Opinion issued November 3, 2016.

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00664-CV

TED B. LYON, III, Appellant[1]

V.

BUILDING GALVESTON, INC., D/B/A BUILDING SOLUTIONS, Appellee

and

BUILDING GALVESTON, INC., D/B/A BUILDING SOLUTIONS, Appellant

V.

TED B. LYON, III, Appellee[2]

---

1 Although the style in Ted B. Lyon, III's notice of appeal identities the defendants as "Lyon Construction Services, et al.," the body of the document reflects that Ted B. Lyon, III is the only defendant appealing the trial court's final judgment. Because it did not file a notice of appeal in this case, Lyon Properties & Custom Homes, LLC d/b/a Lyon Construction Services is not an "appellant." *See* TEX. R. APP. P. 3.1(a), 25.1(c).

2 Because appellant Building Galveston, Inc. is not raising any points or issues against Lyon Properties & Custom Homes, LLC d/b/a Lyon Construction Services in its

On Appeal from the 405th District Court
Galveston County, Texas
Trial Court Case No. 10-CV-2353

MEMORANDUM OPINION

Ted B. Lyon, III and Building Galveston, Inc., d/b/a Building Solutions are appealing a final judgment rendered after a bifurcated trial. We reverse in part and affirm in part.

Background

In February 2010, Ted B. Lyon, III (Lyon), on behalf of Lyon Construction Services, and Building Galveston, Inc., d/b/a Building Solutions (BGI) entered into a subcontract agreement whereby Lyon Construction Services agreed to serve as BGI's subcontractor on the remodeling of Patty Cakes Bakery in Galveston, Texas (the Subcontract). Lyon Construction Services is the assumed name or trade name of Lyon Properties & Custom Homes, LLC, [3] whose sole member is Lyon.

appellant's brief, Lyon Properties & Custom Homes, LLC d/b/a Lyon Construction Services is not an "appellee." *See Showbiz Multimedia, LLC v. Mountain States Mortg. Ctrs., Inc.*, 303 S.W.3d 769, 771 n.3 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (noting that appellee must be party to trial court's final judgment and someone against whom appellant raises issues or points of error in appellant's brief).

[3] We will refer to Lyon Properties & Custom Homes, LLC as Lyon Construction Services, unless otherwise noted.

On May 4, 2010, BGI fired Lyon Construction Services as its subcontractor, claiming that Lyon Construction Services' work was defective and that the company had failed to correct those defects. Three days later, Lyon sent a letter to BGI in which he identified the work that Lyon Construction Services had already performed on the project and demanded payment of an additional $35,697.00 which he asserted was due to his company under the Subcontract.[4]

On May 25, 2010, Lyon sent Stephen and Patricia Rennick, the owners of Patty Cakes Bakery, notice of unpaid labor and materials in accordance with Property Code section 53.056. On June 3, 2010, Lyon executed an affidavit claim of lien on behalf of Lyon Construction Services against the Rennicks for $35,697.00.

On August 20, 2010, Lyon Construction Services filed suit against the Rennicks and the bakery in order to foreclose the $35,697.00 lien. BGI, who was contractually obligated to indemnify the Rennicks, intervened in the suit on April 12, 2011, asserting its own claims against Lyon Construction Services for breach of contract, negligent misrepresentation, fraudulent misrepresentation, negligence, promissory estoppel, and unjust enrichment. BGI also asserted a claim against Lyon Construction Services under Civil Practice and Remedies Code section 12.002 for allegedly filing a fraudulent lien, as defined by Texas Property Code section 53.024.

---

[4] It is undisputed that BGI paid Lyon Construction Services $35,000 prior to BGI's termination of the Subcontract.

The Rennicks later settled Lyon Construction Services' claim against them, paying the company $25,000 from the retainage the Rennicks were withholding on BGI's contract. Lyon, individually, was named as a party on October 17, 2011, when BGI filed its second amended petition in intervention naming Lyon as a third-party defendant.

The majority of the case was tried to a jury on November 5, 2013. The parties, however, agreed to submit the issue of attorney's fees to the trial court after the trial on the merits.

The jury returned its verdict on November 12, 2013. In response to Questions 1 and 2, the jury found that Lyon, individually, agreed to enter into the Subcontract with BGI for the construction of the bakery and that Lyon had failed to comply with the Subcontract. Question 2 asked the jury to assess three types of possible damages that would fairly and reasonably compensate BGI for its damages that were caused by Lyon's failure to comply with the Subcontract: (1) the "reasonable and necessary amounts paid" by BGI "for repairing any defective work performed by Ted Lyon III," (2) the "reasonable and necessary cost" to BGI for "completing the work performed by Ted Lyon III," and (3) the "amounts paid by" BGI "that were a natural, probable, and foreseeable consequence of the failure to comply." The jury answered $26,389.76, $33,037.16, and $7,926.92, respectively. In response to Questions 4 and 5, the jury found that Lyon had presented or used a fraudulent lien or claim against

real property, and found that $31,930.75 would fairly and reasonably compensate BGI for its resulting damages. The jury did not find that Lyon Properties & Custom Homes, LLC failed to comply with the Subcontract.

On February 5, 2015, BGI filed an application for attorney's fees pursuant to Chapter 38. On April 9, 2015, BGI filed its First Supplemental Petition alleging that "BGI presented its claim for damages to defendants more than 30 days prior to the filing of this supplemental petition, and more than 30 days prior to the trial of this case in November of 2013. Defendants failed to pay BGI's damages within 30 days from presentment." Lyon filed objections to the application for attorney's fees and the supplemental petition.

