Reversed and Rendered and Memorandum Opinion filed March 29, 2016.

In The

Fourteenth Court of Appeals

NO. 14-14-00922-CV

KIMBERLY R. REDO, Appellant

V.

KATHERINE MOORE, Appellee

On Appeal from the County Civil Court at Law No. 1
Harris County, Texas
Trial Court Cause No. 1029105

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

In this appeal from the judgment rendered after a jury trial, appellant Kimberly Redo contends there is no evidence to support the judgment against her on appellee Katherine Moore's claims for breach of contract and breach of fiduciary duty. We agree that jury's findings of breach of contract were supported solely by evidence that violates the parol-evidence rule, and thus, has no probative effect. We also agree that there is no evidence that Redo had a fiduciary

relationship with Moore. We therefore reverse the trial court's judgment and render judgment that Moore take nothing by her claims.

I. BACKGROUND

In accordance with the standard of review, we summarize the evidence in the light most favorable to Moore.[1]

Redo and Moore are tax preparers. Throughout most of 2010, both Redo and Moore worked as independent contractors for the tax-preparation company ComproTax. Each received as commission a percentage of the fees collected for the tax returns prepared by her or in her independent office. The percentage differed, depending on whether ComproTax designated the preparer as a "broker," an "apprentice broker," or some other designation. A "broker" was a preparer who worked from his or her own independent office; an apprentice broker was a tax preparer who worked under a broker. As a broker, Redo received a percentage of the fees collected for the tax returns prepared in her office and a percentage of the fees charged by those she recruited. Moore was an "apprentice broker" working under another broker; the fees for the returns she prepared were divided unequally, with portions going to Moore, to ComproTax, to the broker under whom Moore worked, and to Redo, who recruited Moore.

After the term of Redo's contract with ComproTax ended, Redo held a meeting at her office in December 2010 to discuss starting a new tax-preparation company. The meeting was attended by all of the witnesses who later testified at trial: Redo, Moore, Moore's son Frank, Marcia Smith, Esperanza "Hope" Gutierrez, and Vanessa Ben. At the meeting, the group agreed to form a corporation and elected seven board members. Some of the tax preparers on the

[1] *See* Section II, *infra.*

board were brokers, and some were not. Moore was among the broker-board members.

On January 3, 2011, the group met again and each broker-board member signed a written contract ("the Agreement") with the new company, "Just Right Tax Processing & Bookkeeping Firm" ("Just Right").[2] The Agreement was the same as one used by ComproTax, except that the name of the company and division of tax-preparation fees were changed. In particular, the Agreement addressed employment status, compensation, liability for expenses, and stock ownership. Under the terms of the Agreement, the signing broker was not an employee, but an independent contractor paid on commission. Just Right would be paid 30% of the fees charged for the broker's services, and after Just Right was paid, the broker would be paid the remaining 70%. The Agreement did not require Just Right to pay the broker a salary or to reimburse the broker's personal office rent or expenses. The Agreement also permitted the broker to purchase up to ten shares of stock in Just Right for every $2,250 of gross production generated by the broker, with the cost based on the value of the stock.

Over Redo's objection that such evidence was barred by the parol-evidence rule, Moore presented testimony about the terms of an oral agreement reached at the group's first meeting in December 2010. According to Moore, the group agreed that the broker-board members would be paid 70% of the fees for their services, plus $2,500 a month for each of the eight months of the "off-season." Moore additionally testified that the gross fees collected for all of Just Right's tax preparers' services would be divided among some or all of the board members or broker-board members. Finally, Moore introduced evidence that the parties agreed

[2] Frank Moore was a board member, but he operated under a different written contract because he was not a tax-preparer. He instead provided information-technology services.

that the broker-board members would be reimbursed for the amounts they paid to rent their individual offices.

Redo did not form a tax-preparation corporation, but instead operated Just Right as a sole proprietorship from her existing office. After Moore resigned from Just Right in August 2011, she sued Redo for breach of contract and breach of fiduciary duty. Moore admits that Redo paid her 70% of the fees collected for Moore's services, but Moore complains that Redo did not reimburse Moore for the amounts she expended on her personal office rent. Moore also contends that Redo did not pay her a salary during the "off-season" or a percentage of Just Right's gross collected fees. Thus, the parties' dispute turns on whether the terms of the oral agreement are enforceable.

Regarding Moore's breach-of-contract claim, the jury found that Moore and Redo agreed with others to form a tax-preparation corporation; that Redo failed to comply with the agreement; and that the failure was not excused. Regarding Moore's breach-of-fiduciary-duty claim, the jury found that there was a relationship of trust and confidence between Moore and Redo, and that Redo failed to comply with her fiduciary duty to Moore. The jury assessed damages of $976 for the contract claim and $6,786 for the fiduciary-duty claim.[3] The trial court denied Redo's motion for judgment notwithstanding the verdict, and rendered judgment against her for $7,762, which is the sum of the damages assessed.

