Opinion issued December 20, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-17-00294-CV

MICHAEL R. SILBERSTEIN D/B/A MICHAEL R. SILBERSTEIN INVESTMENTS, LTD., Appellant

V.

GLORIA LEWIS, Appellee

On Appeal from the 268th District Court
Fort Bend County, Texas
Trial Court Case No. 15-DCV-220243

MEMORANDUM OPINION

Gloria Lewis entered into a 30-year contract for deed with Michael R. Silberstein. Twenty-seven years later, Silberstein defaulted on a loan for which he had pledged the same property as collateral. The property was sold at a foreclosure sale. Lewis sued Silberstein for, among other claims, breach of contract. In a bench

trial, the trial court found Silberstein liable for breach of contract and awarded damages. In four issues on appeal, Silberstein argues (1) the damage model applied by the trial court was neither requested nor tried by consent; (2) the trial court incorrectly calculated the damages in the damage model it used; (3) there was no evidence or insufficient evidence of the correct damage model; and (4) the evidence of attorneys' fees failed to segregate the fees.

We reverse and remand for a new trial.

Background

Lewis entered into a contract for deed with Silberstein in 1987.[1] Under the terms of the contract, Lewis would make monthly payments on the property for 30 years. At the end of the 30 years, Silberstein would transfer title to Lewis. During that 30-year period, Silberstein could encumber the property.

Silberstein encumbered the property by using it as collateral for a loan. In 2014, Silberstein defaulted on the loan. Because of the default, the property was sold at a foreclosure sale. It was purchased by three men, including Gary Merritt. At that time, Lewis had fewer than 36 payments remaining on the contract for deed.

Lewis sued Silberstein for breach of contract, among other claims. In her live pleading, Lewis prayed that she be awarded "the value of the property less the

[1] Lewis signed it with her now-deceased husband. His involvement in the contract is not pertinent to the issues raised in this appeal.

remaining payments [she] would have made to Silberstein under the contract for deed" or, alternatively, for "the amount [she] would have to pay to reclaim the property from [the purchaser at the foreclosure sale]." Lewis made the same argument at trial, focusing on the value of the property less payment she would have had to pay.

Lewis testified a trial that she did not know how much the property was worth. For proof at trial of the value of the property, Lewis relied on Merritt, one of the purchasers. Merritt testified he bought the property as part of an investment with two other people that had formed an "informal partnership." Merritt testified that he had been buying property at foreclosure sales for over ten years and that he and his partners bought about 25 properties a year.

Merritt testified that the property had a market value between $75,000 and $80,000 at the time of foreclosure. Merritt testified that his valuation was made at the time of the foreclosure sale. The valuation was based on viewing the property, the year the house was built, appraised value, and the value of comparable properties. For the property, Merritt testified that he was not the one to view the property. That was done by one of his business partners, who simply drove by the property. Merritt did not testify about the year the house was built or what condition it was in at the time. Nor did he testify about at what amount the property had been appraised at that time.

For the comparable properties, Merritt testified that there were three that they considered at the time to determine fair market value. One was listed for about $75,000 but had not sold at that time. Merritt testified that it later sold for that amount. Merritt did not provide any details for the other two houses he used as comparables.

To explain the amount for which the property was purchased at the foreclosure sale, Merritt explained that he and his partners buy a house, perform necessary repairs, pay for closing costs, and try to make a profit on the property. They determined they could still make a profit on the property after incurring the other costs if they bid between $40,000 and $45,000. They ultimately paid $42,865 for the property.

The trial court found Silberstein liable for breach of contract. It awarded $138,153.68 in damages plus attorneys' fees. The judgment explains, "Such damages represent restitution for all monthly payments of principal and interest by [Lewis] to [Silberstein] from June 1, 1987 to and including October 2014."

Measure of Damages

In his second issue, Silberstein argues the damage model applied by the trial court was neither requested nor tried by consent.

A. Standard of Review & Applicable Law

Whether the trial court applied the proper measure of damages is a question of law, which we review de novo. *Saulsberry v. Ross*, 485 S.W.3d 35, 51 (Tex. App.—Houston [14th Dist.] 2015, pet. denied).

