COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-15-00053-CV

RAYMAX MANAGEMENT L.P. — APPELLANT

V.

NEW CINGULAR WIRELESS PCS, LLC — APPELLEE

FROM THE 141ST DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 141-272005-14

MEMORANDUM OPINION[1]

In this appeal from a take-nothing judgment based upon a directed verdict, Appellant RayMax Management, L.P., as the landlord under a lease, brings four issues challenging the trial court's ruling that Appellee New Cingular Wireless PCS, LLC, the tenant under the lease, proved as a matter of law that RayMax's

[1]*See* Tex. R. App. P. 47.4.

claim for breach of the lease and past due rents was barred by a settlement agreement. We affirm.

I. Background

In March 1997, Charles Hawkins and Metroplex Telephone Company, doing business as AT&T Wireless Services, entered into a Site Lease Agreement pursuant to which Charles leased real property to Metroplex for the purpose of maintaining a cell phone tower and related equipment. The initial term of the lease was five years, and it was renewable automatically thereafter for five additional five-year terms unless terminated by either party no later than sixty days prior to the end of the term. Charles had previously conveyed the real property upon which the premises were located to RayMax, which he formed with his wife Maxine Hawkins to hold title to properties they purchased. RayMax later ratified the lease.

New Cingular, the successor to Metroplex, mistakenly thought it had terminated the lease at the end of the second five-year term in 2006. But in March 2013, while investigating an email from Maxine[2] about whether a shelter located on the leased premises was an unauthorized encroachment, David Prejean, the chief operating officer of a communications company hired by New Cingular to represent it in real estate matters, discovered that the 2006 termination letter had been sent to the wrong entity. At the time, Prejean

[2]According to Maxine, she handled email matters for Charles.

speculated to New Cingular that back rent on the lease would be due from at least 2009. Prejean and Maxine began corresponding via email in an attempt to resolve the matter. Prejean was also working with New Cingular to determine how much in rent it was willing to pay and whether it wished to abandon the shelter that was on the premises.

In response to an email from Maxine asking about progress on the back rent, Prejean emailed Maxine on July 29, 2013, stating, "Please review the settlement offer from AT&T regarding the abandoned shelter on your property." Attached to the email was an unsigned letter dated June 4, 2013, which read as follows:

> Pursuant to Section 9. Termination of the referenced Site Lease Agreement ("Agreement"), Tenant hereby gives Notice of Termination. The Agreement will terminate as of July 1, 2013 as permitted under Section 9. of the Agreement.
>
> Tenant shall pay to Landlord the lump sum of Twenty Thousand and No/100 Dollars ($20,000.00), which represents settlement for back rent payments for the months of March 1, 2007 through July 1, 2013, to satisfy any and all claims pertaining to the Agreement.
>
> Tenant acknowledges that all of . . . its equipment located in the Premises has been abandoned and is consequently the property of the Landlord.

Maxine responded with an email that stated, "The settlement offer from AT&T looks good and we [are] agreeable. Look forward to hearing back from you."

Two weeks later, Prejean emailed Maxine asking, "Are you suing AT&T over issues at another site?" Maxine emailed back that "we" are suing American

Tower, not AT&T. Prejean did not respond until after Maxine sent another email on August 27, 2013, asking "how the back rent agreement is coming along." Prejean's August 28, 2013 response states,

> It is my understanding that you are in fact suing AT&T on another site so this settlement agreement has gone back to the legal group. I did pass it on that you said you were suing ATC but was told that AT&T was also involved. I'm not sure what is going on at this point.

The next communication in the record is a December 2013 email from the Hawkinses' and RayMax's counsel to New Cingular's counsel:

> [L]et me know if you are the contact as to this matter. [Charles] has asked that we proceed to collect on the $20,000 that was promised as back rent and as referenced in the above letter. If we file suit, as you know we will seek to recover our legal fees. Please advise what is the hold up on this settlement and why it might be tied to the current litigation, if it is.