On April 17, 2015, the trial court conducted a hearing pursuant to "an agreement between the parties . . . that the Court would decide attorney's fees after the trial was done with the jury." At the hearing, the Court took under advisement several objections made by Lyon to BGI's evidence, allowing the creation of a full record with "all of the testimony." The trial court signed a final judgment in the suit on May 19, 2015, in which it sustained the first of those objections, holding that BGI had not pleaded presentment of its claims as required to recover attorney's fees under Chapter 38.

On June 8, 2015, BGI filed a motion for judgment nunc pro tunc, or, in the alternative, a motion to correct the judgment. On June 15, 2015, Lyon filed a motion

for new trial. The trial court signed the first "judgment nunc pro tunc" on July 31, 2015. On August 27, 2015, Lyon Construction Services filed a motion for new trial. On September 30, 2015, BGI filed a second motion for judgment nunc pro tunc. On October 13, 2015, the trial court signed the second "judgment nunc pro tunc."

Both Lyon and BGI filed notices of appeal.

In four issues, Lyon argues that: (1) the trial court erred by denying his motion to disregard the jury's finding that he made, presented, or used a fraudulent lien or claim (Question 4), and Lyon's motion for new trial, because there is legally and factually insufficient evidence to support the finding; (2) the trial court abused its discretion by admitting Plaintiff's Exhibit 45 into evidence; (3) there is legally and factually insufficient evidence to support the trial court's award of attorney's fees to BGI based on the fraudulent lien and invalid lien claims; and (4) the trial court erred by denying Lyon's motion for new trial because the jury's findings for Question 3 were insufficient to allow the court to determine the correct amount of the judgment to which BGI was entitled.

On appeal, BGI argues that the trial court erred in failing to award reasonable attorney's fees to BGI in connection with its successful claim for breach of contract. Specifically, BGI argues that the trial court erred by: (1) sustaining Lyon's objection that BGI did not properly plead presentment of its breach of contract claim; (2) failing to consider BGI's evidence that it presented its claim for breach of contract

to Lyon as required by Chapter 38; and (3) failing to hold that the evidence established presentment of BGI's breach of contract claim.

BGI also asserted a "cross-point" in its response to Lyon's appellant's brief. Specifically, BGI argues that if the trial court's judgment is reversed on appeal with respect to BGI's fraudulent lien and invalid lien claims, then this Court should render judgment in favor of BGI and against Lyon for contractual damages including an additional $25,000 above the trial court's award for contractual damages because "BGI proved as a matter of law that its contract damages included the amounts awarded by the jury as damages associated with the fraudulent lien," and the jury's failure to find that the $25,000 was part of the contract damages was unsupported by the evidence.

Final Judgment

Before we reach the parties' appellate complaints, we must first address which of the trial court's judgments is the final judgment in this case.

A trial court retains jurisdiction over a case for thirty days after it signs a final judgment or order. TEX. R. CIV. P. 329b(d). During this period, the trial court has plenary power to modify its judgment, but, after thirty days has run, the trial court loses its plenary power, and lacks jurisdiction to act in the matter. *Check v. Mitchell*, 758 S.W.2d 755, 756 (Tex. 1988). A party can extend the trial court's plenary power, however, by timely filing an appropriate post-judgment motion—either a motion for

new trial, TEX. R. CIV. P. 329b(e), or a motion to modify, correct, or reform the judgment, TEX. R. CIV. P. 329b(g)—within thirty days after the trial court signs the final judgment or order. The timely filing of an appropriate post-judgment motion extends the trial court's plenary power "until thirty days after all such timely-filed motions are overruled, either by a written and signed order or by operation of law, whichever occurs first." TEX. R. CIV. P. 329b(e).

The trial court had plenary power over the case when it issued its first "judgment nunc pro tunc" on July 31, 2015, by virtue of Lyon's June 15, 2015 motion for new trial which was still pending as of that date. *See* TEX. R. CIV. P. 329b(e). Similarly, the trial court also had plenary power over the case when it issued its second "judgment nunc pro tunc" on October 13, 2015, because of the pending post-judgment motions filed by Lyon Construction Services and BGI. Accordingly, neither the July 31, 2015 judgment nor the October 13, 2015 judgment are "judgments nunc pro tunc" because both judgments were issued while the trial court had plenary power over the case. *See generally Riner v. Briargrove Park Prop. Owners, Inc.*, 976 S.W.2d 680, 682 (Tex. App.—Houston [1st Dist.] 1997, no writ) (noting that judgments nunc pro tunc are used to correct clerical errors after trial court loses its plenary jurisdiction). Furthermore, the October 13, 2015 judgment was made while the trial court still had plenary power and it implicitly vacated or superseded the prior judgment. *See SLT Dealer Grp., Ltd. v. AmeriCredit Fin. Servs.*,

Inc., 336 S.W.3d 822, 832 (Tex. App.—Houston [1st Dist.] 2011, no pet.) ("'Any change in a judgment made during the trial court's plenary power is treated as a modified or reformed judgment that implicitly vacates and supersedes the prior judgment, unless the record indicates a contrary intent.'") (quoting *Price Constr., Inc. v. Castillo*, 147 S.W.3d 431, 441 (Tex. App.—San Antonio 2004, pet. denied)); *Quanaim v. Frasco Rest. & Catering*, 17 S.W.3d 30, 39 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). Accordingly, the October 13, 2015 is the final judgment in this case.

