Affirmed as Modified and Memorandum Opinion filed July 15, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00050-CV

QUALITY INFUSION CARE, INC., Appellant

V.

APC, INC., Appellee

On Appeal from the 113th District Court
Harris County, Texas
Trial Court Cause No. 2006-62927

M E M O R A N D U M O P I N I O N

Appellant, Quality Infusion Care, Inc. ("QIC"), appeals from a judgment for $3,800 in favor of appellee, APC, Inc. ("APC"), following a bench trial. In five issues, QIC contends the evidence is legally and factually insufficient to support the trial court's findings that QIC was negligent, breached the parties' contract, and committed fraud and conversion, or alternatively, there was no evidence to support the damages award for conversion. We modify the judgment to reduce the award of damages from $3,800 to $2,000 and affirm as modified.

I. BACKGROUND

Whitney Broach is president of APC, a company that performs micropigment implantation and laser tattoo removal. In late 2005, Broach began negotiating with Guy Hunt of QIC to lease office space in QIC's building. The parties ultimately decided on a space, but an extensive build-out would be necessary to satisfy APC's needs. On March 30, 2006, the parties entered into a written "Lease Agreement." The agreement provided the lease would commence on the date of substantial completion of the improvements or May 1, 2006, whichever is later. Further, APC was required to pay, on the day the lease was executed, a security deposit of $8,619 equal to the first and last month's rent.

Broach gave QIC a check dated March 29, 2006 for $8,619. According to Broach, she and Hunt had an "understanding" the check would not be negotiated, and she would deliver a cashier's check to replace it. Broach testified she was concerned there might be insufficient funds in her bank account because her mortgage company had double debited some payments. QIC did negotiate the check, and it was not honored due to insufficient funds. Broach remitted another check dated April 9, 2006 for $7,619, which was actually the correct amount due because APC had already paid $1,000 in conjunction with signing a letter of intent as a precursor to execution of the lease. Broach claimed she and Hunt had the same "understanding" regarding this check, but it was also negotiated and returned for insufficient funds.

On April 17, 2006, Broach wrote to Hunt responding to an inquiry about whether APC still intended to lease the space. She expressed her desire to consummate the lease and summarized her expenses incurred thus far toward occupying the space, such as fees for an architect and purchase of equipment. With respect to the unpaid security deposit, Broach said she was waiting on proceeds from a friend's life insurance policy and "[t]he only thing I can do in the meantime is pay you money over several days until the rest of the deposit is paid. If you do not want me to have the space, then please reimburse me all the above expenses."

After writing this letter, APC paid QIC a total of $2,000, via two separate cashier's checks, toward the security deposit, but never remitted the entire deposit. At

trial, Broach testified she did not pay the entire deposit because of the issues with her bank account, her payment of a friend's burial expenses, and her husband's illness. According to Broach, she relayed these concerns to Hunt, and he had no "problem" with payment of the deposit over time.

On May 10, 2006, QIC's senior vice-president and general counsel wrote a letter to Broach terminating the lease because APC had failed to pay the security deposit. He referenced a previous meeting after the initial checks were dishonored, in which Broach promised to "come to" QIC's office on a regular basis and promptly pay the full deposit. Broach testified that Hunt told her the lease was terminated because QIC was not willing to spend the money necessary to perform the build-out.

In the meantime, at Broach's request, QIC had allowed APC, at no cost, to store in an unused area of the building some furniture and fixtures, which would eventually be incorporated into the office space and the build-out. In its letter terminating the lease, QIC expressed it was not obligated to, but would, refund the $2,000 paid toward the security deposit upon APC's retrieval of its property and demanded that Broach immediately make arrangements to do so. Broach testified QIC first told her it would pay the $2,000 to a moving company to remove the property but then represented it would pay her the $2,000 if she removed the property.

The property was not retrieved until late October 2006, and each party faulted the other for this delay. Broach testified she tried several times between May and September 2006 to remove the property but QIC represented each time was inconvenient, whereas QIC claimed it gave Broach the opportunity to remove the equipment during this period. In late September 2006, QIC told Broach that, if she did not remove the property by September 30, 2006, QIC would hire a company to dispose of it and charge the expenses against the $2,000. APC then filed this suit which first consisted of only a request for injunctive relief to prevent disposal of the property and force QIC to pay the moving expenses.