New Cingular did not pay the $20,000 at that time. On April 29, 2014, Maxine emailed Prejean the following:

> Would you please be so kind to inform me definitively what the delay is on the back rent issue. This was agreed upon in March, 2013, it is now entering May, 2014, over ONE YEAR later. I simply do not understand what the issue is. It has absolutely nothing to do with anything else. Perhaps you can explain it to me.

On May 2, 2014, RayMax's counsel drafted the original petition in this case, alleging that New Cingular had breached the Site Lease Agreement and seeking $74,095.78 in past due rents from November 1, 2006, through February 24, 2007; from March 1, 2007, through March 1, 2012; and from March 1, 2012, through May 1, 2014. The Hawkinses received a check for $20,000

after the suit was filed on May 6, 2014, but they returned it because "[t]his matter could have been resolved over a year ago upon acceptable terms if in fact your company had done what it promised."

In its live pleading at the time of trial, RayMax[3] alleged that New Cingular had breached the Site Lease Agreement and sought $47,808.55 in past due rents from May 2010 through January 2015. In its Second Amended Answer, New Cingular pled the affirmative defense of compromise and settlement. New Cingular also counterclaimed for breach of the settlement agreement based on the return of the tendered settlement check.

The case was tried to a jury. After RayMax presented its case-in-chief and rested, New Cingular moved for a directed verdict based on its compromise and settlement defense, claiming that it had proven as a matter of law that RayMax had agreed to settle its claim for past due rents for $20,000 and that, therefore, the suit was barred by the settlement agreement. The trial court granted New Cingular's motion and dismissed the jury. RayMax filed a motion seeking to vacate the directed verdict and to render a directed verdict in its favor, but the trial court rendered a final judgment on the directed verdict for New Cingular, ordering that RayMax take nothing on its claims against New Cingular and that RayMax pay New Cingular's court costs.

[3]The original petition was filed by Charles as plaintiff, but the pleadings were changed to show RayMax as plaintiff after it ratified the lease in August 2014.

RayMax has appealed, arguing that (1) the settlement agreement is unenforceable because it does not meet the requirements of either rule 11 or section 154.071(a) of the Texas Civil Practice and Remedies Code, or, alternatively, that the requisite conditions to the contract formation did not occur, including that the settlement agreement is missing an essential term—the date of payment, (2) if the settlement agreement is not enforceable, the trial court erred by not granting RayMax's motion for judgment and entering a final judgment in its favor, (3) if the settlement agreement is enforceable, the trial court erred before trial by striking RayMax's supplemental pleadings alleging that New Cingular had breached the settlement agreement, or, alternatively, that the issue was tried by consent, and (4) even if the trial court did not err by rendering a directed verdict, it erred by refusing to modify the judgment from a take-nothing judgment to a judgment for the amount New Cingular had agreed to pay in the settlement.

II. Enforceability of the Settlement Agreement

In its first issue, RayMax challenges the directed verdict on the ground that the alleged settlement agreement is not enforceable for three primary reasons: it does not meet the necessary requirements to form an enforceable contract; it is missing the date of payment, which RayMax claims is an essential term; and it does not meet the requirements of rule 11 or section 154.071(a) of the civil practice and remedies code. *See* Tex. Civ. Prac. & Rem. Code Ann. § 154.071(a) (West 2011); Tex. R. Civ. P. 11. RayMax does not challenge the enforceability of the agreement on any other grounds.

A. Standard of Review

A directed verdict is proper only under limited circumstances: (1) when the evidence is insufficient to raise a material fact issue that must be established before the opponent is entitled to judgment or (2) when the evidence conclusively establishes the right of the movant to judgment or negates the right of the opponent. *See Prudential Ins. Co. of Am. v. Fin. Review Servs., Inc.*, 29 S.W.3d 74, 77 (Tex. 2000); *Farmers Grp. Ins., Inc. v. Poteet*, 434 S.W.3d 316, 331–32 (Tex. App.—Fort Worth 2014, pet. denied). "Stated differently, a directed verdict is warranted when the evidence is such that no other verdict can be rendered and the moving party is entitled, as a matter of law, to judgment." *Knife River Corp.–S. v. Hinojosa*, 438 S.W.3d 625, 631 (Tex. App.—Houston [1st Dist.] 2014, pet. denied).

