Opinion issued August 27, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-00767-CV

LAWRENCE FRANCIS ZUNTYCH, Appellant

V.

KAREN ANN WALDING-ZUNTYCH, Appellee

On Appeal from the 405th District Court
Galveston County, Texas
Trial Court Case No. 15-CV-0647

MEMORANDUM OPINION

In this contract dispute, appellant, Lawrence "Larry" Francis Zuntych, appeals a take-nothing judgment in favor of appellee, Karen Ann Walding-Zuntych, who is Larry's ex-wife. Larry claimed that Karen agreed to convey her house in Galveston

to him in exchange for mortgage payments and other expenses he paid on the house over a ten-year period during which he used it extensively. In four issues, Larry argues that he established a cause of action for unjust enrichment as a matter of law, and he challenges the trial court's refusal to submit jury questions on his claims for unjust enrichment, promissory estoppel, and fraud.

We affirm.

Background

Larry sued Karen, his ex-wife, to recover mortgage and other payments he made on a house in Galveston that Karen owned. While Larry and Karen were married, they bought the Galveston house to use as a family vacation house. When they divorced in February 2008, the divorce decree awarded Karen the Galveston house and awarded Larry the parties' family home in Houston. The divorce decree required the parties' children to live in the Cy Fair Independent School District, and Karen testified that, because of that geographical restriction, she could not live in Galveston.

Shortly after their divorce, Karen hired real estate agents and offered her Galveston house for sale. When Larry found out, he asked Karen not to sell the Galveston house, and he offered to make the mortgage payments. Karen agreed, and Larry began paying the mortgage on the Galveston house. The mortgage statements for Karen's Galveston house came to Larry at his home address, he did not tell Karen

he was receiving the mortgage statements, and he did not tell the mortgagee bank to send the mortgage statements to Karen at her home address. Instead, Larry kept the mortgage statements and paid them. Karen acknowledged that she was aware he was doing so.

In 2010, approximately two years after their divorce, Larry and Karen refinanced the mortgage on the Galveston house.[1] Wells Fargo Bank, the mortgagee on the Galveston house, approached Larry about refinancing the mortgage on that house. Larry discussed it with Karen, and she eventually agreed to refinance the Galveston house with Larry. Larry was the "primary contact" with the bank on the refinance process. Larry continued making the mortgage payments on the Galveston house after it was refinanced until trial in this case in May 2018.

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[1] On appeal, Larry repeatedly represents that he co-signed for the refinanced loan on the Galveston house, even arguing that Karen was a "primary signatory" with certain obligations to Larry as the "secondary signatory." Larry does not cite the record or any legal authority to support these assertions, and the evidence introduced at trial contradicts them. According to Covenant 13 in the deed of trust, a "co-signer" is defined as "any Borrower who co-signs this Security Instrument [the deed of trust] but does not execute the [n]ote," and a "co-signer" is "not personally obligated to pay the sums secured" by the note. Unlike a "co-signer," "Borrower's obligations and liability shall be joint and several." The record evidence here shows that Larry executed the note, and that he signed as a "Borrower" with Karen, not as a "co-signer." We also note that Larry's name and signature appear first before Karen's name and signature throughout the deed of trust and note. Thus, the record evidence convincingly shows that Larry was not a co-signer, as "co-sign" is defined in those documents, but rather that he signed as a co-equal borrower with Karen and that he is jointly and severally liable on the note.

In June 2015, Larry sued Karen to partition the Galveston house and for breach of contract, claiming that "[he] was forced to pay the note on the Galveston [house] . . . because Karen . . . refused to make the payments." Larry further alleged that he asked to buy the Galveston house from Karen "through an oral earnest money contract," to which Karen agreed. In his Third Amended Petition for Breach of an Oral Earnest Money Contract and Other Equitable Remedies, the live petition at the time of trial, Larry asserted thirteen causes of action against Karen, including breach of oral earnest money contract, quantum meruit, unjust enrichment, promissory estoppel, fraud, and a request for a declaratory judgment that he is the sole title owner of the Galveston house.[2] Larry asked the court to order Karen to convey the Galveston house to him or order its partition and sale, and he sought imposition of a constructive trust and a resulting trust.