Jury Question 4

In his first issue, Lyon argues that the trial court erred by denying his motion to disregard the jury's finding that Lyon had filed a fraudulent lien because there is legally and factually insufficient evidence to support the finding. Lyon further alleges that the trial court erred in denying his motion for new trial for the same reason. Among his numerous arguments, Lyon asserts that there is legally insufficient evidence to support the jury's implicit finding that his $35,697 claimed lien was invalid.[5]

[5] BGI argues Lyon did not preserve his argument that there was no or insufficient evidence to support the jury's finding that the lien was invalid because he did not raise this argument in his motions for new trial. In his motion to disregard the jury's answer to Question 4, however, Lyon argued that question instructed the jury that the lien was "invalid" if the lien amount exceeded the statutory cap, and "[f]urthermore, there is no evidence to support a finding that the subject lien was even invalid." This is sufficient to preserve his no-evidence challenge for our review. *See Daniels v. Empty Eye, Inc.*, 368 S.W.3d 743, 748–49 (Tex. App.—

Question 4 asked the jury to decide the following question:

> Did Ted Lyon III make, present or use a document or other record with knowledge that the document or other record was a fraudulent lien or claim against real property or an interest in real property with the intent to defraud and with the intent that the document be given the legal effect of evidencing a valid lien or claim against real property or an interest in real property with the intent to cause Building Galveston, Inc. to suffer financial injury?

The jury was instructed that:

> A lien or claim is fraudulent if the person who files it has actual knowledge that the lien or claim was not valid at the time it was filed.
>
> A lien is invalid if the amount of a lien claimed by a subcontractor exceeds:
>
> (1) An amount equal to the proportion of the total subcontract price that the sum of the labor performed, materials furnished, materials specially fabricated, reasonable overhead costs incurred, and proportionate profit margin bears to the total subcontract price; minus
>
> (2) the sum of previous payments received by the claimant on the subcontract.

The jury answered "yes," to question 4.

A. Standard of Review

We review the denial of a motion to disregard a jury finding for legal sufficiency. *See City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex. 2005); *see also* TEX. R. CIV. P. 301 (trial court may "disregard any jury finding on a question that

---

Houston [14th Dist.] 2012, pet. denied) (stating legal sufficiency challenge may be preserved by filing motion to disregard).

has no support in the evidence"). If a party attacks the legal sufficiency of the evidence, it must show no evidence exists to support the adverse finding. *City of Keller*, 168 S.W.3d at 827.

In our legal-sufficiency review, "we must view the evidence in a light that tends to support the finding of disputed fact and disregard all evidence and inferences to the contrary." *Wal–Mart Stores, Inc. v. Miller*, 102 S.W.3d 706, 709 (Tex. 2003); *see also City of Keller*, 168 S.W.3d at 827. "If more than a scintilla of evidence supports the jury's findings, the jury's verdict . . . must be upheld." *Wal–Mart Stores, Inc.*, 102 S.W.3d at 709. "[M]ore than a scintilla of evidence exists if the evidence 'rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.'" *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004) (quoting *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)). Conversely, evidence that is "so weak as to do no more than create a mere surmise or suspicion" is no more than a scintilla and, thus, no evidence. *Id.* (quoting *Kindred v. Con/Chem., Inc.*, 650 S.W.2d 61, 63 (Tex. 1983)).

B. Applicable Law

Section 12.002(a) of the Texas Civil Practice and Remedies Code provides:

> (a) A person may not make, present, or use a document or other record with:
>
> (1) knowledge that the document or other record is a fraudulent court record or a fraudulent lien or claim against real or personal property or an interest in real or personal property;

> (2) intent that the document or other record be given the same legal effect as a court record or document of a court created by or established under the constitution or laws of this state or the United States or another entity listed in Section 37.01, Penal Code, evidencing a valid lien or claim against real or personal property or an interest in real or personal property; and
>
> (3) intent to cause another person to suffer:
>
> (A) physical injury;
>
> (B) financial injury; or
>
> (C) mental anguish or emotional distress.

TEX. CIV. PRAC. & REM. CODE ANN. § 12.002(a) (West Supp. 2016). Property Code section 53.024 expressly limits the amount of a subcontractor's lien, based on the statutory formula quoted verbatim in Question 4 of the charge. TEX. PROP. CODE ANN. § 53.024 (West 2014) (stating subcontractor's lien may not exceed "(1) an amount equal to the proportion of the total subcontract price that the sum of the labor performed, materials furnished, materials specially fabricated, reasonable overhead costs incurred, and proportionate profit margin bears to the total subcontract price; minus (2) the sum of previous payments received by the claimant on the subcontract."). The party asserting that a claimed lien is a fraudulent lien has the burden to prove the requisite elements. *James v. Calkins*, 446 S.W.3d 135, 149 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) (citing *Aland v. Martin*, 271 S.W.3d 424, 430 (Tex. App.—Dallas 2008, no pet.)).

C. Analysis

Lyon argues that in order to answer "yes" to Question 4, the jury had to implicitly make several other affirmative findings. Among these implicit findings, the jury had to find that the amount of Lyon's claimed lien exceeded the maximum amount allowed for a subcontractor's lien under Property Code section 53.024. Lyon argues that there is legally insufficient evidence to support the jury's implicit finding that his $35,697 lien is invalid because there is no evidence applying the statutory formula to the facts of this case, thereby, identifying the amount of section 53.024's statutory cap.