In reviewing a directed verdict, we follow the standards for assessing legal sufficiency of the evidence. *See City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex. 2005). We review the evidence in the light most favorable to the person suffering the adverse judgment, and we must credit favorable evidence if reasonable jurors could and disregard contrary evidence unless reasonable jurors could not. *Id.* at 827; *see also Exxon Corp. v. Emerald Oil & Gas Co.*, 348 S.W.3d 194, 215 (Tex. 2011) (op. on reh'g).

B. Contract Formation

Within the discussion of its first issue, RayMax raises subissues challenging whether Maxine's and Prejean's July 29, 2013 email exchange

formed a valid, enforceable settlement agreement. RayMax first contends that no binding settlement agreement was formed.

A valid contract requires (1) an offer, (2) an acceptance in strict compliance with the terms of the offer, (3) a meeting of the minds, (4) each party's consent to the essential terms, and (5) execution and delivery of the contract with the intent that it be mutual and binding. *City of the Colony v. N. Tex. Mun. Water Dist.*, 272 S.W.3d 699, 720 (Tex. App.—Fort Worth 2008, pet. dism'd). A meeting of the minds occurs when there is mutual understanding and assent to the subject matter and the essential terms of the contract. *Id.* The determination of whether there is a meeting of the minds, and thus offer and acceptance, is based upon objective standards of what the parties said and did and not on their subjective states of mind. *Id.*

Additionally, a contract is legally binding only when it contains terms which are sufficiently definite to enable a court to understand the parties' intentions. *Fort Worth Indep. Sch. Dist. v. City of Fort Worth*, 22 S.W.3d 831, 846 (Tex. 2000). Essential terms are those that the parties would reasonably regard as vitally important elements of their bargain, an inquiry that depends primarily on the intent of the parties. *McCoy v. Alden Indus., Inc.*, 469 S.W.3d 716, 725 (Tex. App.—Fort Worth 2015, no pet.). Specifically, the agreement must identify a basis for determining the existence of a breach and provide for the appropriate remedy. *E.P. Towne Ctr. Partners, L.P. v. Chopsticks, Inc.*, 242 S.W.3d 117, 122 (Tex. App.—El Paso 2007, no pet.) (op. on reh'g). Whether an agreement

contains all essential terms, and is therefore enforceable, is a question of law. *City of the Colony*, 272 S.W.3d at 720; *McCoy*, 469 S.W.3d at 725. But what terms are essential or material to a particular contract should be determined on an agreement-by-agreement basis. *See T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex. 1992).

RayMax claims that the settlement agreement is unenforceable because there was no offer and no acceptance. Maxine testified that the copy of the settlement agreement attached to Prejean's email to her stated "DRAFT" across it when she received it; RayMax argues that, therefore, the evidence shows that what Prejean sent her was only a draft of a settlement offer rather than an actual offer. However, the copies of the settlement agreement admitted into evidence at trial (some of which were admitted as RayMax's exhibits) do not say "DRAFT" across them. Moreover, Maxine's email response agreeing to the settlement offer did not indicate that she was waiting to be presented with a signed version of the attached document before agreeing. She also testified that she understood that it was a settlement offer. Additionally, Maxine admitted at trial and Charles admitted in his deposition testimony read to the jury at trial that they had accepted the offer and agreed to the settlement agreement.[4]

[4]RayMax also argues that there is no evidence that RayMax agreed to the July 2013 settlement. Charles and RayMax entered into a ratification agreement in August 2014, ratifying and confirming that "Hawkins'[s] interest in and to the Site Lease Agreement was conveyed to RayMax under the RayMax Deed [in 1995], and that as of the date of the RayMax Deed, RayMax became the Landlord under the Lease Agreement accepting all rights and assuming all

