

Opinion issued July 14, 2011.



In The
Court of Appeals
For The
First District of Texas

NO. 01-10-00940-CV

ATC HEALTHCARE SERVICES, INC., Appellant
V.
NEW CENTURY FINANCIAL, INC., Appellee

On Appeal from the 152nd District Court
Harris County, Texas
Trial Court Case No. 2007-38981

MEMORANDUM OPINION

This appeal involves New Century Financial, Inc.'s enforcement of its security interest in certain collateral of Chicago Nurses, Inc., a medical staffing agency that operated in the state of Georgia that has since dissolved. Invoking its

rights under a past franchise agreement with Chicago Nurses, ATC Healthcare Services, Inc. (ATC) challenges the trial court's judgment enforcing New Century's security interest in the collateral and dismissing ATC's counterclaims against New Century for tortious interference with contract. ATC further contends that the trial court erred in awarding attorney's fees. We reverse the award of attorney's fees and remand that portion of the proceeding for a new hearing. We affirm the remainder of the judgment.

Background

New Century is a factoring company, or factor, that purchases accounts receivable from businesses to secure business operating loans. Under a factoring agreement, the factor purchases a client's billing invoices at a discount in exchange for a security interest in the receivables owed by third parties in payment of these invoices. Through this transaction, the client gains short-term working capital funds. The factor pays a discounted amount for the invoices and manages the receivables and collections. On payment, the factor remits a portion of the payment to the factoring client, retaining the remainder for service fees.

New Century entered into a factoring agreement with Chicago Nurses in September 2006. At the time, Chicago Nurses already had a factoring line with Advance Financial Corporation with a credit advance of \$200,000. As part of the agreement, New Century agreed to discharge the balance that Chicago Nurses

owed to Advance. In exchange, New Century acquired the right to collect Chicago Nurse's accounts with Chestatec Medical Center, Grady Health System, Emory Health Care, and Northeast Georgia Health System (the account debtors).

Pertinent to the parties' dispute, the factoring agreement provides:

SECURITY INTEREST. As a further inducement for [New Century] to enter into this agreement, [Chicago Nurses] hereby grants to [New Century], as collateral and security for the performance of any obligations hereunder, a Security Interest, under the Illinois and Georgia Uniform Commercial Codes, in all of [Chicago Nurse's] presently owned or hereafter acquired accounts, accounts receivable, contract rights, chattel paper, documents, instruments, money deposit accounts (including the reserve account and any portion of the Maximum Company Discount not rebated to [Chicago Nurses] hereunder), general intangibles, insurance policies, all goods, equipment and inventory. [Chicago Nurses] shall not sell, transfer, or otherwise convey or dispose of any of said property except finished inventory held for sale and sold in [Chicago Nurse's] usual course of business.

Chicago Nurses and Advance informed New Century that the balanced owed on the accounts receivables transferred from Advance was due and outstanding. New Century relied on that representation and did not independently verify the status of these accounts or whether the receivables were collectible. New Century then perfected its interest in Chicago Nurse's collateral by filing UCC financing statements in Illinois and Georgia. The filing statements covered:

All presently existing or hereafter arising, now owned or hereafter acquired, accounts, accounts receivable, contract rights, chattel paper, documents, instruments, money deposit accounts, all other rights to payment, general intangibles, goods, equipment, and inventory. [Chicago Nurses] is not authorized to sell, transfer, or otherwise

convey or dispose of any said property except finished inventory held for sale and sold in the normal course of business.

Also pursuant to the factoring agreement, New Century informed the account debtors of New Century's right to payment. The notice provided that "[t]his notice and instruction remains in full force and effect until you are notified by both the undersigned and New Century Financial, Inc. in writing to the contrary." Within the next few weeks, the account debtors signed and acknowledged receipt of New Century's notice directing that all payments of future amounts be made payable to Chicago Nurses and New Century.

In November 2006, New Century stopped receiving payments on some of the invoices subject to the factoring agreement. New Century learned that approximately \$90,000 owed under the accounts was uncollectible, but determined that it could remedy this shortfall by enforcing its interest in the account debtors' future accounts receivable.

