Court of Appeals
Fourth Court of Appeals District of Texas
San Antonio

MEMORANDUM OPINION

No. 04-10-00551-CV

HIDDEN FOREST HOMEOWNERS ASSOCIATION,
Appellant

v.

James K. **HERN**,
Appellee

From the 224th Judicial District Court, Bexar County, Texas
Trial Court No. 2008-CI-09929
Honorable Martha Tanner, Judge Presiding

Opinion by: Phylis J. Speedlin, Justice

Sitting: Phylis J. Speedlin, Justice
Rebecca Simmons, Justice
Steven C. Hilbig, Justice

Delivered and Filed: June 8, 2011

AFFIRMED

Hidden Forest Homeowners Association challenges the trial court's judgment rendered in favor of James K. Hern. We affirm the judgment of the trial court.

BACKGROUND

Hern owns a home located in the Hidden Forest subdivision. The subdivision is governed by the Hidden Forest Homeowners Association ("Hidden Forest"), which was formed pursuant to the Amended Declaration of Covenants, Conditions and Restrictions of Hidden

Forest ("Declaration"); the Declaration obligates homeowners to pay semiannual assessments. In late 2006, Hern, expecting to be in the United Kingdom for most of 2007, attempted to prepay his 2007 and 2008 assessments, which amounted to approximately $115 every six months. Hidden Forest declined to accept payment for amounts not yet due and owing at that time. Several written notices of delinquency were mailed to Hern.

Hidden Forest referred the matter to attorney Tom L. Newton, Jr. for collection. In January 2008, Newton sent a demand letter to Hern's home while he was out of the country. In April 2008, Hidden Forest placed a lien on Hern's home pursuant to a Notice of Assessment of Lien, asserting $907.65 as the lien amount ($407.65 in assessments and late fees and $500 in attorney's fees and expenses). Two months later, Hidden Forest filed suit against Hern, seeking foreclosure on its lien as well as monetary damages, including unpaid assessments, interest, and attorney's fees. The petition did not assert the amount of the assessments past-due or the attorney's fees sought, but the accompanying discovery asked Hern to admit that unpaid assessments totaled $425.94 and that $1,500 was a reasonable and necessary amount of attorney's fees.

After being served with the lawsuit, Hern attempted to pay Hidden Forest $500 in attorney's fees, in addition to court costs and assessments. Hidden Forest refused his offer, and directed Hern to communicate with their attorney. Believing $1,500 to be an unreasonable amount of attorney's fees,[1] Hern then offered $900 to settle the claim; Hidden Forest again declined Hern's offer. Failing to resolve the entire claim, Hern also attempted to pay just the assessments that were undisputedly past-due, but Hidden Forest would not accept his money, and

[1] Hern asked Hidden Forest to see an itemization of attorney's fees sought by Newton, but neither Hidden Forest nor Newton provided such documentation until Hern secured it via discovery. Hern retained counsel in August 2009.

instead continued to charge Hern monthly late fees.[2] Hidden Forest also suspended Hern's right to vote and to use the common areas and facilities, such as the pool and tennis courts.

Frustrated by the situation, Hern hired an attorney and filed an answer and counterclaim. Hern admitted that he failed to pay his 2007 assessments, but denied that the attorney's fees and costs asserted by Hidden Forest were reasonable. Hern sought damages for unreasonable collection practices; Hern also alleged that Hidden Forest had violated its own Declaration by both suing for foreclosure of Hern's property and seeking a personal judgment against Hern. In August 2009, Hern also placed $1,750 into the registry of the court, seeking a declaration "as to how much of said amount, if any, is reasonably owed to [Hidden Forest] by [Hern] after all lawful offsets" and as a gesture to show that he was not refusing to pay the 2007 assessments and reasonable attorney's fees. Hidden Forest also rejected the tender of this money.

