Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-19-00447-CV

Reynaldo **GARZA**, Individually and d/b/a Crown Duty Free, Gerardo Garza, Crown Duty Free, LLC, and Crown Duty Free, Inc.,
Appellants

v.

VOLTRAN DUTY FREE, LTD.,
Appellee

From the 341st Judicial District Court, Webb County, Texas
Trial Court No. 2018CVH000767-D3
Honorable Rebecca Ramirez Palomo, Judge Presiding

Opinion by: Luz Elena D. Chapa, Justice

Sitting: Rebeca C. Martinez, Chief Justice
Luz Elena D. Chapa, Justice
Beth Watkins, Justice

Delivered and Filed: June 16, 2021

AFFIRMED

This is an appeal from a judgment in favor of the plaintiff, Voltran Duty Free, Ltd., in its suit against appellants, Reynaldo Garza, Gerardo Garza, Crown Duty Free, LLC, and Crown Duty Free, Inc. (collectively, "the Garzas"), for breach of a settlement agreement. Appellants seek to overturn the judgment, arguing the trial court abused its discretion in imposing "death penalty" discovery sanctions against them and in denying their motion for continuance. We affirm the judgment.

BACKGROUND

This litigation arose from the 2017 settlement of a previous lawsuit between the parties. The basic terms of the settlement agreement required the Garzas to pay Voltran $5,000 and to deliver 200 cases of whiskey and 190 cases of cigarettes to Voltran in Belize. The Garzas were responsible for shipping and payment of freight. In April 2018, Voltran filed this suit, alleging the two cargo containers the Garzas sent were rejected by Belize customs because of irregularities in the shipping documents and obvious tampering with some of the product. Voltran alleged it never received the whiskey and cigarettes and sued for breach of contract, quantum meruit, fraud and fraudulent inducement, and unjust enrichment. The Garzas answered, pled various defenses, and asserted a counterclaim for negligence.

Voltran's petition included a request for disclosure pursuant to Texas Rule of Civil Procedure 194.2. In addition, Voltran propounded interrogatories and requests for production upon each of the defendants. The Garzas' disclosures were due July 10, 2018, and their discovery responses were due August 10, 2018. At the request of the Garzas' counsel, Voltran agreed to extend the deadline to provide responses until August 17. The Garzas did not provide any disclosures or discovery responses, and on September 4, Voltran filed a motion to compel discovery and for sanctions. At the October 22 hearing on the motion, the Garzas agreed to provide complete responses without objections by 5:00 p.m. on October 29. The trial court signed an order requiring them to make disclosures by October 27 and to fully respond, without objections, to the discovery requests by October 29. However, the court withheld ordering monetary sanctions and did not award attorney's fees. Also on October 22, the trial court and counsel signed an agreed scheduling order that set the case for a bench trial on April 15, 2019.

The Garzas did not comply with the court's order compelling disclosures and discovery, and they did not respond to a reminder letter Voltran's counsel sent after the deadline had passed.

Voltran then filed a motion to enforce the court's previous order and sought sanctions, alleging the court's previous order had been ineffective and the Garzas' conduct was egregious and justified a presumption their defenses and counterclaim lacked merit. Voltran sought numerous sanctions, including disallowing further discovery, striking the Garzas' pleadings, granting a default judgment, and monetary sanctions, including attorney's fees.

The record reflects the Garzas received timely notice of the motion to enforce and of the hearing on the motion. Nevertheless, they did not serve their disclosures or responses to discovery requests, they did not file a response to the motion, and they did not appear at the December 10, 2018 hearing on the motion. The trial court granted the motion to enforce and again ordered the Garzas to fully respond to the discovery requests by 5:00 p.m. on December 13, 2018. In addition, the court's December 10, 2018 order granted sanctions that disallowed the Garzas from conducting further discovery, charged the expenses of discovery to the Garzas, ruled that unproduced discovery matters would be taken as established, struck the Garzas' pleadings, and awarded attorney's fees.[1] However, the court denied Voltran's requests for a default judgment and dismissal of the counterclaim.

The Garzas did not comply with the trial court's enforcement order or file a motion for extension of time to respond. Nor did they file a motion to reconsider the sanctions before the pleading and discovery deadline passed. However, on December 18, 2018, they provided discovery responses. The Garzas never responded to Voltran's request for disclosures.

