Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-17-00018-CV

DDR DB STONE OAK, LP,
Appellant

v.

RECTOR PARTY CO., LLC; Don Lasseter; and Joslyn Boberg;
Appellees

From the 438th Judicial District Court, Bexar County, Texas
Trial Court No. 2014-CI-01261
Honorable Larry Noll, Judge Presiding

Opinion by: Karen Angelini, Justice

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

Delivered and Filed: December 6, 2017

MOTION TO DISMISS DENIED; REVERSED AND REMANDED IN PART; AFFIRMED IN PART

This appeal arises from a dispute involving a commercial lease. The landlord, DDR DB Stone Oak L.P., sued its former tenant, Rector Party Co. L.L.C., for breach of contract, and the tenant's guarantors, Don Lasseter and Joslyn Boberg, for breach of the guaranty agreements. After holding a bench trial, the trial court found in favor of DDR and awarded it $35,757.62 plus interest for unpaid rent and $20,000.00 for damages arising from Rector's breach of the lease's continuous operation clause. In this appeal, DDR argues the trial court erred by failing to award it additional damages and by excluding expert testimony on attorney's fees. Because we conclude that the trial

court erred by excluding the attorney's fees testimony, we reverse the portion of the judgment denying DDR's request for attorney's fees, remand the case to the trial court for a new trial on attorney's fees, and affirm the remainder of the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On April 23, 2010, Rector signed a ten-year lease to rent space in a shopping center located in San Antonio, Texas, and owned by DDR. The lease permitted Rector to operate a "Party City" costume and party supply store on the property. Rector's co-owners, Don Lasseter and Joslyn Boberg, executed personal guaranty agreements guaranteeing Rector's performance under the Lease. The lease contained a "continuous operation" clause that required Rector to be open for business, fully stocked and staffed, on all business days for approximately three years. Rector agreed to pay liquidated damages of $100 per day for any breach of the continuous operations clause.

Nevertheless, on November 23, 2012, Rector closed its store and removed its furniture, fixtures, and inventory from the premises. On November 26, 2013, Rector sent a letter to DDR informing it that Rector was suffering severe operational losses and, therefore, it was discontinuing the operation of its business. Rector further informed DDR that Rector was looking for a replacement tenant to sublet the premises and it would appreciate DDR's assistance in marketing the premises to obtain a suitable replacement tenant.

Over the next eight months, Rector continued to pay its rent; however, beginning on August 1, 2013, Rector failed to pay its rent and other charges. On September 4, 2013, Rector started to move its inventory back into the leased premises so it could re-open the store. On September 6, 2013, DDR notified Rector of its failure to pay a total of $40,757.62 in rent and other charges, and provided Rector five days in which to cure its default. On September 10, 2013, DDR received two checks from Rector: a check in the amount of $5,000.00 and a check in the amount of $35,757.62.

After receiving the checks, DDR sent Rector an email stating: "Your default is cured." On the same day, DDR sent Rector written notice commanding it to vacate the leased premises. In response, Rector vacated the leased premises and stopped payment on the $35,757.62 check. On September 11, 2013, DDR re-entered the leased premises.

DDR eventually relet the space to another tenant. DDR retained Rector's $20,000.00 security deposit.

DDR sued Rector for breach of contract and Lasseter and Boberg for breach of the guaranty agreements. DDR sought damages for the unpaid rent and for expenses associated with reletting the premises. DDR also requested attorney's fees. Rector, Lasseter, and Boberg (collectively, "Rector") filed an answer in which they generally denied DDR's allegations, asserted the defenses of waiver and estoppel, and claimed that their performance was excused because DDR materially breached the lease.

The case was tried to the court. After the evidence was presented, the trial court ruled in favor of DDR but awarded it substantially less in damages than it had requested. The trial court signed a judgment awarding DDR damages in the amount of $35,757.62 plus interest. At DDR's request, the trial court filed findings of fact and conclusions of law. In its conclusions of law, the trial court concluded that (1) DDR waived any of Rector's breaches occurring prior to September 10, 2013, by inaction and by notifying Rector that its default was cured; (2) Rector was liable to DDR for damages for breach of the continuous operations clause from the date of the email stating that the default was cured to the date the replacement tenant began paying rent; (3) $20,000.00 was the reasonable value of the damages incurred by DDR for Rector's breach of the continuous operation provision of the lease; (4) Rector's security deposit of $20,000.00 was forfeited and applied to pay the damages due to DDR for breach of the continuous operation provision of the

lease; and (5) DDR breached the lease by excluding Rector from the premises the day after it had notified Rector that its default was cured. DDR appealed.

