payment to a subcontractor if "a good faith dispute exists concerning the amount owed for a payment," including a dispute "regarding whether the work was performed in a proper manner." *Id.* § 28.003(b).

Question 16 asked about the exception to the general rule, asking whether Alliance "act[ed] in good faith in withholding payment from Stewart." The jury was instructed that Alliance could withhold payment if there was a good faith dispute concerning the amount owed. The jury was further instructed that a good faith dispute included "a dispute regarding whether work was performed in a proper manner." The jury answered "no." Question 16 does not ask whether

Alliance received a payment from GE or otherwise inform the jury by instruction or definition that payment by GE to Alliance was required before the jury could answer "yes" to Question 16. At the charge conference, Turner and Alliance did not object to the submission of Question 16 or request a definition or instruction concerning payment by GE. Therefore, we consider the sufficiency of the evidence in light of the charge given. *Wal-Mart Stores, Inc.*, 52 S.W.3d at 715. Turner and Alliance only assert that there is no evidence that GE paid Alliance. They do not assert on appeal that the evidence is insufficient in any other way. As charged, whether GE paid Alliance is irrelevant to the jury's answer to Question 16.

We overrule Turner and Alliance's fourteenth issue.

B. Sufficiency of the evidence to support the interest award against Turner

In his fifteenth issue, Turner contends that the trial court erred in rendering judgment for 18% interest against him because there is no evidence that he was a contractor. Section 28.002 of the Texas Property Code applies to a "contractor." *See* TEX. PROP. CODE ANN. § 28.002 (West 2000). Turner argues that Alliance was the contractor, not Turner.

Stewart's response to this argument is that "there is nothing in the language of Chapter 28 [of the Property Code] that would shield a contractor's CEO from individual liability for prompt-pay violations, especially where, as here, Alliance

never disputed that at all times, Turner was performing in his capacity as the CEO of Alliance." Section 28.001 defines a contractor as "a person who contracts with an owner to improve real property or perform construction services for an owner." *Id.* § 28.001(1). The definition does not include an officer of a contractor. Alliance, not Turner, contracted with GE to perform construction on GE's property, and Alliance, not Turner, contracted with Stewart. Because Turner was not the contractor, we conclude that the trial court erred by rendering judgment that Turner, individually, was liable for 18% interest under the Property Code.[7]

We sustain Turner's fifteenth issue.

Segregation of Attorneys' Fees

In their sixteenth issue, Turner and Alliance contend that Stewart did not segregate its attorneys' fees among the various defendants and causes of action involved in this case.

When a party presents multiple claims, some of which support recovery of attorneys' fees and some of which do not, the party must segregate the attorneys' fees attributable to claims for which fees are recoverable. *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 310–11 (Tex. 2006). In its fifth amended petition, Stewart alleged nine causes of action, some of which permit the recovery of

[7] Furthermore, we note that the jury did not find that Turner violated the prompt-pay provisions of the Texas Property Code. Question 16 only inquired whether Alliance acted in good faith in withholding payment from Stewart.

attorneys' fees (e.g., breach of contract) and some do not (e.g., negligence). As noted by the Texas Supreme Court, some evidence of segregation is required concerning even the drafting of a petition that includes both causes of action for which fees are recoverable and those for which fees are not. *Id.* at 314. Therefore, Stewart was required to present evidence of the segregation of its fees. *Id.*

In its brief, Stewart contends that the parties agreed not to provide testimony regarding the segregation of attorneys' fees. However, the record citation to support this contention is not to any pleading or agreement made on the record, but to the assertions in Stewart's response to Turner and Alliance's motion for new trial. This bare assertion by Stewart is not evidence.

The record shows that Turner and Alliance objected to the submission of the attorneys' fees question based on the lack of segregation. The trial court explained that its understanding of the parties' agreement on attorneys' fees was "to go ahead and submit it, but if it is an issue, the parties have agreed to argue that to the Court, and if legally the Court decides that they should be segregated, then you will argue that to the Court as well as to how that would be accomplished." Counsel for Turner and Alliance and counsel for Stewart both stated that was their agreement. Thus, the agreement in the record contradicts Stewart's argument in its brief. After the jury trial, Turner and Alliance did raise the issue again in their motion for new trial. The motion for new trial was overruled by operation of law.