All of Larry's causes of action were based on his claim that Karen orally agreed to convey the Galveston house to him.

At trial, Larry testified that he spent approximately $150,000 on the mortgage of the Galveston house over the ten years he had been paying it. Larry admitted into evidence cancelled checks, receipts, and a document summarizing all the mortgage

[2] Although neither the record nor the parties' briefs are clear on the procedural history of this case, the only causes of action that survived to trial were for breach of contract, quantum meruit, unjust enrichment, promissory estoppel, and fraud.

payments he allegedly made on the house. Larry also testified that he spent approximately $50,000 in other expenses on the Galveston house during the ten years after his divorce, which he supported with receipts and a document summarizing the expenses he paid.[3] For example, Larry paid $4,780 to fix the boat dock on the Galveston house. He testified that the dock had a safety issue and needed to be repaired, but he did not ask Karen for her permission before paying for those repairs. Larry also testified that Karen owed him $268 for a repair that he made to the Galveston house and billed as a service call from Houston Turf Irrigation, a company that Larry owned. Like the boat dock repair, Larry did not ask Karen before making this repair or before making any of the repairs or expending other money on the Galveston house.

Larry testified that, in exchange for making the mortgage and other payments on the Galveston house, Karen agreed to convey the house to him. But he also testified that Karen agreed to repay him for the payments: "I want all the money I paid into the house, and I want title to the house." He acknowledged, however, that

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[3] Larry argues on appeal that the amount of other expenses he paid on the Galveston house includes unspecified taxes, but he points to no evidence supporting his argument. To the contrary, our review of the evidence that he introduced at trial, including his own receipts and document summarizing his alleged expenses, indicates that the only tax he paid concerning the Galveston house was sales tax for goods and utilities he paid, which was included in the amount of damages he asked the jury to award him. The record contains no evidence showing Larry paid any other taxes on the Galveston house.

the parties did not agree on terms of repayment or have a written agreement for conveyance of the Galveston house or for repayment of expenses.

Although not mentioned in his appellate brief, Larry admitted at trial to using and enjoying the Galveston house an average of six to seven days per month during the ten years between his divorce and the trial. With Karen's permission, Larry extensively used the Galveston house for his personal enjoyment, including for weekend trips with his children and his friends, parties, and fishing trips. Larry also permanently stored his boat at the boat dock on the premises of the Galveston house. When he used the Galveston house, he also used Karen's furnishings, including her dishes, her bed, her furniture, and her television. Larry continued using the Galveston house up to the time of trial. He denied, however, that he should have to repay Karen anything for his use and enjoyment of her house.

Karen conceded that she did not make any mortgage payments on the Galveston house in the ten years after their divorce "[b]ecause [she] [hadn't] used the Galveston [house] since then." She had intended to sell it until Larry stopped her, and she testified that she could have sold or rented the house, and she could have separately rented the boat dock. According to Karen, "[T]he agreement was that since Larry was utilizing [the Galveston house] like a renter would utilize the property, he was making the mortgage payments [on the Galveston house] in lieu of a rental." Karen initially agreed that perhaps she should be required to repay Larry

for some of the mortgage payments and expenses he paid on the Galveston house, but, after she was asked about the lost rental or sale income on the Galveston house, she changed her mind: "He's gotten full use out of this house. So when I look at your numbers up there, maybe he shouldn't get anything from this house. He's gotten use out of it all these years."

After Larry rested his case-in-chief, Karen filed a motion for partial directed verdict on the issue of conveying the Galveston house to Larry. During arguments to the trial court, Larry's counsel agreed that there was no evidence to support Larry's theory that the parties had an agreement to convey the Galveston house from Karen to Larry because there was no written agreement as required by the Statutes of Frauds and Conveyances. The trial court granted Karen's motion and directed a verdict in her favor on Larry's cause of action for breach of an oral earnest money contract. Larry does not challenge this decision on appeal.