RayMax also contends that the settlement agreement was not a valid offer because it lacked all of the essential terms and because the following proposals in the June 4, 2013 email were ambiguous: termination of the lease as of July 1, 2013, the payment of back rent of $20,000, and abandonment of the equipment located on the leased premises. RayMax further argues that there was no meeting of the minds over these terms. RayMax's arguments are partially grounded on the premise that the proposed offer in Prejean's email was not timely under the 90-day termination provision of the lease, was not communicated via the notice provision of the lease, and the attached agreement had DRAFT written across it. But the law does not require that an offer to settle a contract dispute be made in accordance with the contract's terms; the very nature of such an offer is to forgo the contract requirements in favor of a new agreement, and the remedy for the failure to perform the new agreement is a suit for breach. *See Priem v. Shires*, 697 S.W.2d 860, 863 n.3 (Tex. App.—Austin 1985, no writ). *See generally Whitmire v. Nat'l Cutting Horse Ass'n*, No. 02-11-00170-CV, 2012 WL 4815413, at *2–10 (Tex. App.—Fort Worth Oct. 11, 2012, no pet.) (mem. op.); *Qaddura v. Indo-European Foods, Inc.*, 141 S.W.3d 882, 888–91 (Tex. App.—Dallas 2004, pet. denied). Nothing in the lease required any settlement to be entered into in accordance with the lease's terms, and nothing

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obligations thereunder." Additionally, after Charles died in October 2014, Maxine, as executrix of his estate, conveyed Charles's interest in the real property and the Site Lease Agreement to RayMax.

more was required to document the lease's termination, such as a bill of sale for the abandoned fixtures.

Likewise, the contract is not unenforceable for lack of specifying the due date for payment of the $20,000. Numerous Texas courts have held that time of payment is not an essential contract term; thus, in the absence of a defined time of payment, a reasonable time will be implied. *See, e.g.*, *Allegiance Hillview, L.P. v. Range Tex. Prod., LLC*, 347 S.W.3d 855, 869 (Tex. App.—Fort Worth 2011, no pet.) ("'[W]here no time for performance is stated in a contract, the law will imply a reasonable time.'"); *Consumer Portfolio Servs., Inc. v. Obregon*, No. 13-09-00548-CV, 2010 WL 4361765, at *6 (Tex. App.—Corpus Christi Nov. 4, 2010, no pet.) (mem. op.); *Jackson v. Carlson*, No. 03-08-00429-CV, 2009 WL 638848, at *2 (Tex. App.—Austin Mar. 12, 2009, no pet.) (mem. op.) (citing multiple cases); *Atl. Lloyds Ins. Co. v. Butler*, 137 S.W.3d 199, 211–12 (Tex. App.—Houston [1st Dist.] 2004, pet. denied) (op. on reh'g); *Shaw v. Kennedy, Ltd.*, 879 S.W.2d 240, 246 (Tex. App.—Amarillo 1994, no writ) (holding that time of performance is not a material term of an agreement); *see also Fischer v. CTMI, L.L.C.*, 479 S.W.3d 231, 239 (Tex. 2016) ("For example, courts often imply a term setting a reasonable 'time of payment.'"). Maxine's later emails show that she attempted to collect the $20,000 from New Cingular up until April 2014. Nevertheless, even though RayMax claims that the time it took New Cingular to actually tender payment was not reasonable, RayMax did not have a claim for

breach of the settlement agreement pending at the time of trial; thus, what a reasonable time for payment would actually be was not at issue.

Citing *CherCo Props., Inc. v. Law, Snakard & Gambill, P.C.*, 985 S.W.2d 262, 266 (Tex. App.—Fort Worth 1999, no pet.), and *Krueger v. Young*, 406 S.W.2d 751, 756 (Tex. Civ. App.—Eastland 1966, writ ref'd n.r.e.), RayMax contends that "[a] trial court can only imply a term in a settlement agreement if the facts are undisputed." But *CherCo* is not dispositive because it involved a claim for breach of a settlement agreement, which RayMax did not allege. *See CherCo Props.*, 985 S.W.2d at 264–65. And *Krueger* held the missing time for performance was, as a matter of law, fatal for statute of frauds purposes because it was not performable within one year. Thus, *Krueger* is distinguishable on its facts. 406 S.W.2d at 755–56.