At trial, Becky Bowholtz, the former office manager of Hidden Forest, and Alan Cooper, the President of Hidden Forest, testified, as did Hern. Additionally, counsel for both parties testified regarding attorney's fees. Billing records introduced by Newton showed $228 worth of time for his actual attorney's fees as of late April 2008 when the lawsuit was filed. Nevertheless, Hidden Forest sought $25,000 in attorney's fees through trial, which was held two years later. The case was submitted to the jury, who found that Hern breached the Declaration's covenants and restrictions by failing to pay assessments. The jury found that $946.71 would compensate Hidden Forest for its damages resulting from Hern's failure to pay assessments that had accrued up to the time of trial and that $728.00 was a reasonable amount of attorney's fees for Hidden Forest. As to Hern's counterclaims, the jury found that Hidden Forest engaged in unreasonable collection practices and breached their own covenants. The jury further found that Hern's

[2] Hern additionally attempted to pay his 2008 assessments (which were not delinquent) after the lawsuit was filed, but Hidden Forest also rejected these payments since the matter of the 2007 assessments had been referred to legal counsel.

counsel was entitled to $11,000 in attorney's fees through trial and that $11,000 would compensate Hern for his damages proximately caused by Hidden Forest's unreasonable collection practices. Hern elected to recover based on Hidden Forest's breach of its own restrictive covenants. The trial court rendered a final judgment offsetting the damages awarded to Hidden Forest against the damages awarded to Hern, rendering judgment in Hern's favor in the amount of $9,325.29, plus court costs, post-judgment interest, and conditional attorney's fees in the event of an appeal. The judgment also denied an order of foreclosure and ordered Hidden Forest to release the lien filed against Hern's property within seven days of judgment becoming final. Hidden Forest timely appealed.

DISCUSSION

On appeal, Hidden Forest challenges the trial court's judgment on four grounds, contending the trial court erred in rendering judgment on Hern's counterclaims of unreasonable debt collection and breach of restrictive covenants. Hidden Forest also complains of the admission of settlement offers made by Hern, and of the jury's finding on the amount of reasonable attorney's fees.

Hern's Counterclaim: Hidden Forest's Breach of Restrictive Covenants

We first address Hidden Forest's argument that the trial court erred in rendering judgment in favor of Hern on a claim for breach of Hidden Forest's own restrictive covenants[3] because (1) this cause of action was neither pleaded nor tried by consent, and (2) there was no evidence that Hidden Forest breached the restrictive covenants. Hern's live pleading at trial was "Defendant's Second Amended Answer and Counterclaim." Hidden Forest complains that

[3] Hern alleged that Hidden Forest breached its own restrictive covenants by seeking both foreclosure of Hern's home and monetary damages. Section 8 of Article IV (titled "Covenant for Maintenance Assessments") of the Declaration provides that "[t]he Association may bring an action at law against the Owner personally obligated to pay the same, or foreclose the lien against the property."

although Hern stated in paragraph 9 that, "Plaintiff has violated its own restrictions in suing for foreclosure of Hern's home and seeking a personal judgment against Defendant Hern", this statement was not alleged as a separate cause of action and was made "in the context of a host of facts alleged by Hern to be part of the common law tort of unreasonable collection practices." Hidden Forest, however, did not specially except to Hern's pleadings. *See* TEX. R. CIV. P. 90. In the absence of special exceptions, a petition should be construed liberally in favor of the pleader. *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 897 (Tex. 2000). We therefore hold that in the absence of special exceptions, Hern pleaded information specific enough to provide Hidden Forest with notice of the causes of action for which Hern sought relief. *See id*. at 896-97 (holding Texas follows "fair notice" standard for pleading, which looks to whether the opposing party can ascertain from pleading nature and basic issues in controversy and what testimony will be relevant); *see also Roark v. Allen*, 633 S.W.2d 804, 809-10 (Tex. 1982).