On the Wednesday before the Monday, April 15, 2019 trial setting, the Garzas filed a motion for continuance, asserting counsel had two settings that conflicted with the April 15 trial.

[1] The order further stated the court would "refuse to allow Defendants to support or oppose designated claims or defenses or prohibit Defendants from introducing designated matters in evidence." However, no claims, defenses, or evidence subject to the order were ever designated.

The following day, they filed a supplemental motion, seeking a continuance of the trial so that defendant Reynaldo Garza could recover from eye surgery. The motion stated Reynaldo had surgery to regain some of his vision damaged by diabetes and that, as of April 9, Reynaldo was required to lie face down fifty percent of the day. Attached to the motion were uncertified copies of medical records, including a summary of an April 9 visit following surgery on one eye, which stated Reynaldo was doing well and recommended that he not engage in strenuous activity or air travel and that he lie face down fifty percent of the day. The motion was verified by counsel but was not supported by affidavit. At 7:00 p.m. on April 12, the Friday before trial, the Garzas filed a motion to reconsider the December 10, 2018 discovery enforcement order.

The trial court took up the Garzas' motions on the morning of trial, April 15. The court denied the first motion for continuance and heard arguments on the motion based on Reynaldo Garza's medical condition. The Garzas' attorney argued that, although there are four defendants, Reynaldo is the principal owner of both businesses and is the person with knowledge of defendants' compliance with the settlement agreement. Counsel argued the case should not take more than an hour to try and could be rescheduled after Reynaldo was recovered. Counsel volunteered he would have no objection to Voltran's representative, who travelled from Honduras, appearing by telephone or videoconference at a future setting. Relying on the medical records that stated Reynaldo needed to be face down certain hours of the day, counsel advised the court he was seeking a continuance of three to four weeks so Reynaldo could recover. However, Garza's son, who was present in the courtroom, advised the court Reynaldo would have another surgery in a few weeks.

The trial court stated that because the case would only take an hour to try, it would attempt to accommodate Reynaldo's recovery schedule. The court gave the parties a choice of proceeding either that afternoon or the following morning and stated Reynaldo could appear when he was able

and the court would hear his testimony out of turn if necessary. The court denied the motion for continuance, and both parties stated they preferred to proceed that afternoon.

The court then took up the motion to reconsider the enforcement order. Voltran objected to consideration of the motion because the motion was untimely, had not been set for hearing and was not served three days prior to trial. The Garzas argued the "death penalty" sanctions in the order were not warranted because the Garzas did not engage in any egregious conduct that justified a presumption their case lacked merit; they were simply late in serving their discovery responses. They also argued the sanctions could not be imposed because the court did not try lesser sanctions first. Finally they asserted Voltran was not harmed because the discovery responses were ultimately provided. The court took the motion under advisement and adjourned until 1:30 p.m.

When the court reconvened for trial, the Garzas' attorney advised the court Reynaldo could not personally appear that afternoon, but he was available by telephone and his testimony would probably take less than ten minutes. Over Voltran's objection, the court ruled Reynaldo could appear and testify by telephone. After further argument regarding the enforcement order, the court ruled it would "retract the death penalty sanctions" and "allow the general denial to stand." The court later reaffirmed the Garzas' "answer stands." Neither party requested any further clarification of the court's ruling.

The case proceeded to trial. After Voltran rested, the trial court granted the Garzas' motion for directed verdict on Voltran's claims for unjust enrichment and to pierce the corporate veil. The court denied the Garzas' motion as to Voltran's fraud claim and deferred a decision on the Garzas' argument that Voltran was not entitled to an award of attorney's fees because there was no evidence of presentment. Reynaldo, who testified by telephone, was the only witness called by the defense. The Garzas presented and argued some of their pleaded defenses, but did not ask for a decision on their counterclaim.

At the conclusion of trial, the court denied a renewed motion for directed verdict and ruled in favor of Voltran on its breach of contract claim. The court requested legal memoranda on the issue of attorney's fees, and subsequently rendered judgment for Voltran in the amount of $148,960 for breach of contract and $19,250 for attorney's fees.

The Garzas appeal, complaining about the trial court's imposition of "death penalty" sanctions, the court's "vague" and "inconsistently enforced" order partially withdrawing its sanctions order, and the court's denial of their supplemental motion for continuance.