RayMax also cites *Davis v. Texas Farm Bureau Insurance*, 470 S.W.3d 97, 104 (Tex. App.—Houston [1st Dist.] 2015, no pet.), for the proposition that "[a] contractual provision dealing with payment is always an essential element or a material term." Here, however, the issue is the absence of such a term, not the construction of the term. Therefore, *Davis* is inapposite.

Finally, RayMax argues that there was no "execution and delivery" of the settlement agreement because neither party signed it. However, Texas law does not require that a contract be signed in order to be executed unless the parties explicitly require signatures as a condition of mutual assent:

> If a written draft of an agreement is prepared, submitted to both parties, and each of them expresses his unconditional assent thereto, there is a written contract. . . . [I]f there is a writing, there need be no signatures unless the parties have made them necessary at the time they express their assent and as a condition modifying that assent. . . . An unsigned agreement all the terms of which are embodied in a writing, unconditionally assented to by both parties, is a written contract.

Simmons & Simmons Constr. Co., Inc. v. Rea, 286 S.W.2d 415, 418 (Tex. 1956) (quoting 1 *Corbin on Contracts* §§ 31–32); *see Mid-Continent Cas. Co. v. Glob. Enercom Mgmt., Inc.*, 323 S.W.3d 151, 157 (Tex. 2010) (recognizing *Simmons*). Here, even though the settlement agreement was unsigned, there is no evidence that either party explicitly required their signatures as a condition of mutual assent; thus, the lack of signatures on the settlement agreement did not render the settlement agreement unenforceable. *But cf. Lujan v. Alorica*, 445 S.W.3d 443, 448–49 (Tex. App.—El Paso 2014, no pet.) (stating that when contract expressly requires a signature prior to it becoming binding, the existence of the instrument is destroyed by the other party's failure to sign the instrument).

Accordingly, we hold that the settlement agreement was not unenforceable for lack of a valid contract formation or a defined payment date.

C. Rule 11 and Section 154.071 of the Civil Practice and Remedies Code

RayMax further argues that the agreement is unenforceable because it does not comply with either rule 11 or section 154.071(a) of the civil practice and remedies code. However, neither applies to this settlement agreement because both govern the enforceability of settlement agreements entered into during the

pendency of litigation. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 154.021 (West 2011) (providing that a court may refer pending dispute for resolution by an alternative dispute resolution procedure), 154.071(a) ("If the parties reach a settlement and execute a written agreement disposing of the dispute, the agreement is enforceable in the same manner as any other written contract."); Tex. R. Civ. P. 11; *Mantas v. Fifth Court of Appeals*, 925 S.W.2d 656, 659 n.2 (Tex. 1996) (noting that section 154.071 "applies specifically to court-ordered alternative dispute resolution"); *Castillo v. Tex. Bd. of Prof'l Eng'rs*, No. 03-10-00124-CV, 2010 WL 5129127, at *4 (Tex. App.—Austin Dec. 14, 2010, no pet.) (mem. op.) (recognizing that rule 11 applies only to settlements reached during pending litigation).

According to RayMax, even though there was no pending litigation regarding this particular lease on the date Maxine agreed to the settlement, rule 11 and section 154.071 should apply because after the settlement was agreed to

> the parties here took their dispute to mediation and agreed to the mediation rules. This dispute could have been included in the suit pending in the 153rd District Court [between Charles and Southern Tower] by amending the suit and New Cingular could have attempted to enforce this agreement in that suit if it could satisfy Rule 11.

