

Affirmed and Memorandum Opinion filed July 17, 2018.



In The

Fourteenth Court of Appeals

NO. 14-15-01089-CV

ROGUE INVESTMENTS, LLC, Appellant

V.

TEXAS TARTS, INC., Appellee

**On Appeal from the 165th District Court
Harris County, Texas
Trial Court Cause No. 2011-52509**

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

Appellant Rogue Investments, LLC bought a bar from appellee Texas Tarts, Inc. After discovering alleged misrepresentations regarding the business revenue and profits, Rogue sued Texas Tarts for violations of the Deceptive Trade Practices Act, breach of contract/warranty, fraud, negligent misrepresentation and gross negligence, and conspiracy. Appellee Texas Tarts counterclaimed that Rogue owed it the remaining balance on the promissory note Rogue executed to purchase the bar.

After a bench trial, the trial court rendered judgment in favor of Texas Tarts, finding Rogue owed Texas Tarts the remaining balance of the promissory note purchase price and that Rogue take nothing against Texas Tarts. We affirm.

I. Background

In 2004, Kristin Trostle along with several partners formed Texas Tarts, Inc., and purchased Rogue Pub, a full-service bar in northwest Harris County, Houston. Although initially a “sweat equity partner,”¹ Trostle eventually bought out the other partners and became the sole shareholder and President of Texas Tarts.

In October 2009, Trostle decided to sell Rogue Pub. Trostle received financial information about the bar from her accountant,² which Trostle gave to Dominick Caravella, a broker, to include in a confidential business listing data sheet. The business listing stated the bar was priced at \$275,000.00, which was 1.4 times the owner’s discretionary earnings. The multiplier (1.46) was derived by taking the sales price of \$275,000 and dividing it by the average reported net profit (*i.e.*, \$188,021.00) for years 2006-2008.³ The listing data sheet also included more detailed figures of profit, revenue and expenses. As reported, the profits to the owner for years 2006-2008 were \$183,952.00, \$188,400.00, and \$195,672.00, respectively. The listing date sheet provided further breakdowns on revenue, operational expenses, equipment and inventory. Taxes paid for mixed beverages were stated as \$33,600.00, \$42,000.00, and \$43,200.00 for years 2006-2008, respectively.

¹ Trostle did not have money to invest at that time so she was invited in as a “sweat equity partner.” She worked at the pub six nights a week, handling all the ordering, deposits, and repairs herself.

² Trostle testified that her accountant, Elaine, provided all the information for the business listing. At the time of trial, Elaine had died and Trostle could not recall Elaine’s last name.

³ Shieves testified that the net profit was “the money left over after deducting all expenses from sales.

In February 2010, two prospective buyers, David Shieves and Rick Caouette, responded to the listing. Shieves, a businessman and accountant, began looking into purchasing a bar with his friend, Caouette, who had previously operated a bar and hoped to have his son-in-law run the bar. Rogue Pub was in their price range. Thus, over the course of several months, Shieves and Caouette met with Trostle and visited the bar. The prospective buyers asked for numerous financial documents and Trostle gave them everything she had in her possession, which included a flash drive containing the bar's point of sale (POS) system⁴ as well as a box of financial documents. The prospective buyers asked for tax returns but they were not provided. Shieves acknowledged that the POS system that he had the opportunity to review before he bought the bar listed all of the past sales of Rogue's Pub.

On May 25, 2010, Trostle, in her capacity as President of Texas Tarts, executed a Bill of Sale agreement with Rogue, selling Rogue Pub for \$275,000.00 (\$100,000.00 down payment and a \$175,000.00 promissory note). Trostle's name appeared individually "as to restrictive covenants only," which related to restrictions on Trostle acquiring another bar within a five-mile radius of Rogue's Pub. The Bill of Sale provided numerous warranties and representations of Texas Tarts, including that the financial data provided on revenue and profit was warranted as true and correct. Texas Tarts further warranted "full disclosure," stating that none of the financial statements furnished by the seller "contain or will contain any untrue statement of material fact, or omit any material fact, the omission of which would be misleading." Finally, the Bill of Sale provided that Rogue was purchasing the business "As Is, Where Is," disclaiming warranties and representations, except for

⁴ Trostle testified that the POS system is what the bar uses to ring up sales throughout the month. Shieves testified that at the time of purchase of Rogue's Pub, the POS system went back several years; however, within a few months of Rogue purchasing the pub, the POS System was erased because it began recording for a new LLC.

those in the agreement.

