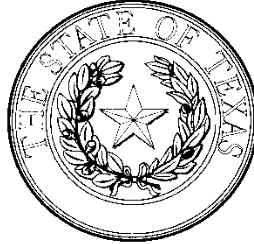
Opinion issued March 24, 2011



In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00732-CV

VIETENTOURS GMBH, Appellant

V.

THE TICKET COMPANY, INC. AND THE TICKET COMPANY INTERNATIONAL, INC., Appellees

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On Appeal from the 165th District Court
Harris County, Texas
Trial Court Case No. 2006-69465

MEMORANDUM OPINION

Vietentours GmbH, a German company, sued The Ticket Company Inc. and The Ticket Company International, Inc. ("TC International") on sworn account and for breach of contract for services provided in connection with the World Cup held

in Germany in June and July 2006. Vietentours claimed it provided over €5.3 million worth of services, but was paid only €4.1million, leaving a balance of €1,217,451.55. A jury found that both TC International and Ticket Company breached the contract with Vietentours, but their breach was excused. The trial court entered a take nothing judgment on Vietentours's claims against both companies. Vietentours raises four issues on appeal, focusing primarily on the legal and factual sufficiency of the jury's finding of excuse. Vietentours also challenges the sufficiency of the evidence supporting the jury's finding of Vietentours's breach, the submission of the damages question, and the finding that the two companies are not jointly and severally liable.

We affirm.

Background

Vietentours provides hotel brokering and logistical services for major international sporting events such as the Olympics or World Cup. Ticket Company and TC International were Houston-based ticketing companies that provided services for group and individual customers to attend sport and concert events. Years before this dispute arose, the two owners of Ticket Company, Christopher Toy and Ali Fazeli, formed TC International with Andrew Worthington.[1] TC International specialized in selling packages to events including hotels, airfare,

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[1] At the time of trial, Worthington was no longer associated with Ticket Company or TC International.

tickets, and souvenirs, while Ticket Company is a ticket broker. TC International is no longer in business.

In 2004, Vietentours and one of the two companies—the parties disagree which one—decided to collaborate on major international sporting events. Vietentours contends that it did business with Ticket Company. Defendants assert that only TC International contracted for Vietentours's services and that they made the distinction clear.[2] Ticket Company and TC International shared offices and had some overlapping employees, though they had separate bank accounts, tax returns, and phone and fax numbers. Vietentours addressed its invoices to Ticket Company, but TC International made all the payments. Worthington, who was Defendants' primary liaison with Vietentours, had business cards and emails identifying himself as the "Director of International Sales and Marketing" for Ticket Company even though he was a co-owner only of TC International. Regardless, the parties generally had a satisfactory business relationship and worked on several events together.

In 2005, the managing director for Vietentours, Hans Overhage, and several Vietentours principals met with Toy, Fazeli, and Worthington in Germany to discuss providing a package for the 2006 World Cup. The parties agreed that

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[2] For ease and clarity, we will refer to the two Houston companies as "Defendants" though we recognize the jury found that no alter ego or joint venture existed between Ticket Company and TC International.

Defendants would purchase tickets for the games and arrange for air travel, and Vietentours would provide bookings for hotels, restaurants, and local transportation. Early booking of the hotel rooms was important because 600-700,000 visitors needed rooms during the World Cup. The arrangements were not exclusive—Vietentours assisted a total of 60,000 customers for all of its clients and Defendants also booked hotels outside of the agreement with Vietentours. Defendants were to provide Vietentours with the number and dates of the hotel rooms needed for their customers as soon as possible after the brackets for cities and teams was announced in December 2005.

Vietentours sent Worthington a series of written contracts between Vietentours and Ticket Company but they were never signed. The problem with the contracts was that there were so many groups of customers with changing preferences and requirements that it was "almost impossible to be producing contract after contract." The parties decided to "keep control" of the evolving list of needed hotels and their agreements through an excel spreadsheet.

Vietentours ultimately provided hotel rooms and other services to approximately 3,000 to 6,000 of Defendants' customers for the World Cup. The World Cup began on June 9 and ended on July 9, 2006. The hotel rooms were needed from June 6 until July 10. The games were held in over a dozen cities in Germany.

On June 7, two days before the start of the World Cup, Overhage informed Worthington that €1.8 million was overdue for Vietentours's services. Vietentours had already paid for the hotel rooms and was facing a large loss and Defendants' prior payments did not cover the amounts owed. Worthington responded that he understood that half of the past-due amount had been paid or was going to be paid that day. Vietentours did not provide Worthington with copies of any invoices for him to review so he could verify this amount, but instead showed him various receipts and other information that confirmed the approximate amount.

