Affirmed and Memorandum Opinion filed August 10, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00464-CV

ADVANCED GAS & EQUIPMENT, INC., Appellant

V.

AIRGAS USA, LLC, Appellee

On Appeal from the 334th District Court
Harris County, Texas
Trial Court Cause No. 2013-03488

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

In this case, we consider whether evidence was offered on each required element of a cause of action for an account stated. Appellant Advanced Gas & Equipment, Inc. bought various industrial gases from appellee Airgas USA, LLC. When the commercial relationship ended, Advanced sued Airgas, seeking payment for gas cylinders Airgas allegedly possessed during the relationship and failed to return at its end. The jury found in favor of Advanced.

Airgas moved for judgment notwithstanding the verdict (JNOV), arguing there was no evidence supporting any of the three elements of Advanced's cause of action. The trial court granted the motion and rendered a take-nothing judgment in favor of Airgas. Because we conclude there is no evidence that Airgas agreed to a fixed amount due, we affirm the trial court's judgment.

BACKGROUND

Advanced sold various industrial gases to end users. Prior to 2006, Union Industrial Gas supplied gas to Advanced. Airgas purchased Union Industrial Gas at the end of 2006, becoming Advanced's supplier.[1] Advanced's business grew, and it signed a distributor agreement with Airgas in 2009.

According to Advanced president Christopher Rudy, Advanced's normal business practice was to take empty cylinders to its supplier, where they would be dropped off to be filled with various gases. Advanced would then pick up cylinders that had been previously filled and would deliver them to its customers. Rudy explained that it was the normal course of business for Advanced to use its own cylinders as well as cylinders owned by Airgas. Advanced paid rent in an amount determined by the distributor agreement for any Airgas cylinders it used. According to Rudy, it was common for Advanced and Airgas cylinders to become, and remain, intermingled. Airgas served as Advanced's supplier until Advanced sold its business to Red Ball Oxygen in 2011.

With their relationship coming to an end, Airgas sought payment on the outstanding balance Advanced owed on previous gas sales and cylinder rentals. Based on the terms of the distributorship agreement, Airgas also sought either the

[1] The exact nature of this transaction was disputed at trial. For purposes of this appeal, we do not need to resolve this dispute or further examine the details of Airgas's purchase of Union Industrial Gas.

return of all Airgas cylinders in Advanced's possession or payment for any cylinders that were not returned.[2]

Advanced eventually paid all outstanding balances owed to Airgas. Advanced also returned all cylinders that Airgas records showed were in Advanced's possession. Advanced, in turn, submitted an invoice to Airgas seeking payment for its cylinders allegedly still in Airgas's possession as well as rental costs Advanced alleged it had to pay when it was forced to use Airgas cylinders instead of its own.[3] When negotiations broke down, Advanced sued Airgas, alleging an account stated cause of action.

Several witnesses testified during the trial. They offered undisputed evidence of transactions between the parties that, at least occasionally, involved Advanced cylinders. The gas cylinders possessed monetary value, which varied depending on the cylinder's type and age. There is also undisputed evidence that it was the regular custom and practice in the gas cylinder industry for a company to pay the cost of replacing cylinders lost while in its possession.[4] Finally, it was undisputed that Airgas did not purchase anything from Advanced, nor did it rent any cylinders from Advanced. Dan Fordyce, an Airgas Bulk Gas Specialist, was asked if he would acknowledge an implied agreement by Airgas to pay the value of Advanced's lost cylinders. Fordyce testified that, if Advanced could establish that a specific number

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[2] The distributor agreement does not address the status of Advanced's cylinders once they were dropped off at Airgas facilities, and thus it does not include any rental or payment provisions regarding those cylinders.

[3] Advanced initially claimed 258 cylinders were missing. It subsequently amended the number to 897 cylinders and ultimately reduced the figure to 895 missing cylinders at the time of trial. Advanced sought a total payment of $320,881.60: $236,761.00 for lost cylinders and $97,120.60 for cylinder rent it alleged it had been forced to pay because its own cylinders were not available.

