Affirmed and Majority and Concurring Opinions filed December 21, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00277-CV

ATRIUM MEDICAL CENTER, LP AND TEXAS HEALTHCARE ALLIANCE, LLC, Appellants

V.

HOUSTON RED C LLC D/B/A IMAGEFIRST HEALTHCARE LAUNDRY SPECIALISTS, Appellee

On Appeal from the 190th District Court
Harris County, Texas
Trial Court Cause No. 2013-04227A

C O N C U R R I N G O P I N I O N

The majority rejects the appellants' main argument under their first issue based on a conclusion that the parties deleted an obligation in their agreement by means of an oral modification. The better course would be to conclude that the agreement never imposed the obligation in question, so there was no need to modify the agreement.

No Merit in the Appellants' First Issue

In their first issue, appellants Atrium Medical Center, LP and Texas Healthcare Alliance, LLC (collectively the "Atrium Parties") assert that appellee Houston Red C LLC d/b/a ImageFIRST Healthcare Laundry Specialists ("ImageFIRST") cannot recover on its breach-of-contract claim as a matter of law because the undisputed trial evidence shows that before Atrium Medical Center, LP breached its November 2012 agreement with ImageFIRST (the "Agreement"), ImageFIRST breached the Agreement by failing to provide a particular service. The service that the Agreement allegedly required was ImageFIRST's giving Atrium access to 120% of the amount of linens invoiced to Atrium on a weekly basis (the "120% Service"). The Atrium Parties' first issue lacks merit for three reasons.

1. The Atrium Parties waived the prior-material-breach defense.

Under their first issue, the Atrium Parties assert that ImageFIRST cannot recover on its breach-of-contract claim as a matter of law because the trial evidence conclusively proves that ImageFIRST materially breached the Agreement before Atrium breached the Agreement. The alleged material breach is the failure to provide the 120% Service starting in February 2013. This contention is an affirmative defense that the Atrium Parties were required to plead.[1] Because the Atrium Parties did not plead it, they waived it unless the parties tried the defense by consent.[2]

On appeal, the Atrium Parties assert that the parties did just that. The

[1] *See* Tex. R. Civ. P. 94; *In re Marriage of Moore*, No. 14-15-00859-CV, 2017 WL 3089962, at *2 (Tex. App.—Houston [14th Dist.] Jul. 20, 2017, pet. filed) (mem. op.).

[2] *See In re Marriage of Moore*, 2017 WL 3089962, at *2.

majority does not address this argument. If issues not raised by the pleadings are tried by express or implied consent of the parties, these issues shall be treated as if they had been raised by the pleadings.[3] To determine whether the issue was tried by consent, we examine the record not for evidence of the issue, but rather for evidence of trial of the issue.[4] Under this court's precedent, one of the essential elements of ImageFIRST's breach-of-contract claim is that ImageFIRST tendered performance or was excused from doing so.[5] The Atrium Parties cite trial evidence as to ImageFIRST's failure to provide the 120% Service after February 1, 2013, but the Atrium Parties also rely on this evidence to show that, as a matter of law, ImageFIRST did not prove the performance element of its breach-of-contract claim. Because the evidence on which the Atrium Parties rely is germane to issues other than the prior-material-breach defense, this evidence does not show trial of the defense.[6] The record does not contain evidence showing trial of the prior-material-breach defense.[7] This defense was not tried by express or implied consent of the parties.[8] Therefore, the Atrium Parties waived this defense, and they may not obtain a reversal of the trial court's judgment based on this defense.[9]

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[3] *See* Tex. R. Civ. P. 67, 301; *In re Marriage of Moore*, 2017 WL 3089962, at *2.

[4] *See In re Marriage of Moore*, 2017 WL 3089962, at *2.

[5] *See Dror v. Mushin*, No. 14-12-00322-CV, 2013 WL 5643407, at *6 (Tex. App.—Houston [14th Dist.] Sep. 23, 2013, pet. denied) (mem. op.).

[6] *See In re Marriage of Moore*, 2017 WL 3089962, at *2.

[7] *See id*.

[8] *See id*. After trial, the Atrium Parties moved the trial court for leave to amend their pleadings as to the prior-material-breach defense on the ground that this issue had been tried by consent. The Atrium Parties do not assert on appeal that the trial court erred in denying this motion, and, in any event, the record reflects that this defense was not tried by express or implied consent of the parties.

[9] *See id*.

2. The trial evidence does not conclusively prove that ImageFIRST breached the Agreement by failing to give Atrium the 120% Service.