Vietentours and Worthington signed an agreement on June 7 that, as of that date, Ticket Company owed Vietentours "about" €1,800,000. The June 7 agreement reflects that Worthington was acting on behalf of Ticket Company. Worthington agreed to provide proof of payment of €900,000 by 4:00 p.m. that day and to pay the remaining €900,000 by June 9. The June 7 agreement stated that if Worthington failed to provide proof of the first payment, "Vietentours will cancel the rooms" for guests checking in the next day. Additionally, if the second payment was not received by June 9, Vietentours would "cancel all the rooms and other services" for guests arriving on or after June 14. TC International made payments of €600,000 by June 9 and €400,000 before the end of the month. Therefore, based on the amounts stated in the June 7 agreement, Ticket Company still had an outstanding balance of €800,000. After receiving these payments,

Vietentours did not cancel the hotel rooms or its other services. On the contrary, the parties entered into an addendum agreement identifying additional services that Vietentours had not yet invoiced.

On July 3, immediately before the World Cup finals, Worthington and Overhage signed another agreement regarding the outstanding indebtedness. Worthington met with Overhage and Vietentours's account manager for two days before he signed that agreement. By that time an unspecified number of Defendants' customers had already left Germany to return to their homes. Worthington was given a number of invoices to review so he could reconcile the accounts, but did not have the opportunity to study them until returning to his hotel on the night of July 3. Nevertheless, Worthington signed another agreement before his study of the invoices, again purporting to act on behalf of Ticket Company. In the July 3 agreement, Ticket Company admitted that Vietentours had provided services and supplies through that date with a value of €5,365,271.55. The July 3 agreement further stated that "the amounts calculated and invoices are correct and not questioned."

The agreement introduced during trial states that a statement of individual and group calculations was attached and "correct and agreed on by both parties." The copy of the July 3 agreement introduced as a trial exhibit does not include any attachment. Several spreadsheets, however, were admitted as a separate exhibit.

These spreadsheets show itemized charges for transfers from airports, meals, transportation, and tours and were initialed by Worthington on behalf of TC International on July 4. Overhage testified the spreadsheets were attached to the July 3 agreement after Worthington signed them on July 4.

Based on the undisputed evidence about the amounts Defendants paid Vietentours, the July 3 agreement would leave an unpaid total of €1.2 million.[3] At trial, Worthington admitted in cross-examination that Vietentours was not paid the entire amount owed, but he did not know the amount of the outstanding debt. Toy, a co-owner of Ticket Company, testified that Vietentours was not fully paid but deferred to Worthington as to the amount outstanding. Neither party called an accountant or bookkeeper to address the amount of the bills or payments.

Worthington and Defendants' representatives testified that they experienced problems with Vietentours's services. Several hotels were not located in the correct cities or within walking distance of public transportation as promised. Several buses were late and the guides provided by Vietentours did not speak Spanish as required. Rooms were also double booked so that some businessmen shared rooms with only one bed. The witnesses, however, testified in general terms and only provided details for one specific problem: when Vietentours failed

[3] Neither party disputes that Defendants paid Vietentours €4.1 million. Overhage did not explain why the amount owing increased after the June payments except to state generally that Vietentours provided additional unspecified services as agreed to in the addendum.

to deliver five rooms at a five-star hotel and instead provided 11 rooms at a four-star, inferior hotel. Defendants found replacement rooms on the open market.

Worthington claimed that when he signed the July 3 agreement he did not know customers were demanding refunds due to complaints about the services provided by Vietentours. He acknowledged on cross-examination, however, that all payments and credits were given by Vietentours. Overhage testified that Vietentours was willing to consider granting Ticket Company credits for any deficiencies in its services, but Ticket Company never provided any details on the amounts.

Worthington testified that Vietentours threatened to cancel all services if he did not sign the June 7 and July 3 agreements—June 7 being two days before the start of the World Cup and July 3 immediately before the finals. Overhage denied placing any pressure on Worthington to sign the agreement. He further claimed that he told Worthington that Vietentours would cancel only the rooms that had not been paid for; it would not cancel the rooms covered by Defendants' past payments.

The trial court granted a directed verdict that TC International failed to comply with its contract with Vietentours. The jury then found that the remaining parties, Ticket Company and Vietentours, also failed to comply with the contract and that Ticket Company and TC International were excused from performance on

grounds of prior material breach or duress. The jury found that Worthington was authorized to act for Ticket Company, even though he was a co-owner of TC International, but that the companies did not have an alter ego or joint venture relationship. Finally, the jury assessed $400,000 in damages against TC International only and awarded Vietentours attorney's fees. The trial court rendered a take nothing judgment on Vietentours's claims.