The record reflects that, at the hearing on APC's request for injunctive relief, the parties agreed APC would retrieve the property by a certain date in October 2006, and it

was finally removed on October 21. Broach testified that, at the hearing, QIC agreed to return the $2,000 deposit when APC retrieved the property. However, the record includes a letter written by APC's attorney to QIC's attorney after the property was retrieved expressing his understanding that QIC was *not* willing to refund the $2,000. In any event, APC's attorney stated that APC would dismiss its suit if QIC would return the $2,000. The attorney also expressed his understanding that QIC's representative inspected the property and there was "no damage, the premises were left clean and all parties were satisfied." It is undisputed that the $2,000 was never returned to APC.

Additionally, Broach testified she discovered some of the property was missing, and Hunt told her that some QIC personnel had entered the storage area and "helped themselves." QIC maintenance persons were able to locate only some of the missing property in other areas of the building.

Broach amended her petition to add various causes of action, including breach of contract, negligence, fraud, and conversion. Trial was to the bench. On October 7, 2008, the trial court signed a final judgment awarding APC $3,800. QIC filed a motion for new trial, which the trial court denied by written order.

The trial court subsequently rendered findings of fact and conclusions of law, including twelve findings relative to APC's claims.[1] Specifically, the court rendered separate findings that QIC was negligent in the performance of duties owed APC and administration of the lease, breached its contract with APC, committed fraud, and converted property owned by APC. With respect to each of these claims, the trial court rendered a separate finding that QIC's action was a proximate cause of APC's damages and a separate finding that $3,800.00 would reasonably compensate APC for its damages.

II. ANALYSIS

In its first four issues, QIC contends the evidence is legally and factual insufficient to support each finding relative to its liability under the above-cited causes of action. In

[1] The thirteenth and last finding was merely a correct finding that QIC had waived a counterclaim previously asserted. In the judgment, the trial court ordered that QIC take nothing on the counterclaim.

its fifth and final issue, QIC contends there was no evidence to support the finding of $3,800 in damages for conversion.

Findings of fact in a bench trial have the same force and dignity as a verdict on jury questions. *West v. Triple B Servs., LLP*, 264 S.W.3d 440, 445 (Tex. App.—Houston [14th Dist.] 2008, no pet.). In reviewing a trial court's findings for sufficiency of the evidence, we apply the same standards applicable to reviewing evidence supporting a jury's answer. *Id.*

When examining a legal-sufficiency challenge, we review the evidence in the light most favorable to the challenged finding and indulge every reasonable inference that would support it. *City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005). We credit favorable evidence if a reasonable fact finder could and disregard contrary evidence unless a reasonable fact finder could not. *Id.* at 827. There is "no evidence" or legally-insufficient evidence when (a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a mere scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact. *See Marathon Corp. v. Pitzner*, 106 S.W.3d 724, 727 (Tex. 2003). The fact finder is the sole judge of witness credibility and the weight to give testimony. *City of Keller*, 168 S.W.3d at 819.

In a factual-sufficiency review, we consider and weigh all the evidence, both supporting and contradicting the finding. *Mar. Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406–07 (Tex. 1998). We set aside the fact finding only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986).

Preliminarily, we note that, at trial and on appeal, APC seemed to argue that QIC committed various acts which support each cause of action. In its written findings, the trial court merely found that QIC was liable in general for each cause of action. QIC did not thereafter request that the trial court make any additional findings to determine the basis for the liability findings. *See* Tex. R. Civ. P. 298 (providing that, after trial court

makes original findings of fact and conclusions of law, any party may file a request for additional amended findings and conclusions). Moreover, in the judgment, the trial court did not specify any particular cause of action on which judgment was rendered.