ISSUES PRESENTED ON APPEAL

DDR presents two issues on appeal. In its first issue, DDR argues the trial court erred in failing to award it additional damages for the expenses it incurred in reletting the premises to the replacement tenant. In its second issue, DDR argues the trial court erred in excluding its expert testimony on attorney's fees. However, before the briefs were filed in this appeal, Rector filed a motion to dismiss arguing that DDR had waived its right to appeal the trial court's judgment based on the acceptance of benefits doctrine. We carried Rector's motion to dismiss with the case. Before addressing DDR's issues, we address Rector's motion to dismiss.

MOTION TO DISMISS

Ten days after the trial court signed the judgment, Rector sent a check to DDR for $56,442.67, which represented payment of the judgment including interest and all taxable court costs. About six weeks later, after filing a request for findings of fact and conclusions of law, a motion for new trial, and a request for additional findings of fact, DDR cashed Rector's check. DDR subsequently executed a conditional satisfaction of judgment, in which it reserved its right to appeal. DDR then filed its notice of appeal.

"The acceptance-of-benefits doctrine is [] anchored in equity and bars an appeal if the appellant voluntarily accepts the judgment's benefits and the opposing party is thereby disadvantaged." *Kramer v. Kastleman*, 508 S.W.3d 211, 217 (Tex. 2017). "Conceptually, the doctrine infers an agreement to terminate the litigation because the judgment has been voluntarily paid and accepted, or implies a waiver, release of errors, or admission that the decree is valid." *Id*. at 218. "Under this doctrine, a merits-based disposition may not be denied absent acquiescence in the judgment to the opposing party's irremediable disadvantage." *Id*. at 213-14. Additionally,

under an exception to the acceptance of benefits doctrine, an appeal may be taken when the reversal of the judgment cannot possibly affect an appellant's right secured under the judgment. *Carle v. Carle*, 234 S.W.2d 1002, 1004 (Tex. 1950).

"The burden of proving an estoppel rests on the party asserting it, and the failure to prove all essential elements is fatal." *Kastleman*, 508 S.W.3d at 217. Therefore, to succeed on its motion to dismiss, Rector must prove both that DDR acquiesced in the judgment and that DDR's acquiescence caused Rector "irremediable disadvantage." *See id*. at 213-14. Here, the record shows that after Rector sent DDR the check, DDR requested findings of fact and conclusions of law, filed a motion for new trial on attorney's fees, and made a request for additional findings of fact and conclusions of law. Although DDR ultimately cashed Rector's check, DDR's intent to appeal was apparent from its actions. Based on this record, we cannot infer an agreement to terminate the litigation.

Furthermore, this case falls squarely under the entitlement exception to the acceptance of benefits doctrine. Under the entitlement exception, when "an appellant accepts only that which appellee concedes, or is bound to concede, to be due him under the judgment he is not estopped to prosecute an appeal which involves only his right to a further recovery." *Carle*, 234 S.W.2d at 1004. In this appeal, DDB argues only that the trial court should have awarded it additional damages and that the trial court should have permitted its expert to testify about attorney's fees. DDB does not challenge the $56,442.67 awarded to it in the judgment and subsequently paid by Rector. DDR's only contention on appeal is that it is entitled to further recovery. Stated another way, our determination of DDR's issues on appeal cannot result in a lesser judgment for DDR.

We conclude that Rector has failed to meet its burden to prove that DDR acquiesced in the judgment to Rector's irremediable disadvantage. *See Guerra v. L&F Distributors, LLC*, 521 S.W.3d 878, 884-85 (Tex. App.—San Antonio 2017, no pet.) (declining to infer an acquiescence

in the validity of the final judgment when the appellant's entitlement to the amount paid was undisputed and unaffected by the resolution of the issue presented on appeal). We, therefore, deny Rector's motion to dismiss.

ADDITIONAL DAMAGES FOR RELETTING EXPENSES

In its first issue, DDR argues the trial court erred in not awarding it additional damages for its reletting expenses, which it claims consisted of brokerage fees related to finding a replacement tenant in the amount of $60,670.00 and costs incurred in remodeling the premises for the replacement tenant in the amount of $182,000.00. DDR points out that the lease allowed it to recover its reletting expenses and argues that the evidence conclusively established its reletting expenses.