BGI responds that there is some evidence to support the jury's implicit finding that Lyon's $35,697 lien is invalid because the evidence establishes that Lyon did not calculate his lien pursuant to Property Code section 53.024's formula. It is undisputed that Lyon did not calculate his lien based on the statutory formula. The plain language of the statute, however, does not require subcontractors to calculate their lien using a specific method. Thus, the fact that Lyon used a different method to calculate his lien does not mean that his lien is per se invalid.

BGI further contends that although Lyon did not perform the section 53.024 calculations, the jury had the statute and all of the information necessary to do the calculations for itself. The jury was instructed that Lyon's lien was "invalid" if the amount of the lien exceeded section 53.024's statutory cap, the formula for which

was quoted directly from the statute. *See* TEX. PROP. CODE ANN. § 53.024 (limiting amount of subcontractor's lien based on statutory formula).

Although the evidence demonstrates that the amount of Lyon's lien was $35,697, there is no testimony applying the formula to the facts of the case which would establish the amount of section 53.024's statutory cap. Furthermore, the jury could not have calculated the statutory cap on its own because there is no evidence establishing two components of section 53.024's formula—Lyon's proportionate profit margin and the reasonable overhead costs he incurred on the project.

BGI argues that the jury could have gleaned this information from Lyon's records and his testimony. Specifically, BGI argues that although he did not identify the amount of his "overhead" on the project, Lyon testified that "he and an equipment operator were his only employees." At most, this is some evidence that Lyon incurred overhead costs on the project, but it is no evidence of the *amount* of those overhead costs, much less evidence of the *reasonableness* of such costs.

Similarly, BGI contends that Lyon's "profit and loss" statement and his testimony that there was "profit in each payment schedule" he received from BGI, is some evidence of Lyon's proportionate profit margin. Lyon's testimony that "profit" was included in the payment schedule is, at most, evidence that Lyon expected to make a profit on the project, but it is no evidence of the *amount* of profit that he expected to realize. Although the "profit and loss" statement contains

categories for various expenses, such as "lumber," "sanitation," and "material purchases," it does not mention "profit margin," much less attempt to quantify it. Indeed, Lyon testified that he incurred other costs on the project, other than those set forth in his "profit and loss" statement which only showed his "hard costs for materials and labor paid out," but he was not asked to quantify those additional costs. After reviewing the record, we have not found any evidence establishing Lyon's actual proportionate profit margin on this project or any testimony, expert or otherwise, indicating what profit margin a subcontractor like Lyon would expect to see on a project such as this one. Without any testimony or evidence on this issue, the jury was left to speculate as to the amount of Lyon's reasonable overhead costs.

There is no evidence regarding the value of Lyon's reasonable overhead costs incurred or proportionate profit margin for the project. Therefore, the jury did not have the evidence necessary to determine whether the proportionate value of Lyon's labor performed, materials furnished, reasonable overhead costs incurred, and proportionate profit margin to the total subcontract price, less previous payments received under the contract, totaled less than Lyon's claimed lien of $35,697.00. Therefore, there is no evidence to support the jury's finding that the lien was invalid, as instructed by Question 4.

The party asserting that the lien is fraudulent bears the burden of proving the requisite elements. *See James*, 446 S.W.3d at 149. Because there is legally

insufficient evidence to support the jury's finding that the lien was invalid, pursuant to section 53.024, the evidence is also legally insufficient to support the jury's finding that Lyon filed a fraudulent lien, as defined by Question 4. Accordingly, we sustain Lyon's first issue and we render judgment in Lyon's favor with respect to BGI's fraudulent lien and invalid lien claims. TEX. R. APP. P. 43.3; *Guevara v. Ferrer*, 247 S.W.3d 662, 670 (Tex. 2007).

The trial court awarded BGI attorney's fees based on its fraudulent lien and invalid lien claims. Having reversed the trial court's judgment and rendered judgment in favor of Lyon with respect to these claims, we also reverse the trial court's award of attorney's fees to BGI in its entirety and remand that issue to the trial court for further proceedings. Having done so, we need not consider Lyon's second and third issues challenging the admission of BGI's attorney's billing records (Plaintiff's Exhibit 45) and the legal and factual sufficiency of the evidence supporting BGI's award of its attorney's fees.

Damages

In his fourth issue, Lyon argues that the trial court erred by denying his motion for new trial on the ground that the jury's answers to Question 3 regarding BGI's damages for Lyon's breach of the Subcontract were insufficient for the trial court to enter judgment in favor of BGI for those damages. In particular, Lyon contends that

BGI did not submit an adequate charge on the issue of its breach of contract damages.

Lyon did not object to the form of Question 3. Accordingly, Lyon has not preserved his challenge to the adequacy of the question on appeal. *See KMG Kanal-Muller-Gruppe Deutschland GmbH & Co. KG v. Davis*, 175 S.W.3d 379, 392 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (citing *C.M. Asfahl Agency v. Tensor, Inc.*, 135 S.W.3d 768, 786 (Tex. App.—Houston [1st Dist.] 2004, no pet.)); *see also* TEX. R. CIV. P. 274 ("Any complaint as to a question, definition, or instruction, on account of any defect, omission, or fault in pleading, is waived unless specifically included in the objections.").

