Opinion issued November 29, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-17-00795-CV

JOHN MITROPOULOS, Appellant

V.

PEDRO PINEDA AND MARY ORTUNO, Appellees

On Appeal from the 113th District Court
Harris County, Texas
Trial Court Case No. 2014-35080

MEMORANDUM OPINION

In this case involving a dispute between adjacent commercial property owners, appellees, Pedro Pineda and his wife Maria Ortuno, sued appellant, John Mitropoulos for breach of a settlement agreement arising out of, among other things,

Mitropoulos's alleged breaking of a sewer line that serviced Pineda's property. After a jury trial, a jury found that, while both parties breached the settlement agreement, Mitropoulos breached first and this breach was not excused. The jury also awarded Pineda and Ortuno $10,200 in damages for "loss of rental income." The trial court denied Mitropoulos's motion for new trial and motion for judgment notwithstanding the verdict and entered judgment on the jury verdict.

In five issues, Mitropoulos contends that (1) the trial court erred when it submitted a damages question in the jury charge concerning loss of rental income because Pineda did not specifically plead for this measure of damages; (2) the trial court's judgment is unsupported by the pleadings; (3) there was legally and factually insufficient evidence to support the jury's award of damages for loss of rental income; (4) the trial court erred when it failed to submit a foreseeability instruction in the jury charge; and (5) there was legally and factually insufficient evidence to support the jury's finding that Mitropoulos breached the settlement agreement first.

We reverse and render.

Background

A. Factual Background

Mitropoulos owned two adjacent lots of commercial property in Houston, and he leased one of these lots to Pineda for several years. Mitropoulos, who lives in New York, operated a business called ApolloFlex, which manufactures hoses that

are used to transfer materials in the petrochemical industry, on one of the lots, and Pineda operated a tire-repair shop on the lot that he leased. In 2005, Pineda and Ortuno purchased the lot that they had been leasing from Mitropoulos for $80,000.

In 2007, Mitropoulos wanted to expand his business, and he approached Pineda and asked if Pineda would sell his property back to Mitropoulos. Pineda declined to sell. Mitropoulos then initiated a lawsuit against Pineda and Ortuno, alleging that a building on Pineda's property encroached onto Mitropoulos's property. Ultimately, the parties reached a resolution of this dispute, and they entered into a settlement agreement in 2010 ("Settlement Agreement" or "the Agreement"). In the Settlement Agreement, the parties agreed to a partial exchange of their properties, and they agreed that both Mitropoulos and Pineda would execute general warranty deeds transferring a portion of their property to the other. The Agreement obligated Mitropoulos to have the lots replatted after the conveyances and provided that replatting "shall be completed" within four months of the Agreement. If the City of Houston did not allow replatting of the properties, the Agreement required Mitropoulos to pay $15,000 to Pineda.

The Settlement Agreement also required the parties, within seven days of executing the Agreement, to remove "any real property they own on the tract of land being conveyed, or any personalty which does not belong to them." The Agreement contained the following provision concerning drainage on the lots:

> [Mitropoulos] hereby releases, relinquishes, and discharges [Pineda and Ortuno] of all personal claims, known or unknown, related in any way to drainage issues pertaining to the adjoining lots, whether in contract, tort, or statute. *Specifically, [Mitropoulos] agrees to permit the existing sewer line that runs through both parties' lot to remain as is*. Should the City require that the drainage be corrected to connect to the main sewage line, [Mitropoulos] will pay in full at his sole cost and expense. The drainage repair performed by [Mitropoulos] at that time will be done to comply with the City's standards, be performed in good faith, and upon completion the land condition will be returned as near as possible to its original condition.

(Emphasis added.) The Agreement also obligated Mitropoulos to issue a title policy for Pineda's lot, at his own expense, following the replatting of the properties, and it included a provision requiring Mitropoulos to pay Pineda if a title company was unwilling to issue a policy. The Agreement further provided that property taxes would "be paid pro rata by the owner of the property up until the date of exchange of deeds proposed by this Agreement."