In response, Rector presents two arguments. First, Rector argues that the trial court properly refused to award DDR its reletting expenses because Rector was excused from performing under the lease because of DDR's prior material breach. According to Rector, the trial court's unchallenged findings of fact show a prior material breach by DDR. We reject this argument. The trial court's findings of fact do not contain a finding that DDR committed a prior material breach. Second, Rector argues that the amount of damages that DDR avoided by reletting the premises necessarily reduced DDR's recovery against Rector under Texas law. We agree with this argument.

When a tenant breaches a lease and abandons the property, a landlord may retake possession of the property and sue for damages. *White v. Watkins*, 385 S.W.2d 267, 270 (Tex. Civ. App.—Waco 1964, no writ). When a landlord elects this remedy and relets the premises for the entire unexpired term, the measure of the landlord's damages is the difference between the rental originally contracted for and that realized from the reletting. *Id*. A landlord has a duty to make reasonable efforts to mitigate its damages. TEX. PROP. CODE ANN. § 91.006(a) (West 2014); *Austin*

Hill Country Realty, Inc. v. Palisades Plaza, 948 S.W.2d 293, 299 (Tex. 1997). In mitigating its damages, the landlord is entitled to recover the amount reasonably expended. *Tex. & P. Ry. Co. v. Mercer*, 90 S.W.2d 557, 560 (Tex. 1936). "The expenses incurred in an effort to mitigate damages are not to aggravate, but to lessen, the amount for which the wrongdoer might be held liable." *Id*.

The universal rule in measuring damages for a breach of contract claim is to provide just compensation for any loss or damage actually sustained as a result of the breach. *Phillips v. Phillips*, 820 S.W.2d 785, 788 (Tex. 1991) (quoting *Stewart v. Basey*, 245 S.W.2d 484, 485-86 (Tex. 1952)); *Sharifi v. Steen Auto., LLC*, 370 S.W.3d 126, 148 (Tex. App.—Dallas 2012, no pet.). In keeping with this rule, a party should be awarded neither less nor more than its actual damages. *Phillips*, 820 S.W.2d at 788; *Sharifi*, 370 S.W.3d at 148. Courts determine the proper measure of damages from the facts of the case. *Vance v. My Apartment Steak House of San Antonio, Inc.*, 677 S.W.2d 480, 481 n.1 (Tex. 1984); *Sharifi*, 370 S.W.3d at 148. There are three damage measures for breach of contract claims: expectancy, reliance, and restitution. *Geis v. Colina Del Rio, L.P.*, 362 S.W.3d 100, 112 (Tex. App.—San Antonio 2011, pet. denied). Expectancy damages award a party the benefit of the bargain. *See id.* Benefit of the bargain damages restore a party to the economic position it would have been in had the contract not been breached. *Sharifi*, 370 S.W.3d at 148; *Geis*, 362 S.W.3d at 112. No one disputes that the proper measure of damages in this case was the expectancy or benefit of the bargain measure.

Here, the lease permitted the landlord, upon breach by the tenant, to elect to "enter upon the Premises without terminating this Lease and relet the Premises in Landlord's name for the account of Tenant for the remainder of the Term upon terms and conditions reasonably acceptable to Landlord and immediately recover from Tenant any deficiency for the balance the Term, plus expenses of reletting." The trial court made an express finding that once Rector "vacated the premises, [DDR] re-entered the premises for the benefit of [Rector] and successfully re[-]leased

the space *for substantially more than the rental it would have received from [Rector] under the lease* made the basis of this suit." (emphasis added). This finding, which is unchallenged on appeal, is supported by the record. The evidence showed that the rental amounts DDR was entitled to under the replacement lease exceeded the rentals it was entitled to under the Rector lease by $278,405.60. Additionally, the evidence showed that the $278,405.60 in excess rent that DDR was entitled to under the replacement lease exceeded the total amount DDR sought for reletting expenses, which was $242,670.00. Under these circumstances, we cannot say that the trial court erred in not awarding DDR additional damages in the amount of $242,670.00 for its reletting expenses.

