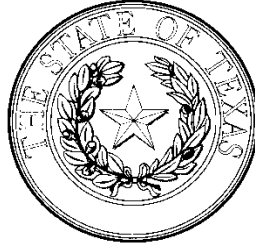


Opinion issued December 16, 2010



In The
Court of Appeals
For The
First District of Texas

NO. 01-09-00870-CV

ALOYSIUS D. HOANG, Appellant

V.

BLANCA ORTIZ, Appellee

**On Appeal from the County Civil Court at Law No. 2
Harris County, Texas
Trial Court Case No. 925926**

MEMORANDUM OPINION

Appellant, Aloysius D. Hoang, appeals the trial court's judgment rendered in favor of appellee, Blanca Ortiz, after a bench trial. The judgment found Hoang, a co-defendant in the case below, but the only appellant in this appeal, jointly and

severally liable for civil conspiracy, in the amount of \$15,348.75. In his first two issues, Hoang contends that the trial court rendered a judgment that acts contrary to the public interest, and that the trial court abused its discretion by acting arbitrarily and unreasonably. In his third and fourth issues, Hoang contends the evidence is legally and factually insufficient to support the trial court's implied finding that he was a co-conspirator in a civil conspiracy. We sustain Hoang's third issue and hold the evidence is legally insufficient to support a finding that Hoang acted as a co-conspirator.

We reverse and render.

BACKGROUND

In February 2008, Ortiz leased a retail space from Hung Duc Bui and Hue Thi Tran, the original and non-appealing defendants in this case. Bui and Tran agreed to make improvements to the retail space so that Ortiz could use the space to open a restaurant. The agreement consisted of two contracts, a Retail Lease Contract and a Lease Deposit Agreement. Bui and Tran made improvements on the space, but the improvements were not built according to proper code guidelines and failed to pass inspection. Ortiz was, therefore, unable to open her restaurant and she stopped paying rent to Bui and Tran in August 2008.

Bui and Tran filed a forcible detainer suit in Harris County to evict Ortiz; however, the judge ruled in favor of Ortiz and allowed her to remain in the space.

Bui and Tran appealed to county court. In September 2008, Ortiz sued Bui, Tran, and their property companies in county court for breach of contract and other causes of action including civil conspiracy. Bui and Tran appeared through counsel, Triet Phan, in October 2008. The forcible detainer appeal and breach of contract suit were later consolidated.

In April 2009, Bui and Tran approached Hoang for a one-hour pro-bono legal consultation. At the start of the consultation, Bui presented Hoang with the Retail Lease Contract. Bui told Hoang that he was involved in a breach of contract lawsuit related to the contract. Neither Bui nor Tran informed Hoang that they had petitioned for a forcible detainer; that they had lost and Ortiz had been allowed to remain on the property; or, that the forcible detainer had been consolidated with Ortiz's breach of contract suit. Hoang told Bui and Tran that he could not help them on any matters regarding the lawsuit and that they should discuss those matters with the attorney representing Bui at that time. Bui responded that he was not asking Hoang for advice regarding the lawsuit, but was merely asking, based upon the details in the contract, what his basic remedies were if someone did not pay him rent for eight months. Hoang reviewed the Retail Lease Contract only, and he advised Bui that if no rent had been paid for eight months he had three potential remedies pursuant to the contract. Hoang stated that Bui could (1) choose not to do anything, (2) file an eviction, or (3) foreclose. As part of the foreclosure

option, Hoang stated that pursuant to the contract, Bui and Tran had the option to lock Ortiz out of the property and sell her kitchen equipment. Hoang did not otherwise explain the steps involved in foreclosing on the property. Bui and Tran asked if this was the extent of the possible remedies, and Hoang replied affirmatively. Bui and Tran then left the consultation. They did not hire Hoang to represent them.

The day after the consultation, Bui and Tran changed the locks and sold Ortiz's kitchen equipment. They did not provide any contact information or give notice to Ortiz that they had changed the locks. Ortiz was unable to recover the kitchen equipment.

