Opinion issued November 10, 2011.

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00738-CV

ELENA MARKOVSKY, Appellant

V.

KIRBY TOWER, LP, Appellee

On Appeal from the 11th District Court
Harris County, Texas
Trial Court Case No. 2009-03458

MEMORANDUM OPINION

Elena Markovsky appeals the trial court's final judgment ordering she take nothing on her claims against Kirby Tower, LP, and awarding Kirby Tower $300,000.00 in earnest money Markovsky had placed in escrow for the purchase of

a condominium unit. Markovsky sued Kirby Tower for breach of contract, seeking the return of the earnest money. The jury found that Kirby Tower had breached the contract but that the breach was excused by Markovsky's waiver. The trial court rendered judgment awarding Kirby Tower the $300,000.00 in earnest money. In two issues on appeal, Markovsky contends that the trial court erred by failing to disregard the jury's finding that Markovsky waived a completion date provision of the parties' contract and that the trial court erred by granting relief to Kirby Tower because Kirby Tower's pleadings did not seek a release of the earnest money. We conclude the trial court did not err by overruling Markovsky's motion to disregard the jury's answer to the waiver issue, but erred by awarding the earnest money to Kirby Tower without supporting pleadings or a jury finding that Markovsky breached the Agreement. We reverse in part and affirm in part.

Background

Markovsky and her husband decided to purchase a condominium unit in a building being developed and sold by Kirby Tower. In January 2008, Kirby Tower sent Markovsky a Condominium Purchase Agreement. The unit price was $3,000,000.00 and Kirby Tower required an earnest money deposit of $300,000.00. Markovsky[1] asked to include a provision in the Agreement allowing an unconditional "out"—that is, a right to terminate the contract and receive a

[1] Markovsky testified that her husband negotiated the contract. However, he did not sign the Agreement; only Markovsky did.

return of the earnest money. Kirby Tower's sales manager told her that was not possible. Instead, he included the following provision in a "Special Provisions Addendum" to the Agreement:

> Notwithstanding any other provisions, the Completion Date is scheduled on or before May 31, 2008. In case of Seller's failure to complete the Unit on or before the completion date, Buyer reserves the right to a full refund of Earnest Money along with any accrued interest.

Although this provision was not the unconditional out Markovsky originally requested, Markovsky was satisfied with—and agreed to—this provision because she felt it was very unlikely that the unit could be completed by May 31, 2008.

The unit was not completed by May 31, 2008. Markovsky nevertheless continued to make changes to the unit plans and continued to proceed under the contract, including selecting unit upgrades and specifying cabinets and appliances to install in the unit. Markovsky and her husband intended to close on the unit until their personal finances deteriorated and they felt they could no longer comfortably afford the unit. On November 5, Markovsky's husband therefore informed Kirby Tower's sales manager that Markovsky wished to cancel the Agreement and receive her earnest money back. The sales manager asked for some time and Markovsky agreed to contact him later in the month. On November 19, Markovsky contacted the sales manager again. The sales manager told Markovsky's husband that the May 31, 2008 completion date was a typographical

error and it should have read May 31, 2009. In response, Markovsky sent a letter to the title company dated November 20, 2008, stating that Kirby Tower was in breach by failing to complete the unit by May 31, 2008 and asking for a return of the earnest money and accrued interest.

Kirby Tower responded by sending a letter to Markovsky informing her that "we both know" the May 31, 2008 date was a typographical error that should have been May 31, 2009. Kirby Tower asked Markovsky to sign an amendment changing the date to May 31, 2009 or it would file suit to reform the Agreement. Markovsky did not respond to the letter. She filed this suit seeking the return of her earnest money plus accrued interest.

Waiver

In her second issue, Markovsky contends the trial court erred by failing to disregard the jury's answer to question number three, the waiver question. Specifically, Markovsky contends that the defense of waiver was not available as a matter of law and that no evidence supports the jury's finding of waiver.