Alternatively, Hidden Forest contends that even if Hern had properly pleaded a cause of action for breach of restrictive covenants against Hidden Forest, there is no evidence to establish that Hidden Forest breached its own covenants. An appellant challenging the legal sufficiency of the evidence to support a finding on an issue for which it did not have the burden of proof must show that there is no evidence to support the finding. *Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983). When reviewing a legal sufficiency challenge, we determine "whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review." *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). We view the evidence in the light favorable to the verdict, crediting favorable evidence if reasonable jurors could and disregarding contrary evidence unless reasonable jurors could not. *Id.* Appellate courts will sustain a legal sufficiency or "no evidence" challenge 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. *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997).

In reviewing the factual sufficiency of the evidence on an issue on which the appellant did not have the burden of proof, we will consider and weigh all of the evidence in the record, and cannot set aside the judgment unless the evidence in support of the finding is so weak that the judgment is clearly wrong and manifestly unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986).

Hidden Forest denies that the Declaration prohibits it from seeking both a foreclosure judgment and a personal judgment against a delinquent owner. We disagree. Section 8 of Article IV (titled "Covenant for Maintenance Assessments") of the Declaration provides that "[t]he Association may bring an action at law against the Owner personally obligated to pay the same, **or** foreclose the lien against the property." (emphasis added). Similarly, Hidden Forest's Bylaws state that the Board of Directors has a duty to "foreclose the lien against any property for which assessments are not paid within thirty (30) days after due date **or** to bring an action at law against the owner personally obligated to pay the same." (emphasis added). Accordingly, the Declaration does not by its own terms permit Hidden Forest to seek multiple forms of relief when pursuing non-payment of assessments. Hidden Forest's petition was admitted into evidence without objection when proffered to show that both forms of relief were sought in violation of Hidden Forest's own covenants. Additionally, both Bowholtz and Cooper agreed that Hidden Forest should be expected to follow its own covenants and restrictions. Because there is more than a scintilla of evidence in the record that Hidden Forest's lawsuit

impermissibly sought both a personal judgment against Hern and foreclosure of the lien in violation of the Declaration, the trial court did not err in permitting recovery on this cause of action.

Hidden Forest alternatively maintains that, regardless of the Declaration's prohibition against seeking foreclosure and a monetary judgment, it is permitted to assert alternative claims for relief pursuant to Rule 48 of the Texas Rules of Civil Procedure. *See* TEX. R. CIV. P. 48.[4] We do not agree that Rule 48 is applicable here. First, Hidden Forest did not plead in the alternative, but specifically sought both foreclosure of the lien and a personal judgment against Hern. Second, Rule 48 contemplates the availability of alternative claims, i.e., seeking rescission of a contract and alternatively suing for damages for breach of contract. *See Crabtree v. Burkett*, 450 S.W.2d 728, 731 (Tex. Civ. App.—Beaumont 1970, no writ). Here, Hidden Forest's own restrictive covenants limit its power to seek conjunctive relief. We overrule Hidden Forest's second issue. Based upon our resolution of this issue, we do not address Hidden Forest's first issue, in which it argues the trial court erred in rendering judgment on Hern's counterclaim of unreasonable debt collection practices. *See* TEX. R. APP. P. 47.1 (requiring court of appeals to hand down opinion that is as brief as practicable but that addresses every issue necessary to final disposition of appeal).

Settlement Offer and Tender of Payment

Next, Hidden Forest contends the trial court erred by admitting evidence of a settlement offer made by Hern in violation of Rule 408, and that Hern improperly deposited money into the

[4] Rule 48 provides: "A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based upon legal or equitable grounds or both." TEX. R. CIV. P. 48.