In its reply brief, DDR asserts that the trial court should not have credited the excess rental amounts under the replacement lease because Rector failed to plead offset as an affirmative defense. We reject this argument. First, the lease permitted DDR to "relet the Premises in Landlord's name *for the account of Tenant*." (emphasis added). Therefore, the lease terms required the trial court to credit the excess rental amounts to Rector's account. Second, under Texas law, the goal of benefit-of-the bargain damages is to restore a party to the position it would have been in had the contract been performed, not to put a party in a better position than if the contract had been performed. *See Sharifi*, 370 S.W.3d at 148. To restore a party to the position it would have been in had the contract been performed, a factfinder considers what additions to a party's wealth have been prevented by the breach and what subtractions from his wealth have been caused by it. *Id*. If the trial court in this case had awarded DDR an additional $242,670.00 for its reletting expenses, it would have placed DDR in a better position than if the original contract had been performed in contravention of the goal of benefit-of-the-bargain damages.

DDR also argues that even if Rector was entitled to an offset in the amount of $278,405.60 for rent under the replacement lease, the trial court erred because DDR also sought (1) damages

for unpaid rent and common area maintenance charges in the amount of $151,456.67; (2) damages for late fees in the amount of $17,800.00; (3) liquidated damages for non-occupancy in the amount of $48,400.00; and (4) 15% interest on all of these amounts. According to DDR, when these other damages and the interest that DDR requested are considered, an offset in the amount of $278,405.60 still results in a $354,919.17 balance in its favor. Again, we reject DDR's argument. DDR did not present an issue complaining that the trial court erred in not awarding it damages for unpaid rent and common area maintenance charges, late fees, and non-occupancy of the premises, and we cannot assume that the trial court erred in not awarding it these damages.

Based on the record before us and the arguments presented by the parties, we conclude that the trial court did not err by not awarding DDR $242,670.00 in reletting expenses. We overrule DDR's first issue.

EXCLUSION OF ATTORNEY'S FEES TESTIMONY

In its second issue, DDR argues the trial court abused its discretion in excluding expert testimony regarding its attorney's fees. At trial, DDR called its trial counsel and expert witness, Charles J. Muller, to testify about the attorney's fees DDR had incurred in the case. Rector objected to Muller's attorney's fees testimony on the basis that DDR's corresponding disclosure was inadequate because it only identified the subject matter of Muller's testimony and did not give any of his opinions. *See* TEX. R. CIV. P. 194.2(f)(3). The trial court sustained Rector's objection and did not allow Muller to testify. The trial court denied DDR's request for attorney's fees.

On appeal, DDR argues that the trial court abused its discretion because its disclosure was sufficient. Alternatively, DDR argues that even if its disclosure was insufficient, the trial court abused its discretion because the record establishes that Rector would not have been unfairly surprised or unfairly prejudiced by the attorney's fees testimony. DDR further argues that the trial court abused its discretion because Rector could have sought a continuance or additional time to

conduct discovery or depose Muller but failed to do so. DDR finally argues that it was harmed by the trial court's error because DDR was entitled to recover attorney's fees on its claims and Muller's testimony was its only source of evidence regarding its attorney's fees. In response, Rector argues the trial court properly excluded DDR's attorney's fees testimony.

A trial court's exclusion of evidence on the basis that it was not properly identified during discovery is reviewed for an abuse of discretion. *Mentis v. Barnard*, 870 S.W.2d 14, 16 (Tex. 1994). The test for an abuse of discretion is whether the trial court's action was arbitrary or unreasonable under the circumstances of the case. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985).

Rule 193.6 prohibits a party from offering evidence not timely disclosed in a discovery response "unless the court finds that: (1) there was good cause for the failure to timely make, amend, or supplement the discovery response; or (2) the failure to timely make, amend, or supplement the discovery response will not unfairly surprise or unfairly prejudice the other parties." TEX. R. CIV. P. 193.6(a). One purpose of the rule is to prevent trial by ambush. *Rodriguez v. JPMorgan Chase Bank, N.A.*, No. 04-14-00342-CV, 2015 WL 3772110, at *7 (Tex. App.—San Antonio 2015, pet. denied). However, Rule 193.6 "provides a less burdensome alternative to the draconian sanction of automatic exclusion under former Rule 215(5), which required a showing of good cause." *State v. Target Corp.*, 194 S.W.3d 46, 50 (Tex. App.—Waco 2006, no pet.).

The party seeking to offer the evidence at issue has the burden to establish good cause or lack of unfair surprise or unfair prejudice. TEX. R. CIV. P. 193.6(b). A finding of good cause or the lack of unfair surprise or unfair prejudice must be supported by the record. *Id*. Furthermore, even if the party seeking to offer the evidence fails to carry its burden under Rule 193.6(b), the court may grant a continuance or temporarily postpone the trial to allow a response to be made, amended,

or supplemented, and to allow opposing parties to conduct discovery regarding any new information presented by that response. TEX. R. CIV. P. 193.6(c).