The goal in measuring breach of contract damages is to provide just compensation for any loss or damage sustained because of the breach. *Walden v. Affiliated Comput. Servs., Inc.*, 97 S.W.3d 303, 328 (Tex. App.—Houston [14th Dist.] 2003, pet. denied.). The facts of the case determine the proper measure of damages as well as any allowance offsets. *Vance v. My Apartment Steak House of San Antonio, Inc.*, 677 S.W.2d 480, 481 n.1 (Tex. 1984). Damages must be measured by a legal standard, and that standard must be used to guide the fact-finder in determining what sum would compensate the injured party. *Allied Vista, Inc. v. Holt*, 987 S.W.2d 138, 141 (Tex. App.—Houston [14th Dist.] 1999, pet. denied). "Damages for breach of contract protect three interests: a restitution interest, a reliance interest, and an expectation interest." *Chung v. Lee*, 193 S.W.3d 729, 733 (Tex. App.—Dallas 2006, pet. denied).

Generally, the measure of damages for breach of contract to sell real estate is the difference between the contract price and the market value of the property at the time of the breach. *See Smith v. Herco, Inc.*, 900 S.W.2d 852, 861 (Tex. App.—Corpus Christi 1995, writ denied); *Ryan Mortg. Inv'rs v. Fleming-Wood*, 650

S.W.2d 928, 935 (Tex. App.—Fort Worth 1983, writ ref'd n.r.e.). Known as the benefit of the bargain measure of damages, it is the difference between the value of the object of the contract and the value received. *See Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 817 (Tex. 1997).

Conversely, restitution damages restore what the plaintiff has conferred on the defendant. *WPS, Inc. v. Expro Americas, LLC*, 369 S.W.3d 384, 408 (Tex. App.—Houston [1st Dist.] 2012, pet. denied). "Rescission is merely the 'common, shorthand name' for the composite remedy of rescission and restitution." *Cruz v. Andrews Restoration, Inc.*, 364 S.W.3d 817, 825 (Tex. 2012). "Rescission is an equitable remedy that operates to extinguish a contract that is legally valid but must be set aside due to fraud, mistake, or for some other reason to avoid unjust enrichment." *Gentry v. Squires Constr., Inc.*, 188 S.W.3d 396, 410 (Tex. App.—Dallas 2006, no pet.). The measure of damages is the return of the consideration paid, together with such further special damages or expenses as may have been reasonably incurred by the wronged party. *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 345 (Tex. 2011) (citing *Smith v. Nat'l Resort Comtys., Inc.*, 585 S.W.2d 655, 660 (Tex. 1979). Once a contract is rescinded, the rights and liabilities of the parties are extinguished, and the parties are restored to the positions that they would have occupied if no contract had ever been

made. *Baty v. ProTech Ins. Agency*, 63 S.W.3d 841, 855 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

Rescission also requires the mutual restoration of benefits: A plaintiff seeking to be restored to his position before signing the contract must likewise restore to the defendant whatever the plaintiff has received in the transaction. *Cruz*, 364 S.W.3d at 825–26. The buyer is obligated to restore to the seller the value of their occupation of the property. *See Morton v. Nguyen*, 412 S.W.3d 506, 510–12 (Tex. 2013) (holding, even though he breached contract for deed by failing to comply with disclosure requirements, seller was entitled to setoff in amount of fair market rental value of house during buyer's occupation of property).

B. Analysis

The trial court awarded $138,153.68 in "restitution for all monthly payments of principal and interest." *See Cruz*, 364 S.W.3d at 825 (holding "rescission" is shorthand name remedy of rescission and restitution); *Gentry*, 188 S.W.3d at 410 (holding rescission is equitable remedy that extinguishes legally valid contract that must be set aside due to fraud, mistake, or to avoid unjust enrichment). As Silberstein points out, however, Lewis did not request rescission and restitution in her live pleading.

"A general prayer for relief will support any relief raised by the evidence that is consistent with the allegations and causes of action stated in the petition." *Moran*

v. Williamson, 498 S.W.3d 85, 93 (Tex. App.—Houston [1st Dist.] 2016, pet. denied); *accord Salomon v. Lesay*, 369 S.W.3d 540, 553 (Tex. App.—Houston [1st Dist.] 2012, no pet.). Lewis did not pray for general relief in her live pleading, though. Instead, she prayed for a specific calculation of damages for her breach of contract claim. She prayed for "the value of the property less the remaining payments [she] would have made to Silberstein under the contract for deed" or alternatively, for "the amount [she] would have to pay to reclaim the property from [the purchaser at the foreclosure sale]." The trial court's restitution award does not reflect either of these proposed measurements.