We overrule Lyon's fourth issue.

Cross-Point

BGI asserts a "cross-point" in its response to Lyon's brief. Specifically, BGI argues that if the trial court's judgment is reversed on appeal with respect to BGI's fraudulent lien and invalid lien claims, then this Court should render judgment in favor of BGI and against Lyon for contractual damages, including an additional $25,000 above the trial court's award for contractual damages, because "BGI proved as a matter of law that its contract damages included the amounts awarded by the jury as damages associated with the fraudulent lien" and the jury's failure to find that the $25,000 was part of the contract damages was unsupported by the evidence.

In a case tried to a jury, legal and factual sufficiency issues must be preserved in the trial court. *See Daniels v. Empty Eye, Inc.*, 368 S.W.3d 743, 748–49 (Tex. App.—Houston [14th Dist.] 2012, pet. denied). A legal sufficiency challenge may be preserved in one of five ways: "(1) a motion for directed verdict, (2) a motion for judgment notwithstanding the verdict, (3) an objection to the submission of the issue to the jury, (4) a motion to disregard the jury's answer to a vital fact issue, or (5) a motion for new trial." *Id.* A factual sufficiency challenge must be raised in a motion for new trial. *Id.* at 749 (citing TEX. R. CIV. P. 324(b)(2)). BGI did not file any such motions challenging the sufficiency of the jury's findings regarding its breach of contract damages. Accordingly, we hold that BGI failed to preserve its challenges to the sufficiency of the evidence supporting the jury's answers to Question 3. *See id.*; *also In re Commitment of Bradshaw*, No. 09-12-00570-CV, 2013 WL 5874613 (Tex. App.—Beaumont Oct. 31, 2013, pet. denied) (mem. op.) (holding oral motion for new trial inadequate to preserve legal insufficiency argument).

BGI's Appeal

In one issue with three subparts, BGI argues that the trial court erred by failing to award BGI its reasonable attorney's fees in connection with BGI's successful claim for breach of contract against Lyon.[6] Specifically, BGI argues that the trial

[6] BGI is not challenging the portion of the trial court's judgment denying all relief requested by BGI against Lyon's company, Lyon Properties & Custom Homes, LLC d/b/a Lyon Construction Services.

court erred by: (1) denying BGI's motion for leave to file its First Supplemental Petition to allege presentment because it did not create surprise or prejudice; (2) sustaining Lyon's objection that BGI did not properly plead presentment of its breach of contract claim; (3) failing to consider BGI's evidence that it presented its claim for breach of contract to Lyon as required by Chapter 38; and (4) failing to hold that the evidence established presentment of BGI's breach of contract claim.

Lyon responds that the trial court did not abuse its discretion by refusing to award BGI its attorney's fees because BGI's live pleading did not allege presentment, and the trial court did not abuse its discretion by enforcing the agreed scheduling order and denying BGI's motion for leave to file a supplemental pleading.

The agreed scheduling order in this case stated that all "[p]leadings must be amended or supplemented by [September 3, 2013], except by written agreement of all parties."[7] Trial began on November 5, 2013. On the first day of trial, BGI filed its Third Amended Petition in Intervention, with leave from the trial court. Although BGI asserted claims against Lyon, individually, for breach of the subcontract and attorney's fees pursuant to Texas Civil Practice and Remedies Code Chapter 38, BGI

[7] The order also set the case for trial by jury on "11-4-13 at 9:00 A.M." and further ordered: "There will be no further continuances of this case; this trial date will not be continued."

did not allege that it had been more than thirty days since BGI had presented its damages claim to Lyon, and that Lyon had failed to pay BGI's damages.

The issue of attorney's fees was submitted to the trial court after the trial on the merits by agreement of the parties. BGI attempted to file its First Supplemental Petition on April 9, 2015—five months after the jury returned its verdict. BGI alleged in its First Supplemental Petition that it had satisfied the statutory requirements for presentment. Lyon objected to the supplemental petition as untimely and argued that he was surprised because BGI had repeatedly refused to provide Lyon with a copy of "any purported section 38.002 presentment letter." Lyon also argued that he would be prejudiced if BGI was allowed to file the supplemental pleading.

On April 17, 2015, the trial court held a hearing regarding the issue of attorney's fees. During that hearing, Lyon's counsel argued that when they agreed to submit the issue of attorney's fees to the court, they believed that they were only submitting the question of the *amount* of fees and that any conditions precedent with respect to attorney's fees, such as presentment, had to have been submitted to the jury. After hearing from the parties on this point, the trial court asked, "So we have on the record an agreement between the parties or among the parties that the Court would decide attorney's fees after the trial was done with the jury; is that right?" Lyon's counsel responded, "Accurate, Your Honor." The trial court responded,

"Okay. If it's on the record and it's an agreement, that should be a Rule 11 Agreement right there; and I don't see what the issue is."

The trial court denied BGI's motion for leave to file its supplemental pleading, but allowed BGI to put on testimony establishing presentment. BGI also offered several exhibits into evidence, but the trial court reserved its ruling on the admissibility of most of the documents. When Lyon's counsel asked if his objections were overruled, the trial court responded, "Your objections are – I'm holding it in advance for now and we'll hear the rest of the testimony and I'll make the decision then." In the final judgment, the trial court sustained Lyon's objection based on BGI's failure to plead presentment. As a result of this ruling, the trial court did not reach the remainder of Lyon's objections to BGI's evidence of presentment.