Further, at the conclusion of trial, the court orally announced the basis for the $3,800 damages award: "$2,000 for the security deposit and $1,800 for the move-in and that will be it." However, comments made by the court at the conclusion of a bench trial do not substitute for written findings of fact and conclusions of law. *See In re Doe 10*, 78 S.W.3d 338, 340 n.2 (Tex. 2002); *In re W.E.R.*, 669 S.W.2d 716, 716 (Tex. 1984). In its written findings, the trial court did not identify the components of its damages award but simply made a blanket finding of $3,800 for every cause of action. The $2,000 security deposit and $1,800 expenses for moving equipment into the building were not the only damages which APC sought to recover. Broach also testified regarding, and APC asked the trial court to award, the following: $1,000 expended on architectural fees for build-out plans; $2,000 for removal of the property stored at the building; and $8,750 for the fair market value of the items that were missing.

We have attempted to glean the alleged acts of QIC on which APC relied to support each cause of action. We will address whether the award of $3,800 may be upheld under any of these causes of action based on any of the alleged acts upon which APC relied to support each theory and for any of the components of damages requested by APC. *See Am. Indus. Life Ins. Co. v. Ruvalcaba*, 64 S.W.3d 126, 136–38 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (determining whether evidence was sufficient to presume findings on prerequisites necessary to establish more general finding of fact made by trial court).

A. Breach of Contract

To prevail on a breach-of-contract claim, a party must establish (1) a valid contract existed between the plaintiff and the defendant, (2) the plaintiff tendered performance or was excused from doing so, (3) the defendant breached the terms of the contract, and (4) the plaintiff sustained damages resulting from the defendant's breach. *West*, 264 S.W.3d at 446.

APC apparently claimed that QIC committed a breach by wrongfully terminating the lease. APC sought to recover the amounts it spent preparing to consummate the lease, including architect fees and costs to move equipment into storage at the building, and costs to retrieve the property after termination. However, the evidence conclusively established QIC did not wrongfully terminate the lease because APC first failed to pay the security deposit. The lease specifically authorized termination if APC "shall fail to pay when due any installments of Rent or other payment required" thereunder.

We recognize the trial court was free to believe Broach's testimony that Hunt represented QIC would not deposit the check she timely submitted for the deposit or the subsequent check, but would wait for her to submit a cashier's check. However, this testimony was immaterial because Broach admittedly never submitted cashier's checks for the full remainder of the deposit. As we have mentioned, Broach wrote to Hunt in mid-April—about two weeks after the deposit was due—explaining difficulties that had prevented payment of the deposit and representing it would be paid via installments over the next several days. Although Broach testified that Hunt had no "problem" with this arrangement, again, APC admittedly did not pay the remainder of the deposit over the next several days. It was not until a month later—mid-May—that QIC notified APC it was terminating the lease for failure to pay the deposit. Although the evidence demonstrated QIC allowed APC additional time after the due date to pay the deposit, APC presented no evidence showing QIC agreed to hold the space open indefinitely until APC paid the entire deposit.

We also recognize that, according to Broach, Hunt generally stated QIC terminated the lease because it was unwilling to spend "thousands" on the build-out. However, any such representation was not necessarily inconsistent with the letter from QIC's officer and counsel terminating the lease due to APC's failure to pay the security deposit. As QIC argued at trial, it was not unreasonable for QIC to refuse to expend money on the build out considering APC had not even paid the security deposit and Broach gave various excuses for the inability to do so. Nevertheless, Hunt's

representation did not negate that QIC had the right to terminate the lease due to APC's failure to pay the security deposit.

Apparently, APC also contends that QIC breached the lease by failing to return the $2,000 after termination. We do agree the evidence supports this contention.

At trial, QIC cited the following provision of the lease when arguing it was allowed to use the security deposit to "cover" its "expenses":

> Upon the occurrence of any default by Tenant, Landlord may, from time to time, without prejudice to any other remedy, use the security deposit to the extent necessary to make good any arrears of Rent, or to pay any sums owed to Landlord under this Lease, or any damage, injury, expense or liability caused to Landlord by any Tenant default.

However, QIC did not present evidence that it incurred any expenses resulting from APC's default. APC never occupied the space because the lease was terminated before it even commenced or the build-out was performed. Additionally, the evidence showed that APC, not QIC, paid for removal of APC's property that was stored in a separate area of the building. Regardless of which party caused the delay in retrieval of the property, QIC presented no evidence of damages caused by the delay. Further, QIC did not controvert the statement in the letter from APC's counsel to QIC after retrieval of the property that there was "no damage, the premises were left clean and all parties were satisfied."