registry of the court. *See* TEX. R. EVID. 408.[5] Rule 408's prohibition on the admission into evidence of offers of settlement, however, does not require exclusion of evidence when offered for a purpose other than that of proving liability for or invalidity of a claim or its amount. *Barrett v. U.S. Brass Corp*., 864 S.W.2d 606, 633 (Tex. App.—Houston [1st Dist.] 1993), *rev'd on other grounds sub nom Amstadt v. U.S. Brass Corp*., 919 S.W.2d 644 (Tex. 1996). The burden is on the party objecting to the evidence to show that it was offered as part of settlement negotiations and not offered for another purpose. *TCA Bldg. Co. v. Northwestern Resources Co*., 922 S.W.2d 629, 636 (Tex. App.—Waco 1996, writ denied). In deciding whether the evidence is being impermissibly offered as evidence of a settlement offer or whether it is being offered for some other valid reason, the trial court may properly exercise its discretion. *Id*. Here, the $900 settlement offer made by Hern was offered to show that Hern attempted to pay his overdue assessments and late fees, as well as reasonable attorney's fees. Thus, we cannot conclude the trial court abused its discretion in admitting evidence of the $900 settlement offer. Moreover, the same evidence was admitted earlier during the trial without objection by Hidden Forest. Bowholtz testified without objection that Hern told her he had offered Newton $900 to resolve the situation. Accordingly, even if the trial court had abused its discretion in allowing testimony of the settlement offer, the issue was not preserved for appeal where the same evidence was admitted at trial without objection. *See* TEX. R. APP. P. 33.1(a); *Schwartz v. Forest Pharms., Inc*., 127 S.W.3d 118, 124 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (holding that any

[5] Rule 408 reads: "Evidence of (1) furnishing or offering or promising to furnish or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice or interest of a witness or a party, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution." TEX. R. EVID. 408.

error in admitting evidence is cured when the same evidence comes in elsewhere without objection).

Hidden Forest also contends that Hern improperly deposited money into the registry of the court because it is not an allowable method of resolving a debt and because it was done *ex parte*. *See* TEX. R. CIV. P. 21. Hidden Forest, however, does not cite any authority in support of its argument that it is improper to deposit money into the registry of the court when a homeowner has admitted failure to pay his past-due assessments. As to the contention that the order of deposit was sought *ex parte*, we conclude Hidden Forest was not harmed by any lack of notice. Hidden Forest was certainly made aware of the deposit at the time Hern's counterclaim was filed, which was well before trial. Thus, Hidden Forest cannot complain (nor has it done so) that it was prejudiced by Hern's failure to serve it with notice of the order of deposit. We therefore hold the trial court did not abuse its discretion in permitting testimony regarding the court registry deposit. Accordingly, we overrule Hidden Forest's third issue.

Reasonable Attorney's Fees

Finally, Hidden Forest maintains that the trial court erred by not setting aside the jury's finding on the amount of reasonable fees for necessary services of Hidden Forest's attorneys, because it was against the great weight and preponderance of the evidence. A party challenging the factual sufficiency of a jury finding upon which that party had the burden of proof must demonstrate that "the adverse finding is against the great weight and preponderance of the evidence." *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001). We must first examine the entire record to determine if there is some evidence to support the finding. *Id*. at 241-42. If there is, we must then determine whether "the finding is so contrary to the overwhelming weight and preponderance of the evidence as to be clearly wrong and manifestly unjust, or if the great

preponderance of the evidence clearly supports its non-existence." W. Wendell Hall, *Hall's Standards of Review in Texas*, 42 ST. MARY'S L. J. 1, 42 (2010) (quoting *Castillo v. U.S. Fire Ins. Co.*, 953 S.W.2d 470, 473 (Tex. App.—El Paso 1997, no writ)). Regardless of whether the "great weight" challenge is to a finding or a nonfinding, "[a] court of appeals may reverse and remand a case for new trial [only] if it concludes that the jury's 'failure to find' is against the great weight and preponderance of the evidence." *Ames v. Ames*, 776 S.W.2d 154, 158 (Tex. 1989).