A. Standard of Review and Applicable Law

We review a trial court's ruling on amended pleadings for abuse of discretion. *Hardin v. Hardin*, 597 S.W.2d 347, 349–50 (Tex. 1980); *see also Bagwell v. Ridge at Alta Vista Invs. I, LLC*, 440 S.W.3d 287, 292 (Tex. App.—Dallas 2014, pet. denied) (noting trial courts have wide discretion to manage their dockets). Likewise, we review a trial court's enforcement of its scheduling order for an abuse of discretion. *Bagwell*, 440 S.W.3d at 292. An abuse of discretion occurs when the trial court acts in an unreasonable and arbitrary manner, or when it acts without reference

to any guiding rules or principles. *Gunn v. Fuqua*, 397 S.W.3d 358, 377 (Tex. App.—Dallas 2013, pet. denied).

Generally, a party may amend its pleadings at any time prior to seven days before trial unless the amended pleadings operate as a surprise to the opposing party. TEX. R. CIV. P. 63; *Gunn*, 397 S.W.3d at 377. That deadline may be altered by the trial court in a scheduling order issued pursuant to rule 166. TEX. R. CIV. P. 63; *see also* TEX. R. CIV. P. 166. A party may seek leave of court to amend its pleadings after the deadline imposed by a scheduling order entered pursuant to rule 166. TEX. R. CIV. P. 63. Leave "shall be granted" by the trial court "unless there is a showing that such filing will operate as a surprise to the opposing party." *Id.* A trial court has no discretion to refuse an amended pleading unless: (1) the opposing party presents evidence of surprise or prejudice; or (2) the amendment asserts a new cause of action or defense, and is thus prejudicial on its face, and the opposing party objects to the amendment. *State Bar v. Kilpatrick*, 874 S.W.2d 656, 658 (Tex. 1994); *Bagwell*, 440 S.W.3d at 292–93.

B. Analysis

Although BGI pleaded a breach of contract claim against Lyon, individually, and pleaded for attorney's fees pursuant to Chapter 38, BGI did not expressly plead that it had presented its claim to Lyon and Lyon failed to pay within thirty days of presentment until BGI's First Supplemental Petition. In its supplemental pleading,

BGI alleged that it "presented its claim for damages to Lyon more than 30 days prior to the filing of this supplemental petition, and more than 30 days prior to the trial of this case in November of 2013." BGI's supplemental pleading did not present a new cause of action or defense; rather, it added more specific allegations concerning BGI's claim for attorney's fees under Chapter 38.

Furthermore, at the attorney's fees hearing, BGI's counsel testified that Lyon's counsel contacted him two or three times after the trial on the merits ended in November 2013 and asked for a copy of BGI's "presentment letter," if any. BGI responded by sending a copy of its demand letter to Lyon's counsel in July 2014—nine months before the hearing.[8] In light of this testimony and the record as a whole, including the parties' agreement on the record to submit the issue of attorney's fees to the trial court, Lyon could have anticipated that BGI would amend its pleadings to specifically plead presentment in compliance with Chapter 38 prior to the April 17, 2015 hearing on attorney's fees. Accordingly, we hold that the amendment was not facially prejudicial. *See Hardin*, 597 S.W.2d at 350 (stating that amendment is facially prejudicial if it asserts new substantive matters that could not have been anticipated by opposing party, and would detrimentally affect opposing party's presentation of case).

[8] The letter demanded $255,000, including $200,000 in attorney's fees.

Because the amendment was not prejudicial on its face, the trial court could only have denied leave to amend if Lyon presented evidence of surprise or prejudice. *Kilpatrick*, 874 S.W.2d at 658. While Lyon alleged surprise and prejudice, he offered no evidence of either at the hearing. *See id.*; *Bagwell*, 440 S.W.3d at 292–93. On the contrary, there was testimony that Lyon's counsel repeatedly asked for a copy of BGI's "presentment letter" post-trial on the merits and that BGI responded by sending a copy of a letter to Lyon's counsel nine months before the hearing. This testimony, at a minimum, undermines Lyon's claim that he was surprised that BGI wanted to amend its petition in order to allege presentment after the jury verdict.[9]

We further note that although BGI's prior petition did not expressly plead presentment, it did give Lyon fair notice that BGI was attempting to recover its attorney's fees pursuant to Chapter 38 as a result of Lyon's breach of the Subcontract. *See Roark v. Allen*, 633 S.W.2d 804, 810 (Tex. 1982) ("A petition is sufficient if it gives fair and adequate notice of the facts upon which the pleader bases his claim.") Because Lyon did not specially except to BGI's lack of specific pleading of presentment, we construe the pleadings liberally in favor of BGI. *See Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 897 (Tex. 2000); *see also Gibson v. Cuellar*, 440 S.W.3d 150, 156–57 (Tex. App.—Houston [14th Dist.] 2013,

[9] Although it is not determinative of the issue of surprise or prejudice, we note that Lyon did not request a continuance after the trial court ruled that it would allow BGI to put on evidence of presentment at the attorney's fees hearing.

no pet.) (holding that pleading that did not specifically mention Chapter 38 was sufficient to support award of attorney's fees in absence of special exception).

Based on this record, the trial court should have allowed BGI to amend its pleading and the court abused its discretion by not doing so. *See Kilpatrick*, 874 S.W.2d at 658; *Bagwell*, 440 S.W.3d at 292–93. We can only reverse on this basis, however, if the error was harmful. *See* TEX. R. APP. P. 44.1 (providing that no civil judgment may be reversed unless error complained of probably caused rendition of improper judgment or probably prevented appellant from properly presenting case to court of appeals).