A. Standard of Review

A trial court may disregard a jury finding when the question is immaterial or there is legally insufficient evidence to support the finding. *Hall v. Hubco, Inc.*, 292 S.W.3d 22, 27 (Tex. App.—Houston [14 Dist.] 2006, pet. denied) (citing *Spencer v. Eagle Star Ins. Co. of Am.*, 876 S.W.2d 154, 157 (Tex. 1994)). A

question is immaterial: "(1) if the question should not have been submitted; (2) if the question was rendered immaterial by other findings, or (3) if the question called for a finding not within the jury's province, such as presenting a question of law for the court." *Vecellio Ins. Agency, Inc. v. Vanguard Underwriters Ins. Co.*, 127 S.W.3d 134, 140 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (citing *Spencer*, 876 S.W.2d at 157). A trial court's decision on a motion to disregard based on a legal issue is reviewed de novo. *Hall*, 292 S.W.3d at 27–28 (citing *Houston Lighting & Power Co. v. City of Wharton*, 101 S.W.3d 633, 638 (Tex. App.—Houston [1st Dist.] 2003, pet. denied)). When the motion to disregard is based on a complaint that the evidence is legally insufficient, we employ the well-settled legal sufficiency or "no evidence" review. *See Tiller v. McLure*, 121 S.W.3d 709, 713 (Tex. 2003). The evidence is legally insufficient when (1) the record discloses a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or rules 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 a vital fact. *City of Keller v. Wilson*, 168 S.W.3d 802, 810 (Tex. 2005). In determining whether there is legally sufficient evidence, we must consider evidence favorable to the finding if a reasonable fact-finder could and disregard

evidence contrary to the finding unless a reasonable fact-finder could not. *Id.* at 807, 827.

B. Waiver addressed by the contract

In this portion of her second issue, Markovsky contends, "Where the parties have contracted regarding waiver, such provision precludes a finding [of] waiver as a matter of law." The Agreement contains a paragraph that states: "29. WAIVER. By closing this agreement, buyer shall be deemed to have waived all claims against Seller and Seller shall have been deemed to have fulfilled all of its contractual obligations . . . ." Thus, Markovsky argues, the contract determines that waiver, if any, occurs only at closing. In support of her argument, Markovsky cites *Giller Industries, Inc. v. Hartley*, 644 S.W.2d 183 (Tex. App.—Dallas 1982, no writ).

We decline to apply *Giller Industries* as Markovsky urges. In that case, the Dallas court was addressing a non-waiver provision. *Giller Indus., Inc.*, 644 S.W.2d at 184. The provision stated, "No waiver by the parties hereto of any default or breach of any term, condition or covenant of this lease shall be deemed to be a waiver of any subsequent default or breach of the same or any other term, condition, or covenant contained herein." *Id.* The Dallas court held that, because of this clause, the landlord had not waived its right to claim a breach of contract due to the tenant's late rent payment, even though the landlord had previously

accepted late payments without protest. *Id.* But this case is distinguishable from *Giller Industries*. The provision in *Giller Industries* stated that a prior waiver of the other party's breach would not waive subsequent breaches. *Id.* The provision in this case is more narrowly drawn, specifically stating that any waiver will take place "[b]y closing" the Agreement. It is undisputed that a closing on the unit never took place.

Because the contractual provision at issue in *Giller Industries* differs significantly from the one in this case, that case does not apply to the Agreement.

We overrule this portion of Markovsky's first issue.

C. No evidence of waiver

In this portion of her second issue, Markovsky contends that the evidence is legally insufficient to show that Kirby Tower was prejudiced or misled or that she intended to waive the completion date clause of the contract.

Concerning the first contention, Markovsky argues that a court will not imply waiver unless the conduct of the party charged with waiver prejudices the other party. *See Nixon Constr. Co. v. Downs*, 441 S.W.2d 284, 286 (Tex. Civ. App.—Houston [1st Dist.] 1969, no writ); *see also Enserch Corp. v. Rebich*, 925 S.W.2d 75, 82 (Tex. App.—Tyler 1996, writ dism'd) ("[W]waiver by implication should not be inferred contrary to the intention of the party whose rights would be injuriously affected thereby, unless the opposite party has been misled to his or her

prejudice.") Markovsky argues that the record contains no evidence that Kirby Tower was misled or prejudiced. We must, however, measure the sufficiency of the evidence against the charge given in the absence of an objection. *Wal–Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 715 (Tex. 2001); *Osterberg v. Peca*, 12 S.W.3d 31, 55–56 (Tex. 2000). Markovsky did not object to the proposed charge on the grounds that it did not require a finding that Kirby Tower was misled or suffered prejudice. The lack of any such evidence is, therefore, irrelevant to our legal sufficiency review. *See Wal–Mart Stores, Inc.*, 52 S.W.3d at 715; *Osterberg*, 12 S.W.3d at 55–56.

The charge in this case asked the jury, "Was [Kirby Tower's] failure to comply [with the Agreement] excused?" The jury was also instructed, "Failure to comply by [Kirby Tower] is excused if compliance is waived by [Markovsky]. Waiver is an intentional surrender of a known right or intentional conduct inconsistent with claiming that right." A reasonable juror could have found waiver based on this definition and the evidence presented.

