Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-17-00229-CV

Malcolm C. **HALBARDIER**,
Appellant

v.

Arthur **PEREZ**,
Appellee

From the County Court at Law No. 3, Bexar County, Texas
Trial Court No. 2016CV07203
Honorable David J. Rodriguez, Judge Presiding

Opinion by: Irene Rios, Justice

Sitting: Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice
Irene Rios, Justice

Delivered and Filed: April 25, 2018

AFFIRMED

Malcolm Halbardier sued his neighbor, Arthur Perez, seeking to recover half the cost of replacing ninety feet of fence that divides their properties. In four issues on appeal, Halbardier contends the trial court erred by failing to file findings of fact and conclusions of law and rendering a take nothing judgment on his claims for breach of contract, promissory estoppel, and quantum meruit. We affirm the judgment of the trial court.

BACKGROUND

Halbardier contracted with Quality Fence & Welding ("Quality Fence") to replace the fence enclosing his backyard. Halbardier asked Perez, his next-door neighbor, to split the cost of replacing the portion of fence shared by Halbardier and Perez. Perez agreed to pay half the cost of replacing the fence, i.e., $720. The parties agreed Perez would pay Quality Fence directly.

The length of the entire fence dividing the parties' properties is one hundred feet. The length of the fence to Halbardier's return[1] is ninety feet, and the fence extends another ten feet to Perez's return. Quality Fence's employees replaced ninety feet of fence dividing the parties' properties up to the point of Halbardier's return. However, they did not replace the portion of the fence dividing the parties' properties between Halbardier's return and Perez's return. When Perez noticed that Quality Fence's employees did not replace the entire one hundred feet of fence, he complained to Halbardier. Halbardier and Perez then approached Quality Fence's employees and asked why they did not replace the entire fence. Quality Fence's employees explained Halbardier's contract with Quality Fence called for the replacement of only ninety feet of the fence, i.e., up to Halbardier's return. Perez did not remit any payment to Quality Fence, and Halbardier paid the entire cost of the fence.

Halbardier sued Perez for breach of contract, promissory estoppel, and quantum meruit, alleging Perez owed him $720. During the bench trial, Perez testified the agreement was to split the cost of replacing the entire fence dividing the parties' properties, up to Perez's return. Halbardier testified the agreement was to split the cost of only ninety feet of fence, up to Halbardier's return. Halbardier further testified that when he and Perez entered into the agreement, he showed Perez a diagram indicating that only ninety feet of the fence would be replaced. The

[1] The parties use the term "return" to refer to the point at which the fence enclosure turns toward the house.

trial court admitted the diagram into evidence. The trial court entered a judgment that Halbardier take nothing on each of his claims.

Halbardier timely filed a request with the trial court for findings of fact and conclusions of law. When the trial court failed to file any findings and conclusions, Halbardier timely filed a notice of past due findings. The trial court did not file findings of fact or conclusions of law.

This appeal followed.

STANDARD OF REVIEW

If the trial court fails to file findings of fact and conclusions of law in response to a proper and timely request, we must presume the trial court made all the findings necessary to support the judgment. *Ad Villarai, LLC v. Chan Il Pak*, 519 S.W.3d 132, 135 (Tex. 2017) (per curiam). However, where the appellate record includes the reporter's and clerk's records, the trial court's implied findings are not conclusive and may be challenged for legal and factual sufficiency. *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002). We will affirm the trial court's judgment on any legal theory that finds support in the evidence. *Exterior Bldg. Supply, Inc. v. Bank of Am., N.A.*, 270 S.W.3d 769, 772 (Tex. App.—Dallas 2008, no pet.).

When a party challenges the legal sufficiency of an adverse finding on an issue on which he has the burden of proof, he must demonstrate on appeal that the evidence conclusively established all vital facts in his favor as a matter of law. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001) (per curiam). We first examine the record for evidence to support the finding. *Id.* "If there is no evidence to support the finding, [we] then examine the entire record to determine if the contrary position is established as a matter of law. *Id.* We indulge every reasonable inference to support the judgment, crediting favorable evidence if a reasonable factfinder could and disregarding contrary evidence unless a reasonable factfinder could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 822, 827 (Tex. 2005).