C. Harm

Lyon argues that the trial court's error, if any, was harmless because Texas Rule of Civil Procedure 270 forbade receipt of evidence on the disputed presentment issue post-verdict; and (2) BGI's evidence was legally insufficient to prove presentment.

With regard to Rule 270, Lyon argues that there was no agreement for the trial court to decide any controversial presentment issue, and Rule 270 should have forbidden receipt of evidence on that controversial issue post-verdict, citing *Genender v. USA Store Fixtures, LLC*, 451 S.W.3d 916, 927–28 & n.17 (Tex. App.—Houston [14th Dist.] 2014, no pet.). Rule 270 states in its entirety: "When it clearly appears to be necessary to the due administration of justice, the court may

permit additional evidence to be offered at any time; provided that in a jury case no evidence on a controversial matter shall be received after the verdict of the jury." TEX. R. CIV. P. 270.

We have not found any cases applying Rule 270 in the context of a bifurcated trial such as this, where the parties agreed to submit one issue to the trial court post-jury verdict. Contrary to Lyon's position, the record reflects that the parties agreed to submit the issue of attorney's fees to the court, thereby removing the issue from the jury. When Lyon's counsel requested that an "instruction related to attorney's fees" be included in the jury charge, the trial court responded that "both sides agreed that attorney's fees would be taken up by a separate motion with the Court and not put to the jury." Because the issue of attorney's fees was submitted to the trial court, not the jury, we conclude that Rule 270 does not bar the admission of additional evidence regarding the presentment of attorney's fees to the trial court.

Lyon further argues that the trial court's error, if any, was harmless because BGI's evidence was legally insufficient to prove presentment. Specifically, Lyon contends that BGI's evidence regarding settlement discussions and discovery responses was neither admissible nor legally sufficient to establish presentment of its claim in compliance with Chapter 38.[10]

[10] Lyon also argues that BGI's evidence regarding confidential mediation proceedings is inadmissible. In light of our disposition of this issue, we need not address this point.

Section 38.002 requires a party to present its claim to the opposing party, and that the opposing party refuse to pay, before the requesting party is entitled to attorney's fees. TEX. CIV. PRAC. & REM. CODE ANN. § 38.002 (West 2015). Presentment is a "demand or request for payment or performance, whether written or oral." *See Gibson*, 440 S.W.3d at 157 (citing *Jones v. Kelley*, 614 S.W.2d 95, 100 (Tex. 1981)). No particular form of presentment is required. *Gibson*, 440 S.W.3d at 157. The purpose of presentment is to allow the opposing party to pay a claim within thirty days after the party has notice of the claim before becoming liable for attorney's fees. *Jones*, 614 S.W.2d at 100. The party seeking attorney's fees must plead and prove presentment of its claim. *Gibson*, 440 S.W.3d at 157.

"Generally, presentment is an issue of fact." *Genender*, 451 S.W.3d at 924–25 (citing *Gibson*, 440 S.W.3d at 157 n.7); *see also France v. Am. Indem. Co.*, 648 S.W.2d 283, 286 (Tex. 1983) (holding trial court erred by concluding that plaintiff was not entitled to attorney's fees when there was some evidence of presentment; "At the very least, a fact issue was raised here as to presentment."); *cf. Roylex, Inc. v. Avco Cmty. Dev., Inc.*, 559 S.W.2d 833, 838 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ) ("Since the evidence on presentment was conclusive, that issue did not have to be submitted to the jury.").[11] Presentment can occur after a lawsuit

[11] Generally, whether a party is entitled to seek an award of attorney's fees pursuant to Chapter 38 is a question of law that we review de novo. *See Peterson Grp., Inc. v. PLTQ Lotus Grp., L.P.*, 417 S.W.3d 46, 59–60 (Tex. App.—Houston [1st Dist.]

has been filed. *See generally Bethel v. Norman Furniture Co., Inc.*, 756 S.W.2d 6, 8 (Tex. App.—Houston [1st Dist.] 1988, no writ) (holding evidence that defendant "had actual notice of the claim and had 30 days within which to pay it, before trial, but failed to do so" was sufficient evidence of presentment supporting award of attorney's fees pursuant to Chapter 38).[12]

Citing to *Genender*, Lyon argues on appeal that post-lawsuit settlement discussions and discovery responses are legally insufficient to prove presentment. 451 S.W.3d at 927–28 & n.17. *Genender*, however, does not hold that evidence of post-lawsuit settlement discussions and discovery responses can never be sufficient to prove presentment. On the contrary, *Genender* held that a single entry in a party's attorney billing records stating "confer with opposing counsel re: potential to

---

2013, pet. denied) (citing *Holland v. Wal-Mart Stores, Inc.*, 1 S.W.3d 91, 94 (Tex. 1999)). However, this Court has held that when there are fact findings necessary to establish an award of attorney's fees, a mixed standard of review is appropriate. *See Referente v. City View Courtyard, L.P.*, 477 S.W.3d 882, 885–86 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (reviewing denial of attorney's fees based on contractual "prevailing party" provision under mixed standard of review; reviewing trial court's determination that party nonsuited to avoid unfavorable ruling for abuse of discretion and deferring to factual findings supported by some evidence, and reviewing legal questions involved in determination de novo).