Ortiz filed a motion for reentry and, on May 5, the trial court heard Ortiz's motion for reentry and ordered Bui and Tran to give her the new keys and return all of her personal property. Bui and Tran failed to comply with the court's order. Ortiz subsequently filed a motion for contempt.

On May 12, Bui again contacted Hoang and informed him that he had been summoned to appear at a contempt hearing set for the following day and that his attorney, Phan, was withdrawing as counsel. Hoang learned at that point that Bui and Tran had locked Ortiz out of the space, had sold her equipment, and were now facing contempt of court. Bui told Hoang that he and Tran did not plan to appear at court because they did not care about the hearing. Hoang advised him to appear,

but Bui replied he also did not have the money to pay an attorney to represent him. Bui then asked Hoang to represent him pro bono for the contempt hearing only and Hoang agreed.

On May 13, Hoang appeared with Bui and Tran at the contempt hearing. At the hearing, he learned that Bui and Tran had filed a forcible detainer but had lost, and that Ortiz had been awarded possession of the premises before Bui and Tran changed the locks and sold her equipment. Hoang informed the court that he did not know about these facts when he advised Bui and Tran. Phan, Bui and Tran's former counsel, was also at the hearing and also informed the court that Bui and Tran had not kept Phan informed of their actions, including the lock-out and sale of Ortiz's equipment. The trial court found Bui and Tran in contempt and sanctioned them. After the contempt hearing, Ortiz amended her petition and added Hoang as a co-defendant.

Hoang appeared for trial as a co-defendant. Bui and Tran were not at trial. Hoang informed the court that he had tried to convince Bui and Tran to come to the trial, but Bui informed him that "they don't care anymore." At trial, Ortiz and her counsel, Javier Marcos, testified. Hoang testified regarding his interactions with Bui and Tran. Without objection, Hoang tendered an affidavit by Bui that also discussed Bui's interactions with Hoang. Ortiz read portions of Bui's testimony from the contempt hearing.

At the conclusion of the trial, the trial court remarked that it “just [did not] know if [there] was civil conspiracy for joint and several liability.” As a result, the trial court asked for briefing on the civil conspiracy issue from both Hoang and Ortiz and stated it would enter judgment approximately 30 days from the trial date. Both parties submitted briefs. The trial court entered a judgment against Bui and Tran for joint and several liability on damages totaling \$203,169.45, and entered judgment against Hoang for joint and several liability on damages totaling \$15,348.75 for the civil conspiracy claim only. This appeal followed.

LEGAL SUFFICIENCY

In his third issue, Hoang contends the evidence is legally insufficient to support the trial court’s implied finding that he was a co-conspirator in a civil conspiracy.

A. Standard of Review

The record on appeal contains the reporter’s record of the bench trial, but no party requested or proposed post-judgment findings under rule 296 of the Texas Rules of Civil Procedure. *See* TEX. R. CIV. P. 185. A request for findings of fact and conclusions of law is not required to question the sufficiency of the evidence. *Pruet v. Coastal States Trading, Inc.*, 715 S.W.2d 702, 704 (Tex. App.—Houston [1st Dist.] 1986, no writ). When there are no findings of fact and conclusions of law, however, we may infer that the trial court made all the findings necessary to

support its judgment. *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002); *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990). We presume, therefore, that the trial court found all questions of fact in support of the judgment, and we must affirm the judgment if it can be upheld on any legal basis supported by the pleadings and the evidence. *See Point Lookout W., Inc. v. Whorton*, 742 S.W.2d 277, 278 (Tex. 1987); *see also Worford*, 801 S.W.2d at 109; *Fair Deal Auto Sales v. Brantley*, 24 S.W.3d 543, 546 (Tex. App.—Houston [1st Dist.] 2000, no pet.). Because the record includes the reporter’s record, the trial court’s implied findings of fact may be challenged in this Court for legal and factual sufficiency. *See BMC Software Belgium*, 83 S.W.3d at 795; *Fair Deal Auto Sales*, 24 S.W.3d at 546.