[4] Most of this evidence was provided by Advanced's expert witness on industry practices, Warren Hankammer.

of cylinders were missing, payment "was part of the equation."

During trial, Advanced presented a spreadsheet of transactions between Advanced and Airgas showing a total of 895 missing cylinders. Of this number, 462 transactions took place before Airgas purchased Union Industrial Gas. Advanced also introduced a large number of business records, which Rudy testified backed up the spreadsheet. These documents included dock sheets and delivery tickets prepared each time a cylinder exchange happened between Advanced and Airgas. There were also Airgas invoices and Airgas computer-generated summaries of transactions. Rudy admitted, however, that he was not certain there were business records backing up each spreadsheet entry. Additionally, Pamela Davis, Advanced's cylinder specialist who actually created the summary spreadsheet, testified that she did not verify each transaction included in the spreadsheet with back-up documents.

Rudy testified that he calculated the value of the allegedly missing cylinders using the values Airgas had used in its missing-cylinder claim against Advanced, which in turn were based on the distributor agreement. Rudy also explained that in calculating the rental amount Advanced sought from Airgas, he used the same rental rate charged by Airgas, which was also based on the distributor agreement. Rudy admitted there was never an agreement between Advanced and Airgas regarding Airgas' responsibility to pay for Advanced's missing cylinders or to reimburse Advanced for rental fees incurred as a result of missing cylinders.

Testifying on behalf of Airgas, Fordyce denied there was ever an agreement (1) that Airgas lost or did not return Advanced cylinders; (2) on a number of missing Advanced cylinders or their type and age; (3) on the value of those cylinders; or (4) on a rental rate. Fordyce also testified that Airgas employees performed a visual inventory of all cylinders on Airgas facilities in southeast Texas and they did not

find any cylinders owned by Advanced.[5]

Jana McCoy, Airgas's cylinder audit specialist, testified about her efforts to resolve all matters in dispute between Advanced and Airgas. McCoy examined Advanced's cylinder spreadsheet and found that it included 462 cylinders that allegedly went missing prior to Airgas's 2006 purchase of Union Industrial Gas. McCoy denied Airgas had any responsibility for those cylinders. McCoy then attempted to verify Advanced's other claims from the information on the spreadsheet but was unable to do so, so she requested, but never received, business records supporting Advanced's claimed number of missing cylinders.

McCoy then performed, along with Rudy, an offset process in an effort to resolve the dispute. During this process, McCoy generated various documents and emails stating the number of cylinders still in dispute at that moment in time as well as potential numbers of cylinders in Airgas's possession. At the end of the offset process, McCoy believed all issues had been settled with Airgas owing Advanced no cylinders. Despite her belief the dispute had been resolved, McCoy was aware that, after the offset process, Advanced still asserted Airgas had Advanced cylinders in its possession. Contrary to that assertion, McCoy denied (1) finding records demonstrating that Airgas had 895 Advanced cylinders; (2) agreeing that Airgas would pay Advanced any money for cylinders; (3) agreeing to a replacement value for Advanced's allegedly missing cylinders; or (4) agreeing to pay rental reimbursement to Advanced.

At the conclusion of the evidence, the jury found that Advanced and Airgas had an account stated between them and that Airgas "fail[ed] to comply with the

[5] According to the record, companies identify their cylinders by attaching unique neck rings to each cylinder or by painting identifying information on the cylinders. The record also shows that Airgas had facilities outside southeast Texas.

account stated." It then found that Advanced's damages totaled $107,083.[6] Airgas moved for JNOV, arguing there was no evidence supporting any of the elements of Advanced's claim for an account stated. The trial court granted the motion and rendered a take-nothing judgment. This appeal followed.