At the jury charge conference following the directed verdict, Larry objected to the trial court's refusal to include jury questions on his unjust enrichment, promissory estoppel, and fraud causes of action, generally arguing that the evidence and the pleadings supported submission of these claims to the jury. The court refused Larry's questions on promissory estoppel because "the pleadings refer solely to promissory estoppel involving the oral earnest money contract," on which the court had just directed a verdict in Karen's favor. The court also denied Larry's questions

on unjust enrichment and fraud. The trial court submitted two theories of liability to the jury: breach of contract by Karen to repay Larry and quantum meruit.[4] The jury unanimously found against Larry, and the trial court entered a take-nothing judgment against him.

Larry filed a post-judgment motion for judgment notwithstanding the verdict asking for restitution from Karen for unjust enrichment. The trial court denied the motion. Larry subsequently filed a motion to modify the judgment or for new trial on similar grounds, arguing that he was entitled to recovery under his theories of restitution, unjust enrichment, and constructive trust as a matter of law.[5] The trial court also denied this motion.

This appeal followed.

Legal Sufficiency of Evidence

In his first issue, Larry argues that the evidence was legally sufficient to establish a cause of action for unjust enrichment against Karen as a matter of law, and therefore he is entitled to reimbursement from Karen secured by a constructive trust or equitable lien on the Galveston house.

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[4] Question 1 asked, "Did [Larry] and [Karen] agree that if [Larry] paid the mortgage and other expenses for the Galveston [house] that [Karen] would repay [Larry]?" Question 4 asked, "Did [Larry] perform compensable work for [Karen]?" Question 4 also defined "compensable work."

[5] Larry's motion offered argument only on his constructive trust theory.

A. Standard of Review

An appellant who "attacks the legal sufficiency of an adverse finding on an issue on which [he] has the burden of proof . . . must demonstrate, as a matter of law, all vital facts in support of the issue."[6] *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001) (citing *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989), and W. Wendell Hall, *Standards of Review in Texas*, 29 St. Mary's L.J. 351, 481–82 (1998)). In conducting our review, we examine the record for evidence that supports the challenged finding, while ignoring all evidence to the contrary. *Id.* (citing *Sterner*, 767 S.W.2d at 690). If some evidence supports the challenged finding, "our inquiry with regard to this issue need go no further." *Sterner*, 767 S.W.2d at 691. If, however, there is no evidence to support the challenged finding, we must examine the entire record to determine whether the contrary proposition is established as a matter of law. *Dow Chem. Co.*, 46 S.W.3d at 241 (citing *Sterner*, 767 S.W.2d at 690). "The point of error should be sustained only if the contrary proposition is conclusively established." *Id.* at 241–42 (citations omitted).

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[6] In his brief, Larry argues that the standard of review differs depending on whether he raised his legal sufficiency challenge in a motion for judgment notwithstanding the verdict, a motion to modify the judgment, or a motion for new trial. However, the scope of legal sufficiency review is the same regardless of the type of motion we are reviewing. *See City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex. 2005) ("[T]he scope of [legal-sufficiency] review should not depend upon the motion in which it is asserted. . . . Accordingly, the test for legal sufficiency should be the same for summary judgments, directed verdicts, judgments notwithstanding the verdict, and appellate no-evidence review.").

In conducting our legal sufficiency review, we review all the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that the finding was true. *Jones v. Republic Waste Servs. of Tex., Ltd.*, 236 S.W.3d 390, 396 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005)). To give appropriate deference to the factfinder's conclusions and the role of a court conducting a legal sufficiency review, reviewing evidence in the light most favorable to the finding requires a reviewing court to assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so. *Id.* (citing *City of Keller*, 168 S.W.3d at 822). A corollary is that a court should disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible, although this does not mean that a court must disregard all evidence that does not support the finding. *Id.* (citing *City of Keller*, 168 S.W.3d at 822).