A couple of weeks later, on December 5, 2006, Chicago Nurses and ATC entered into a franchise agreement. ATC did not search for account liens before entering into the franchise agreement, and Chicago Nurses did not seek authorization for the discharge of debt or transfer of collateral subject to New Century's security interest, as it had with Advance. The franchise agreement included unusually favorable terms for Chicago Nurses. ATC waived the franchise fee and instead paid Chicago Nurses \$70,000 for the franchise, and agreed to pay

70% of the gross margin as a royalty payment instead of the 55% Chicago Nurses had paid to each of its other franchisees. The franchise agreement also required Chicago Nurses to stop billing its clients in its own name and to direct its clients to issue all payments in ATC's name. Except for the name change, ATC's business activities remained substantially the same as Chicago Nurse's had been, using the same location, equipment, nurses, and hospitals.

The account debtors' payments to New Century came to a halt as they received and paid the new invoices generated under ATC's name that directed payment to ATC. These included payments by Northeast Georgia and Emory Adventist totaling \$274,703.98 on accounts subject to New Century's perfected security interest.

New Century sent a letter to ATC informing ATC of its rights to any amounts payable by ATC to Chicago Nurses and demanding an accounting of all payments it had received that were subject to New Century's security interest in Chicago Nurse's collateral. ATC refused. It responded with its own demand letter contesting the validity of New Century's security interest in the accounts. In March 2007, New Century filed this suit, requesting declaratory relief and claiming tortious interference with contract and conversion. ATC counterclaimed for its own declaration, breach of contract, tortious interference with contract, conversion, unjust enrichment, and moneys had and received. The parties tried their claims to

the bench, and the trial court entered judgment in favor of New Century upholding its security interest in the accounts. This appeal followed.

Discussion

I. Evidentiary sufficiency

ATC first challenges the trial court's failure to find that ATC is the unimpaired owner of the account collateral, and thus that New Century is not entitled to judgment on its claims. When, as here, a trial court enters findings of fact and conclusions of law, we "indulge every reasonable presumption in favor of the findings and judgment of the trial court, and no presumption will be indulged against the validity of the judgment." *Vickery v. Comm'n for Lawyer Discipline*, 5 S.W.3d 241, 252 (Tex. App.—Houston [14th Dist.] 1999, pet. denied). We review the trial court's conclusions of law de novo. *Nguyen v. Yovan*, 317 S.W.3d 261, 267 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (citing *Smith v. Smith*, 22 S.W.3d 140, 149 (Tex. App.—Houston [14th Dist.] 2000, no pet.)). When performing a de novo review, we exercise our own judgment and redetermine each legal issue. *Id.* (citing *Quick v. City of Austin*, 7 S.W.3d 109, 116 (Tex.1998)).

We construe ATC's challenge to the ownership of the post-franchise accounts as a question of evidentiary sufficiency. When reviewing a trial court's factual determinations after a bench trial, we use the same factual sufficiency standard that applies to jury verdicts. *Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex.

1996). We consider all of the evidence in a neutral light, and we set aside the verdict only if the evidence is so weak or if the finding is so against the great weight and preponderance of the evidence such that it is clearly wrong and unjust. *Grider v. Mike O'Brien, P.C.*, 260 S.W.3d 49, 57 (Tex. App.—Houston [1st Dist.] 2008, pet. denied).

In a bench trial, the trial court judges the credibility of the witnesses, determines the weight of testimony, and resolves conflicts and inconsistencies in the testimony. *See Sw. Bell Media, Inc. v. Lyles*, 825 S.W.2d 488, 493 (Tex. App.—Houston [1st Dist.] 1992, writ denied). As long as the evidence falls “within [the] zone of reasonable disagreement,” we will not substitute our judgment for that of the fact-finder. *See City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005).

A. Application of the UCC

ATC first contends that the trial court committed legal error in granting the judgment in favor of New Century because no evidence supported the trial court’s determination that ATC was liable to New Century for the account payments. According to ATC, the trial court wrongly analyzed New Century’s claims under the UCC when they should have been considered and rejected under a vicarious liability theory because New Century lacked diligence in valuing Chicago Nurse’s

collateral at the time it assumed the accounts and discharged Advance, the previous factor for Chicago Nurses.

