

Affirmed and Memorandum Opinion filed February 9, 2010



In The

Fourteenth Court of Appeals

NO. 14-08-00566-CV

ILIAS GIANNAKOPOULOS, Appellant

V.

BILL ERIS, Appellee

**On Appeal from the 295th District Court
Harris County, Texas
Trial Court Cause No. 2005-75228**

MEMORANDUM OPINION

This is an appeal from the trial court's award of attorney's fees on a breach-of-contract claim. Appellant Ilias Giannakopoulos contends that the trial court erred in awarding attorney's fees to appellee Bill Eris because (1) Eris's attorney failed to properly notice and present a claim for such fees, (2) Giannakopoulos paid the demanded amount within thirty days after the claim was presented, and (3) the award is excessive in relation to the actual damages awarded. We affirm.

Giannakopoulos and Eris jointly purchased three adjacent parcels of real estate located at 311, 315, and 319 West Gray in Houston. They operated a business at 315 West Gray and used the other two lots for parking. In June 2003, Giannakopoulos and Eris transferred their interests in the property to a corporation, H.G.B.E., Inc. Giannakopoulos and Eris each owned fifty percent of H.G.B.E.'s shares.

In 2003, Giannakopoulos and Eris entered into an agreement titled "AGREEMENT FOR USE OF 315 WEST GRAY" (the "contract"). Under the contract, Giannakopoulos agreed to allow Eris to run the business and to have all the proceeds from the business for three years. Eris agreed to pay all the expenses related to the business and to pay \$1,000 per month to H.G.B.E. to be used to pay real-estate taxes on the property. Giannakopoulos and Eris further agreed that any additional property taxes owed were to be paid to H.G.B.E. "on a 50-50 basis." H.G.B.E.'s only bank account was an account in Eris's and Giannakopoulos's names, and Eris deposited the money for the property taxes on the lots into this account. Eris subsequently paid the full amount of the property taxes owed on the lots for 2004, 2005, and 2006, even though the taxes for each year exceeded the amounts he had deposited in the account for this purpose.

In 2005, Eris filed suit against Giannakopoulos, seeking to partition or sell the property, and requesting reimbursement for property taxes paid. A jury found that Giannakopoulos had breached the parties' contract and awarded damages of \$3,941.90, representing Giannakopoulos's share of the property taxes owed. The jury also awarded to Eris \$64,684.94 in attorney's fees. The trial court reduced the attorney's fee award to \$32,342.47, the amount Eris's attorney testified was expended on the breach-of-contract claim. This appeal followed.¹

¹ Both parties filed notices of appeal, but Eris did not file a brief urging any issues on his behalf. On January 15, 2010, Eris moved to dismiss his appeal. We grant the motion.

II

In his first issue, Giannakopoulos contends the trial court erred in awarding attorney's fees to Eris because Eris's attorney failed to properly notice and present a claim under Chapter 38 of the Texas Civil Practice and Remedies Code. Specifically, Giannakopoulos contends Eris's attorney failed to plead and prove that all conditions precedent had been met, and his demand letter did not satisfy Chapter 38 because it did not give Giannakopoulos thirty days to pay the amount demanded. Whether a party is entitled to recover attorney's fees is a question of law for the court; the amount to be awarded is a question for the trier of fact. *See Holland v. Wal-Mart Stores, Inc.*, 1 S.W.3d 91, 94 (Tex. 1999) (per curiam). In the absence of findings of fact and conclusions of law, we will imply all findings necessary to the court's judgment so long as the record supports them. *Vickery v. Comm'n for Lawyer Discipline*, 5 S.W.3d 241, 251–52 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).

Section 38.001 provides that a person may recover reasonable attorney's fees on a claim based on an oral or written contract. Tex. Civ. Prac. & Rem. Code Ann. § 38.001(8) (Vernon 2008). To recover attorney's fees, the claimant must comply with the following requirements of section 38.002: (1) the claimant must be represented by an attorney; (2) the claimant must present the claim to the opposing party or to a duly authorized agent of the opposing party; and (3) payment for the just amount owed must not have been tendered within thirty days of presentment. *Id.* § 38.002 (Vernon 2008). Presentment of the claim is required to provide the other party with an opportunity to pay the claim before incurring an obligation for attorney's fees. *Jones v. Kelley*, 614 S.W.2d 95, 100 (Tex. 1981). No particular form of presentment is required. *France v. Am. Indem. Co.*, 648 S.W.2d 283, 286 (Tex. 1983); *Harrison v. Gemdrill Int'l, Inc.*, 981 S.W.2d 714, 719 (Tex. App.—Houston [1st Dist.] 1998, pet. denied). All that is necessary is that a party show that its assertion of a debt or claim and a request for compliance was made to the opposing party, and the opposing party refused to pay the

claim. *Standard Constructors, Inc. v. Chevron Chem. Co.*, 101 S.W.3d 619, 627 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).