"When a party attacks the factual sufficiency of an adverse finding on an issue on which [he] has the burden of proof, [he] must demonstrate on appeal that the adverse finding is against the great weight and preponderance of the evidence." *Dow Chem.*, 46 S.W.3d at 242. We "must consider and weigh all the evidence." *Id.* We will set aside the judgment only if the evidence supporting the trial court's finding is so weak or if the trial court's finding is "so against the great weight and preponderance of the evidence that it is clearly wrong and unjust." *Id.*

BREACH OF CONTRACT

In his first issue, Halbardier contends the trial court erred by rendering a take nothing judgment on his breach of contract claim.

"To create an enforceable contract, there must be (1) an offer, (2) acceptance in strict compliance with the terms of the offer, (3) a meeting of the minds, (4) each party's consent to the terms, and (5) execution and delivery of the contract with the intent that it be mutual and binding." *2001 Trinity Fund, LLC v. Carrizo Oil & Gas, Inc.*, 393 S.W.3d 442, 449 (Tex. App.—Houston [14th Dist.] 2012, pet. denied). "'Meeting of the minds' describes the mutual understanding and assent to the agreement regarding the subject matter and the essential terms of the contract." *Id.* "Mutual assent concerning material, essential terms is a prerequisite to formation of a binding contract." *Id.* Terms that the parties "would reasonably regard as vitally important elements of their bargain" are essential or material terms. *Kanan v. Plantation Homeowner's Ass'n, Inc.*, 407 S.W.3d 320, 330 (Tex. App.—Corpus Christi 2013, no pet.) (citations omitted). To determine whether there was a "meeting of the minds" regarding the subject matter and essential terms, we "use an objective standard, considering what the parties did and said, not their subjective states of mind." *Komet v. Graves*, 40 S.W.3d 596, 601 (Tex. App.—San Antonio 2001, no pet.).

In this case, the record shows there was a lack of mutual assent between the parties regarding an essential term of the alleged contract; to wit, how much of the fence would be

replaced. According to Halbardier, the agreement was to replace only ninety feet of the fence, up to Halbardier's return. Halbardier testified he showed Perez a diagram indicating only ninety feet of the fence dividing the parties' properties would be replaced. Perez, however, testified the agreement was to replace the entire fence along the parties' shared property line. Perez also testified that when he noticed that Quality Fence's employees did not replace the entire one hundred feet of fence, he immediately complained to Halbardier and asked the employees why they did not complete the fence. Thus, in light of the parties' conduct and statements, we conclude the evidence was legally and factually sufficient to support a finding by the trial court that there was no meeting of the minds regarding how much of the fence was to be replaced. *See Parker Drilling Co. v. Romfor Supply Co.*, 316 S.W.3d 68, 77 (Tex. App.—Houston [14th Dist.] 2010, pet. denied) (finding that, upon "reviewing the parties' communications, acts, and circumstances surrounding the communications, . . . there was no meeting of the minds" regarding the essential terms of an alleged contract). Thus, no contract existed between Halbardier and Perez. We overrule Halbardier's first issue.

PROMISSORY ESTOPPEL

In his second issue, Halbardier contends the trial court erred by rendering a take nothing judgment on his promissory estoppel claim.

Generally, promissory estoppel is a viable alternative to a breach of contract action where the promise at issue is not covered by a valid contract between the parties. *Trevino & Assocs. Mech., L.P. v. Frost Nat. Bank*, 400 S.W.3d 139, 146 (Tex. App.—Dallas 2013, no pet.). The elements of promissory estoppel are: "(1) a promise, (2) foreseeability of reliance thereon by the promisor, and (3) substantial reliance by the promisee to his detriment." *English v. Fischer*, 660 S.W.2d 521, 524 (Tex. 1983). To satisfy the element of detrimental reliance, the plaintiff must show that he changed his position in reliance on the promise. *See id.* (finding no promissory

estoppel where plaintiff could not show he would not have taken his detrimental actions if defendant had not made the promise); *Trevino & Assocs. Mech., L.P.*, 400 S.W.3d at 147 (finding no promissory estoppel where plaintiff failed to show it would not have continued to deposit money into its bank account if defendant had not promised to renew or extend the loan agreement).

Halbardier presented no evidence to the trial court that he would not have contracted with Quality Fence to replace the fence enclosing his backyard if Perez had not promised to split the cost of replacing their shared portion of the fence. Thus, Halbardier failed to show that he changed his position in reliance on Perez's promise to share the cost of replacing the fence dividing their properties. *See English*, 660 S.W.2d at 524. We conclude the evidence was legally and factually sufficient to support a finding by the trial court that there was no detrimental reliance by Halbardier, and thus no viable claim of promissory estoppel. We overrule Halbardier's second issue.