DISCUSSION

Points of Error One and Two: Imposition, Withdrawal, and Enforcement of Death Penalty Sanctions

In their first point of error, the Garzas argue the trial court abused its discretion in granting "death penalty" sanctions as part of the December 2018 enforcement order. They complain the trial court struck their pleadings based on "the mere fact that discovery had not been timely answered." They argue the trial court erred because the Garzas' conduct was not egregious and the record does not reflect the trial court considered lesser sanctions before striking their pleadings. *See Cire v. Cummings*, 134 S.W.3d 835, 840-41 (Tex. 2004). Voltran argues the trial court tried lesser sanctions first, the Garzas' conduct was egregious, and the sanctions were just.

Initially, we question whether the Garzas waived this complaint by failing to timely urge it in the trial court. *See* TEX. R. APP. P. 33.1 (to preserve error for appeal, party must urge timely request, objection, or motion); *Hoxie Implement Co. v. Baker*, 65 S.W.3d 140, 152 (Tex. App.—Amarillo 2001, pet. denied) (an objection is timely when asserted at earliest opportunity or when potential error becomes apparent). They did not respond to the motion that expressly sought death penalty sanctions, did not appear at the noticed hearing to object to the requested sanctions, and did not promptly file a motion raising their complaints after the trial court rendered the sanctions

order. They raised their objections on the eve of trial—four months after the order was signed, after the discovery deadline, and after the pleading amendment deadline.

However, on the record before us, we are not required to decide whether the trial court abused its discretion by imposing "death penalty" sanctions in its December 2018 order or whether the motion to reconsider was untimely because the trial court granted the Garzas' motion to reconsider. The court withdrew the "death penalty" sanctions, thus effectively reinstating the Garzas' pleadings, before the presentation of the evidence. The Garzas received the relief they requested in the trial court. In their brief, the Garzas assert the trial court's December 2018 "death penalty" sanctions nevertheless prevented them from presenting their own evidence and calling witnesses. The record does not reflect that the trial court precluded the Garzas from presenting any witness or evidence on the basis of the "death penalty" sanctions. Moreover, assuming the court erroneously prevented them from presenting evidence, the record fails to show harm that would authorize a reversal. *See* TEX. R. APP. P. 44.1(a)(1). The Garzas did not make an offer of proof or file a bill of exceptions regarding any testimony or evidence they were allegedly precluded from offering in support of their position and thus failed to preserve any error. *See* TEX. R. EVID. 103(a)(2); TEX. R. APP. P. 33.2; *Katy Int'l, Inc. v. Jiang*, 451 S.W.3d 74, 95-96 (Tex. App.—Houston [14th Dist.] 2014, pet. denied); *Nelson v. Duesler*, No. 09-09-00288-CV, 2010 WL 1796098, at *2-3 (Tex. App.—Beaumont May 6, 2010, no pet.) (mem. op.).

In their second point of error, the Garzas contend the trial court's oral order retracting the "death penalty" sanctions was "fatally vague" and that the trial court "was inconsistent with its application of its withdrawal order during the trial." They assert this led to them "being thwarted from providing crucial evidence that would have changed the outcome of the proceedings."

The trial court expressly "retract[ed] the death penalty sanctions." The plain meaning of this order is that the Garzas' pleadings that had been stricken in the enforcement order were

reinstated. *See Cire*, 134 S.W.3d at 841 ("death penalty" sanctions are those that effectively adjudicate the merits of a party's claims or defenses). The court's further statements that the court would "allow the general denial to stand" and that the Garzas' "answer stands" could have caused some confusion about whether the Garzas' affirmative and verified defenses and their counterclaim had been reinstated. But the Garzas did not ask the trial court to clarify its order or object that the order was unclear; thus, any complaint the ruling was unclear was waived. *See* TEX. R. APP. P. 33.1. Moreover, the record does not support that any confusion about the ruling caused reversible error. The court did not inconsistently apply the ruling, and the court did not preclude the Garzas from presenting or proffering any evidence on their defenses or counterclaim.