Pineda and Ortuno sued Mitropoulos for breach of the Settlement Agreement in June 2014. Pineda alleged that Mitropoulos breached the Agreement by (1) failing to replat the lots within four months of the Agreement; (2) failing to provide a title policy or pay Pineda if a title company would not issue a policy; and (3) permitting the sewer line that runs through both lots to be altered. With respect to the allegation relating to the sewer line, Pineda alleged:

> In violation of the terms of the Agreement, [Mitropoulos] altered the existing sewage line running through both parties' lots. [Pineda] operates his small business on the Pineda Property and, as a result of sewage line work, he experienced plumbing issues within his place of

> business. As a result, [Pineda] was unable to operate his business for approximately two years and experienced significant lost profits.

Pineda sought "actual damages," "consequential damages," attorney's fees, pre- and post-judgment interest, and court costs.

In his first amended answer, Mitropoulos asserted the affirmative defense of offset, alleging that he had been ready and willing to fulfill his contractual obligation of providing a title insurance policy, but he had "been prevented from doing so by a lack of cooperation from" Pineda. Mitropoulos alleged that, under the Agreement, Pineda had the obligation to pay property taxes up until the date deeds were exchanged "as part of the title insurance requirement," but Pineda failed to do so, leading to Mitropoulos's paying over $4,500 in delinquent taxes on Pineda's behalf. Mitropoulos requested that, if a jury found that he had breached the Agreement, he should receive an offset in the amount of delinquent taxes he had paid on Pineda's behalf. Mitropoulos also alleged that Pineda should be estopped from recovering for breach of the Agreement because Pineda himself had breached the Agreement by failing to remove his personal property from the portion of the property being conveyed by the exchange deed.

B. Trial Proceedings

During opening statements at trial, Pineda's attorney discussed the provisions of the Settlement Agreement that Mitropoulos had allegedly breached. Counsel stated:

> But as part of the settlement agreement, Mr. Mitropoulos was to leave the sewer line as is. That's what the language says—leave the sewer line as is—because we need it for our tire shop. We need to be able to rotate the tires. We need to have a working bathroom. And they didn't do that. When Mr. Mitropoulos built out his warehouse and his business, he broke the sewer line. Okay? And when he broke the sewer line, Pedro and Maria were unable to rent their little property. And you will hear testimony that the rent was going to be about $1700 a month. That's what he could get for his property. You know, he said, "Look, I'm getting a home loan so I can have something for my family. I've got potential tenants who will pay me $1700 a month."

Mitropoulos's counsel did not object to this statement at the time. After both parties delivered their opening statements and before testimony began, Mitropoulos's counsel raised the following issue outside the presence of the jury:

> For the first time today, I heard that we're being accused of breaking the sewer line. That's not in the pleadings and wasn't in the disclosures. I don't want to get in the position I'm trying that by agreement, so I'm going to be objecting to that kind of evidence—that we broke the sewer line. I don't see that in there. Now, I could be corrected and shown something else, but I just wanted to get that out in front so nobody would be surprised by it.

In response the trial court stated, "I think [Pineda's counsel] knows that if he has overpromised the jury, he will pay for it, one way or another."

Pineda testified that, as part of the Settlement Agreement, he and Mitropoulos exchanged deeds transferring a portion of each of their properties to each other. Pineda also testified that, contrary to the Settlement Agreement, Mitropoulos did not permit the existing sewer line to remain as is, but he instead broke the sewer line

during construction on Mitropoulos's property in May 2012.[1] Pineda stated that he witnessed a piece of machinery on Mitropoulos's property break the sewer line while digging. Pineda testified that he did not speak to Mitropoulos about this issue, but he did speak to one of Mitropoulos's workers, who knew that the sewer line had been broken. Pineda stated that, as a result of the broken sewer line, he could no longer operate his tire shop because the water could not drain from his property.

Pineda also testified that, because of the broken sewer line, he was unable to rent his property. He stated that "[a] lot of people wanted to rent it, but since there was no drainage" on the property, he could not find a tenant. Eventually, in June 2013, Pineda was able to rent the property to Raul Gonzalez Jr., who repaired the sewer line and deducted the cost of the repairs from his monthly rental payments. The trial court admitted into evidence a copy of a rental agreement between Pineda and Gonzalez. This agreement was written in Spanish and an English translation was read into the record. Under their agreement, Gonzalez would pay Pineda $6000 total from June 2013 through December 2013. Beginning January 1, 2014, Pineda and Gonzalez would make a new contract for five years in which rent would be $1700

[1] Mitropoulos's counsel objected to this testimony, arguing that this evidence was "not in conformity with their pleadings and the disclosures they made prior in the case and [we] ask that the evidence be struck." The trial court overruled this objection.

for the first year, $1730 for the second year, $1900 for the third year, and $2000 for the fourth and fifth years.