Because the record does not clearly set forth an agreement between the parties on the segregation of attorneys' fees, but did show that the parties agreed to argue segregation to the court, we remand to the trial court to segregate the fees. *See id.* Additionally, remand for attorneys' fees is appropriate because our disposition of the issues in this appeal results in a significantly reduced award. *See Young v. Qualls*, 223 S.W.3d 312, 314–15 (Tex. 2007). Therefore, the trial court must reconsider the issue of attorneys' fees through the trial in this case.

Conclusion

We affirm the portion of the trial court's judgment in which it awarded Stewart $268,513 for breach of the Concrete Subcontract and $468,802 for breach of the Site Work Subcontract. We reverse the portion of the trial court's judgment in which it awarded Stewart $268,513 for misapplication of trust funds from the Concrete Subcontract and $468,802 for misapplication of trust funds from the Site Work Subcontract, and we render judgment that Stewart take nothing on its claims for misapplication of trust funds. We reverse the award of 18% prompt-pay interest rendered against Turner individually and render judgment that Stewart take nothing on its prompt-pay interest claim against Turner individually. We reverse the portion of the judgment in which the trial court awarded attorneys' fees and remand this cause for the trial court to reconsider the issue of attorneys' fees.

Harvey Brown
Justice

Panel consists of Justices Jennings, Higley, and Brown.

Appendix

QUESTION NO.1

Did Stewart Builders substantially perform its obligations to Alliance Construction under the Site Work Subcontract?

A party substantially completes a contract if: (1) it satisfies the essential elements of the contract, and (2) any defect in performance does not destroy the purpose of the contract

You are instructed that to establish "substantial performance," a party must show that:

(1) it has not willfully departed from the terms of the Site Work Subcontract,

(2) It has not omitted essential points of the Site Work Subcontract,

(3) It has honestly and faithfully performed the Site Work Subcontract in its material and substantial particulars, and

(4) The only variance from the strict and literal performance of the Site Work Subcontract consists of technical or unimportant omissions or details.

QUESTION NO.5

Did Alliance Construction fail to comply with one or more of its obligations to Stewart Builders under the Site Work Subcontract?

Answer "Yes" or "No" for each of the following:

(a) failure to pay contract balances _____

If your answer to Question No.5 is "Yes," then answer the following question. Otherwise, do not answer the following question.

QUESTION NO.7

Was Alliance Construction's failure to comply with the Site Work Subcontract excused?

1. Failure to comply by Alliance Construction is excused by Stewart Builders' previous failure to comply with a material obligation of the same agreement.

2. Failure to comply by Alliance Construction is excused if all the following circumstances occurred;

    1. Stewart Builders

        a. by words or conduct made a false representation or concealed material facts,

        b. with knowledge of the facts or with knowledge or information that would lead a reasonable person to discover the facts, and

        c. with the intention that Alliance Construction would rely on the false representation or concealment in acting or deciding not to act; and

    2. Alliance Construction

        a. did not know and had no means of knowing the real facts, and

        b. relied to its detriment on the false representation or concealment of material facts.

3. Failure to comply by Alliance Construction is not excused if Stewart Builders substantially performed the Site Work Subcontract

If you answered "No" to Question No.1, then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 6

Did Stewart Builders fail to comply with one or more of its obligations to Alliance Construction under the Site Work Subcontract?

Answer "Yes" or "No" to each of the following:

(a) not building to 2-10-8 specifications: _____

(b) building when conditions were too wet: _____

If your answer to Question No. 5 was "Yes," and your answer to Question No. 6 was "No," then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 11

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Stewart Builders for its damages, if any, that resulted from Alliance Construction's failure to comply with the Site Work Subcontract?

Do not include any amount for interest on damages, if any.

Answer separately in dollars and cents for damages, if any.

a. Contract balance: _____
The unpaid contract balance, including any agreed change orders.

If your answer to Question No. 18 is "Yes," then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 19

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Stewart Builders for its loss, if any, resulting from the misapplication of trust funds under the Site Work Subcontract?

Answer in dollars and cents, if any.

Answer: $_____