It is undisputed that Eris pleaded for recovery of his attorney's fees pursuant to Texas Civil Practice and Remedies Code section 38.001. Giannakopoulos complains, however, that Eris is not entitled to attorney's fees because he failed to plead that "all conditions precedent have been performed or have occurred." *See* Tex. R. Civ. P. 54. But the failure to plead that all conditions precedent have been met does not preclude an award of attorney's fees; it merely requires the claimant to prove the requirements of section 38.002. *See Wingate v. Acree*, No. 14-01-00851-CV, 2003 WL 1922569, at *6 (Tex. App.—Houston [14th Dist.] Apr. 24, 2003, no pet.) (mem. op.); *Cook Composites, Inc. v. Westlake Styrene Corp.*, 15 S.W.3d 124, 138 (Tex. App.—Houston [14th Dist.] 2000, pet. dismissed); *see also Grimm v. Grimm*, 864 S.W.2d 160, 162 (Tex. App.—Houston [14th Dist.] 1993, no writ) (explaining generally that when a plaintiff fails to plead performance of conditions precedent she may nevertheless obtain judgment on her claim if she proves all essential elements of the claim, including the performance of any conditions precedent). Therefore, Eris's failure to plead that all conditions precedent have been met will not preclude an award of attorney's fees if he proved that he complied with the requirements of section 38.002.

Giannakopoulos contends, however, that Eris failed to show that he made a proper demand on him. He also contends that Eris's demand letter failed to satisfy the requirements of Chapter 38 because it did not give Giannakopoulos thirty days to pay the amount demanded, but rather demanded payment in three days. We disagree.

At trial, Eris testified that he asked Giannakopoulos to pay his fifty percent of the additional property taxes, but Giannakopoulos refused and told Eris that he would have to pay the taxes. Oral presentment of a claim is sufficient to satisfy the presentment requirement; it is not necessary for a party to present a claim in writing. *Jones*, 614 S.W.2d at 100; *Harrison*, 982 S.W.2d at 719. Further, on January 26, 2007, Eris's

attorney sent a letter to Giannakopoulos's attorney demanding that Giannakopoulos pay his fifty percent of the excess taxes for 2006 (\$3,280.52) as the contract provided. Although the letter demanded payment by January 30, 2007, we nevertheless conclude it is adequate to show presentment. *See Harrison*, 981 S.W.2d at 719 (holding employee's oral demand for payment "when he got through with his two-week tour" satisfied presentment requirement); *Carr v. Austin Forty*, 744 S.W.2d 267, 271 (Tex. App.—Austin 1987, writ denied) (holding letter requesting payment at unspecified time satisfied presentment requirement). Therefore, Eris's oral and written requests for payment adequately presented Eris's claim for purposes of section 38.002. We overrule Giannakopoulos's first issue.

III

In his second issue, Giannakopoulos contends the trial court erred in awarding attorney's fees to Eris because he paid the demanded amount within thirty days of presentment. *See Tex. Civ. Prac. & Rem. Code Ann. § 38.002(3); Staff Indus., Inc. v. Hallmark Contracting, Inc.*, 846 S.W.2d 542, 548–49 (Tex. App.—Corpus Christi 1993, no writ). Specifically, Giannakopoulos asserts that the January 26 demand letter requested payment of \$3,280.52, representing his share of the property taxes owed for 2006, and "it is undisputed" that he paid the taxes directly to the Harris County tax assessor by January 31, 2007.² Giannakopoulos contends Eris has failed to prove that he breached any contract by tendering the taxes to the tax assessor's office instead of Eris, and furthermore, the contract does not provide for Giannakopoulos to tender payment to Eris. Giannakopoulos also asserts that "the goal of the contract" was not jeopardized by his timely payment of the property taxes directly to the tax assessor, and therefore Eris is not entitled to any attorney's fees.

² Although it is undisputed that Giannakopoulos paid some amount directly to the tax assessor, Giannakopoulos does not direct us to any evidence in the record that he paid the taxes by January 31, 2007, and we have found no testimony or exhibits in the record supporting this representation.

To the extent Giannakopoulos argues that Eris is not entitled to attorney's fees because he failed to prove the contract was breached, this argument is waived because the jury found that Giannakopoulos did breach the contract, and Giannakopoulos does not challenge this finding. Further, it is undisputed that Eris paid all of the taxes due on the lots for the years 2004, 2005, and 2006, and Giannakopoulos did not reimburse Eris for any portion he owed under the contract for those years. And, Giannakopoulos does not contend he ever paid any part of the 2004 or 2005 taxes to either Eris or the tax assessor's office.