Silberstein is also correct that the issue of rescission damages was not tried by consent. "When both parties present evidence on an issue and the issue is developed during trial without objection, any defects in the pleadings are cured at trial, and the defects are waived." *Ingram v. Deere*, 288 S.W.3d 886, 893 (Tex. 2009) (citing TEX. R. CIV. P. 67). An issue is not tried by consent, however, just because some evidence is presented relevant to that issue. *Id.* (citing *Sage St. Associates v. Northdale Const. Co.*, 863 S.W.2d 438, 446 (Tex. 1993)). Instead the issue must be developed in a way that both parties understand it to be contested. *See id.*

Two of the conditions precedent to assert a claim for rescission "include: (1) giving timely notice to the seller that the contract is being rescinded, and (2) returning or offering to return the property received and the value of any benefit

derived from its possession. The party seeking rescission carries the burden of proof on these issues." *Carrow v. Bayliner Marine Corp.*, 781 S.W.2d 691, 696 (Tex. App.—Austin 1989, no writ) (internal citations omitted); *see also Cruz*, 364 S.W.3d at 826 (recognizing requirements of notice and tender for common law rescission claim).

Here, no mention of rescission or restitution was made at trial by either party or by the court. Lewis asked the trial court to award her damages based on the market value of the property. No evidence was presented showing that Lewis gave Silberstein notice of rescission or made any offer to return the value of any benefit received. Evidence of the amount of money Lewis paid to Silberstein during her 27 years of payments was not enough to make rescission a contested issue at trial. *See Ingram*, 288 S.W.3d at 893 (holding merely presenting some evidence relevant to issue is not enough to establish trial by consent).

Because Lewis did not request rescission and restitution in her pleading and because the issue was not tried by consent at trial, we hold the trial court lacked authority to award Lewis restitution damages. We sustain Silberstein's second issue.[2]

[2] Because we sustain this issue, we do not need to reach Silberstein's first issue, arguing the trial court improperly calculated restitution damages.

Legal Sufficiency of Damages

In his third issue, Silberstein argues he is entitled to a take-nothing judgment because there was no evidence or insufficient evidence of the correct measure of damages.

A. Standard of Review

In an appeal from a bench trial, the trial court's findings of fact have the same weight as a jury verdict. *Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994); *Nguyen v. Yovan*, 317 S.W.3d 261, 269–70 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). When challenged, a trial court's findings of fact are not conclusive if there is a complete reporter's record on appeal. *See BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002) (holding implied findings can be challenged when there is complete reporter's record); *Shields Ltd. P'ship v. Bradberry*, 526 S.W.3d 471, 480 (Tex. 2017) (holding implied findings and express findings are reviewed in same manner). We review a trial court's findings of fact under the same legal-sufficiency standard used when determining whether sufficient evidence exists to support an answer to a jury question. *See Catalina*, 881 S.W.2d at 297; *Nguyen*, 317 S.W.3d at 269–70.

An appellant may not challenge a trial court's conclusions of law for factual sufficiency, but we may review the legal conclusions drawn from the facts to determine their correctness. *See BMC Software*, 83 S.W.3d at 794. In an appeal

from a bench trial, we review the conclusions of law de novo and will uphold them if the judgment can be sustained on any legal theory supported by the evidence. *See id.*

When considering whether legally sufficient evidence supports a challenged finding, we must consider the evidence that favors the finding if a reasonable fact finder could, and disregard contrary evidence unless a reasonable fact finder could not. *See City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). We view the evidence in the light most favorable to the trial court's findings and indulge every reasonable inference to support them. *Id.* at 822. We may not sustain a legal sufficiency, or "no evidence," point unless the record demonstrates (1) a complete absence of evidence of a vital fact; (2) that 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) that the evidence offered to prove a vital fact is no more than a mere scintilla; or (4) that the evidence conclusively establishes the opposite of the vital fact. *Id.* at 810. Because it acts as the fact finder in a bench trial, the trial court is the sole judge of the credibility of witnesses and the weight to be given to their testimony. *Montgomery Indep. Sch. Dist. v. Davis*, 34 S.W.3d 559, 567 (Tex. 2000). As long as the evidence at trial "would enable reasonable and fair-minded people to differ in their conclusions," we will not substitute our judgment for that of the fact finder. *City of Keller*, 168 S.W.3d at 822.