With respect to the rental value of Pineda's property, the following exchange occurred:

Pineda's counsel:	Is that [$1700] the fair market rental value for a month for your property?
Mitropoulos's counsel:	Objection, Your Honor. No foundation laid that this witness would have any idea what fair market value rental is for that property.
Pineda's counsel:	Owner can testify as to the value of their own property, Your Honor.
The Court:	Understood. You can cross-examine him on the basis of his opinion.
Pineda:	Well, that's what people—what a person will pay at the most, is 1700, 1800 a month.

Pineda also testified that, to his knowledge, Mitropoulos did not pay any of his property taxes and that he did not know if he ever received a title policy from Mitropoulos.

On cross-examination, Mitropoulos's counsel asked Pineda to define "fair market value," and Pineda responded, "I don't know any of that." Pineda also agreed with Mitropoulos's counsel that, contrary to a provision in the Settlement Agreement, he did not remove personal property from the portion of land exchanged with Mitropoulos within seven days of signing the Agreement. Pineda testified again

that Mitropoulos's workers broke the sewer line during construction on Mitropoulos's property, but he agreed with Mitropoulos's counsel that neither Mitropoulos nor the City of Houston ever told him that the sewer line needed to be moved.

Mitropoulos was called adversely by Pineda's counsel, and he agreed with counsel that while the Settlement Agreement required replatting of the properties to occur within four months of the Agreement, replatting did occur, but not within the time frame set out in the Agreement. Mitropoulos attributed the delay to the City of Houston. With respect to the provision in the Agreement that required the parties to remove their personal property from the land within seven days after deeds were exchanged, Mitropoulos testified that Pineda had several junk cars and other items on the portion of land that was exchanged, which Pineda eventually removed, albeit not within the specified seven-day time frame. Mitropoulos agreed that he never asserted a claim against Pineda for his failure to timely remove his personal property from the land.[2]

Mitropoulos disputed that the sewer line that ran between the two properties was ever broken, and he denied ever hearing about a broken sewer line from one of his workers. He testified that the breaking of a sewer line was a "major event" that

[2] When asked by his own counsel whether he was "making a complaint" about Pineda's failure to remove personal property, Mitropoulos responded, "No, not at all."

he would be expected to be notified of if it had happened. He also stated that he had never been notified by the City of Houston that the sewer line needed to be moved or that any alteration to it needed to be made.

Mitropoulos agreed that he had never provided a title policy to Pineda, although he testified that this was due to his discovering that Pineda owed delinquent property taxes, and Mitropoulos had to pay the delinquent taxes "to continue the process." Mitropoulos agreed that he paid the delinquent taxes in April 2011. When asked why, as of the date of trial in May 2017, he still had not had a title policy issued to Pineda, Mitropoulos testified that the trial was the first time Pineda, through his counsel's opening statement, acknowledged that Mitropoulos had paid the delinquent taxes on his behalf.

During the charge conference, Mitropoulos's counsel made the following objection:

> I object to the submission of Jury Question No. 5 regarding damages. There's been no evidence of damages in this case on which the jury could base a verdict. There's no competent evidence regarding the failure to repair the sewer line, what it might cost, and that it's necessary. There is no evidence of loss of rental income. In fact, it's the opposite of that. And there is a concession by the other side that the failure to pay the title policy actually results in a credit to my client. So there's no—there's no evidence to support the inclusion of any of these damage issues in this case, and I object to their submission to the jury in the following format. Other than that, I have no objections.

Mitropoulos did not request the inclusion of any particular instructions in the jury charge.