Further, Giannakopoulos provides no authority to support his contention that his payment of his portion of the 2006 taxes directly to the tax assessor precludes Eris's recovery of his attorney's fees.³ Eris demanded that the taxes owed be paid to him, not the tax assessor, as Eris had already paid the tax assessor. Moreover, the purpose of the contract's provision that "[a]ny additional taxes owed shall be paid to H.G.B.E., Inc. on a 50-50 basis" by Eris and Giannakopoulos was to ensure that any additional tax burden would be shared equally. Eris testified that he paid the excess taxes for 2006 out of his personal account. Giannakopoulos did not reimburse Eris for paying his half of that amount, nor did he reimburse Eris for his half of the excess property taxes for 2004 or 2005. Thus, Eris incurred damages that remained unpaid at the time of the judgment. *See* Tex. Civ. Prac. & Rem. Code Ann. § 38.002(3). On these facts, we are not persuaded

³ Giannakopoulos cites Texas Civil Practice and Remedies Code section 38.002(3) and two cases for the general proposition that payment within thirty days after the claim is presented precludes liability for attorney's fees. *See Ellis v. Waldrop*, 656 S.W.2d 902, 905 (Tex. 1983); *Staff Indus., Inc.*, 846 S.W.2d at 549. Neither case, however, is analogous to this case. In *Ellis*, the supreme court held that the defendant in a declaratory-judgment action who had no obligation to act under a right-of-first-refusal agreement was not liable for attorney's fees under the predecessor statute to section 38.001 because an essential element to recovery under the statute was the existence of a duty or obligation the party failed to meet. *See* 656 S.W.2d at 905. In *Staff Industries*, the Corpus Christi court of appeals held that a general contractor's conditional tender of payment as a settlement offer did not defeat the subcontractor's claim for attorney's fees, explaining that for purposes of section 38.002, a tender must be an unconditional offer by the debtor to pay a sum not less than that due to the creditor. *See* 846 S.W.2d at 548-49. Here, Giannakopoulos does not contend that he had no obligation to pay under the contract or that he made an unconditional tender to Eris of the full amount owed.

that the “goal” of the contract was fulfilled by Giannakopoulos’s payment to the tax assessor rather than to Eris.

Giannakopoulos also argues that he could not have paid the money to H.G.B.E. because at the time Eris demanded payment the corporation was inactive, and an “inactive corporation cannot tender payments on its behalf.” Giannakopoulos cites no authority to support this cursory argument. By failing to brief this issue, Giannakopoulos has waived it. *See* Tex. R. App. P. 38.1(i); *Nguyen v. Kosnoski*, 93 S.W.3d 186, 188 (Tex. App.—Houston [14th Dist.] 2002, no pet.). In any event, the contract was between Eris and Giannakopoulos individually, and the Harris County Appraisal District’s account for the lots was in Eris’s and Giannakopoulos’s names, as was the corporation’s bank account. Thus, H.G.B.E.’s status or ability to tender payment is irrelevant. We therefore overrule Giannakopoulos’s second issue.

IV

In his third issue, Giannakopoulos contends the trial court erred in awarding \$32,342.47 in attorney’s fees to Eris, because “such an award is disproportionate to and excessive in relation to the \$3,941.00 actual damages awarded.” To support this argument, Giannakopoulos again argues that in awarding attorney’s fees, the trial court failed to consider his testimony that he had timely tendered his portion of the property taxes to the tax assessor. He also argues that Eris’s attorney’s fees were “unnecessarily incurred” because Eris failed to bring forth any other claim that would entitle him to attorney’s fees or reimbursement of maintenance expenses Eris allegedly paid.⁴ Giannakopoulos provides no authority, however, to support his contention that the award of attorney’s fees was excessive in relation to the amount of the judgment. Therefore, we conclude Giannakopoulos has waived this argument on appeal. *See* Tex. R. App. P. 38.1(i); *Nguyen*, 93 S.W.3d at 188; *see also In re C.Z.B.*, 151 S.W.3d 627, 635 (Tex.

⁴ As we have already discussed, Giannakopoulos does not appeal the jury’s finding that he breached the contract with Eris; therefore, whether Eris asserted other claims that would support an award of attorney’s fees is irrelevant.

App.—San Antonio 2004, no pet.) (holding party waived issue on appeal because his brief did not contain any authority in support of his argument regarding unreasonable and excessive attorney’s fees).

* * *

We overrule Giannakopoulos’s issues and affirm the trial court’s judgment.

/s/ Jeffrey V. Brown
Justice

Panel consists of Justices Yates, Frost, and Brown.