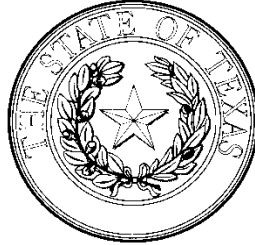


Opinion issued February 10, 2011.



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

NO. 01-09-00726-CV

**EDWARD FERRO AND JON ORECHIA, Appellants
V.
ARTHUR DINICOLANTONIO AND STEPHEN DINICOLANTONIO,
Appellees**

**On Appeal from the County Court at Law No. 3
Galveston County, Texas
Trial Court Case No. 56295**

MEMORANDUM OPINION

In this commercial dispute, Arthur Ferro and Jon Orechia appeal the judgment against them and in favor of brothers Arthur Dinicolantonio and Stephen Dinicolantonio on contracts involving the construction and sale of recreational

boats. Ferro contends that the trial court erred in granting partial summary judgment on Ferro's admitted breach of various agreements to refund advances used to pay vendors, acquire boats, and purchase materials for building boats. Ferro also contends that the trial court abused its discretion in excluding Arthur's deposition testimony, in which he invoked his fifth-amendment right against self-incrimination. Orechia contends, and the Dinicolantonios agree, that the judgment does not correctly state the amount of damages and prejudgment interest for which Orechia is jointly liable, as the claims against him are not coextensive with the claims against Ferro.

We hold that Ferro's challenge to the partial summary judgment is without merit. We further hold that Ferro waived his complaint concerning the trial court's ruling on the proffered deposition testimony. We hold that the judgment does not accurately state Orechia's joint liability in accord with the jury's findings. While the Dinicolantonios agree that the judgment misstates the amount owed, the parties do not agree on the amount for which Orechia is liable. As Orechia did not present this issue in the trial court, we remand the case for the limited purpose of reforming the judgment to correctly state the amount of the judgment for which Orechia is jointly liable. We affirm the remainder of the judgment.

Background

In 1998, the Dinicolantonios bought a boat manufacturing business, American Offshore (“AO”), from Edward Ferro. They then entered into a licensing agreement with Ferro under which Ferro ran the business, using AO’s equipment and other assets, and maintaining possession of AO’s warehouse. In return, Ferro was to pay a royalty to the Dinicolantonios on each boat sold. Orechia built boats with his brother, Ferro.

The Dinicolantonios continued to work with Ferro, advancing funds for boat construction materials and working with prospective boat buyers. When Ferro failed to pay royalties due or repay loans owed, the Dinicolantonios sued Ferro for breach of contract.

Soon after the Dinicolantonios filed the suit against him, Ferro transferred two parcels of real property to Orechia by quitclaim deeds. The Dinicolantonios discovered the transfer and revised their pleadings to name Orechia as a defendant and bring a fraudulent transfer action against him. *See* TEX. BUS. & COM. CODE ANN. § 24.005 (Vernon 2002).

The Dinicolantonios moved for partial summary judgment on Ferro’s liability for certain amounts owed and on Ferro’s offset counterclaim. The trial court granted both motions. The parties proceeded to trial on the remaining claims. Among other findings, the jury found that Ferro breached the licensing agreement and misappropriated assets. The jury also made an affirmative finding against both

Ferro and Orechia on the fraudulent transfer claim. The trial court entered judgment on the jury's findings. The judgment holds Ferro and Orechia jointly and severally liable for the awards based on all of the jury's findings against Ferro on the contract claims, and does not limit Orechia's liability to the amount relating to the unlawful transfer.

Discussion

I. Partial summary judgment

Ferro first contends that the trial court erred in granting summary judgment on Ferro's liability for payment of business loans and fees owed under the licensing agreement, claiming that the evidence raises a fact issue about the amount of actual damages owed. But in his deposition, Ferro admitted to owing the amounts sought in the Dinicolantonios' motion:

Q. Did Mr. Dinicolantonio write you a check on February 2, 2004, for \$17,000?

A. Most likely, yes.

...

Q. You're not disputing that you owe Mr. Dinicolantonio \$17,000?

A. No.

Q. —based on that check that he wrote you on February 3, 2004?

A. No.

Q. I'm going to show you two checks by Mr. Dinicolantonio to American Offshore that were negotiated by American Offshore

Original, your company, January 30, 2005, and February 7, 2005 for \$5,000 apiece.

A. (Reviewing document) Uh-huh.

Q. Are you disputing in any way that you owe Mr. Dinicolantonio those amounts?

A. No.

Q. Okay. Are you saying that you have paid him those amounts already?

A. No.

...

Q. Okay. Are you familiar with a situation where Mr. Dinicolantonio purchased a boat on behalf of—or from a man named Terry Maxey?

A. Uh-huh.

Q. Did you and Mr. Dinicolantonio have an agreement that American Offshore would sell the boat and that he would get the purchase price back?

A. Yeah. . . .

Q. Was the boat eventually sold to Art Sabatan?

A. Yes. . . .

...

Q. Did Mr. Dinicolantonio ever get the purchase price back as agreed?

A. No. No I got the money for it.

Q. Okay.

A. It was \$25,700 I believe.

Q. And do you agree that . . . you and Mr. Dinicolantonio had a contract that he would get his purchase price back once that boat was sold?