The Atrium Parties also argue that the trial evidence proves as a matter of law that ImageFIRST breached the Agreement starting on February 1, 2013, by failing to provide the 120% Service to Atrium. Evidence at trial showed that, starting on February 1, 2013, ImageFIRST made deliveries more frequently than the three deliveries per week that ImageFIRST had been making. Evidence also showed that when ImageFIRST stopped the three-deliveries-per-week schedule, ImageFIRST also stopped providing the 120% Service. The Atrium Parties cite the trial testimony of Ryan Steen, ImageFIRST's President, on this point, and suggest that Steen conceded that ImageFIRST breached the Agreement starting on February 1, 2013. Though Steen may have agreed that ImageFIRST abandoned the three-deliveries-per-week schedule and stopped providing the 120% Service on February 1, 2013, Steen did not give testimony that rises to the level of a judicial admission that ImageFIRST breached the Agreement by engaging in this conduct.[10]

A crucial premise of the Atrium Parties' argument is that the Agreement requires ImageFIRST to provide the 120% Service throughout its term and even if ImageFIRST was making more than three deliveries per week. In the Agreement, Atrium and ImageFIRST agreed that "[t]he terms of this contract shall apply to all subsequent increases or additions to such service." The parties also agreed that "[n]o modification of this agreement will be binding unless in writing and signed by [ImageFIRST]." The record contains no evidence of any written modification of the Agreement. If ImageFIRST agreed to provide the 120% Service throughout the Agreement's term and even if ImageFIRST was making more than three

[10] *See Regency Advantage Ltd. P'ship v. Bingo Idea–Watauga, Inc.,* 936 S.W.2d 275, 278 (Tex. 1996); *In re S.A.M.,* 321 S.W.3d 785, 790, n. 1 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

deliveries per week, then it would appear that ImageFIRST was breaching the Agreement starting on February 1, 2013.[11]

The provision of the Agreement that addresses the 120% Service provides as follows: "I further understand the three times per week delivery system with 40% of my total inventory being available for use at each delivery (120% total available weekly) and will be billed for 100% weekly."[12] The "I" appears to refer to Atrium's agent. The Atrium Parties assert that, under this provision, ImageFIRST agreed to provide the 120% Service throughout the Agreement's term and regardless of how many deliveries per week ImageFIRST was making. In this provision, the parties discuss the 120% Service only in the context of the "three times per week delivery system," which was discontinued at Atrium's request on January 31, 2013. In the Agreement, the parties anticipated that there might be "subsequent increases or additions" to ImageFIRST's services under the Agreement. Although the parties agreed to various terms in the first page of the Agreement, the parties did not agree that ImageFIRST would provide the 120% Service regardless of how many deliveries per week ImageFIRST was making. Under the Agreement's unambiguous language, the parties were free to increase the number of deliveries to more than three times per week, and ImageFIRST agreed to provide the 120% Service only when it was making three deliveries per week.[13] Thus, though the trial evidence showed that ImageFIRST stopped

[11] ImageFIRST's oral-modification argument and the majority's reliance on this argument are discussed later in this opinion.

[12] An agent of Atrium and an agent of ImageFIRST signed at the bottom of each page, and at least one of the agents appears to have signed the second page on December 16, 2012, more than a month after an agent of Atrium signed the first page. Nonetheless, the parties agree that the two pages in Plaintiff's Exhibit 1 constitute the Agreement, and it is presumed that these two pages are the Agreement for the purposes of this opinion.

[13] *See Highmount Expl. & Prod. LLC v. Harrison Interests, Ltd.*, 503 S.W.3d 557, 566 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

providing the 120% Service on February 1, 2013, this evidence did not show that ImageFIRST breached the Agreement. The trial evidence does not prove as a matter of law that ImageFIRST breached the Agreement starting on February 1, 2013, by failing to provide the 120% Service to Atrium.

3. The trial evidence is legally and factually sufficient to support the trial court's finding that ImageFIRST fully performed its obligations under the Agreement.

Under this court's precedent, one of the essential elements of ImageFIRST's breach-of-contract claim is that ImageFIRST tendered performance or was excused from doing so.[14] The trial court found that ImageFIRST fully performed its obligations under the Agreement. On appeal the Atrium Parties argue that the trial evidence is legally and factually insufficient to support this finding.