B. Governing Law

Unjust enrichment is an equitable principle stating that one who received benefits unjustly should make restitution for those benefits. *Tex. Integrated Conveyor Sys., Inc., v. Innovative Conveyor Concepts, Inc.*, 300 S.W.3d 348, 367 (Tex. App.—Dallas 2009, pet. denied) (citing *Villareal v. Grant Geophysical, Inc.*, 136 S.W.3d 265, 270 (Tex. App.—San Antonio 2004, pet. denied)); *see Lee v. Lee*,

411 S.W.3d 95, 111 (Tex. App.—Houston [1st Dist.] 2013, no pet.) ("This court has previously held that unjust enrichment is an independent cause of action.") (collecting cases). Unjust enrichment occurs when a person has wrongfully secured a benefit or has passively received one which it would be unconscionable to retain. *Tex. Integrated Conveyor Sys.*, 300 S.W.3d at 367 (citing *Villareal*, 136 S.W.3d at 270). A person is unjustly enriched when she obtains a benefit from another by fraud, duress, or the taking of an undue advantage. *Id.* (citing *Heldenfels Bros., Inc. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992)). Unjust enrichment is an equitable right and is not dependent on the existence of a wrong. *Id.* (citing *Villareal*, 136 S.W.3d at 270).

C. Analysis

Larry argues that he conferred a benefit on Karen by paying the mortgage and other expenses on the Galveston house under circumstances that would make Karen's retention of the benefit unjust. Specifically, he argues that the bank would have foreclosed on Karen's Galveston house and Larry would have been in default on its note had he not made these payments.[7] Karen responds that the evidence shows

[7] Larry also argues, without citation to any legal authority or record evidence, that Karen was the primary signatory on the refinanced loan on the Galveston house and therefore she was "obligated to the secondary signatory—Larry—to pay the debt or repay [Larry] if [Karen] fail[ed] to repay [Larry]." *See, e.g.*, *Guimaraes v. Brann*, 562 S.W.3d 521, 538 (Tex. App.—Houston [1st Dist.] 2018, pet. denied) ("Failure to cite to appropriate legal authority or to provide substantive analysis of the legal issues presented results in waiver of a complaint on appeal.") (citations omitted); TEX. R. APP. P. 38.1(i). We conclude that Larry waived this argument for failure to

that she did not wrongfully secure a benefit and it is not unconscionable for her to retain the benefit of payments freely made by Larry. Karen points out that Larry does not argue that she secured any benefit through fraud, duress, or undue influence. Karen further argues that, because Larry had an adequate remedy at law through money damages for breach of contract, the equitable remedy of unjust enrichment is unavailable to Larry.

Larry offered no evidence at trial and points to none on appeal to support his argument that Karen's Galveston house would have been foreclosed upon and Larry would have been in default on the note but for his payment of expenses, including the mortgage payments, on the Galveston house. Larry testified that Karen had difficulty making the mortgage payment on both her Galveston house and her house in Houston, that he and Karen refinanced the note on both houses, and that a homeowner's association was awarded a judgment against Karen and him for unpaid homeowner's association fees on Karen's Houston house. Larry admitted into evidence the refinanced notes on Karen's Galveston and Houston houses and the judgment against Larry and Karen for unpaid homeowner's fees on the Houston house.

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properly brief it. Furthermore, had it been preserved, the evidence, as we discuss above, shows that Larry was a co-equal borrower with joint and several liability on the refinanced loan.

However, Larry's evidence does not show that the mortgagee would have foreclosed on Karen's Galveston house had Larry not paid the mortgage payments on it. Karen testified that she would have sold or rented the Galveston house if Larry had not paid the mortgage payments on it. *See Jones*, 236 S.W.3d at 396 (stating that reviewing courts must view evidence in light most favorable to finding, assume factfinder resolved disputed facts in favor of finding if reasonable factfinder could do so, and disregard evidence that reasonable factfinder could have disbelieved or found to be incredible). Thus, there is no evidence to support Larry's argument that Karen was unjustly enriched because, had Larry not paid the mortgage payments on her Galveston house, the bank would have foreclosed on it. *See id.*