Also, on May 25, 2010, Rogue signed a promissory note with Texas Tarts in the amount of \$175,000.00. The first twelve months of payments were unconditionally guaranteed by Caouette, individually. Rogue began making payments on the note on July 1, 2010. With payments still due and owing, Rogue defaulted; the last payment Texas Tarts received was in September 2011. Rogue still owed Texas Tarts \$68,503.33 on the note.⁵

On September 1, 2011, Rogue filed this case against Texas Tarts and Trostle, alleging claims for DTPA violations, breach of contract/warranty, fraud, negligent misrepresentation and gross negligence, and conspiracy. Rogue claimed, among other things, that Texas Tarts and Trostle had misrepresented the bar's profitability in the business listing because they had underreported taxes by \$50,000.00. Rogue argues that the \$50,000.00 increased tax burden would justify a \$70,000.00 reduction in sales price, which is what was left on Rogue's promissory note at the time when Rogue stopped making payments and filed suit. Texas Tarts and Trostle filed their answer, including affirmative defenses of estoppel, statute of fraud, parole evidence, laches, waiver, assumption of risk, and contributory negligence. Texas Tarts also filed a counterclaim against Rogue for breach of contract for the remaining amount owed under the promissory note and sought attorney's fees.

On August 20, 2015, the parties commenced trial to the bench. On September 8, 2015, the trial court rendered a Final Judgment in favor of Texas Tarts and Trostle and against Rogue. The trial court ordered that Texas Tarts recover from Rogue its actual damages on the remaining amount owed under the promissory note, attorney's

⁵ At the time of trial, the interest due under the note on the amount owing was \$18,655.42.

fees, costs, and pre- and post-judgment interest. The trial court further ordered that Rogue take nothing against Texas Tarts and Trostle.

On September 21, 2015, the trial court entered Findings of Fact and Conclusions of Law. The trial court's Findings of Fact,⁶ in relevant part, are as follows:

9. On or about May 25, 2010, Rogue executed a Promissory Note (the "Note") payable to the order of Texas Tarts in the original principal amount of \$175,000.00.
10. Texas Tarts is the holder in due course of the Note.
11. The Note is an enforceable contract between Texas Tarts and Rogue.
12. Rogue promised to pay Texas Tarts the principal amount, together with all interest, default interest, loan charges, fees, late charges and attorneys [sic] fees that are due Texas Tarts.
13. Rogue defaulted on the Note by failing to pay Texas Tarts as promised.
14. Texas Tarts counterclaimed for breach of contract for failure to pay the remaining balance of the purchase price.
15. As of August 20, 2015, the remaining balance on the Note is \$68,503.33, which is due, in addition to interest at the rate of 7%, plus attorney[s] fees as provided for in the Note.
16. All conditions precedent have been waived or have occurred or been performed by Texas Tarts.
17. Rogue's default and refusal to respond to Texas Tarts['] requests for payment made it necessary for Texas Tart to employ an attorney, Michael T. Fuerst, to file a counter-claim to collect the amount due under the note.
18. Rogue agreed to pay reasonable attorney's fees by Texas Tart[s] for collection in case of default.
19. Rogue is liable to Texas Tarts for \$68,503.33 for balance owned

⁶ The "Findings Agreed to By the Parties," are enumerated by the trial court in numbers 1-8. The trial's court's "Additional Findings of Fact" are set forth in numbers 9-23.

[sic] on the Note, plus interest at the rate of 7% through August 21, 2015.

20. Rogue is liable to Texas Tarts for \$10,000.00 in reasonable and necessary attorney's fees incurred by Texas Tarts through the trial of this case.

21. If Rogue appeals to the Court of Appeals and is unsuccessful, Texas Tarts is entitled to recover reasonable and necessary attorney's fees of \$8,000.00, plus \$3,500 if Texas Tarts must respond to a petition for review in the Texas Supreme Court and \$10,000.00 if the Texas Supreme Court accepts review and Rogue is ultimately unsuccessful on appeal to the Texas Supreme Court.

22. The Court finds that Trostle was a credible witness at trial.

23. To the extent that any Finding of Fact should be characterized as a Conclusion of Law, the Court re-characterizes it here, accordingly.

The trial court further made the following Conclusions of Law:

1. Rogue breached the Note and is liable to Texas Tart[s] for breach of contract.

2. Rogue is liable to Texas Tart[s] for damages in the sum of \$68,503.33 in damages.

3. Rogue is liable for \$10,000.00 in reasonable and necessary attorney's fees incurred by Texas Tarts throughout trial of this case.

4. If Rogue appeals to the Court of Appeals and is ultimately unsuccessful, Texas Tarts is entitled to recover reasonable and necessary attorney's fees of \$8,000.00 through the Court of Appeals, \$3,500 for responding to a petition for review, and \$10,000.00 if the Texas Supreme Court accepts review, and Rogue is ultimately unsuccessful on appeal to the Texas Supreme Court.