The lease also provided:

> If Tenant shall fully and faithfully comply with all the terms, provisions, covenants and conditions of this Lease including the payment of any damages, or any cost or expense to restore the Leased Premises . . . then the security deposit shall be returned to Tenant . . . .

Although not exactly clear, QIC apparently relied on this provision when positing it was not obligated to return the $2,000 even if APC removed its stored property. Nonetheless, we conclude that this provision did not authorize retention of the $2,000.

The only term of the lease with which APC failed to comply was payment of the entire security deposit. Because the lease was terminated before it was commenced, APC

could not have failed to comply with any other terms. Under QIC's apparent reasoning, it was allowed to retain the portion of the deposit that *was* paid because APC failed to pay the entire deposit. However, we cannot conclude that such a construction is contemplated within the above-cited provision.

Because the provision is contained within the section of the lease entitled "Security Deposit," we conclude the referenced "all the terms, provisions, covenants and conditions of the lease" meant terms of the lease other than this particular section. Reading the whole "Security Deposit" section, we construe the purpose of the deposit was to secure compliance with other terms of the lease and to compensate QIC for any damages caused to the premises. *See Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 134 (Tex. 1994) (recognizing that court must read all parts of a contract together to ascertain the parties' agreement, and "[n]o one phrase, sentence, or section [of a contract] should be isolated from its setting and considered apart from the other provisions."). Therefore, termination of the lease before commencement obviated the need for APC to pay the remainder of the deposit. In essence, QIC was not authorized to retain part of the deposit to secure payment of the full deposit when the lease was never commenced.

Consequently, the evidence is legally and factually sufficient to uphold an award of $2,000 under a breach-of-contract theory. Accordingly, we will next address whether the evidence is sufficient to support the trial court's finding on any other theory that would support recovery of more than $2,000.

B. Fraud

The elements of fraud are (1) a material representation was made, (2) the representation was false, (3) when the representation was made, the speaker knew it was false or made the statement recklessly without any knowledge of the truth, (4) the speaker made the representation with the intent that the other party should act on it, (5) the party acted in reliance on the representation, and (6) the party thereby suffered injury. *Aquaplex, Inc. v. Rancho La Valencia, Inc.*, 297 S.W.3d 768, 774 (Tex. 2009).

At trial, APC suggested QIC purportedly misrepresented that it intended to lease the space to APC and perform the necessary build-out because it later reneged on this

promise. A promise of future performance constitutes an actionable misrepresentation if the promise was made with no intention of performing at the time it was made. *Id.* at 774. However, as we have explained, the evidence conclusively established APC first breached the lease by failing to pay the security deposit. Therefore, the fact that the lease was never consummated is not evidence QIC had no intent to perform.

At trial, APC also suggested QIC made a false representation that it would not negotiate the checks APC originally submitted to pay the deposit and would wait for APC to deliver a cashier's check. However, APC presented no evidence that its reliance on any such misrepresentation caused the damages claimed in this suit. The consequence of QIC's action in depositing the checks was merely that they were not honored. As we have discussed, APC failed to subsequently pay the full deposit via cashier's check or any other means, which justified termination of the lease.

Finally, on appeal, APC primarily contends QIC falsely represented it would securely store APC's property in the building, and APC would not have entered into the lease or stored the property if it had known the items would not be secure. However, APC cites no evidence QIC promised the property would be secure but cites testimony showing only that QIC allowed APC to store the property at the building. To the extent QIC's agreement to store the property encompassed a representation it would be secure, the fact that employees subsequently took some items, without more, did not prove QIC had no intent to securely store the property.[2]

C. Conversion

To establish conversion of personal property, a claimant must prove (1) it owned or had legal possession of the property or entitlement to possession, (2) the defendant unlawfully and without authorization assumed and exercised dominion and control over the property to the exclusion of, or inconsistent with, the claimant's rights, (3) the claimant demanded return of the property, and (4) the defendant refused to return the

[2] APC also suggests on appeal that QIC falsely promised to pay the $2,000 to a mover for removal of APC's property or return this money to APC. We need not consider this contention because we have already concluded APC was entitled to return of the deposit under the terms of the lease.

property. *Hunt v. Baldwin*, 68 S.W.3d 117, 131 (Tex. App.—Houston [14th Dist.] 2001, no pet.). The usual measure of damages for conversion is the fair market value of the property at the time and place of conversion. *United Mobile Networks, L.P. v. Deaton*, 939 S.W.2d 146, 147–48 (Tex. 1997).