Nor is there evidence that Karen's benefit is unjust because Larry would have been in default on the note had he not paid it. Karen testified she had planned to sell or rent the Galveston house and the boat dock. Moreover, Larry's evidence showed that he signed the refinanced note as a borrower with joint and several liability, and he therefore had a personal interest in protecting his credit by not defaulting on the loan. Moreover, Larry admitted that, after the divorce, the mortgage statements for the Galveston house came to Larry's home address and he did not tell Karen he was receiving the mortgage statements or tell the bank to send them to Karen at her address, but instead Larry paid the mortgage statements. Larry also testified that he was the first and "primary contact" with the mortgagee bank on the refinanced loan

for Karen's Galveston house and that he had sought out Karen for her agreement to refinance the loan. Larry also admitted that he continued making the mortgage payments and other expenses even after Karen allegedly told him she would not repay him. Thus, even if Larry would have been in default on the note if it were not paid, that does not show that Karen wrongfully secured a benefit or that her retention of the benefit is unjust.

Finally, Larry never mentions his own admission at trial that he used and enjoyed the Galveston house six days per month over ten years, or that he stored his boat at the boat dock located at the Galveston house. Nor does Larry mention that he did not seek Karen's approval prior to paying for repairs and other expenses. Thus, Larry has not conclusively established the vital fact that Karen wrongfully secured a benefit that would be unjust or unconscionable for her to retain. *See Dow Chem. Co.*, 46 S.W.3d at 241; *Sterner*, 767 S.W.2d at 691 (holding that some evidence supported challenged finding and, "[t]herefore, our inquiry with regard to this issue need go no further"). We therefore conclude that Larry has not established his cause of action for unjust enrichment as a matter of law.

We overrule Larry's first issue.

Jury Questions

In his second, third, and fourth issues, Larry challenges the trial court's refusal to submit jury questions on his causes of action for unjust enrichment, promissory estoppel, and fraud.

D. Standard of Review

We review a trial court's refusal to include a requested jury question for abuse of discretion. *Sw. Energy Prod. Co. v. Berry-Helfand*, 491 S.W.3d 699, 727–28 (Tex. 2016) (citations omitted); *Moss v. Waste Mgmt. of Tex., Inc.*, 305 S.W.3d 76, 81 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (citation omitted). A trial court abuses its discretion when it acts arbitrarily or unreasonably, or if it acts without reference to any guiding rules or principles. *Moss*, 305 S.W.3d at 81 (citing *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985)). A trial court has broad discretion to submit questions to the jury, subject to the requirement that the court must submit questions that are raised by the written pleadings and the evidence. TEX. R. CIV. P. 278; *Union Pac. R.R. Co. v. Williams*, 85 S.W.3d 162, 166 (Tex. 2002); *Moss*, 305 S.W.3d at 81.

E. Unjust enrichment

In his second issue, Larry argues that the trial court abused its discretion by refusing to submit jury questions on unjust enrichment. He argues that he was entitled to the question because Karen's retention of the benefit of Larry's payments

was unjust in that Karen would have lost the Galveston house to foreclosure and Larry would have been in default under the mortgage if he had not made the mortgage payments. Karen responds that Larry's pleadings did not raise the issue of an agreement by Karen to repay him; instead, Larry only pleaded that Karen had agreed to convey the Galveston house to him.

As we discussed above, the evidence does not support Larry's claim for unjust enrichment. *See Tex. Integrated Conveyor Sys.*, 300 S.W.3d at 367 (stating that unjust enrichment requires evidence that defendant wrongfully secured benefit or passively received one that would be unconscionable to retain). Larry's extensive use of the Galveston house shows that Karen was not unjustly enriched. On this record, we hold that the trial court did not abuse its discretion in refusing to submit Larry's proposed questions on unjust enrichment to the jury. *See Sw. Energy Prod. Co.*, 491 S.W.3d at 727–28 (reviewing jury-charge rulings for abuse of discretion); *Williams*, 85 S.W.3d at 166 ("A party is entitled to a jury question . . . if the pleadings and evidence raise an issue.") (citing TEX. R. CIV. P. 278).