In a factual sufficiency review, we consider and weigh all of the evidence. *See Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *Arias v. Brookstone, L.P.*, 265 S.W.3d 459, 468 (Tex. App.—Houston [1st Dist.] 2007, pet. denied). When the appellant challenges an adverse finding on an issue on which it did not have the burden of proof at trial, we set aside the verdict only if the evidence supporting the finding is so weak as to make the verdict clearly wrong and manifestly unjust. *See Cain*, 709 S.W.2d at 176; *Reliant Energy Servs., Inc. v. Cotton Valley Compression, L.L.C.*, 336 S.W.3d 764, 782 (Tex. App.—Houston [1st Dist.] 2011, no pet.). When it challenges an adverse finding on an issue on which it had the burden of proof at trial, the appellant must demonstrate on appeal that the adverse finding is against the great weight and preponderance of the evidence. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001); *Reliant Energy Servs., Inc.*, 336 S.W.3d at 782.

B. Analysis

We have held that the trial court erred by awarding the damages it did. If there is no evidence to support Lewis's claim for damage, as Silberstein argues, we must render a take-nothing judgment. *See Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp.*, 299 S.W.3d 106, 124 (Tex. 2009) (holding courts must render judgment when there is no evidence to support damages). Otherwise, we must remand for a new trial or suggest a remittitur, when appropriate. *See id.*

(holding, when there is some evidence of damages, but not enough to support the full amount, courts suggest a remittitur or remand for new trial).

Lewis pleaded two modes of damages for her breach of contract claim. She prayed for "the value of the property less the remaining payments [she] would have made to Silberstein under the contract for deed" or, alternatively, for "the amount [she] would have to pay to reclaim the property from [the purchaser at the foreclosure sale]." No one argues, and we do not find, that there is any evidence in the record of how much it would cost for Lewis to repurchase the property from the purchasers at the foreclosure sale. Lewis argues there is evidence, however, of the value of the property at the time of the foreclosure sale less the remaining payments she owed to Silberstein under the contract for deed. Silberstein concedes in his brief that this is a correct model of damages for her breach of contract claim. Accordingly, we review the sufficiency of the evidence to support this model. More specifically, we review the evidence to see if there is some evidence of the fair market value of the property at the time of foreclosure.

Lewis relies on the property-owner rule to establish that there is proof in the record of the value of the property at the time of the foreclosure sale. The property-owner rule establishes that an owner is qualified to testify to the market value of his property. *Natural Gas Pipeline Co. of Am. v. Justiss*, 397 S.W.3d 150, 155 (Tex. 2012). While the owner does not have to establish her credentials as a witness, her

testimony nevertheless must meet the other requirements for opinion evidence. *See id.* That is, the testimony must establish that the valuation is "based on market, rather than intrinsic or some other speculative value of the property." *Id.* (citing *Porras v. Craig*, 675 S.W.2d 503, 505 (Tex. 1984)).

Lewis testified that she did not know the fair market value of the property at any time. Nor was she ever the owner of the property. Instead, Lewis presented the testimony of Gary Merritt, one of the people that purchased the property at foreclosure. Merritt testified he bought the property as part of an investment with two other people that had formed an "informal partnership." Merritt testified that the property had a market value between $75,000 and $80,000 at the time of foreclosure.

Merritt testified that his valuation was made at the time of the foreclosure sale. The valuation was based on viewing the property, the year the house was built, appraised value, and the value of comparable properties. For viewing the property, Merritt testified that he was not the one to view the property. That was done by one of his business partners, who simply drove by the property. Nowhere in his testimony did Merritt indicate that he has ever been out to the property. Merritt did not testify about the year the house was built or what condition it was in at the time of sale. Nor did he testify about at what amount the property had been appraised at that time.

For the comparable properties, Merritt testified that there were three that they considered at the time to determine fair market value. One was listed for about $75,000 but had not sold at that time. Merritt testified that it later sold for that amount. Merritt did not provide any details for the other two houses he used as comparables.

The basis of Merritt's testimony supporting his estimation of market value, then, was a drive-by viewing of the property that he had no personal knowledge of; the age of the house, which was not disclosed at trial; the appraisal value of the property, which was also not disclosed; and the value of comparable properties. For the comparable properties, nothing was revealed about two of them at trial and, for the third, the only things disclosed were its asking price and that it was in the same neighborhood. This testimony does not establish that the valuation is "based on market, rather than intrinsic or some other speculative value of the property." *Id.*

