Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00733-CV

Erasmo **GARCIA** and Kent W. Hicks,
Appellants

v.

David **DAVILA**,
Appellee

From the County Court at Law No. 3, Bexar County, Texas
Trial Court No. 2014-CV-01891
Honorable Jason Wolff, Judge Presiding

Opinion by: Karen Angelini, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Karen Angelini, Justice
Patricia O. Alvarez, Justice

Delivered and Filed: October 25, 2017

AFFIRMED

Erasmo Garcia and Kent W. Hicks appeal from a judgment rendered against them on a Texas Deceptive Trade Practices Act (DTPA) claim. In this appeal, Garcia and Hicks argue that the trial court erred in granting a directed verdict on a breach of contract claim against them and in admitting certain evidence. We affirm.

BACKGROUND

David Davila and his wife moved to San Antonio, Texas in 2011. Davila wanted to purchase a house in San Antonio, but he knew it would be a challenge because he had a foreclosure

on his credit report. Davila saw an ad in which Garcia, a real estate agent, portrayed himself as a "seller finance expert." The ad stated: "Everyone has the right to homeownership regardless of income or credit."

In August 2012, Davila met with Garcia and informed him of the prior foreclosure. Garcia told Davila that he had worked with people who had challenges with their credit, including foreclosures. Garcia reviewed Davila's bank statements, obtained his credit report, and advised Davila that he had a good credit score and he would qualify for a home loan of up to $300,000. Davila and Garcia entered into a representation agreement. Garcia's sponsoring broker, Hicks, was also a party to the contract. The agreement provided that Garcia and Hicks would use their best efforts to assist Davila in acquiring property in the market area, would assist Davila in negotiating the acquisition of the property, and would comply with other parts of the agreement. Under the agreement, Garcia would receive a commission calculated as 6% of the gross sales price if Davila agreed to purchase a property. In addition, the agreement stated that Davila was not required to pay the commission until it was "earned and payable." The broker's commission was "earned" when Davila entered into a contract to buy property in the market area or he breached the agreement. The broker's commission was "payable" upon the earlier of the closing of the transaction to acquire the property, Davila's breach of a contract to buy property, or Davila's breach of the representation agreement. Finally, the agreement provided that Davila would pay Garcia and Hicks a "nonrefundable advance fee" of $4500, which would be credited against any other fee at the time of closing. Davila paid Garcia the $4500 "advance fee" when he signed the representation agreement.

In October 2012, Davila found a house that he wanted to buy for $285,000. Davila consulted with Garcia. Garcia continued to assure Davila that he qualified for a loan. With Garcia's assistance, Davila prepared to make an offer on the house. Davila signed an earnest money

contract. Before Davila signed the earnest money contract, Garcia told him that he was required to pay the rest of the 6% commission. Davila delivered a check to Garcia for the balance of the commission, $12,600. Davila also paid $2,900 in earnest money and option fees. Davila's offer was accepted by the sellers. Davila applied for a mortgage and the closing was set for November 19, 2012.

The day before the closing, Garcia and the mortgage loan officer informed Davila that the bank had declined to issue the loan to Davila. The reason for the bank's refusal was that the foreclosure had actually occurred six months later than shown on Davila's credit report. Davila would have to wait several more months before his credit report would "clear" and then he would be able to qualify for a mortgage. Without informing Davila, Garcia asked the sellers to grant Davila a three and a half month extension on the earnest money contract. The sellers refused. The sale did not go through and Davila forfeited the $2900 earnest money and option deposit to the sellers.

Davila asked Garcia and Hicks to refund him the $17,100 commission he had paid them, but they refused to do so.

Davila then sued Garcia and Hicks for DTPA violations and breach of contract. The case was tried to a jury. After the evidence was presented, the trial court directed verdict in favor of Davila on the breach of contract claim and submitted the DTPA claim to the jury. The jury found in favor of Davila on the DTPA claim. Davila elected to recover on the DTPA claim and not on the breach of contract claim. The trial court rendered judgment that Davila recover from Garcia and Hicks actual damages in the amount of $22,600, additional damages in the amount of $17,100, and attorney's fees. Garcia and Hicks appealed.

DIRECTED VERDICT

In their first issue, Garcia and Hicks argue the trial court erred in directing verdict in favor of Davila on his breach of contract claim. We are authorized to reverse a judgment when a trial court's error probably caused the rendition of an improper judgment. TEX. R. APP. P. 44.1(a)(1). Here, the judgment was based on the DTPA claim only. Therefore, the trial court's action in directing verdict on the breach of contract claim did not cause the rendition of an improper judgment. We overrule Garcia and Hicks's first issue.

ADMISSION OF EVIDENCE

In their second and third issues, Garcia and Hicks argue the trial court erred in admitting Exhibits 10 and 11 into evidence at trial.

To preserve the right to complain on appeal about the erroneous admission of evidence, a proper objection must be made at the time the evidence is offered. *See Banda v. Garcia*, 955 S.W.2d 270, 272 (Tex. 1997); *Line Enter., Inc. v. Hooks & Matteson Enter., Inc.*, 659 S.W.2d 113, 118 (Tex. App.—Amarillo 1983, no writ); TEX. R. APP. P. 33.1(a). An appellant's complaint on appeal must be the same as the objection made in the trial court. *Ward v. Ward*, No. 04-12-00703-CV, 2014 WL 470153, at *2 (Tex. App.—San Antonio Feb. 5, 2014, pet. denied).