When reviewing the legal sufficiency of the evidence, we consider the evidence in the light most favorable to the challenged finding and indulge every reasonable inference that would support it.[15] We must credit favorable evidence if a reasonable factfinder could and disregard contrary evidence unless a reasonable factfinder could not.[16] We must determine whether the evidence at trial would enable reasonable and fair-minded people to find the facts at issue.[17] The factfinder is the only judge of witness credibility and the weight to give to testimony.[18]

When reviewing a challenge to the factual sufficiency of the evidence, we examine the entire record, considering both the evidence in favor of, and contrary

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[14] *See Dror*, 2013 WL 5643407, at *6.

[15] *City of Keller v. Wilson,* 168 S.W.3d 802, 823 (Tex. 2005).

[16] *See id.* at 827.

[17] *See id.*

[18] *See id.* at 819.

to, the challenged finding.[19] After considering and weighing all the evidence, 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.[20] The trier of fact is the sole judge of the credibility of the witnesses and the weight to be given to their testimony.[21] We may not substitute our own judgment for that of the trier of fact, even if we would reach a different answer on the evidence.[22] The amount of evidence necessary to affirm a judgment is far less than that necessary to reverse a judgment.[23]

The Atrium Parties base their sufficiency challenges on the evidence showing that ImageFIRST did not provide the 120% Service starting on February 1, 2013. Yet, the evidence shows that beginning on that date, ImageFIRST made more than three deliveries per week, and, in this scenario, the Agreement does not require ImageFIRST to provide the 120% Service. Under the applicable standards of review, the trial evidence is legally and factually sufficient to support the trial court's finding that ImageFIRST fully performed its obligations under the Agreement.

Flaws in the Majority's Analysis

Though the majority concludes that the Atrium Parties' arguments under their first issue lack merit, the majority applies a different analysis. Contrary to the unambiguous language of the Agreement, the majority indicates that the Agreement required ImageFIRST to provide the 120% Service throughout the Agreement's term and even if ImageFIRST was making more than three deliveries

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[19] *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406–07 (Tex. 1998).

[20] *Id.*

[21] *GTE Mobilnet of S. Tex. v. Pascouet*, 61 S.W.3d 599, 615–16 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

[22] *Maritime Overseas Corp.*, 971 S.W.2d at 407.

[23] *Pascouet*, 61 S.W.3d at 616.

per week. The majority concludes that this requirement does not conflict with the trial court's finding that ImageFIRST fully performed its obligations under the Agreement because the parties agreed to modify the Agreement to eliminate this requirement. There is no allegation or evidence of any written modification, so any such modification of the Agreement would have been an oral modification. But, if the Agreement contained such a requirement, then the parties agreed that this requirement "shall apply to all subsequent increases or additions to such service" and that "[n]o modification of this agreement will be binding unless in writing and signed by [ImageFIRST]."[24]

Though ImageFIRST argues on appeal that the parties agreed to such an oral modification, the only evidence that ImageFIRST cites is testimony by Steen that ImageFIRST had to provide the 120% Service under a three-delivery-per-week schedule but that this changed when the parties negotiated a "different delivery schedule." This evidence seems to show an agreement to increase the frequency of the deliveries under the Agreement rather than an oral agreement to modify the Agreement. There does not appear to be legally sufficient evidence to show that the parties agreed to an oral modification of the Agreement. Even if there were evidence showing an oral modification, the parties agreed that oral modifications of the Agreement would not be binding, and under recent Texas precedent, courts generally enforce such agreements.[25] The trial evidence does not raise a fact issue as to any potential exception to the general enforceability of the parties' ban on

[24] The Atrium Parties have not asserted in the trial court or on appeal that the statute of frauds would bar enforcement of any alleged oral modification. *See* Tex. Bus. & Com. Code Ann. § 26.01(b)(6) (West, Westlaw through 2017 1st C. S.).

[25] *See Shields Ltd. P'ship v. Bradberry*, 526 S.W.3d 471, 481–85 & n.44 (Tex. 2017); *see also Cooper Valves, LLC v. ValvTechnologies*, —S.W.3d—,—, 2017 WL 3090159, at *7 (Tex. App.—Houston [14th Dist.] Jul. 20, 2017, no pet.) (enforcing contract provision in which parties prohibited oral modifications of the contract).

oral modifications.[26] So, the better course would be to reject the Atrium Parties' arguments based on the absence of a contractual obligation to provide the 120% Service under an increased delivery schedule, rather than to rely on an oral-modification theory.

For the reasons stated above, though I join the court's judgment, I respectfully decline to join the majority opinion.

/s/ Kem Thompson Frost
Chief Justice

Panel consists of Chief Justice Frost and Justices Donovan and Wise. (Donovan, J., majority).

[26] *See Shields Ltd. P'ship*, 526 S.W.3d at 481–85 & n.44.