Directed Verdict and Submission of Excuse Question

As part of his first issue, Vietentours contends that the trial court erred in submitting jury question two, asking whether TC International's failure to comply was excused, because the court granted Vietentours a partial directed verdict on that issue. The trial court granted a directed verdict on one issue only: TC International's admission that it owed Vietentours money under the contract and, therefore, breached the contract. The trial court did not grant a directed verdict on the excuse issue and excuse was not discussed during the directed verdict motion. We overrule the first part of Vietentours's first issue.

Legal and Factual Sufficiency

In the remainder of its first issue, Vietentours argues the evidence was legally and factually insufficient to support the jury's findings that Ticket Company and TC International's performance was excused. The trial court utilized a broad form jury question combining excuses of prior material breach and

duress. Because the trial court used a broad form question without objection, Vietentours can prevail on its sufficiency of the evidence claims only if the evidence is insufficient for both prior material breach and duress. *See City of Houston v. Levingston*, 221 S.W.3d 204, 230 (Tex. App.—Houston [1st Dist.] 2006, no pet.). In other words, either of the submitted theories may be the basis for concluding that sufficient evidence exists to support the jury's finding of excuse.

A. Standard of Review

We will sustain a legal sufficiency or "no-evidence" challenge if the record shows one of the following: (1) a complete absence of evidence of a vital fact, (2) rules of law or evidence bar the court from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a scintilla, or (4) the evidence conclusively establishes the opposite of the vital fact. *City of Keller v. Wilson*, 168 S.W.3d 802, 810 (Tex. 2005). In conducting a legal sufficiency review, a "court must consider evidence in the light most favorable to the verdict, and indulge every reasonable inference that would support it." *Id.* at 822. If there is more than a scintilla of evidence to support the challenged finding, we must uphold it. *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 48 (Tex. 1998). If the evidence at trial would enable reasonable and fair-minded people to differ in their conclusions, however, then jurors must be allowed to do so. *City of Keller*, 168 S.W.3d at 822;

see also King Ranch, Inc. v. Chapman, 118 S.W.3d 742, 751 (Tex. 2003). "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." *Keller*, 168 S.W.3d at 822.

In conducting a factual sufficiency review, we must consider and weigh all of the evidence that supports or contradicts the jury's findings. *Plas-Tex., Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 445 (Tex. 1989). We set aside a verdict only if the evidence is so weak or if the finding is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001). The jury is the sole judge of the witnesses' credibility and the weight to be given their testimony. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003).

B. Excuse by Duress

Vietentours contends the evidence supporting the jury's finding of excuse is legally and factually insufficient because the company exercised a legal right to demand payment without exerting any duress on Defendants.

1. Duress

In general terms, economic duress that may invalidate a contract and render it unenforceable occurs when one party takes unjust advantage of the other party's economic necessity or distress to coerce the party to enter into the contract. *See*

Brown v. Cain Chem., Inc., 837 S.W.2d 239, 244 (Tex. App.—Houston [1st Dist.] 1992, writ denied). There are five elements to an economic duress defense:

> (1) a threat or action was taken without legal justification; (2) the threat or action was of such a character as to destroy the other party's free agency; (3) the threat or action caused the opposing party's free will to be overcome and caused the other party to do that which it would not otherwise have done and was not legally bound to do; (4) the restraint was imminent; and (5) the opposing party had no present means of protection.

Graybar Elec. Co. v. LEM & Assocs., L.L.C., 252 S.W.3d 536, 546 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

The test for causation—whether the duress contributes substantially to the claimant's decision to assent—is subjective and considers all of the surrounding circumstances such as the background and relationship of the parties and the emotional condition of the party claiming duress. *Sudan v. Sudan*, 145 S.W.3d 280, 287 (Tex. App.—Houston [14th Dist.] 2004), *rev'd on other grounds*, 199 S.W.3d 291 (Tex. 2006). The duress, however, must derive from acts or conduct of the party accused of duress and the emotions of the purported victim alone are insufficient to establish duress. *Williams v. Jackson*, No. 01-07-00850-CV, 2008 WL 4837484, at *2 (Tex. App.—Houston [1st Dist.] Nov. 6, 2008, no pet.) (mem. op.); *Sudan*, 145 S.W.3d at 286. What constitutes duress is a question of law, but whether duress exists in a particular situation is generally a question of fact dependent upon the circumstances surrounding the situation. *Matthews v.*

Matthews, 725 S.W.2d 275, 278 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).