To support its conversion claim, APC suggests QIC's threat to dispose of the property in storage if APC did not retrieve it by a certain date was an unlawful exercise of dominion and control over the property. However, the evidence negates that QIC committed conversion relative to this threat because it did not dispose of the property and APC did eventually retrieve it, albeit after some delay.

At trial, APC sought to recover the fair market value of the equipment that was missing after APC retrieved its property from storage at the building. However, APC presented no evidence to support a finding that QIC was liable for converting the property.[3]

The only evidence APC presented relative to the missing property was that unnamed QIC employees took some items. "The general rule is that an employer is liable for its employee's tort only when the tortious act falls within the scope of the employee's general authority in furtherance of the employer's business and for the accomplishment of the object for which the employee was hired." *Minyard Food Stores, Inc. v. Goodman*, 80 S.W.3d 573, 577 (Tex. 2002). For an employee's acts to be within the scope of employment, "the conduct must be of the same general nature as that authorized or incidental to the conduct authorized." *Id.*

APC presented no evidence the QIC employees took APC's property in furtherance of QIC's business or that their actions were of the "same general nature" as their authorized duties or incidental thereto. *See id.* To the contrary, the representation

[3] As QIC contends, the trial court's oral comments indicate it found no damages relative to the missing property. Nonetheless, because the trial court made a general written finding that QIC committed conversion, causing $3,800 in damages, and APC presented some evidence the fair market value of the missing equipment exceeded this amount, we have evaluated whether the evidence is sufficient to uphold this award under a conversion theory.

by Hunt to Broach that the employees "helped themselves" indicated the employees' actions were in furtherance of their own interests.[4]

D. Negligence

The elements of a negligence claim are existence of a legal duty, breach of that duty, and damages proximately caused by the breach. *W. Inv., Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005). At trial, APC did not advance any argument particular to a negligence claim. However, on appeal, APC urges that QIC breached a duty to safeguard APC's property while it was in storage. Assuming without deciding that QIC owed any duty to safeguard the property, APC presented no evidence of a breach.

The only witness who testified concerning storage of the property was a maintenance supervisor presented by QIC, who explained the storage area was "under lock and key," only he and management personnel had the key, and QIC employees did not have "free reign" of the area. APC presented no evidence of any further methods QIC should have exercised to prevent employees from taking the property. Moreover, there was no evidence regarding the identity of the employees who took the property or the time frame in which it was taken to even establish what precautions QIC purportedly should have exercised to prevent removal of the property. Without more, the mere fact that employees may have "helped themselves" did not prove QIC was negligent.

III. CONCLUSION

In sum, we sustain QIC's first, third, and fourth issues challenging legal sufficiency of the evidence to support the findings that it committed negligence, fraud, and conversion, respectively. Therefore, we need not consider QIC's factual-sufficiency challenge to these findings or its fifth issue challenging the damages awarded for conversion. We also sustain QIC's second issue challenging legal sufficiency of the evidence to support the breach-of-contract finding to the extent the trial court implicitly found QIC committed a breach by terminating the lease and need not consider its factual-

[4] APC also pleaded QIC converted "monies," apparently referencing the $2,000. Again, we need not address this allegation due to our conclusion regarding refund of the $2,000 under the terms of the lease.

sufficiency contention. We overrule QIC's legal and factual sufficiency challenges to the breach-of-contract finding to the extent the trial court implicitly found QIC breached the lease by refusing to return the $2,000 security deposit.

Accordingly, we modify the trial court's judgment to reduce the damages award from $3,800 to $2,000 and affirm as modified.

/s/ Charles W. Seymore
Justice

Panel consists of Justices Yates, Seymore, and Brown.