We disagree. ATC's vicarious liability theory ignores the plain language of the factoring agreement and New Century's UCC filings, both admitted in evidence before the trial court. In its findings of fact and conclusions of law, the trial court found that New Century had perfected security interests in Chicago Nurse's "presently existing or hereafter arising, now owned or hereafter acquired, accounts [and] accounts receivable" This evidence, which ATC does not challenge, supports the trial court's conclusion that article 9 of the Uniform Commercial Code applies to the parties' dispute.

A security interest is "an interest in personal property . . . which secures payment or performance of an obligation." TEX. BUS. & COM. CODE ANN. § 1.201(35) (West 2009). If perfected, a security interest is enforceable not only against the debtor, but also against purchasers of the collateral, creditors, and other third parties. *Id.* §§ 9.201, 9.203(b)(1) (West 2011). As a result, New Century was not limited to its contractual rights against Chicago Nurses or Advance in connection with the factoring agreement. On proper proof, the UCC gives New Century the right to enforce its security interest directly against ATC. *See id.* § 9.507(a) (West 2011) ("A filed financing statement remains effective with respect to collateral that is sold, exchanged, leased, *licensed*, or *otherwise disposed*

of and in which a security interest . . . continues, even if the secured party knows of or consents to the disposition.”) (emphasis added).

The franchise agreement did not confer to ATC rights in the collateral beyond those Chicago Nurses retained under its factoring agreement with New Century. Chicago Nurses could not transfer rights that it did not possess. *See id.* § 3.203(b) (West Supp. 2010) (transfer of instrument vests in transferee any right of transferor to enforce instrument); *id.* § 9.203(b) (West 2011) (security interest attaches when (1) debtor signs security agreement containing description of collateral; (2) secured party gives value for security interest; and (3) debtor obtains rights in collateral). The trial court correctly held that ATC’s rights under the franchise agreement were subject to New Century’s rights to the collateral.

B. Scope of New Century’s security interest

ATC also disputes the trial court’s findings that continuing payments directed to ATC from the account debtors on existing accounts as well as new accounts generated under ATC’s name after Chicago Nurses and ATC entered into the franchising agreement, could be subject to New Century’s perfected security interest. ATC maintains that the latter accounts were not Chicago Nurse’s “hereafter acquired accounts,” but instead were ATC’s own, separate accounts.

The placement of accounts under ATC’s name or payment to ATC as directed in the franchising agreement, however, does not affect New Century’s pre-

existing rights in them as collateral for outstanding loans New Century made to Chicago Nurses. *See id.* § 9.507(a). ATC relies on a disclaimer in the franchising agreement in which Chicago Nurses disclaims any authority to obligate ATC for its obligations to contend that ATC is insulated from assuming any of Chicago Nurses's obligations under the factoring agreement. This contention ignores New Century's perfected security interest in the accounts, which enforce directly against ATC. The trial court found that ATC was not a buyer in the ordinary course of business; ATC does not challenge this finding. Based on that finding, which the record supports, ATC's rights to Chicago Nurses' receivables under the franchising agreement are subject to "all defenses of any party which would be available in an action on a simple contract." *See id.* § 3.306(b) (West 2002). Legally sufficient evidence also supports the trial court's implied conclusion that new accounts landed after the ATC franchise, despite bearing ATC's name, were subject to New Century's security interest as account "hereafter arising, . . . or hereafter acquired" because ATC was a continuation of Chicago Nurses' business. We hold that the judgment properly requires ATC to pay damages representing the proceeds of the collateral plus reasonable expenses of collection and enforcement, offset by credit for collateral received by New Century.