To support their assertion that the court inconsistently applied the ruling, the Garzas cite to a number of Voltran's objections to evidence. However, only one of those objections was sustained on the basis of the sanctions, and it was not one of the "death penalty" sanctions. In that instance, the Garzas' counsel was cross-examining Voltran's representative and the witness testified he had some photographs on his telephone. When counsel asked the witness to find and produce the photographs, Voltran objected that counsel was trying to obtain discovery from the witness on the stand and the enforcement order disallowed the Garzas from conducting further discovery. The trial court sustained the objection. The part of the December 2018 order that disallowed further discovery was not a "death penalty" sanction, was not withdrawn by the trial court, and neither the sanction nor the trial court's ruling on the objection are challenged in this appeal.

The Garzas do not point to any trial court ruling that prevented them from presenting evidence on the basis of the "death penalty" sanctions. In each of the other allegedly inconsistent evidentiary rulings to which the Garzas cite, the trial court either expressly ruled on another ground (e.g., speculation, hearsay, failure to lay proper foundation), overruled the objection and allowed the evidence, or did not rule at all. The Garzas' assertion that they were "thwarted from providing

crucial evidence" is not borne out by the record. The court did not exclude any evidence on the ground the Garzas could not present evidence in support of a defense or counterclaim. The Garzas were not precluded from calling any witness. Reynaldo testified for the defense, and the Garzas did not attempt to call any other witness. The Garzas presented evidence on and argued some of their defenses, which the trial court considered. They did not argue their counterclaim. Had they desired to present more evidence or witnesses in support of their defenses or counterclaim, they should have attempted to introduce the evidence and, had the trial court precluded it, created a record of the excluded material so this court could have reviewed its admissibility. None of this occurred. Therefore, nothing is preserved for our review. *See Katy Int'l*, 451 S.W.3d at 95-96; *Nelson*, 2010 WL 1796098, at *2-3.

The Garzas' first and second points of error are overruled.

Points of Error Three and Four: Denial of the Supplemental Motion for Continuance

In their third and fourth points of error, the Garzas argue the trial court abused its discretion in denying their supplemental motion for continuance. They contend the trial court erred because Reynaldo was physically and mentally unable to undertake his defense and because preventing him from testifying in person denied the Garzas due process.

We will not disturb a trial court's denial of a motion for continuance unless appellants show the trial court has committed a clear abuse of discretion. *Vickery v. Vickery*, 999 S.W.2d 342, 363 (Tex. 1999). To obtain a reversal, appellants must also show prejudice resulting from denial of the motion. *Id.*

"The mere absence of a party does not entitle him to a continuance." *Id.* When the ground of the motion is that a party's presence is essential for his attorney to adequately represent him, the motion must explain why. *See id.* When the contention is that the party's presence is required so he may testify, the motion must be supported by affidavit showing the matters to which he will

testify, the materiality of the testimony, and diligence used to procure the testimony. TEX. R. CIV. P. 252; *Vickery*, 999 S.W.2d at 363. In addition, if the testimony is available by other means, such as by deposition, movant must show why presentation of the testimony by other means is insufficient. *Vickery*, 999 S.W.2d at 363. When the party's absence is allegedly due to health issues, the trial court does not abuse its discretion in denying a motion for continuance in the absence of "a supporting affidavit from medical personnel stating it was impossible, from a medical standpoint, for the party to appear in court or that it would endanger the party's health to appear in court." *Keenan v. Keenan*, No. 04-04-00240-CV, 2005 WL 471186, at *1 (Tex. App.—San Antonio Mar. 2, 2005, no pet.) (mem. op.); *see Hawthorne v. Guenther*, 917 S.W.2d 924, 930 (Tex. App.—Beaumont 1996, writ denied); *Olivares v. State*, 693 S.W.2d 486, 490 (Tex. App.—San Antonio 1985, writ dism'd).

The Garzas' supplemental motion for continuance was verified by counsel and stated that Reynaldo was recovering from surgery to regain his eyesight. It stated Reynaldo was under medical supervision and his recovery plan required that he lay face down fifty percent of the time. The motion generally referred to sixty pages of attached uncertified medical records. One of the records, dated six days before trial, was a summary of a visit following surgery on one eye. The record stated Reynaldo was doing well and he reported vision in his other eye was improving. It further stated Reynaldo was advised not to engage in strenuous activity or air travel[2] and recommended that he lie face down fifty percent of the day for a week and sleep on his right side. The motion sought a continuance until Reynaldo completed his recovery, but did not state that he was unable to appear or testify and did not assert that his presence at trial was required or necessary to present the defense. No medical affidavit was attached.