The jury charge instructed the jury that "[a] failure to comply with an agreement must be material," and the instruction listed five circumstances for the jury to consider in determining whether a party's failure to comply is material. The jury found, in answers to Questions One and Two, that both Mitropoulos and Pineda failed to comply with the Settlement Agreement. In Question Three, the jury found that Mitropoulos "failed to comply with the agreement first," and in Question Four, the jury found that Mitropoulos's failure to comply was not excused.[3] Question Five asked the jury to award damages, and allowed the jury to award damages for Mitropoulos's "[f]ailure to repair the sewage lines," "[l]oss of rental income," and Mitropoulos's "[f]ailure to obtain a title policy." The jury awarded no damages for failure to repair the sewage lines, $10,200 for loss of rental income, and "-1,553.48 + Title" for failure to obtain a title policy.

After the jury returned its verdict, the parties stipulated that the trial court would determine questions relating to attorney's fees. In its final judgment, the trial court ordered Mitropoulos to pay $10,200 to Pineda and Ortuno. The trial court awarded Pineda $27,500 in trial-level attorney's fees and a total of $42,500 in conditional appellate-level attorney's fees. The judgment did not include the jury's

[3] Question Four included an instruction that Mitropoulos's failure to comply was excused if compliance were waived by Pineda, and the instruction defined waiver as "an intentional surrender of a known right or intentional conduct inconsistent with claiming the right."

award of "-1,553.48 + Title" for Mitropoulos's failure to obtain a title policy, and the parties make no complaint about this on appeal.

Mitropoulos then filed a motion for new trial, a motion for judgment notwithstanding the verdict, and a motion to disregard certain jury answers. Mitropoulos argued that the jury award for loss of rental income was not supported by Pineda's pleadings, which sought "consequential damages," but did not specifically seek damages for loss of rental income. Mitropoulos argued that, in addition to the pleading defect, Pineda's discovery responses never disclosed or described any damages for loss of rental income and the trial court overruled Mitropoulos's trial objections to evidence concerning this measure of damages. Mitropoulos attached Pineda's discovery responses as evidence. In Pineda's first amended responses to Mitropoulos's request for disclosure, when asked to state "the amount and any method of calculating economic damages," Pineda stated values for Mitropoulos's failure to comply with his obligation to replat the lots and obtain a title policy and also stated the following:

> Additionally, under the Agreement, [Mitropoulos] was to leave the existing sewage line "as is," but failed to do so and altered the existing sewage line. As a result, Mr. Pineda experienced sewage and plumbing issues within his place of business and was unable to operate his business for two (2) years due to inoperative restrooms. Mr. Pineda's business generates approximately $30,000.00 in income per year and, as a result of the sewage issues caused by [Mitropoulos], [Pineda] incurred lost profits of $60,000.

In his second amended responses, Pineda further stated that the cost of repairs for the sewage line "have been estimated at $28,117.00." None of the discovery responses attached to Mitropoulos's motion mentioned loss of rental income.

Mitropoulos argued that this measure of damages should not have been submitted to the jury due to the pleading defect, that the issue was improperly submitted because the trial court did not include an instruction that "foreseeability was a prerequisite to find these damages," and that Pineda did not present probative evidence of these damages. Mitropoulos also argued that Pineda's testimony concerning loss of rental income was conclusory because it did not state the basis of his opinion regarding fair rental value of the property. Mitropoulos further argued that the jury's finding that he breached the Agreement first was against the great weight and preponderance of the evidence, as Pineda testified that he did not remove his personal property from the exchanged property within seven days, as required by the Agreement.

The trial court denied Mitropoulos's post-judgment motion, and this appeal followed.

Sufficiency of the Evidence

In his third issue, Mitropoulos contends that the evidence was legally and factually insufficient to support the jury's award of damages for loss of rental income.

A. Standard of Review

When reviewing the legal sufficiency of the evidence supporting the jury's findings, we consider all the evidence in the light most favorable to the prevailing party, indulging every reasonable inference in that party's favor. *Khorshid, Inc. v. Christian*, 257 S.W.3d 748, 758 (Tex. App.—Dallas 2008, no pet.). We credit favorable evidence if reasonable jurors could do so and disregard contrary evidence unless reasonable jurors could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 807, 827 (Tex. 2005). When a party attacks the legal sufficiency of the evidence supporting an adverse finding on which he did not have the burden of proof, the party must show that no evidence supports the jury's adverse finding. *Exxon Corp. v. Emerald Oil & Gas Co.*, 348 S.W.3d 194, 215 (Tex. 2011). We sustain a "no evidence" point if there is no more than a scintilla of evidence to support the finding. *Khorshid*, 257 S.W.3d at 758. More 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); *see Exxon*, 348 S.W.3d at 215 (stating that evidence is legally sufficient if it would enable reasonable and fair-minded people to reach verdict under review). The evidence offered to prove a vital fact is not more than a scintilla if the evidence is so weak as to do no more than create a mere surmise or suspicion of the fact's existence. *Ford Motor Co.*, 135 S.W.3d at 601.