QUANTUM MERUIT

In his third issue, Halbardier contends the trial court erred by rendering a take nothing judgment on his quantum meruit claim.

> A plaintiff seeking to recover under quantum meruit must prove that:
>
> 1) valuable services were rendered or materials furnished;
> 2) for the person sought to be charged;
> 3) which services and materials were accepted by the person sought to be charged, used and enjoyed by him;
> 4) under such circumstances as reasonably notified the person sought to be charged that the plaintiff in performing such services was expecting to be paid by the person sought to be charged.

Vortt Expl. Co. v. Chevron U.S.A., Inc., 787 S.W.2d 942, 944 (Tex. 1990). "To recover in quantum meruit, the plaintiff must show that his efforts were undertaken *for* the person sought to be charged; it is not enough to merely show that his efforts benefitted the defendant." *Truly v. Austin*, 744 S.W.2d 934, 937 (Tex. 1988) (emphasis in original).

The record shows Perez received valuable services and materials—namely, the replacement of ninety feet of fence. However, it was not Halbardier who replaced the fence, but Quality Fence per its contract with Halbardier. The record contains no evidence that Halbardier rendered any services or furnished any materials to Perez for Perez's benefit. To the extent that Halbardier argues he furnished a service to Perez by contracting with Quality Fence to replace their shared fence, the record indicates Halbardier's sole purpose in contracting with Quality Fence was to benefit himself by replacing the fence enclosing his own backyard. The most that Halbardier proved at trial was that his efforts to replace his own fence incidentally benefited Perez, which is insufficient to allow a plaintiff to recover under quantum meruit. *See id.* (developer could not recover under quantum meruit where developer rendered services to benefit his own financial interests, rather than to directly benefit defendants). Thus, we conclude the evidence was legally and factually sufficient to support the trial court's judgment that Halbardier was not entitled to recover under quantum meruit. We overrule Halbardier's third issue.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In his fourth issue, Halbardier contends the trial court's failure to file findings of fact and conclusions of law was harmful error because it forces him to guess at the trial court's reasons for its decision and prevents him from making a proper presentation of his appeal.

"In any case tried in the district or county court without a jury, any party may request the court to state in writing its findings of fact and conclusions of law." TEX. R. CIV. P. 296. The party must file its request within twenty days after the trial court signs the judgment, and the court clerk "shall immediately" bring the request "to the attention of the judge who tried the case." *Id.* The trial court must file its findings and conclusions within twenty days of the timely request. TEX. R. CIV. P. 297. If the trial court fails to file findings and conclusions within twenty days, the requesting party "shall" file a notice of past due findings within thirty days after filing the initial

request. *Id.* A timely past-due notice extends the judge's deadline to forty days from the party's initial request. *Id.*

"[W]hen a party makes a proper and timely request for findings of fact and conclusions of law and the trial court fails to comply, harm is presumed unless the record affirmatively shows that the requesting party was not harmed by their absence." *Haut v. Green Café Management, Inc.*, 376 S.W.3d 171, 182 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (citing *Tenery v. Tenery*, 932 S.W.2d 29, 30 (Tex. 1996) (per curiam)). The trial court's failure to file findings of fact and conclusions of law is harmful error if it prevents an appellant from properly presenting his case to the appellate court. *Tenery*, 932 S.W.2d at 30. However, the trial court's failure to file written findings of fact and conclusions of law is not harmful error if the record before us affirmatively shows that the complaining party suffered no injury. *Id.*; *Estate of Hernandez*, No. 04-14-00046-CV, 2014 WL 7439713, at *4 (Tex. App.—San Antonio Dec. 31, 2014, pet. denied) (mem. op.).

In this case, the record affirmatively shows Halbardier was not harmed by the trial court's failure to make the requested findings of fact and conclusions of law. The evidence presented at trial was neither lengthy nor complicated. Moreover, Halbardier was able to brief all of the relevant issues and does not identify any issue that he was unable to brief as a result of the trial court's failure to file written findings and conclusions. *See Rumscheidt v. Rumscheidt*, 362 S.W.3d 661, 665–66 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (concluding appellant was not harmed by the trial court's failure to file findings and conclusions where the evidence was neither lengthy nor complicated, appellant was able to brief all relevant issues, and appellant did not identify any issue he was unable to brief due to the trial court's failure to file findings and conclusions). We overrule Halbardier's fourth issue.

Conclusion

For the foregoing reasons, we affirm the judgment of the trial court.

Irene Rios, Justice