Under the legal-sufficiency standard, we must credit evidence that supports the judgment if reasonable and jurors could, and disregard contrary evidence unless reasonable jurors could not. *See City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). If the evidence falls within the zone of reasonable disagreement, we may not invade the fact-finding role of the trial court, who alone determines the credibility of the witnesses, the weight to give their testimony, and whether to accept or reject all or any part of that testimony. *See id.* at 822.

When, as here, the complaining party challenges the legal sufficiency of the evidence underlying an adverse finding on which he did not have the burden of

proof, he must demonstrate that there is no evidence to support the finding. *Scottsdale Ins. Co. v. Nat'l Emergency Servs., Inc.*, 175 S.W.3d 284, 300 (Tex. App.—Houston [1st Dist.] 2004, pet. denied). We must sustain a no-evidence contention only if (1) the record reveals a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or of evidence 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 mere scintilla; or (4) the evidence establishes conclusively the opposite of the vital fact. See *City of Keller*, 168 S.W.3d at 810; *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997). If, alternatively, more than a scintilla of evidence supports the finding, the no-evidence challenge fails and the evidence to support the finding is legally sufficient. *Scottsdale Ins. Co.*, 175 S.W.3d at 300 (citing *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 782 (Tex. 2001)). More than a scintilla of evidence exists if the evidence rises to a level that enables reasonable and fair-minded people to differ in their conclusions. *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004). Less than a scintilla of evidence exists when the evidence is so weak as to do no more than create a mere surmise or suspicion of a fact. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003).

B. Civil Conspiracy

A civil conspiracy is a combination by two or more people to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means. *See Goldstein v. Mortenson*, 113 S.W.3d 769, 778 (Tex. App.—Austin 2003, no pet.). A conspiracy requires a preconceived plan and unity of design and purpose. *Id.* “The required elements of a civil conspiracy are (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as a proximate result.” *Greenberg Traurig of N.Y., P.C. v. Moody*, 161 S.W.3d 56, 80 (Tex. App.—Houston [14th Dist.] 2004, no pet.). In addition, civil conspiracy requires specific intent to agree to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means. *A.H. Belo Corp. v. Corcoran*, 52 S.W.3d 375, 384 (Tex. App.—Houston [1st Dist.] 2001, pet denied) (citing *Juhl v. Airington*, 936 S.W.2d 640, 644 (Tex. 1996)). An attorney may be liable to a third person if he knowingly commits a fraudulent act or knowingly enters into a conspiracy to defraud a third person. *Lesikar v. Rappeport*, 33 S.W.3d 282, 302 (Tex. App.—Texarkana 2000, pet. denied) (citing *Likover v. Sunflower Terrace II, Ltd.*, 696 S.W.2d 468, 472 (Tex. App.—Houston [1st Dist.] 1985, no writ)).

C. Analysis

Hoang contends the evidence is legally insufficient to support the trial court's implied finding that he was a co-conspirator in a civil conspiracy. We first address whether there was an underlying tort or other unlawful means or purpose to support the trial court's civil conspiracy finding. *Chu v. Hong*, 249 S.W.3d 441, 444 (Tex. 2008) (noting "[c]onspiracy is a derivative tort"); *Gary E. Patterson & Assocs., P.C. v. Holub*, 264 S.W.3d 180, 204 (Tex. App.—Houston [1st Dist.] 2008, pet. denied) ("Civil conspiracy is a derivative action premised on an underlying tort."). Ortiz alleged several causes of action, including conversion and fraud. Because there are no findings of fact and conclusions of law, we infer that the trial court found an underlying unlawful act that supports Ortiz's conspiracy claim. *See Chu*, 249 S.W.3d at 444 (recognizing tort of conversion as cause of action that will support civil conspiracy claim); *Lesikar*, 33 S.W.3d at 302 (recognizing tort of fraud as cause of action that will support civil conspiracy claim).