When reviewing the factual sufficiency of the evidence supporting the jury's findings, we consider and weigh all of the evidence, not just the evidence that supports the verdict. *Khorshid*, 257 S.W.3d at 758. We may set aside the verdict only if the evidence is so weak or the finding is so against the great weight and preponderance of the evidence that the verdict is clearly wrong and unjust. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001) (per curiam). The jury, as the fact-finder, is the sole judge of the credibility of the witnesses and the weight to be given to their testimony. *Khorshid*, 257 S.W.3d at 758. As a result, we may not pass upon the witnesses' credibility or substitute our judgment for that of the jury. *Id.*; *see City of Keller*, 168 S.W.3d at 822 (stating that as long as evidence falls within "zone of reasonable disagreement" appellate court may not substitute its judgment for that of fact-finder). The fact-finder may choose to believe one witness over another. *Estrada v. Cheshire*, 470 S.W.3d 109, 120 (Tex. App.—Houston [1st Dist.] 2015, pet. denied).

B. Evidence of Loss of Rental Income Damages

Loss of rental income is "an appropriate measure of damages for the temporary loss of use of land." *City of Austin v. Teague*, 570 S.W.2d 389, 394 (Tex. 1978); *Mullendore v. Muehlstein*, 441 S.W.3d 426, 428 (Tex. App.—El Paso 2014, pet. abated) ("The calculation of damages for temporary injuries to real property should be tailored to the circumstances of the specific case."). Rental value is "that

amount which, in the ordinary course of business, the premises would bring or for which they could be rented, or the value, as ascertained by proof of what the premises would rent for, and not the probable profit which might accrue." *Teague*, 570 S.W.2d at 394. "The purpose of the measure of damage being based upon the value of the loss of use is to compensate the owner for his loss due to the inability to use the property for its normal purposes." *Mullendore*, 441 S.W.3d at 428 (quoting *Etex Tel. Co-op., Inc. v. Sanders*, 607 S.W.2d 278, 281 (Tex. Civ. App.—Texarkana 1980, no writ)). Lost rentals, like lost profits, "must be shown by competent evidence and with reasonable certainty." *Teague*, 570 S.W.2d at 395 (noting that "rule about the certainty of losses of profits is instructive also about the certainty of losses of rentals"); *Wood v. Kennedy*, 473 S.W.3d 329, 336 (Tex. App.—Houston [14th Dist.] 2014, no pet.) ("The rental value of a property must be established with reasonable certainty.").

A property owner may testify to the value of his property. *Nat. Gas Pipeline Co. of Am. v. Justiss*, 397 S.W.3d 150, 155 (Tex. 2012). The "Property Owner Rule" creates a rebuttable presumption that a landowner is personally familiar with his property and knows its fair market or fair rental value, and thus is qualified to express an opinion about that value. *Wood*, 473 S.W.3d at 336. However, the owner's testimony "does not necessarily provide relevant evidence of value that can support a judgment" because the owner's testimony must "meet the same requirements as

any other opinion evidence." *See id.* at 337 (quoting *Justiss*, 397 S.W.3d at 156). As with expert testimony, property valuations "may not be based solely on a property owner's *ipse dixit*." *Justiss*, 397 S.W.3d at 159. That is, an owner "may not simply echo the phrase 'market value'" and state a number; the owner "must provide the factual basis on which his opinion rests." *Id.* "[C]onclusory or speculative statements" about the property's value do not support a jury's verdict. *Id.*; *Wood*, 473 S.W.3d at 337 ("[A]n owner's valuation testimony is not relevant if it is conclusory or speculative. Qualifications and a subjective opinion will not—standing alone—support a judgment.") (internal citations omitted).

Mitropoulos argues that Pineda's testimony concerning loss of rental income was conclusory and speculative and constitutes legally insufficient evidence to support the jury's verdict. We agree.