The jury charge in questions 2 and 5 defined duress as "the mental, physical or economic coercion of another, causing that party to act contrary to his free will and interest." During trial, Vietentours objected to the excuse questions based on legal and factual sufficiency and not to the language of the charge. 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. v. Sturges*, 52 S.W.3d 711, 715 (Tex. 2001) (holding review of sufficiency of evidence is made against charge given, even if incorrect statement of law, in absence of objection); *Osterberg v. Peca*, 12 S.W.3d 31, 55–56 (Tex. 2000) (review evidence against charge in absence of objection).

B. Sufficient Evidence of Duress

Vietentours argues that there is legally and factually insufficient evidence to support the jury finding that Worthington signed the June 7 and July 3 agreements contrary to his free will and interest as a result of mental or economic coercion. More specifically, Vietentours contends that it only threatened to withhold continuing services if Defendants did not pay or promise to pay, a threat it had a

legal right to make. Vietentours further asserts that the threat only involved further performance and did not involve paid-for hotel rooms.

To constitute duress, the threat must involve some act the threatening party has no legal right to do. *Flameout Design & Fabrication, Inc. v. Pennzoil Caspian Corp.*, 994 S.W.2d 830, 837 (Tex. App.—Houston [1st Dist.] 1999, no pet.). Vietentours asserts it had a legal right to demand overdue payment for its services. Worthington testified he found nothing wrong with Vietentours "asking to be paid for [its] services," but he also stated that everything would "collapse" if he did not sign the June 7 agreement because their customers would not have any rooms, buses, or other services from Vietentours. The World Cup tournament began on June 9, therefore, Vietentours demands on June 7 left Defendants no alternatives to accommodate their customers at a time when between 600,000 and 700,000 spectators were competing for rooms and services. Worthington claimed that Vietentours threatened that all of Defendants' customers would have no hotel rooms or services. The June 7 agreement, moreover, does not limit the threat to only rooms for which Defendants had not yet paid. On the contrary, it states that Vietentours "will cancel all the rooms and other services" for guests who had not yet checked into the hotels.

Worthington testified that "the same kind of threat" was made before the July 3 agreement—"sign it or else." He stated, "If I didn't sign this agreement, I

wouldn't get the rooms for the finals." He testified that he had to sign both contracts because he did not "have an option."

Reading Worthington's testimony in the light most favorable to the verdict, as we must in a legal sufficiency challenge, we reject Vietentours's argument. The evidence is undisputed that Defendants paid €4.1 million towards the amount owed, though the jury heard conflicting evidence as to the amount of the remaining debt. Contrary to Vietentours's contentions, the June 7 agreement does not limit the threat to only unpaid rooms and Worthington testified that the same threats were made in conjunction with the July 3 agreement. The jury also heard evidence that Vietentours timed the threats of total cancellation to coincide with the start of the World Cup and the final rounds.

Vietentours had a legal right to demand payment for the money owed for its services, but it did not have the right to threaten to cancel all services, even those for which Defendants had already paid. Worthington's testimony about the threat of total cancellation, despite Defendants' payments, and the timing of those threats are more than a scintilla of evidence to show economic coercion causing a party to act "contrary to his free will and interest." We find the evidence to be legally sufficient to support the jury's finding of duress.

For a factual sufficiency review, we must consider all the evidence, whether it supports or contradicts the jury's findings. *See Plas-Tex., Inc.*, 772 S.W.2d at

445. The record does not reflect how many customers remained in Germany by July 3 and Vietentours representatives testified that the only threat concerned their continued performance, not the cancellation of all rooms and services. The jury determined the weight and credibility to give Worthington's testimony compared to the testimony of Vietentours's witnesses. *See Golden Eagle Archery*, 116 S.W.3d at 761. "The issue of duress actually boils down to the credibility of the witnesses," and we will not disturb the jury's evaluation of that testimony. *Gooch v. Am. Sling Co.*, 902 S.W.2d 181, 187 (Tex. App.—Fort Worth 1995, no writ). We cannot say, reviewing all of the evidence that supports and contradicts the jury's findings, that the evidence was so weak as to make a jury finding of excuse by duress clearly wrong and unjust. *See id.*

We find one of the two grounds contained in the broad form excuse questions is supported by legally and factually sufficient evidence. We therefore overrule Vietentours's first issue.

Conclusion

The remainder of Vietentours's appeal argues the following: first, the evidence was insufficient to show Vietentours breached the contract; second, that the trial court erred in submitting a damages question because it asserts Worthington made a judicial admission as to damages; and third, that the trial court failed to hold Defendants jointly and severally liable under an alter ego theory for

the damages awarded. We have upheld the jury's finding of Defendants' excused performance. Therefore, the trial court correctly entered a take nothing judgment and we do not reach the remaining issues on Vietentours's breach, damages, or alter ego.

We affirm the judgment of the trial court.

Harvey Brown
Justice

Panel consists of Justices Jennings, Higley, and Brown.