Next, we review whether there was evidence of civil conspiracy. Ortiz contends that each of the required elements of civil conspiracy were met. Ortiz asserts that (1) two or more persons were involved in the conspiracy because Hoang met with Bui and Tran; (2) there was an object to be accomplished because Hoang instructed Bui and Tran that they could sell her equipment; (3) their minds

met once Hoang instructed Bui and Tran that they could sell her equipment as a legal remedy; (4) an unlawful act occurred when Bui and Tran sold her equipment without following statutorily required procedures; and (5) she suffered damages as a proximate result of Bui's and Tran's sale of her equipment. Ortiz does not address whether Hoang had the specific intent to conspire against Ortiz. Hoang, on the other hand, asserts there is no evidence to support at least one element of Ortiz's civil conspiracy claim and no evidence that he had the specific intent to commit civil conspiracy.

Hoang testified at trial and provided the following version of events. Bui and Tran approached him for a one-hour, pro-bono consultation that Hoang periodically gave to members of the Houston Vietnamese community. At the start of the consultation, Bui and Tran presented Hoang with the Retail Lease Contract. Hoang reviewed the retail lease contract only. Bui and Tran notified Hoang that they were involved in a breach of contract lawsuit involving the contract. Hoang told them that he could not help him on any matters regarding the lawsuit and that those matters must be discussed only with the attorney representing Bui and Tran at that time. Bui responded that he was not asking Hoang for advice regarding the lawsuit, but was merely asking, based upon the details in the contract, what his basic remedies were if someone did not pay him rent for eight months. Hoang then

read the contract to Bui, translating the contract from English to Vietnamese. In explaining the remedies section of the contract, Hoang read:

Landlord may enter, take possession of the premises by self-help, by picking or changing the locks if necessary, and may lock out tenant or any other person who may be occupying the premises until the default is cured, without being liable for damages.

Hoang told Bui and Tran that if no rent had been paid for eight months, pursuant to the contract, he had three potential remedies. Bui and Tran could (1) choose not to do anything, (2) file an eviction, or (3) foreclose. Hoang did not specifically explain the steps involved in foreclosing property. Hoang also did not specifically advise Bui and Tran to lock-out Ortiz or sell her property; however, he did state that if Ortiz had not paid the rent, “pursuant to the contract,” Bui and Tran had “the right to lock [Ortiz] out” and “litigate the damages.” Hoang also advised Bui and Tran that if they wanted to file an eviction, they should find an attorney or enlist the attorney that they already had. Bui and Tran asked if this was the extent of possible remedies, and Hoang replied affirmatively. Bui and Tran then left the consultation without retaining Hoang.

Hoang also testified that Bui did not tell him, and that he did not know, that Bui and Tran had filed for a forcible detainer but had lost. He did not know that the court had allowed Ortiz to stay in the space or that Bui and Tran had appealed the forcible detainer decision. He further testified that if he had about the court’s decision regarding the forcible detainer, he would have advised Bui differently

regarding the foreclosure option. He testified that he did not have any control over Bui and Tran regarding what they chose to do. At the end of Hoang's testimony, the trial court asked Hoang to confirm that (1) he told Bui and Tran that they could foreclose on the equipment and sell it, (2) he gave the foreclosure advice without explaining to Bui and Tran the proper procedures to follow, and (3) Bui and Tran left Hoang's office under the impression that it would be appropriate to sell the equipment. Hoang answered affirmatively to all three questions.

Bui also testified during the motion for contempt hearing. He testified that he sold Ortiz's equipment because Hoang advised him that he could sell it. Bui also made statements in an affidavit that Hoang presented to the trial court without objection. In the affidavit, Bui made the following statements. During the consultation, Bui asked Hoang to review the Lease Contract. Bui notified Hoang that another party had sued them for breach of the Retail Lease Contract. When Bui told Hoang that he had counsel representing him regarding the lawsuit, Hoang told him he could not discuss the lawsuit. Bui then asked Hoang whether or not he could lease the property or foreclose on the equipment if the tenant had not paid for eight months. Hoang responded that if there were defaults for eight consecutive payments, and if there were no temporary restraining orders or no temporary injunction orders, pursuant to the contract, he could (1) not do anything, (2) file and eviction and lease the property to someone else, or (3) foreclose. Bui did not

inform Hoang that his other attorney had filed a forcible detainer, that they had lost, or that Ortiz had the right to remain on the premises pursuant to the court's order.