Markovsky testified repeatedly that she did not expect the unit to be completed by May 31, 2008, nor did she intend for it to be completed by that date. She also testified that it did not matter to her if the unit was completed by May 31 or not. She testified that when she did ask for a return of the earnest money, she did so because her and her husband's financial status had changed and they felt

they could no longer "comfortably afford" the unit, not because the unit was not complete on May 31. In addition, Markovsky did not request a return of the earnest money until more than five months after the May 31, 2008 completion date was missed. During that interval, she met several times with the architects and revised the plans for the unit. She also continued making selections for customized or upgraded components for the unit, such as making cabinet selections in September 2008. She additionally testified that, until her finances deteriorated, she had no intention of terminating the contract, but intended to close on the unit despite the fact that it was not completed on May 31, 2008.

Similarly, Markovsky's husband testified that he thought it was very unlikely the completion date would be met and that he did not care. He also testified that he and Markovsky had no intention of seeking an earnest money refund based on Kirby Tower's failure to complete by May 31, 2008. He expressly stated that the completion date had nothing to do with the decision to seek a return of the earnest money; rather, he and Markovsky's personal financial status was the reason they sought to get out of the contract.

Accordingly, we conclude that the record contains some evidence from which a rational juror could find Markovsky engaged in intentional conduct inconsistent with claiming the right to enforce the May 31, 2008 completion date.

We therefore hold that the evidence is legally sufficient to support the jury's finding of waiver.

Markovsky cites *Tiger Truck, LLC v. Bruce's Pulp & Paper, LLC*, 282 S.W.3d 176 (Tex. App.—Beaumont 2009, no pet.), in support of her argument that her actions do not constitute waiver. That case, however, is distinguishable. In *Tiger Truck*, the contract gave Tiger Truck sixty days to conduct due diligence and the closing date was thirty days after the expiration of the due diligence period. 282 S.W.3d at 185. The seller argued that Tiger Truck waived its right to terminate the contract by continuing its activities on the property after the sixty-day due diligence period had expired. *Id.* The court noted that, while Tiger Truck did not terminate the contract at its earliest opportunity, "none of Tiger Truck's behavior after [the due diligence period expired] indicates an intention to waive its right to terminate the contract." *Id.* Tiger Truck received an environmental assessment days before the due diligence period expired. *Id.* The assessment triggered a more in-depth environmental study, which revealed contamination on the property from underground petroleum tanks. *Id.* The court stated, "At most, Tiger Truck delayed exercising its right to terminate until it determined that it could not promptly work around the still-developing environmental issues with the property." *Id.* at 186.

Here, Markovsky was not in the midst of conducting a due-diligence review to determine whether to proceed with the purchase at the time her right to obtain a refund arose. Instead, the evidence shows Markovsky fully intended to proceed to closing for months after the May 31 completion date and that she continued to work with Kirby Tower towards consummating the contract for another five months. Markovsky's conduct more closely resembles the actions in *SP Terrace, L.P. v. Meritage Homes of Texas, LLC*, 334 S.W.3d 275 (Tex. App.—Houston [1st Dist.] 2010, no pet.), which were found to raise a fact issue concerning waiver. In that case, under the parties' contract, SP Terrace was required to file a subdivision plat on December 31, 2005. *SP Terrace, L.P.*, 334 S.W.3d at 279. SP Terrace did not do so and Meritage, on February 3, 2006, demanded return of its earnest money for SP Terrace's breach. *Id.* at 280. SP Terrace presented evidence that Meritage had continued to participate in meetings and that SP Terrace accommodated changes requested by Meritage in the months following the December 31 deadline. *Id.* at 285. This court reversed a summary judgment for Meritage, finding SP Terrace had raised a fact issue concerning waiver. *Id.* at 285.

We overrule this portion of Markovsky's second issue.

Pleadings and Judgment

In her first issue, Markovsky contends that the trial court erred in awarding the $300,000.00 earnest money to Kirby Tower because Kirby Tower did not plead

for that relief.