II. ISSUES PRESENTED

In two issues with multiple sub-parts, Redo challenges the judgment on Moore's breach-of-contract claim and her breach-of-fiduciary-duty claim. In the

[3] Over Redo's objection that the cause of action had not been pleaded, the trial court also included fraud liability and damages questions in the charge; however, the jury failed to find that Redo had committed fraud.

dispositive argument for each claim, Redo challenges the legal sufficiency of the evidence.

To review the legal sufficiency of the evidence, we consider the evidence in the light most favorable to the judgment, "crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not." *City of Keller v. Wilson*, 168 S.W.3d 802, 807 (Tex. 2005). Where, as here, the opposing party had the burden of proof at trial, we will sustain the legal-sufficiency challenge if there is no more than a scintilla of evidence in support of the adverse finding. *Burbage v. Burbage*, 447 S.W.3d 249, 259 (Tex. 2014).

III. LEGAL INSUFFICIENCY OF THE BREACH-OF-CONTRACT EVIDENCE

Moore admitted that she was paid the 70% commission specified in the written Agreement, but she sought damages based on the parties' earlier oral agreement regarding reimbursement and compensation. According to Moore, the parties orally agreed in December 2010 that, in addition to the 70% commission, Just Right would reimburse her the $800 she paid each month to rent her personal office. Moore also introduced evidence that the parties agreed Just Right would pay her a monthly salary of $2,500 for eight months, and that the gross amount of tax-preparation fees Just Right collected would be divided in some fashion among some or all of the seven board members elected at the December 2010 meeting.[4]

[4] Moore testified inconsistently that the gross amount of all of the fees would be divided (a) evenly among the seven board members elected in December 2010; (b) evenly among the five people who were board members in December 2010 and who were brokers; (c) evenly among the four people who were board members in December 2010 and who continued to have a separate personal office at the time of trial; and (d) unevenly, so that of the $495,000 in gross fees that Just Right collected by August 7, 2011, $100,000 would go to each of the four people who were board members in December 2010 and who continued to have a separate personal office at the time of trial, and $95,000 would be divided by an unknown formula among some or all of the three remaining board members.

In her first issue, Redo contends that evidence about the terms of the alleged oral agreement of December 2010 are not probative of the parties' contractual agreement, because after they signed the Agreement on January 3, 2011, the parol-evidence rule barred enforcement of the inconsistent terms of the prior agreement. *See Hous. Expl. Co. v. Wellington Underwriting Agencies, Ltd.*, 352 S.W.3d 462, 469 (Tex. 2011) ("The parol evidence rule applies when parties have a valid, integrated written agreement, and precludes enforcement of prior or contemporaneous agreements."); *David J. Sacks, P.C. v. Haden*, 266 S.W.3d 447, 450 (Tex. 2008) (per curiam) ("An unambiguous contract will be enforced as written, and parol evidence will not be received for the purpose of creating an ambiguity or to give the contract a meaning different from that which its language imports."); *Hubacek v. Ennis State Bank*, 159 Tex. 166, 170, 317 S.W.2d 30, 32 (1958) ("When parties have concluded a valid integrated agreement with respect to a particular subject matter, the rule precludes the enforcement of inconsistent prior or contemporaneous agreements.").

In response, Moore argues that evidence of the parties' oral agreement falls within the "collateral and consistent" exception to the parol-evidence rule. This exception applies to an agreement "that is both collateral to and consistent with a binding agreement, and that does not vary or contradict the agreement's express or implied terms or obligations." *David J. Sacks*, 266 S.W.3d at 451 (citing *Hubacek*, 159 Tex. at 170, 317 S.W.2d at 31).

To determine if the oral agreement's terms at issue are inconsistent with the Agreement, we refer to the written contract to see how the parties addressed those subjects. *See Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 333 (Tex. 2011) ("In construing a contract, a court must ascertain the true intentions of the parties as expressed in the writing itself."); *Messer v.*

Johnson, 422 S.W.2d 908, 912 (Tex. 1968) (explaining that when determining whether the parties intended the written agreement to be the final agreement, "the chief and most satisfactory index for the judge is found in the circumstance whether or not the particular element of the alleged extrinsic negotiation is dealt with at all in the writing." (quoting 9 Wigmore on Evidence § 2430 (3rd ed. 1940)).