ANALYSIS

In a single issue on appeal, Advanced argues the trial court erred when it granted Airgas a JNOV on Advanced's cause of action for an account stated. A trial court may disregard a jury's verdict and render a JNOV if no evidence supports the jury's findings, or if a directed verdict would have been proper. *Hartland v. Progressive Cty. Mut. Ins. Co.*, 290 S.W.3d 318, 321 (Tex. App.—Houston [14th Dist.] 2009, no pet.). We review a JNOV under a no-evidence standard, meaning we must credit evidence favoring the jury's verdict if reasonable jurors could and we disregard contrary evidence unless reasonable jurors could not. *Garza v. Cantu*, 431 S.W.3d 96, 101 (Tex. App.—Houston [14th Dist.] 2013, pet. denied). We uphold the jury's finding if more than a scintilla of competent evidence supports it. *Id.* No evidence exists and a JNOV must be granted when the record demonstrates: (1) a complete absence of a vital fact; (2) when a rule of law or evidence precludes according weight to the only evidence offered to prove a vital fact; (3) when the evidence offered to prove a vital fact amounts to no more than a scintilla; or (4) when the evidence conclusively establishes the opposite of a vital fact. *Hartland*, 290 S.W.3d at 321.

The common-law cause of action for an account stated has historically been asserted in two situations. 13 Corbin on Contracts § 72.1(1) 450 (2005). The first occurs when parties have an ongoing business relationship with a series of

[6] This number corresponds to the value Advanced placed on its cylinders that allegedly went missing prior to Airgas becoming Advanced's supplier in 2006.

transactions back and forth as part of an open running account. *Id.* The parties eventually confer and agree on the balance due to one party or the other. *Id.* The second occurs when two parties owe each other liquidated debts created by separate, independently enforceable transactions and the parties strike a balance between them. *Id.* at 435. Texas courts have held that the cause of action consists of three elements: (1) transactions between the parties gave rise to an indebtedness of one party to the other; (2) an express or implied agreement between the parties fixes an amount due; and (3) the party to be charged makes an express or implied promise to pay the indebtedness. *Busch v. Hudson & Keyse, LLC*, 312 S.W.3d 294, 299 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (citing *Dulong v. Citibank (S.D.), N.A.*, 261 S.W.3d 890, 893 (Tex. App.—Dallas 2008, no pet.)). Airgas argued in its motion for JNOV that there was no evidence supporting any of the three elements. Advanced responded that legally sufficient evidence supports all three elements. Advanced makes the same argument on appeal.

Even if we assume for purposes of this appeal that legally sufficient evidence supports the first and third elements, we conclude there is no evidence the parties made an express or implied agreement fixing the amount due. In support of that element, Advanced points to Fordyce's testimony that, if Advanced could establish a specific number of cylinders were missing, payment "was part of the equation." Advanced also cites Hankammer's testimony explaining it was industry custom that an entity would pay the replacement cost for cylinders lost while under that entity's control. The cited testimony does nothing more than establish that Airgas agreed with Hankammer's general principle, not that Airgas had agreed on the number, type, and age of lost cylinders or the replacement cost of each. Unlike a cause of action for breach of contract, a cause of action for account stated does not simply require evidence of damages from one party; it requires agreement on the amount of

damages by both parties. *See Neil v. Agris*, 693 S.W.2d 604, 605 (Tex. App.—Houston [14th Dist.] 1985, no writ) (reversing account stated judgment because record contained no evidence patient agreed to pay doctor $1,700); *Paine v. Moore*, 464 S.W.2d 477, 480 (Tex. App.—Tyler 1971, no writ) ("An account stated requires an absolute acknowledgment or admission of a sum certain by the debtor to the creditor.").

Advanced next points to undisputed evidence that it sent its summary spreadsheet to Airgas, which had the spreadsheet in its possession for several months. According to Advanced, this evidence establishes that the parties impliedly agreed on a "sum certain" owed to Advanced. In support of this contention, Advanced cites McCoy's testimony regarding her efforts to resolve the entire dispute between the parties through an offset process, which extended over a period of time.