5. Rogue is liable for pre-judgment interest at the rate of 7% and post-judgment interest at the rate of 5%.

6. Rogue is liable to Texas Tarts for all court costs incurred in this case.

7. Rogue shall take nothing from Texas Tarts and Kristin Trostle.

8. The Court finds that Trostle was a credible witness as trial.

9. To the extent that any Conclusion of Law should be characterized

as a Finding of Fact, the Court re-characterizes it here accordingly.

10. All relief requested and not expressly granted is denied.

Rogue did not request additional or amended findings of fact and conclusions of law. Rogue filed a motion for new trial,⁷ which appears to have been denied by operation of law. This appeal timely followed.⁸

II. Analysis

Rogue presented the following two issues on appeal:

1. Given that the evidence reflected that Texas Tarts overstated its profit by \$50,000 by omitting unreported tax liability, was the right to offset by Rogue in the amount of \$70,000 established as a matter of law, such that Texas Tarts should have taken nothing against Rogue?

2. In the alternative, was the trial court's failure to award offset against Texas Tarts against the great weight of the evidence such that the judgment should be reversed and the case remanded for a new trial?

⁷ Rogue requested a new trial based on the following grounds: the award of damages under the note is excessive; there is legally and factually insufficient evidence to support the amount of damages awarded under the promissory note; the trial court's failure to award damages for offset due to fraudulent inducement is against the overwhelming weight of the evidence; the trial court's failure to find fraudulent inducement is against the overwhelming weight of the evidence; the trial court's failure to award damages for offset due to breach of the representations and warranties of the sale contract is against the overwhelming weight of the evidence; and the trial court should grant a new trial in the interest of justice.

⁸ Texas Tarts sought and was granted several unopposed motions to extend time to file appellee's brief to pursue settlement negotiations. By letter dated January 5, 2018, we requested the parties advise the court of the settlement status. To date, the parties have not notified the court of a settlement and Texas Tarts has not filed a brief.

Both of Rogue’s issues on appeal involve its affirmative defense of offset. *See Brown v. Am. Transfer & Storage Co.*, 601 S.W.2d 931, 936 (Tex. 1980) (“The right of offset is an affirmative defense. The burden of pleading offset and of proving facts necessary to support it are on the party making the assertion.”).

Rogue has waived his issues relating to offset by not obtaining or requesting additional or amended findings of fact and conclusions of law on the issue. Texas Rule of Civil Procedure 299 governs omitted findings of fact and conclusions of law and provides:

When findings of fact are filed by the trial court they shall form the basis of the judgment upon all grounds of recovery and of defense embraced therein. The judgment may not be supported upon appeal by a presumed finding upon any ground of recovery or defense, no element of which has been included in the findings of fact. . . .

Tex. R. Civ. P. 299. “Courts have interpreted this rule to require parties to request findings of fact and conclusions of law relevant to a defense or theory of recovery that they wish to assert on appeal.” *MCG Drilling Inv., LLC v. Double M Ranch, Ltd.*, No. 11-14-00299-CV, 2018 WL 2022590, at *5 (Tex. App.—Eastland Apr. 30, 2018, no pet.) (memo. op.); *see also Bartlett v. Bartlett*, 465 S.W.3d 745, 752 (Tex. App.—Houston [14th Dist.] 2015, no pet.); *Pinnacle Homes Inc. v. R.C.L. Offshore Eng’g Co.*, 640 S.W.2d 629, 630 (Tex. App.—Houston [14th Dist.] 1982, writ ref’d n.r.e.); *see also Park v. Payne*, 381 S.W.3d 615, 618 (Tex. App.—Eastland 2012, no pet.).

“When none of the findings address a ground of recovery or a defense and the appellant does not file a request for additional or amended findings of fact, the appellant waives [its] ground of recovery or defense.” *Fleming v. Fleming*, No. 01-11-00635-CV, 2012 WL 6754994, at *6 (Tex. App.—Houston [1st Dist.] Dec. 28, 2012, no pet.) (memo. op.) (citing *Pinnacle Homes, Inc.*, 640 S.W.2d at 630; *see also*

Stanley Works v. Wichita Falls Indep. Sch. Dist., 366 S.W.3d 816, 824 (Tex. App.—El Paso 2012, pet. denied) (“A party asserting an affirmative defense in a trial before the court must request findings in support of the defense to avoid waiver. If the trial court’s findings do not include any of the elements of the defense asserted, the party must specifically request additional findings relevant to the defense.”) (internal citations omitted)). Here, the trial court made no findings or conclusions concerning Rogue’s affirmative defense of offset, but Rogue did not request additional findings or conclusions on this ground. Thus, Rogue has waived its claim for offset on appeal.

Rogue’s issues on appeal are overruled.

III. Conclusion

The judgment of the trial court is affirmed.

/s/ John Donovan
Justice

Panel consists of Justices Christopher, Donovan, and Jewell.