A. Office Rent Reimbursement

Regarding office expenses, the Agreement states that Just Right "has and maintains through its facilitation efforts offices, properly equipped with furnishing, staff and equipment suitable to serving the public as an income tax preparer." Just Right agreed "to facilitate and maintain for the Preparer's use, the necessary forms, equipment, office space and furniture, other supplemental paper products, software . . . and certain reference materials." The parties agreed, however, that Moore was "an independently self-employed individual" and not an employee. As such, she was free to exercise her independent judgment "as to the time, place, and manner" in which she performed services, and was required to pay "any and all expenses incurred by . . . her in the performance of the agreement, unless [Just Right] has in writing agreed to do otherwise."

According to Moore, Redo's office served as Just Right's "corporate office," but because Moore knew that Just Right was never incorporated, it is more accurate to refer to this as "the company's office." Consistent with the terms of the Agreement, Redo maintained the company's office, paying the rent and other expenses for that location. At least eight people performed tax-preparation

services at the company's office, including three of the board members who were elected at the December 2010 meeting.[5]

As a self-employed independent contractor who was free to choose the place where she performed tax-preparation services, Moore could have chosen to perform tax-preparation services at the company's office, which Redo agreed to "maintain for [Moore's] use." Moore also could choose to work from another location and "pay any and all expenses" she incurred. Moore chose to work from her personal office.

The earlier oral agreement that the company would pay Moore's personal office rent and other personal office expenses is neither collateral to the written Agreement, nor consistent with it. *Cf. Bd. of Regents of the State Teachers Colls. v. Goetz*, 453 S.W.2d 290, 291–92 (Tex. 1970) (holding that the parol-evidence rule barred enforcement of an earlier agreement that dealt differently with the same subject specifically dealt with in the final written contract). The oral agreement is not a collateral agreement, because the same subject is addressed in both the oral and written agreements. *Cf. Ledig v. Duke Energy Corp.*, 193 S.W.3d 167, 179 n.10 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (explaining that where the parties agreed in writing that an employee hired in April would be paid a prorated amount of the yearly bonus, an oral agreement that the employee would be paid the full amount of the yearly bonus was not a collateral agreement). The two agreements are inconsistent because the oral agreement would require Just Right to the bear the cost of renting Moore's personal office, and the written Agreement requires Moore to bear that expense. *Cf. Gonzalez v. United Bhd. of Carpenters & Joiners, Local 551*, 93 S.W.3d 208, 211 (Tex. App.—Houston [14th Dist.] 2002,

[5] The board members were Redo, Gutierrez, and Charlene Marble. Gutierrez was a broker, and performed tax-preparation services both at the company's office and at her own office.

no pet.) (where earnest money contract provided that the obligation to sell the property was conditioned on the approval of the sellers' members, an earlier representation that no such approval was required constituted an unenforceable prior inconsistent statement). Thus, under the parol-evidence rule, the parties' oral agreement that Just Right would reimburse Moore for her personal office rent and expenses is not an enforceable contractual obligation. *See Hubacek*, 159 Tex. at 170, 317 S.W.2d at 31 (explaining that the parol-evidence rule precludes enforcement of an oral agreement that varies or contradicts the terms of a later written agreement).

B. Compensation

Regarding compensation, Moore, identified in the Agreement as "Preparer," agreed that Just Right would be paid the greater of 30% of the fees that Moore charged, or that she should have charged, for her services; however, Moore would not be liable to pay Just Right until the fee was received. Once Just Right had been paid, Moore would be paid the remaining 70%. Moore admits that she was paid this amount, but contends that the parties also agreed that she would be paid (1) a monthly salary of $2,500 for eight months, and (2) a percentage of the gross amount of fees collected for all of Just Right's tax preparers' services.

When a fee has been agreed upon in a written contract, a prior or contemporaneous agreement to alter the fee is not collateral to the written contract; it is in conflict with it. *See David J. Sacks*, 266 S.W.3d at 451; *Lakeway Co. v. Leon Howard, Inc.*, 585 S.W.2d 660, 662 (Tex. 1979) (per curiam). Although Moore testified that the parties orally agreed to a variety of compensation terms, all of them would result in Just Right being paid less than 30%, and Moore being paid more than 70%, of the fees collected for Moore's services.

In arguing that the parol-evidence rule does not apply to the testimony about the oral agreement's terms regarding compensation, Moore asserts that the oral agreement to form "a corporation that would hire and employ Moore" is collateral to, and consistent with, the written Agreement. Such an agreement would be inconsistent with the written Agreement, which expressly provides that the "relationship between the Company and [Moore] shall be that of independent contractor and independent contractee." The parties additionally stipulated in the written Agreement that Moore "shall not be deemed or construed to be an employee" of Just Right.