[2] The record reflects Reynaldo resides in Laredo, where the trial was held; thus, air travel would not be necessary.

When the motion was argued, counsel stated that Reynaldo's testimony was required because he was the "main owner" of the two business defendants and the person who dealt with "this situation," and counsel gave a brief summary of Reynaldo's anticipated testimony. However, counsel did not provide any medical evidence regarding why Reynaldo could not appear for the one-hour trial or for the ten minutes it was estimated his testimony would take. The trial court attempted to accommodate Reynaldo's recommended recovery schedule by giving the Garzas the option of trying the case either that afternoon or the next morning so that he could attend. The court also stated it would hear Reynaldo's testimony out of order if needed. Counsel advised the court he preferred to proceed that afternoon. When court reconvened that afternoon, counsel advised the court, "my client can't make it today but he's available on phone." Over Voltran's objection, the court granted the request that Reynaldo be allowed to testify by telephone.

The Garzas did not meet their burden for obtaining a continuance and have not shown prejudice from the denial of the motion. They did not present a medical affidavit or other evidence stating that Reynaldo's presence at trial would endanger his health, and they did not show he was medically prevented from appearing in person for the short trial. *See Olivares*, 693 S.W.2d at 490 (no abuse of discretion to deny continuance based on party's affidavit with no supporting affidavit from medical personnel that states appearance in court would endanger party's health). The Garzas did not offer any explanation as to why defendant Gerardo Garza or another representative of the two entity defendants could not be present, testify, or assist with the defense, and did not establish that Reynaldo's physical presence was necessary to present the defense. *See Vickery*, 999 S.W.2d at 363-64 (without a showing of why party's presence in the courtroom was necessary to assist the defense and why deposition testimony was inadequate, there was no showing of prejudice from absence at trial). Finally, the motion did not allege Reynaldo was physically or mentally unable to undertake his defense and no evidence to that effect was presented to the court. Nothing in the

record suggests Reynaldo was unable to meaningfully consult with counsel. He was not questioned about his mental or physical capacity, and his testimony was clear and coherent. The Garzas assert they were prejudiced because Reynaldo's condition made him unable to read documents during his testimony. They point to two instances during cross-examination when Voltran's counsel asked about a document and Reynaldo responded he was not looking at the document. It is unclear from the record whether Reynaldo was physically incapable of seeing the document or simply did not have a copy of the documents in front of him. Nevertheless, the Garzas offer no argument as to how they were prejudiced by Garza's inability to answer those questions. We conclude the Garzas have not shown the trial court abused its discretion by denying the motion for continuance or that they suffered prejudice as a result. We therefore overrule their third point of error.

In their fourth and final point of error, the Garzas contend the trial court's denial of the motion for continuance "denied their right to participate in the proceedings" because the trial court could not properly assess Reynaldo's credibility. We disagree. The trial date for this case was set by agreement six months in advance, and the record contains no explanation of why the three defendants other than Reynaldo did not appear and participate. Further, the trial court did not deny Reynaldo the right to participate in the proceeding in person. As discussed above, no showing was made that Reynaldo was medically unable to appear in person. The trial court offered to accommodate Reynaldo's recovery schedule so he could testify in person. Nevertheless, he did not appear, and the trial court granted the Garzas' request that he be allowed to testify by telephone. Other than to generally state that "the trial court could not properly judge the credibility of the litigants," the Garzas do not provide any argument as to why hearing Reynaldo's testimony by telephone was a violation of due process. We therefore overrule the Garzas' fourth point of error. *See Hawthorne*, 917 S.W.2d at 930 (no abuse of discretion to deny motion for continuance when party's deposition testimony was available for trial and "it cannot be said [party] had no

opportunity to present her side of the case"); *Jones v. John's Community Hosp.*, 624 S.W.2d 330, 332-33 (Tex. App.—Waco 1981, no pet.) (when plaintiff's testimony was all available by deposition, no showing of prejudice by denying continuance requested on ground of poor health that allegedly made plaintiff unavailable).

CONCLUSION

For the reasons discussed, we overrule the appellants' points of error and affirm the trial court's judgment.

Luz Elena D. Chapa, Justice