[12] Other courts have held that presentment must occur prior to the filing of a lawsuit. *See Canine, Inc. v. Golla*, 380 S.W.3d 189, 193–94 (Tex. App.—Dallas 2012, pet. denied); *see also Genender v. USA Store Fixtures, LLC*, 451 S.W.3d 916, 924 n.13 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (noting dispute between 14th Court of Appeals' opinions regarding whether presentment must occur before suit is initiated or before judgment, but declining to address issue). Unlike in *Genender*, we have found no such conflicting precedent from our Court.

resolve" was, standing alone, insufficient to prove presentment. *Id.* at 927; *see also Belew v. Rector*, 202 S.W.3d 849, 856–57 (Tex. App.—Eastland 2006, no pet.) (stating evidence that counsel "had some settlement discussions" insufficient to prove presentment).

Likewise, *Genender* did not hold that a discovery response that "does not demand payment of the claim but rather explains the legal theories and factual bases for the claim" does not show presentment. 451 S.W.3d at 927 n.16. Rather, *Genender* rejected the party's assertion that it presented its claim by providing "discovery responses" because the party did not "cite to the record for this assertion nor describe in any way how a demand for payment was made through its 'discovery response.'" *Id.* at 927.[13]

Furthermore, depending upon the precise language used, discovery responses and the opposing party's response thereto have been held sufficient to satisfy section 38.002's presentment requirement. *See, e.g.*, *Busch v. Hudson & Keyse, LLC*, 312 S.W.3d 294, 301 (Tex. App.—Houston [14th Dist.] 2010, no pet.); *Lone Star Steel Co. v. Scott*, 759 S.W.2d 144, 157 (Tex. App.—Texarkana 1988, writ denied); *Gensco, Inc. v. Transformaciones Metalurgicias Especiales, S.A.*, 666 S.W.2d 549, 554 (Tex. App.—Houston [14th Dist.] 1984, writ dism'd); *Welch v. Gammage*, 545

[13] The footnote that Lyon relies upon is obiter dicta in light of the court's holding based on inadequate briefing. *See Genender*, 451 S.W.3d at 927 & n.17.

S.W.2d 223, 226 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.). In these cases the request for admission and response, either alone or coupled with other evidence, established that the party seeking attorney's fees had made a demand for payment on the opposing party or that a claim or debt had been asserted and the opposing party refused to pay the claim. *See Busch*, 312 S.W.3d at 301; *Lone Star Steel*, 759 S.W.2d at 157; *Gensco*, 666 S.W.2d at 552, 554; *Welch*, 545 S.W.2d at 226.

Unlike in *Genender*, the record in this case contains more than a vague allusion to settlement discussions. BGI's counsel testified that he spoke with Lyon's counsel on at least two occasions prior to trial on the merits during which time they attempted to settle their clients' claims. Specifically, BGI's counsel testified that he had a conversation with Lyon's counsel after BGI intervened in the lawsuit against the Rennicks in 2011, but prior to mediation, and that he and Lyon's counsel "discussed that each side had competing claims, that we were claiming that we were damaged, that we were owed money." BGI's counsel further testified that BGI identified the amount of damages that BGI believed it was owed based on its claims against Lyon in its interrogatory response, which was provided to Lyon's counsel on two occasions prior to trial.

When asked if BGI's counsel told him what BGI believed its damages were prior to mediation, Lyon's counsel testified that he did not recall the substance of his pre-mediation conversations with BGI's counsel, but he knew that Lyon was being

sued for breach of contract and that BGI was seeking attorney's fees in connection with that claim. Lyon's counsel also testified that BGI never presented his client with a claim that it could pay without incurring attorney's fees and that Lyon never tendered payment of BGI's claimed damages. Thus, although disputed, the record contains some evidence of presentment. *See Harrison v. Gemdrill Int'l, Inc.*, 981 S.W.2d 714, 719 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) (holding appellant's trial testimony that, when he informed appellee of his resignation, he told appellee he wanted to "collect his pay 'without fail,'" constituted sufficient evidence of presentment). Whether such evidence demonstrates presentment, however, is an unresolved question of fact that the trial court would have resolved, had it not erroneously denied BGI's motion for leave. *See France*, 648 S.W.2d at 286 (holding trial court erred by concluding that party was not entitled to attorney's fees when there was some evidence of presentment; "At the very least, a fact issue was raised here as to presentment.").

Because the trial court erroneously denied BGI's motion for leave to amend its pleading to more specifically allege presentment, and BGI offered some evidence of presentment at the hearing, we conclude that the trial court's error was harmful because it probably caused rendition of an improper judgment denying BGI attorney's fees on its contract claim. *See* TEX. R. APP. P. 44.1 (providing that no civil judgment may be reversed unless error complained of probably caused rendition of

improper judgment or probably prevented appellant from properly presenting case to court of appeals).

Conclusion

We reverse the portion of the trial court's judgment rendering judgment in favor of BGI with respect to BGI's fraudulent lien and invalid lien claims and render judgment in Lyon's favor on those claims. We also reverse the trial court's award of attorney's fees to BGI based on its fraudulent lien and invalid lien claims, and the trial court's denial of attorney's fees to BGI on its breach of contract claim, and we remand for further proceedings on the attorney's fees issue. We affirm the judgment in all other respects.

Russell Lloyd
Justice

Panel consists of Justices Bland, Massengale, and Lloyd.