The only other evidence presented at trial of the value of the property at the time of foreclosure was the sale price at the foreclosure sale. Silberstein argues that this evidence cannot be considered. For support, Silberstein relies on *SPT Federal Credit Union v. Big H Auto Auction, Inc.*, 761 S.W.2d 800 (Tex. App.—Houston [1st Dist.] 1988, no writ). In *SPT Federal*, we held, "Actual sale price is not prima facie evidence of market value where something indicates that the sale is out of the ordinary in some way." *Id.* at 801 (citing *Gulf, Colorado & Santa Fe Ry. v. Hillis*,

320 S.W.2d 687, 691 (Tex. Civ. App.—Waco 1959, no writ)). We held that evidence of the price of property sold at a foreclosure sale is not competent evidence of its fair market value since the transaction is not freely made between a willing seller and a willing buyer. *Id.* at 801–02; *see also Village Place, Ltd. v. VP Shopping, LLC*, 404 S.W.3d 115, 133 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (same).

Foreclosure price does not reflect fair market value of property because property is typically sold for less than its fair market value at a foreclosure sale. *See* TEX. PROP. CODE § 51.003 (anticipating property sold at foreclosure to sell for less than fair market value and allowing party that previously owned property offset for deficiency judgment).

There is no evidence in the record that the property in question sold for more than its fair market value. Instead, Merritt testified that he had been buying property at foreclosure sales for over ten years and that he and his partners bought about 25 properties a year. He and his partners buy a house, perform necessary repairs, pay for closing costs, and try to make a profit on the property. They determined they could still make a profit on the property after incurring the other costs if they bid between $40,000 and $45,000. They ultimately paid $42,865 for the property.

The evidence indicates, then, that the property is worth at least and possibly more than $42,865. By arguing that this amount constitutes no evidence of the fair market value of the property, Silberstein is asking us to render a judgment in which

Lewis recovers nothing because she was actually entitled to recover more. We decline. We hold that, in this circumstance, the foreclosure price of the property constitutes more than a scintilla of the value of the property.

We overrule Silberstein's third issue.

If the evidence does not support the trial court's damage award but there is evidence of damages, an appellate court is authorized to suggest a remittitur on its own motion. *Pointe West Center, LLC v. It's Alive, Inc.*, 476 S.W.3d 141, 150 (Tex. App.—Houston [1st Dist.] 2015, pet. denied) (citing *Springs Window Fashions Div., Inc. v. Blind Maker, Inc.*, 184 S.W.3d 840, 889 (Tex. App.—Austin 2006, pet. granted and remanded by settlement agreement); *Hernandez v. Sovereign Cherokee Nation Tejas*, 343 S.W.3d 162, 176 (Tex. App.—Dallas 2011, pet. denied)). Because the foreclosure price represents only some of the fair market value of the property, we hold remittitur is not appropriate in this case. *See Springs Window Fashions*, 184 S.W.3d at 889. We must, then, remand for a new trial. *See Akin, Gump*, 299 S.W.3d at 124.

When liability is contested, courts may not grant a new trial on unliquidated damages solely. TEX. R. APP. P. 44.1(b). Instead, we must remand for a new trial on both liability and damages. *See CCC Group, Inc. v. S. Cent. Cement, Ltd.*, 450 S.W.3d 191, 203 (Tex. App.—Houston [1st Dist.] 2014, no pet.). Because Silberstein disputes liability, and the fair market value of the property constitutes

unliquidated damages, we must remand for a new trial on both liability and damages. *See id.*

Attorneys' Fees

In his fourth issue, Silberstein challenges the trial court's award of attorneys' fees. A party can recover attorneys' fees for breach of contract. TEX. CIV. PRAC. & REM. CODE § 38.001(8). In this situation, however, the party seeking attorneys' fees must first prevail on its claim. *See Ashford Partners, Ltd. v. ECO Res., Inc.*, 401 S.W.3d 35, 40 (Tex. 2012) (holding, in order to qualify for attorneys' fees under section 38.001, "a litigant must prevail on a breach of contract claim and recover damages."). Because we have reversed the award for breach of contract, Lewis currently has not prevailed on her claim. Accordingly, we must also remand her claim for attorneys' fees related to this claim. *See Strebel v. Wimberly*, 371 S.W.3d 267, 285 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (reversing and remanding award of attorneys' fees because court reversed and remanded claim supporting attorneys' fees).

We sustain Silberstein's fourth issue.

Conclusion

We reverse the judgment of the trial court and remand for a new trial.

Laura Carter Higley
Justice

Panel consists of Justices Jennings, Higley, and Massengale.

Justice Massengale, concurring in the judgment only.