A disclosure identifying an attorney's fees expert and stating that the expert will be testifying about the reasonableness and necessity of attorney's fees is sufficient to give the "general substance" of that expert's testimony, especially when the responding party is seeking fees for representation during the entire litigation, which are not determinable at the time of disclosure. *Kim v. Sanchez*, No. 02-12-00465-CV, 2014 WL 4364170, at *4 (Tex. App.—Fort Worth 2014, pet. denied); *Goldman v Olmstead*, 414 S.W.3d 346, 365 (Tex. App.—Dallas 2013, pet. denied); *Reynolds v. Nagely*, 262 S.W.3d 521, 531 (Tex. App.—Dallas 2008, pet. denied).

We cannot address DDR's first argument, whether its disclosure was sufficient to provide the general substance of Muller's argument, because DDR's disclosure is not included in the record. However, we can address DDR's alternative argument, whether the record establishes Rector's lack of unfair surprise or unfair prejudice. The record shows that DDR provided Rector's counsel with copies of its redacted legal billing statements three or four days before trial. Rector's counsel, who had been involved in the case since its inception, testified that he had had an opportunity to compare the attorney's fees claimed by DDR and the attorney's fees incurred by Rector. Believing that DDR and Rector would have put the same amount of time and effort into the case, Rector's counsel had asked his secretary to add up his time in the case. According to Rector's counsel, DDR's attorney's fees were approximately four times the amount of Rector's attorney's fees, despite the fact that his rate was double the rate charged by DDR's counsel. Rector's counsel went on to explain that this was a very straightforward case with "really no factual controversy" and that there were only two legal issues presented: the significance of DDR's letter stating that the default was cured and the extent to which Rector was entitled to a credit for the increased rental by the replacement tenant. We conclude that the record establishes a lack of unfair

surprise or unfair prejudice to Rector. Not only does the record show that DDR effectively supplemented its disclosure, it also shows that Rector's counsel was prepared to cross-examine Muller and to argue effectively against the attorney's fees claimed by DDR.

Because the record establishes Rector's lack of unfair surprise or unfair prejudice, we conclude that the trial court abused its discretion in excluding Muller's testimony on DDR's attorney's fees. *See Target*, 194 S.W.3d at 50-51 (concluding that the trial court abused its discretion in excluding expert testimony because of untimely discovery supplementation when the record showed no unfair surprise or unfair prejudice); *Elliott v. Elliott*, 21 S.W.3d 913, 921 (Tex. App.—Fort Worth 2000, pet denied) (holding that the trial court abused its discretion in excluding expert witnesses' testimony when the pleadings provided notice and the experts were listed in another discovery response); *see also Tex. Mun. League Intergovernmental Risk Pool. v. Burns*, 209 S.W.3d 806, 817-18 (Tex. App.—Fort Worth 2006, no pet.) (holding that the failure to disclose attorney's billing records in response to request for disclosure did not render related testimony inadmissible under rule 193.6 when billing information was produced in attachments to attorney's fees motions filed prior to trial).

Rector cites a single case, *Morales v. Rice*, 388 S.W.3d 376, 386 (Tex. App.—El Paso 2012, no pet.), to support its argument that the trial court properly excluded Muller's testimony. *Morales* is distinguishable. In *Morales*, the appellate court held that the trial court abused its discretion when it allowed attorney's fees testimony by a witness even though the litigant had failed to disclose the basis of the attorney's testimony by producing supporting documents in response to requests for disclosure. *Id*. Unlike the present case, in *Morales*, the litigant wholly failed to produce any billing statements or documents related to its legal fees prior to trial. *Id*.

We conclude that the trial court abused its discretion in excluding Muller's testimony and that DDR was harmed by the error. *See* TEX. R. APP. P. 44.1(a)(1); *Frazin v. Hanley*, 130 S.W.3d

373, 378 (Tex. App.—Dallas 2004, no pet.) (concluding that error in excluding attorney's fees expert testimony was necessarily harmful because it was the only evidence to dispute the opposing party's calculation of damages and attorney's fees). We sustain DDR's second issue.

CONCLUSION

We reverse the portion of the judgment denying DDR's request for attorney's fees and remand this case to the trial court for a new trial on DDR's request for attorney's fees. *See* TEX. R. APP. P. 44.1(a)(2). We affirm the judgment in all other respects.

Karen Angelini, Justice