We overrule Larry's second issue.

F. Promissory Estoppel

In his third issue, Larry argues that the trial court abused its discretion in refusing to submit his proposed jury questions on promissory estoppel because there is "some evidence" that he relied on Karen's promise to repay him—despite

admitting the jury found against the existence of such an agreement, which Larry does not challenge on appeal. Karen responds that Larry did not plead promissory estoppel based on a promise by Karen to repay him, but rather pleaded the cause of action based on the oral earnest money contract.

Promissory estoppel requires: (1) a promise; (2) foreseeability of reliance upon the promise by the promisor; and (3) substantial reliance by the promisee to his detriment. *Beverick v. Koch Power, Inc.*, 186 S.W.3d 145, 152 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (citing, among others, *English v. Fischer*, 660 S.W.2d 521, 524 (Tex. 1983)). Larry does not point the Court to evidence that he relied on Karen's promise to repay him. *See id.* Moreover, Larry offers no argument, and the evidence does not support, that he substantially relied on Karen's alleged promise to repay him to his detriment. *See id.* As discussed above, Larry began paying the mortgage after the parties divorced without telling Karen he was receiving the mortgage statements or telling the bank to send them to Karen. Larry was also the "primary contact" with the mortgagee bank on the refinanced loan on the Galveston house. And Larry used and enjoyed the Galveston house six days per month for ten years, and he permanently parked his boat at the boat dock.

Furthermore, Larry's pleadings, including his promissory estoppel theory, were based solely upon his allegation that he and Karen had an oral earnest money contract to convey the Galveston house, which Larry's counsel agreed at trial was

unenforceable for the lack of a required written agreement. *See, e.g.*, *Reiland v. Patrick Thomas Props., Inc.*, 213 S.W.3d 431, 437 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) ("The statute of conveyances and the statute of frauds require that conveyances and contracts of sale of real property be in writing and signed by the conveyor or party to be charged.") (citing TEX. PROP. CODE ANN. § 5.021, and TEX. BUS. & COM. CODE ANN. § 26.01(b)(4)). There is no evidence on at least one element of promissory estoppel, and the claim is not supported by Larry's pleadings. *See Beverick*, 186 S.W.3d at 152 (stating promissory estoppel requires evidence that defendant substantially relied to his detriment on plaintiff's promise). On this record, we hold that the trial court did not abuse its discretion in refusing to submit Larry's proposed questions on promissory estoppel to the jury. *See Sw. Energy Prod. Co.*, 491 S.W.3d at 727–28 (reviewing jury-charge rulings for abuse of discretion); *Williams*, 85 S.W.3d at 166 ("A party is entitled to a jury question . . . if the pleadings and evidence raise an issue.") (citing TEX. R. CIV. P. 278).

We overrule Larry's third issue.

G. Fraud

In his fourth issue, Larry argues that the trial court abused its discretion in refusing to submit his fraud question to the jury because the evidence shows that Karen agreed to repay him for amounts he paid on the Galveston house and that Karen refused to repay him under circumstances indicating that she made her

promise to repay with no intention to perform and therefore she entered into the agreement with the sole purpose of inducing Larry to pay the expenses. Larry's argument is conclusory, merely substituting the parties' names in his restatement of the elements of a common-law fraud cause of action. We hold that Larry has failed to adequately brief this issue, and it is waived. *See Jacobs v. Satterwhite*, 65 S.W.3d 653, 655–56 (Tex. 2001) (quoting *San Jacinto River Auth. v. Duke*, 783 S.W.2d 209, 209–10 (Tex. 1990), for "well-established rule that grounds of error not asserted by points of error or argument in the court of appeals are waived"); TEX. R. APP. P. 38.1(i).

We overrule Larry's fourth issue.

Conclusion

We affirm the judgment of the trial court. We dismiss any pending motions as moot.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Lloyd, and Hightower.