Moore next contends that evidence of the terms of her compensation under the December 2010 oral agreement falls within the collateral-and-consistent exception because the oral agreement "deals with Moore's ownership of the stock of the corporation," and the later written Agreement does not. In her response brief in this court, Moore also characterizes herself as a "prior owner" of Just Right.

Moore did not claim at trial that she was entitled to compensation based on an ownership interest in Just Right or in stock in the planned corporation. Moreover, her appellate arguments about ownership of Just Right or its "stock" are not supported by the record.

First, there is no evidence that Moore was ever an owner of Just Right, or that she was orally promised an ownership interest in the company. She instead testified that ownership of the company was supposed to be addressed in a written agreement. Moore stated, "[T]hat meeting [about forming a corporation] was in December. When we came through with the next meeting [on January 3, 2011], that's when the paperwork came in. And we signed documents, stating that we were brokers, owners, managers, board members, is what this was supposed to

represent." But with the exception of a stock-incentive provision discussed below, the written Agreement in the record does not address ownership of Just Right. Moore produced no evidence that any such agreement exists.

Second, there is no evidence that Moore was orally promised shares of stock in the planned corporation. The January 2011 written Agreement contains a stock-incentive provision under which Moore could buy stock in the corporation, and Moore testified that this was the first mention of stock. She further agreed that "the way [she was] to get stock out of the corporation so [she] would get money out of the corporation" was by purchasing stock under this provision of the written Agreement. There is no evidence that any other method of acquiring stock in the planned corporation was ever discussed, and there is no evidence that if Just Right had been incorporated, Moore would have purchased stock.

In sum, the evidence of the oral agreement about Moore's compensation violates the parol-evidence rule, and the record does not support her argument that the oral agreement about her compensation is collateral to, and consistent with, the terms of the later written Agreement. Thus, the evidence is legally insufficient to support the portion of the judgment representing an award of damages on Moore's breach-of-contract claim. *See Hua Xu v. Lam*, No. 14-13-00730-CV, 2014 WL 5795475, at *11 (Tex. App.—Houston [14th Dist.] Nov. 6, 2014, no pet.) (mem. op.) ("Evidence that violates the parol evidence rule has no legal effect and 'merely constitutes proof of facts that are immaterial and inoperative.'" (quoting *Piper, Stiles & Ladd v. Fid. & Deposit Co.*, 435 S.W.2d 934, 940 (Tex. Civ. App.—Houston [1st Dist.] 1968, writ ref'd n.r.e.))).

We sustain Redo's first issue.

IV. LEGAL INSUFFICIENCY OF THE BREACH-OF-FIDUCIARY-DUTY EVIDENCE

Fiduciary duties arise in two types of relationships. Most commonly, certain formal relationships—such as those between an attorney and client, between partners, and between a trustee and a trust beneficiary—give rise to fiduciary duties as a matter of law. *See Ins. Co. of N. Am. v. Morris*, 981 S.W.2d 667, 674 (Tex. 1998). In addition, a confidential relationship—which may arise from a moral, social, domestic, or purely personal relationship of trust and confidence—may give rise to an informal fiduciary duty. *Associated Indem. Corp. v. CAT Contracting, Inc.*, 964 S.W.2d 276, 287 (Tex. 1998) (citing *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962)).

The damages assessed on Moore's fiduciary-duty claim were predicated solely on the existence of a confidential relationship. But, "[t]o impose an informal fiduciary duty in a business transaction, the special relationship of trust and confidence must exist prior to, and apart from, the agreement made the basis of the suit." *Meyer v. Cathey*, 167 S.W.3d 327, 331 (Tex. 2005) (per curiam) (quoting *Associated Indem. Corp*., 964 S.W.2d at 288). On appeal, Redo correctly points out that there is no evidence that she and Moore had such a preexisting confidential relationship.

Moore does not address this problem, but appears to contend that this was harmless error by arguing that "much like a managing partner or a joint venturer," she and Redo had a formal fiduciary relationship as a matter of law. Under the terms of Moore's signed contract, however, Moore and Redo were neither partners nor joint venturers; their relationship was "that of independent contractor and independent contractee." The existence of a formal fiduciary relationship was neither alleged nor proved.

Because there is no evidence that Redo and Moore had a fiduciary relationship, the evidence is legally insufficient to support the portion of the judgment representing an award of damages on Moore's breach-of-fiduciary-duty claim.

We sustain Redo's second issue.

IV. CONCLUSION

Because the evidence is legally insufficient to support the judgment against Redo on Moore's claims of breach of contract and breach of fiduciary duty, we reverse the trial court's judgment and render judgment that Moore take nothing by her claims.

/s/ Tracy Christopher
Justice

Panel consists of Chief Justice Frost and Justices Christopher and Donovan.