We review complaints about the admission or exclusion of evidence for an abuse of discretion. *In the Interest of J.P.B.*, 180 S.W.3d 570, 575 (Tex. 2005). To obtain a reversal of a judgment based on the erroneous admission of evidence, an appellant must show that (1) the trial court's ruling was in error, and (2) the error probably caused the rendition of an improper judgment. *Interstate Northborough P'ship v. State*, 66 S.W.3d 213, 220 (Tex. 2001); TEX. R. APP. P. 44.1(a)(1). To show harm, the evidence must be controlling on a material issue and not cumulative of other evidence. *See Texas Dept of Transp. v. Able*, 35 S.W.3d 608, 617 (Tex. 2000); *Cortez v. HCCI-San Antonio, Inc.*, 131 S.W.3d 113, 119 (Tex. App.—San Antonio 2004), *aff'd*,

159 S.W.3d 87 (Tex. 2005). The erroneous admission of evidence that is merely cumulative of properly admitted evidence is harmless error. *Gee v. Liberty Mut. Fire Ins., Co.*, 765 S.W.2d 394, 396 (Tex. 1989).

At trial, Davila asked the trial court to admit Exhibits 10 and 11, which were documents concerning administrative complaints against Garcia filed by Davila and others. Exhibit 10 was a "Proposal for Decision" prepared by an administrative law judge in the administrative proceeding. The "Proposal for Decision" contained proposed findings of fact and conclusions of law. Exhibit 11 was the Texas Real Estate Commission's final order in the administrative proceeding, which adopted the proposed findings of fact and conclusions of law and incorporated them by reference. Most of the administrative law judge's "Proposal for Decision" (Exhibit 10) was attached to the final order (Exhibit 11).

At trial, Garcia and Hicks objected to Exhibit 10 on the basis that it was "irrelevant and prejudicial" and "hearsay," and to Exhibit 11 on the basis that "it purports to be a final order when it is not" and "[i]t is a final decision by the SOAH judge that is currently on appeal." The trial court overruled these objections.

Exhibit 11

Garcia and Hicks's only objection in the trial court to Exhibit 11 (the final order in the administrative proceeding) was that it was not a final order because it had been appealed. However, Garcia and Hicks now argue on appeal that the trial court abused its discretion in admitting Exhibit 11 because it was not relevant and its probative value was substantially outweighed by the danger of unfair prejudice. Garcia and Hicks may not advance a complaint on appeal that is different from the objection they made at trial. *See Ward*, 2014 WL 470153, at *2 (concluding the appellant did not preserve a complaint for appellate review when he did not raise the same complaint in the trial

court that he raised on appeal); TEX. R. APP. P. 33.1(a). We conclude that Garcia and Hicks have failed to preserve their complaints about Exhibit 11 for appellate review.

Exhibit 10

Garcia and Hicks also argue on appeal that the trial court abused its discretion in admitting Exhibit 10 (the administrative law judge's "Proposal for Decision") because it was not relevant and its probative value was substantially outweighed by the danger of unfair prejudice. We will assume, without deciding, that the trial court abused its discretion in admitting Exhibit 10, and evaluate whether Garcia and Hicks have shown the required harm.

To determine whether erroneously admitted evidence probably resulted in the rendition of an improper judgment, we review the entire record. *Able*, 35 S.W.3d at 617; *Gee*, 765 S.W.2d at 396. Here, the record shows that the jury heard detailed testimony from Davila about his dealings with Garcia. According to Davila's testimony, Garcia presented himself to Davila as an expert in obtaining financing for buyers with credit problems, and told Davila that he had excellent credit and that he would not have problems obtaining a mortgage notwithstanding the prior foreclosure. However, Davila testified that the bank refused to provide him financing because of the prior foreclosure. Davila also testified that he had asked Garcia if he had any complaints pending against him and Garcia falsely stated that he did not. Davila further testified that Garcia required him to pay Garcia and Hicks their full commission before he was obligated to do so under the parties' contract.

The record also shows that Exhibit 10 was largely cumulative of other evidence admitted at trial. Exhibit 11 included most (sixteen out of twenty pages) of the "Proposal for Decision" as an attachment. Furthermore, both Davila and Garcia testified about Davila's complaint with the Texas Real Estate Commission and the related administrative proceeding. Finally, Davila testified about the damages he had incurred.

In the section of their brief addressing harm, Garcia and Hicks assert that Exhibit 10 was harmful because the jury could have "read the [ALJ's] findings of fact and conclusions of law" and the "sanctions issued upon" them. Garcia and Hicks further assert that Exhibit 10 was harmful because Davila's "damages [were] itemized" in the administrative findings. However, Garcia and Hicks's briefing does not show that Exhibit 10 was controlling on a material issue and that it was not cumulative of other evidence. Therefore, we conclude that Garcia and Hicks have failed meet their burden to establish that any error in admitting Exhibit 10 probably caused the rendition of an improper judgment. *See Interstate Northborough*, 66 S.W.3d at 220; *Gee*, 765 S.W.2d at 396-97; TEX. R. APP. P. 44.1(a)(1).

We overrule Garcia and Hicks's second and third issues.

CONCLUSION

The trial court's judgment is affirmed.

Karen Angelini, Justice