"A trial court cannot enter judgment on a theory of recovery not sufficiently set forth in the pleadings or otherwise tried by consent." *Hartford Fire Ins. Co. v. C. Springs 300, Ltd.*, 287 S.W.3d 771, 779 (Tex. App.—Houston [1st Dist.] 2009, pet. denied); *see also* TEX. R. CIV. P. 301 (providing that the "judgment of the court shall conform to the pleadings"); *Kao Holdings, L.P. v. Young*, 261 S.W.3d 60, 65 (default judgment against defendant improper because—among other reasons—no claim was pleaded against that defendant); *In re Park Mem'l Condo. Ass'n, Inc.*, 322 S.W.3d 447, 450–51 (Tex. App.—Houston [14th Dist.] 2010, orig. proceeding) (trial court erred by granting relief for disbursement of insurance proceeds where plaintiff's petition "did not assert any claim whatsoever to the insurance proceeds"). Kirby Tower's live pleading contains a general denial and several affirmative defenses. It does not assert a claim that Markovsky is in breach of the contract. It does not mention the $300,000.00 at all—or, in the words of our sister court, Kirby Tower's pleading "did not assert any claim whatsoever" to the earnest money. *See In re Park Mem'l Condo. Ass'n, Inc.*, 322 S.W.3d at 450. Because the pleadings do not support an award of the earnest money to Kirby Tower, the trial court erred by awarding the $300,000.00 to Kirby Tower. *See Hartford Fire Ins. Co.*, 287 S.W.3d at 779; *see also Cunningham v. Parkdale*

Bank, 660 S.W.2d 810, 813 (Tex. 1983) ("Thus, a party may not be granted relief in the absence of pleadings to support that relief.").

Kirby Tower raises two arguments in this appeal that it contends support the award of the $300,000.00 to it. First, Kirby Tower asserts that it did not allege a counterclaim "because such a counterclaim would have been improper, as its only basis would have been merely to seek the opposite relief sought by Markovsky's declaratory judgment." The sole authority on which Kirby Tower relies is *Howell v. Mauzy*, 899 S.W.2d 690 (Tex. App.—Austin 1996, writ denied). In that case, the Austin Court of Appeals stated, "A court may allow a declaratory judgment counterclaim . . . if it is something more than a mere denial of plaintiff's claims and has greater ramifications than the original suit." *Howell*, 899 S.W.2d at 706.

Markovsky's entire theory of recovery, whether framed as a declaratory judgment or as a breach of contract, was based on the completion date in the Special Provisions Addendum of Agreement. That is, Markovsky relied on Kirby Tower's failure to complete the unit by May 31, 2008. This provision plainly states, "In case of Seller's failure to complete the Unit on or before the completion date, Buyer reserves the right to a full refund of Earnest Money along with any accrued interest." This provision does not grant Kirby Tower any right to the earnest money if it did complete the unit by that date (or, as here, Markovsky waived the right to enforce that provision). Rather, other sections of the contract

determine the entitlement to the earnest money in situations other than the failure to meet the completion date. In the Addendum to the Agreement, paragraph 13 provides that if Kirby Tower is in default, Markovsky's sole remedy—if she does not elect in writing to enforce specific performance within 30 days of written notice of Kirby Tower's default—is to treat the Agreement as terminated and receive a refund of all payments that are not designated non-refundable under the Agreement. A similar provision states that Kirby Tower is entitled to the earnest money and all other refundable amounts as liquidated damages if Markovsky is in default. For Kirby Tower to have properly asserted a claim to the earnest money, it needed to do more than merely deny Markovsky's claim of the breach of the completion date provision of the contract. A claim for the earnest money based on Markovsky's breach required a pleading separate and apart from pleadings concerning Kirby Tower's failure to complete or the defensive issues of mutual mistake and waiver. *Howell*, therefore, does not apply.[2]

Second, Kirby Tower also asserts that "[i]t is undisputed that Markovsky terminated the contract claiming she had a right to do so based upon Kirby's breach." Accepting these assertions as correct, it still does not relieve Kirby Tower

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[2] Furthermore, neither party pleaded these sections as the basis of a breach. Nor was the jury asked about these sections. These sections were not discussed during opening statements or during the charge conference (and closing arguments were not recorded). Because these sections were neither pleaded nor tried by consent, they cannot form the basis of the trial court's judgment. *See Hartford Fire Ins. Co.*, 287 S.W.3d at 779.

of the burden of pleading its cause of action. *See Hartford Fire Ins. Co.*, 287 S.W.3d at 779; *see also Cunningham*, 660 S.W.2d at 813; *Webb v. Glenbrook Owners Ass'n, Inc.*, 298 S.W.3d 374, 380 (Tex. App.—Dallas 2009, no pet.) ("A judgment that is not supported by any pleading or tried by consent is void.").

We sustain Markovsky's first issue.

Conclusion

We reverse that portion of the trial court's judgment that states Kirby Tower is entitled to the $300,000.00 earnest money plus accrued interest and orders the title company to release the earnest money to Kirby Tower. We affirm the remainder of the judgment and remand the cause to the trial court for further proceedings consistent with this opinion.

Rebeca Huddle
Justice

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