A. Yeah. He gets credit for 25-7 definitely on my account.

Q. You're not disputing that you owe Mr. Dinicolantonio \$25,700 for that boat?

A. No. I'm not disputing that, no.

Ferro pleaded offset as an affirmative defense and counterclaim. In his response to the Dinicolantonios' motion, Ferro claimed that he was entitled to an unspecified amount of credit because the Dinicolantonios had removed boats from the business and either kept or sold them, without paying Ferro his share of the profit or paying for Ferro's labor.

Ferro neglects to mention that the trial court disposed of Ferro's offset counterclaim by granting the Dinicolantonios' motion for summary judgment on the affirmative defense of limitations. In connection with that ruling, the trial court rendered a take-nothing judgment on that counterclaim. He does not appeal that trial court ruling. He does not show that the offset he claims in response to the Dinicolantonios' motion for partial summary judgment on the specified and admitted debts differs from those presented in his counterclaim. Ferro also does not make any argument specifically challenging the trial court's ruling that any claim to an offset is time-barred because it relates to transactions that predate the applicable four-year statute of limitations. Nor does he identify any evidence in the record or legal authority to support his contention. We therefore hold that Ferro this issue lacks merit. *See* TEX. R. APP. P. 38.1(f), (i); *Morrill v. Cisek*, 226 S.W.3d 545, 548–49 (Tex. App.—Houston [1st Dist] 2006, no pet.); *see also Progressive Cty. Mut. Ins. Co. v. Boyd*, 177 S.W.3d 919, 921 (Tex. 2005)

(observing that subsequent events in trial court may render harmless any error in granting summary judgment).

II. Exclusion of Arthur's deposition testimony

Ferro next contends that the trial court erred in excluding Arthur's deposition testimony, in which Arthur initially invoked his right to fifth-amendment protection in response to a series of questions. Arthur later reversed his position and provided substantive answers to those questions. The Dinicolantonios' motion in limine asked the trial court to exclude any reference to Arthur's assertion of his fifth-amendment rights because (1) his reversal of position during the same deposition did not permit the fact finder to draw an adverse inference from his initial assertion of the right and (2) any probative value would be substantially outweighed by the danger of unfair prejudice. *See* TEX. R. EVID. 403, 513(c); *Lozano v. Lozano*, 52 S.W.3d 141, 150 (Tex. 2001) (Phillips, C.J., concurring) (observing that civil rules permit fact finder to draw reasonable inferences from party's assertion of privilege against self-incrimination).

The record shows that the trial court did not exclude the requested testimony. When the parties prepared to tender Arthur's deposition testimony at trial, the trial court indicated that it would admit Arthur's assertions of his fifth-amendment right. The Dinicolantonios then sought to present, under the rule of optional completeness, additional testimony showing that Arthur later decided not

to invoke the privilege and instead chose to answer the questions. *See* TEX. R. EVID. 107. The trial court granted the Dinicolantonios' request to add the proffered testimony. Ferro's attorney objected, "Judge, that's an attempt to unring the bell. That's not—that's not right." The trial court responded, "Well, I am going to allow it." Ferro's attorney replied, "Then, I am not going to read it. I am going to read it into a bill of exception and not while Mr. Dinicolantonio is on the stand."

The trial court agreed to allow the testimony in which Arthur asserted his Fifth Amendment right. It was trial counsel's choice to withdraw it upon the trial court's decision to allow further testimony on the matter. Trial counsel provided no basis for an objection to the additional testimony. To preserve error for appellate review, the party must timely object at trial and state the grounds for the objection with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds are apparent from the context. TEX. R. APP. P. 33.1(a)(1)(A); *see also* TEX. R. EVID. 103(a)(1). Ferro waived this issue by withdrawing the proffered testimony. *See Bay Area Healthcare Group, Ltd. v. McShane*, 239 S.W.3d 231, 235 (Tex. 2007) (noting that complaining party must timely and specifically object to evidence and obtain ruling to preserve issue for appellate review).

III. Amount of damages and prejudgment interest owed by Orechia

The jury found that Ferro fraudulently transferred the two pieces of property to Orechia. In his issue on appeal, Orechia contends that the judgment erroneously holds him jointly and severally liable for damages and prejudgment interest that should have been assessed against Ferro alone. The Dinicolantonios agree that the judgment against Orechia is incorrect. The parties do not agree on the amount for which Orechia is liable. After reviewing the record, we conclude that the trial court is in a better position to address and resolve this issue. We therefore reverse the portion of the judgment against Orechia that holds him jointly and severally liable for all of the damages and remand the case to the trial court for the limited purpose of reforming the judgment to correctly state the amount of damages. We do not disturb the trial court's order allowing execution on the property.

Conclusion

We hold that Ferro's complaint concerning the trial court's partial summary judgment was resolved by another trial court ruling from which he does not appeal. Ferro did not preserve his complaint about the trial court's evidentiary ruling because he withdrew the proffered testimony. With respect to Orechia's challenge, we hold that the judgment does not correctly reflect the extent of his joint and several liability for damages. Because the trial court has not had an opportunity to address this issue, and the actual extent of Orechia's liability is not readily

ascertainable from the record, we reverse the judgment with respect to Orechia and remand the case to the trial court for the limited purpose of reforming the portion of the judgment relating to the amount owed by Orechia. We affirm the remainder of the judgment. All pending motions are dismissed as moot.

Justice Bland

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