The record in this case reflects that, prior to the break in the sewer line that occurred in May 2012, Pineda did not rent his property. Instead, he used it to operate his own tire repair shop. Pineda testified that, after the sewer line broke, he could no longer operate his own business, so, at an unspecified point in time, he began attempting to rent his property. Pineda stated generally that "[a] lot of people wanted to rent" the property but would not due to the lack of proper drainage to the property. He testified that in June 2013, thirteen months after the sewer line broke, he was able to rent his property to Raul Gonzalez, who paid him $6000 in rent from June through

December 2013 and repaired the sewer line on Pineda's property, deducting the cost of repairs from the rent payments. Beginning in January 2014, Pineda and Gonzalez were to enter into a new contract for five years, with the rental amount set at $1700 per month for the first year and then increasing to $2000 per month in the fourth and fifth years. Ultimately, the only damages that the jury awarded were $10,200 for "loss of rental income."

In this case involving property that had not previously been used as rental property, the only testimony concerning rental value was an agreement Pineda entered into in June 2013, more than one year after the sewer line break, in which a renter agreed to pay $1700 per month to rent the property. This is not a situation in which Pineda was renting his property to an established tenant when the breach occurred in May 2012, such that he would have a factual basis for asserting the fair rental value of the property at the time of the breach. There is no evidence that the $1700 per month Gonzalez agreed to pay in June 2013 constituted the rental value of the property from May 2012 to June 2013, which was the time period for which Pineda was seeking compensation for loss of rental income.

Furthermore, there is no evidence that the rental market conditions present in June 2013 were the same as the market conditions in May 2012 or any month up to June 2013. *See Z.A.O., Inc. v. Yarbrough Drive Ctr. Joint Venture*, 50 S.W.3d 531, 546–47 (Tex. App.—El Paso 2001, no pet.) (holding testimony that "current fair

market rental value" of property was $2,500 was insufficient to support jury award of $110,000 for loss of rental value suffered in past because "[t]here was no indication that the $2,500 figure represented an accurate assessment of the land's rental value for the duration of the period the land could not be rented due to Appellant's breach" and "[t]here was no testimony as to whether the property could have been rented for $2,500 per month dating back to the time of the breach"); *see also Vill. Place, Ltd. v. VP Shopping, LLC*, 404 S.W.3d 115, 133–34 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (stating that while "[e]vidence of the purchase price of property can be some evidence of its value," evidence of purchase price during different time period is not competent evidence of fair market value "unless it is accompanied by evidence showing the circumstances of the sale, such as how the property was marketed and comparability of market conditions").

To recover damages for loss of rental income, Pineda was required to establish these damages "with reasonable certainty." *See Teague*, 570 S.W.2d at 395. Pineda's testimony that he was unable to rent his property for over a year and that, when he was able to find a tenant, the rental value of the property was $1700 per month does not establish, with reasonable certainty, that the rental value of his property was $1700 per month for the year prior to finding a tenant. *See Z.A.O., Inc.*, 50 S.W.3d at 547. We therefore conclude that the evidence was legally insufficient to support the jury's award of $10,200 in damages for loss of rental income.

We sustain Mitropoulos's third issue. Because there is legally insufficient evidence to support the only damages awarded by the jury, we need not address Mitropoulos's remaining four issues. *See* TEX. R. APP. P. 47.1 (requiring appellate court to hand down opinion that "addresses every issue raised and necessary to final disposition of the appeal"). Furthermore, because legally insufficient evidence supports the only damages awarded to Pineda and thus a take-nothing judgment against Pineda is proper, we conclude that Pineda is not a prevailing party and he is not entitled to attorney's fees. *See Intercontinental Grp. P'ship v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 653, 655–56 (Tex. 2009) (stating that, to recover attorney's fees under Civil Practice and Remedies Code Chapter 38, party must "prevail on a cause of action for which attorney's fees are recoverable" and recover damages and that "[a] stand-alone finding on breach confers no benefit whatsoever" and an award of zero damages "necessarily zeroes out 'prevailing party' status" for plaintiff).

Conclusion

We reverse the judgment of the trial court, vacate the trial court's award of attorney's fees to Pineda and Ortuno, and render a take-nothing judgment against Pineda and Ortuno.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Bland, and Lloyd.