The reasonableness of attorney's fees is ordinarily left to the trier of fact, and a reviewing court may not substitute its judgment for the jury's. *Smith v. Patrick W.Y. Tam Trust*, 296 S.W.3d 545, 547 (Tex. 2009); *Ragsdale v. Progressive Voters League*, 801 S.W.2d 880, 881 (Tex. 1990) (per curiam). Factors to be considered in determining the amount of attorney's fees to be awarded include the following: (1) the time and labor required, novelty and difficulty of the questions presented, and the skill required; (2) the likelihood that acceptance of employment precluded other employment; (3) the fee customarily charged for similar services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or the circumstances; (6) the nature and length of the professional relationship with the client; (7) the expertise, reputation, and ability of the lawyer performing the services; and (8) whether the fee is fixed or contingent. *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997). "A reasonable fee is one that is not excessive or extreme, but rather moderate or fair." *Garcia v. Gomez*, 319 S.W.3d 638, 642 (Tex. 2010).

At trial, counsel for both parties testified concerning attorney's fees. Newton, a shareholder with Allen, Stein & Durbin, and lead counsel for Hidden Forest, testified that his fees through trial were $25,000 based upon his training, education, and experience, and

considering the time and labor involved, novelty of question involved, the skill required to perform the services, and the fact that the fee arrangement with the client was a contingency fee. Itemized billing records for all of the attorneys and legal staff working on the case were admitted into evidence. Newton testified that he personally spent 75 hours on the case, his associate spent over twelve hours on the case, and his legal assistant spent almost 26 hours. Newton stated that shareholder attorneys in his firm charge $250.00 per hour, associate attorneys bill at a rate of $200.00 per hour, and legal assistants charge $125.00 per hour.

Counsel for Hern, Peter L. Kilpatrick, testified that the attorney's fees sought by Hidden Forest were unreasonable and should amount to $0. The jury awarded Hidden Forest $728.00 in attorney's fees for preparation and trial, $6,250.00 in attorney's fees for appeal to the court of appeals, and $2,500 for appeal to the Supreme Court of Texas.

We recognize there was no evidence controverting Newton's hourly rate; however, the trier of fact is not required to award attorney's fees equal to those testified to at trial, even when that testimony is uncontradicted. *See Hicks Oil & Butane Co. v. Garza*, No. 04-05-00836-CV, 2006 WL 2263896, at *4 (Tex. App.—San Antonio Aug. 9, 2006, no pet.) (mem. op.) (affirming award of attorney's fees that was substantially lower than amount unequivocally testified to at trial); *Inwood N. Homeowners' Ass'n, Inc. v. Wilkes*, 813 S.W.2d 156, 157-58 (Tex. App.—Houston [14th Dist.] 1991, no writ) (affirming award of $500 in attorney's fees to plaintiff who presented undisputed evidence of approximately $1,500 in attorney's fees where small amount in controversy was an "attendant circumstance tending to cast suspicion on the uncontradicted evidence regarding the attorney's fee"). Here, the jury was aware of the simplistic nature of Hidden Forest's case, which merely sought to recover assessments that Hern admitted he had not paid. The amount Hidden Forest sought in attorney's fees was more than 26 times the amount it

recovered due to Hern's failure to pay assessments. The jury could have rationally determined that 3.78 hours was a reasonable amount of time to expend in legal services for this case (dividing $728 awarded in attorney's fees by Newton's hourly rate of $250). *See Travis Law Firm v. Woodson Wholesale, Inc*., No. 14-07-00204-CV, 2008 WL 4647380, at *4-5 (Tex. App.—Houston [14th Dist.] Oct. 21, 2008, no pet.) (mem. op.) (holding testimony of $50,887.89 in attorney's fees was contradicted by attendant circumstances, i.e., fee sought by firm was more than 84 times the principal amount firm recovered, and affirming award of $1,500 in attorney's fees). Accordingly, we hold that the jury's award of $728 in attorney's fees for preparation and trial is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. We overrule Hidden Forest's fourth issue. Based on the foregoing reasons, we affirm the trial court's judgment.

Phylis J. Speedlin, Justice