II. Attorney's fees

ATC also challenges the propriety and evidence supporting the reasonableness of the attorney’s fee award in favor of New Century. ATC first asserts that the Declaratory Judgment Act cannot support the award because New Century abandoned its request for declaratory relief at trial. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (West 2008). ATC does not identify the portion of the record that supports this assertion, and our review of the record does not support it either; on the contrary, the judgment recites that New Century “requested attorney’s fees pursuant to the Texas Civil Practice & Remedies Code § 37.009.” ATC also contends that attorney’s fees under the Declaratory Judgment Act are improper because the judgment awards damages, not declaratory relief. We disagree. Although the judgment uses the term “damages,” when read together with the trial court’s findings of fact and conclusions of law—which are expressly incorporated by reference—it essentially enforces New Century’s security interest, that is, the “right to payment of a monetary obligation.” TEX. BUS. & COM. CODE ANN. § 9.102(a)(2) (West 2011). The judgment therefore supports an award of attorney’s fees under section 37.009.

New Century also requested attorney’s fees based on sections 9.607(d) and 9.608(a)(1)(A) of the Texas Business and Commerce Code. *See id.* §§ 9.607(d), 9.608(a)(1)(A) (West 2011) ATC contends that the UCC does not provide any basis for the fee award. On the contrary, the trial court made express findings

relating to the validity of and New Century's right to enforce its security interests as against ATC. In express support of the attorney's fee award, the trial court entered the following findings of fact and conclusions of law:

13. In event of default, a secured party may deduct from the collections reasonable expenses of collection and enforcement, including reasonable attorney fees and legal expenses incurred by the secured party. The additional expense to recover a party's collateral is recoverable by the secured party. A security interest that secures payment or performance of an obligation, may recover the reasonable expenses of collection and enforcement and to the extent provided by agreement and not prohibited by law, reasonable attorney's fees and legal expenses incurred by the secured party.

.....

14. [Chicago Nurses] defaulted under the terms and conditions of the Purchase Agreement.

.....

19. [New Century] placed ATC on notice of its rights as purchaser of the accounts and as the holder of a security interest in the accounts and general intangibles of [Chicago Nurses], and ATC had a duty to remit all payments otherwise payable to [Chicago Nurses] under the Franchise Agreement to [New Century] ATC knew of [New Century's] perfected security interest in the collateral, and ATC's actions caused [New Century] to incur the additional expense of attorney's fees to recover its collateral.

(Citations omitted). These findings, which are unchallenged, support the trial court's decision to award attorney's fees to New Century.

ATC also claims that the fee award should be reversed because New Century failed to segregate the fees incurred in trying its statutory claims from

those it incurred in connection with its conversion and unjust enrichment claims, and in defending the claims against it, for which attorney's fees were unrecoverable. We agree. "[I]f any attorney's fees relate solely to a claim for which such fees are unrecoverable, a claimant must segregate recoverable from unrecoverable fees." *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 313 (Tex. 2006). The proof that New Century provided to the trial court shows that New Century did not segregate its fees or satisfy its burden to show that the fees fall within the narrow exception to the duty to segregate—that "discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated." *Id.* at 313–14. ATC timely objected to New Century's failure to segregate. In the absence of any evidence segregating the fees, the trial court's attorney's fee award, albeit less than the amount that New Century requested, must be reversed.

New Century's unsegregated evidence of attorney's fees constitutes some evidence of what the segregated amount should be. Accordingly, we remand the issue of New Century's claim for attorney's fees for further proceedings. *See Hong Kong Dev., Inc. v. Nguyen*, 229 S.W.3d 415, 455–56 (Tex. App.—Houston [1st Dist.] 2007, no pet.) ("When an appellate court sustains a challenge that attorney's fees were not properly segregated, the remedy is to sever that portion of

the judgment awarding attorney's fees and to remand the cause for the issue to be relitigated.”).

Conclusion

We hold that the trial court properly applied the Uniform Commercial Code to the dispute between ATC and New Century, and the evidence supports the finding that New Century has a valid, enforceable security interest against ATC. We further hold that factually sufficient evidence does not support the trial court’s attorney’s fee award. We therefore reverse the portion of the trial court’s judgment awarding New Century its attorney’s fees and remand that issue to the trial court for further proceedings. We affirm the remainder of the judgment.

Jane Bland
Justice

Panel consists of Chief Justice Radack and Justices Bland and Wilson.*

* The Honorable Randy Wilson, Judge of the 157th District Court of Harris County, participating by assignment.