On appeal, Ortiz contends there was an "object to be accomplished" because Hoang instructed Bui and Tran to sell her equipment. The record does not show that Hoang specifically instructed Bui and Tran to sell Ortiz's equipment. The record shows instead that Hoang advised Bui and Tran based upon a limited knowledge of the facts, that he believed foreclosure on Ortiz's property was a legal remedy available to Bui and Tran, and that they should seek the assistance of counsel. The record shows that when Hoang offered this advice he was aware that there was a dispute over the Retail Lease Contract, but was not aware of the other legal proceedings regarding Bui's and Tran's dispute with Ortiz because Bui did not inform Hoang. We conclude that there is no evidence that Hoang offered this advice as part of a larger scheme to defraud Ortiz or that defrauding Ortiz was the object to be accomplished when he offered the advice.

Ortiz next asserts that there was a meeting of the minds when Hoang instructed Bui that he could sell Ortiz's equipment as a legal remedy. Although Hoang told Bui that a foreclosure consisting of a self-help lock-out and equipment sale was a possible legal remedy, there is less than a scintilla of evidence that Hoang specifically intended to injure Ortiz through his advice or that he knew his

advice would result in injury to Ortiz. Even if Bui and Tran had previously conspired to injure Ortiz, Hoang's involvement was merely collateral, and there is no evidence that Hoang knew of any intent by Bui and Tran to injure Ortiz. *Laxson v. Giddons*, 48 S.W.3d 408, 410 (Tex. App.—Waco 2001, pet. denied) (“One without knowledge of the object and purpose of a conspiracy cannot be a conspirator; he cannot agree, either expressly or tacitly, to the commission of a wrong which he knows not of.”); *see also Goldstein*, 113 S.W.3d at 779 (noting proof that individual had some collateral involvement in transaction is insufficient of itself to establish that defendant was conspirator).

Finally, there is no evidence in the record that Hoang advised Bui of the option to foreclose on Ortiz's property because he had the specific intent to accomplish an unlawful purpose or lawful purpose by unlawful means. *See A.H. Belo Corp.*, 52 S.W.3d at 384. For specific intent to exist in a civil conspiracy claim, the parties must be aware of the harm or wrongful conduct at the beginning of the agreement among them and intend to cause that harm through illegal means. *San Antonio Credit Union v. O'Connor*, 115 S.W.3d 82, 91 (Tex. App.—San Antonio 2003, pet. denied). There is no evidence that Hoang was aware that an illegal act would occur if Bui and Tran foreclosed on Ortiz's equipment when he advised foreclosure as an available legal remedy. Additionally, there is no

evidence that Hoang intended to harm Ortiz when he advised Bui and Tran that he could foreclose on her equipment.

Viewing the evidence in the light most favorable to the trial court's ruling, we conclude that a reasonable factfinder could not have formed a firm belief or conviction that Hoang acted as a co-conspirator because there no evidence of either the requisite "object to be accomplished," or "meeting of the minds," and no evidence that Hoang had the specific intent to injure Ortiz. Consequently, we hold that the evidence is legally insufficient to support the trial court's civil conspiracy finding. *See San Antonio Credit Union v. O'Connor*, 115 S.W.3d 82, 94 (Tex. App.—San Antonio 2003, pet. denied) (holding evidence legally insufficient to support conspiracy finding when there was no direct or circumstantial evidence of specific intent); *see also City of Keller*, 168 S.W.3d at 810; *Greenberg Traurig*, 161 S.W.3d at 80.

We sustain Hoang's third issue.

CONCLUSION

We reverse the judgment of the trial court and render judgment that Ortiz take nothing on her civil conspiracy claim against Hoang. In light of this disposition, we need not address Hoang's remaining issues on appeal.

Sherry Radack
Chief Justice

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