Although it is true that approval of an account can be inferred from a party's silence if the account is rendered and retained without objection for a reasonable time after an opportunity to object, the cases standing for that proposition are distinguishable from the present case. *See, e.g., Busch*, 312 S.W.3d at 299–300; *Dulong*, 261 S.W.3d at 894; *Palmer v. Kamin*, 238 S.W.2d 216, 217 (Tex. App.—Austin 1951, writ ref'd). In both *Busch* and *Dulong*, each defendant signed a credit agreement, received a credit card, and made charges on the credit cards issued by each lender. *Busch*, 312 S.W.3d at 299–300; *Dulong*, 261 S.W.3d at 894. The credit card companies sent bills to each defendant, and neither defendant objected to the amounts shown on the bills. *Busch*, 312 S.W.3d at 299–300; *Dulong*, 261 S.W.3d at 894. The courts in both cases held in favor of the companies, concluding that the express credit agreements, combined with the borrowers' silence in the face of regular statements presenting the amount due under the agreements, established that the borrowers "agreed to the full amount shown on the statements and impliedly

promised to pay the indebtedness." *Dulong*, 261 S.W.3d at 894.

In *Palmer*, the appellant asserted that the trial court's judgment was not supported by the pleadings because the appellee had pled for a specific amount and the jury ultimately awarded a lesser amount. 238 S.W.2d at 217. In analyzing that issue, the court observed that a "stated account does not constitute a contract upon a new consideration having all the sanctity of a written agreement but only presumptive evidence of the correctness of the items involved and the balance reached, the effect of which is to cast on the adverse party the burden of disproving its correctness." *Id.* Although the factual recitation in *Palmer* is sparse, the court's holding—"that [disproving] a stated account . . . in part should not affect the right to recover upon the part which is proved"—shows that the parties agreed that at least the lesser amount found by the jury was owed.[7] *Id.*

Those are not the facts here. Airgas and Advanced had no express agreement addressing Advanced's cylinders. Instead, Airgas stated generally that it would consider paying for any missing cylinders if Advanced could establish the number and type of missing cylinders. Also, Airgas was not silent in the face of the claim Advanced presented in its summary spreadsheet. Airgas instead commenced an investigation into Advanced's claim, sought supporting documentation, and then engaged in an offset process through which Airgas concluded it owed Advanced neither money nor cylinders. This conduct hardly qualifies as silence in the face of Advanced's summary spreadsheet.

Instead, this case is similar to *Continental Casualty Company v. Dr. Pepper*

[7] The jury charge further supports this conclusion. Special Issue No. 3 of the charge asked the jury: "Do you find from a preponderance of the evidence that on September 16, 1949, the defendant . . . agreed with the plaintiffs that the defendants owed the plaintiffs . . . the sum of $5423.54, less the following items shown on the audit sheet made up on September 16, 1949, . . . totaling $439.29?" The jury answered "We do." *Palmer*, 238 S.W.2d at 216.

Bottling Company of Texas, Inc., 416 F. Supp. 2d 497, 505 (N.D. Tex. 2006). There, the court granted summary judgment on Continental Casualty's claim for an account stated because there was no evidence Dr. Pepper had agreed it owed any amount to Continental Casualty, only that Dr. Pepper orally disputed owing any amount and then agreed to "review the invoices" and "pay any amounts it believed it owed after review of [Continental Casualty's] invoices." *Id.* The court concluded there was no evidence of an agreement that a specific amount was due or of an agreement to pay such an amount. *Id.*; *see Unit, Inc. v. Ten Eyck-Shaw, Inc.*, 524 S.W.2d 330, 334 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.) ("It is insufficient to merely allege that an account was presented to the defendant and that they have failed or refused to pay it. To bring an action on an account stated, it would be incumbent upon plaintiff to allege in his petition that the defendant admitted the correctness of the account and that he expressly or impliedly assented to it.").

Because there is similarly no evidence that Airgas agreed to pay Advanced a specific amount, we hold the trial court did not err when it granted JNOV on Advanced's claim for an account stated. We overrule Advanced's issue.

CONCLUSION

Having overruled Advanced's sole issue on appeal, we affirm the trial court's judgment.

/s/ J. Brett Busby
Justice

Panel consists of Justices Boyce, Busby, and Wise.