In other words, RayMax contends that rule 11 and section 154.071(a) apply to the settlement agreement here even though no suit had yet been filed when it was entered into because the parties voluntarily discussed amounts due for this lease in conjunction with mediation in the suit pending in the 153rd District Court

regarding a different lease and a different defendant.[5] However, RayMax does not cite, nor have we found, any authority indicating that post-settlement agreement discussions, even those occurring during voluntary mediation of a separate dispute, invoke the requirements of either rule 11 or section 154.071 when there is no litigation pending regarding the dispute that was settled. RayMax admitted in its reply brief that "[i]t is correct that there was no litigation pending as to this *this dispute* on that date." Thus, the trial court correctly ruled as a matter of law that the settlement agreement did not fail for lack of compliance with either rule 11 or section 154.071.

We overrule RayMax's first issue. Also, because its second issue is premised upon a ruling in its favor on the enforceability issue, we overrule RayMax's second issue as well.

III. RayMax's Stricken Pleading

RayMax contends in its third issue that the trial court abused its discretion by striking its "First Supplemental Response to Defendant[']s Answers and Counterclaims" that it filed seven days before trial. In its supplemental pleading, RayMax attempted to raise claims that New Cingular breached the settlement agreement first and that New Cingular had committed fraud in withholding the settlement payment. New Cingular objected to the amendment and filed a motion to strike the new pleading, alleging that it raised new claims and defenses

[5]That suit was between Charles and Dallas SMSA Tower Holdings, L.P.

that RayMax could have raised at an earlier time and, thus, that it caused surprise and was prejudicial on its face.[6] On appeal, RayMax only challenges the trial court's striking of its supplemental pleading as to its claim that New Cingular breached the settlement agreement.

In its response to New Cingular's motion and at the hearing on the motion, RayMax's counsel contended that the new pleading was based on newly-discovered information from Prejean's deposition that allegedly showed New Cingular deliberately withheld payment because RayMax had filed the 153rd District Court suit against Southern Tower and a New Cingular representative wanted to mediate both disputes together. New Cingular argued that RayMax's pleadings had always denied the existence or enforceability of a settlement agreement; thus, RayMax's supplemental pleading that a settlement agreement existed and was breached constituted a wholly new claim.

Under the rules of civil procedure, the trial court must allow amendments to pleadings that further presentation of the merits of the action unless the objecting party shows prejudice to that party's action or defense on the merits. Tex. R. Civ. P. 63, 66. In other words, the trial court has no discretion to refuse an amendment unless the opposing party presents evidence of surprise or prejudice or the opposing party objects to an amendment that asserts a new cause of

[6]According to RayMax, at the hearing on New Cingular's motion to strike, New Cingular raised surprise solely as to the fraud defense and not the breach of settlement agreement defense. However, New Cingular had expressly raised surprise as to both claims in its motion to strike, and its arguments regarding surprise specifically referenced both "claims."

action or defense and thus is prejudicial on its face. *Greenhalgh v. Serv. Lloyds Ins. Co.*, 787 S.W.2d 938, 939 (Tex. 1990). The burden of showing prejudice or surprise rests on the party resisting the amendment. *Id.*

We review a trial court's ruling on amended pleadings for an abuse of discretion. *Strange v. HRsmart, Inc.*, 400 S.W.3d 125, 131 (Tex. App.—Dallas 2013, no pet.) (citing *Hardin v. Hardin*, 597 S.W.2d 347, 349–50 (Tex. 1980); *Halmos v. Bombardier Aerospace Corp.*, 314 S.W.3d 606, 622 (Tex. App.—Dallas 2010, no pet.)). A trial court abuses its discretion if the court acts without reference to any guiding rules or principles, that is, if the act is arbitrary or unreasonable. *Low v. Henry*, 221 S.W.3d 609, 614 (Tex. 2007); *Cire v. Cummings*, 134 S.W.3d 835, 838–39 (Tex. 2004). An appellate court cannot conclude that a trial court abused its discretion merely because the appellate court would have ruled differently in the same circumstances. *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 558 (Tex. 1995); *see also Low*, 221 S.W.3d at 620.

RayMax's arguments against striking its pleading all attempted to explain why there was a delay in raising its breach of the settlement agreement claim, but it did not explain why this claim would not be considered a new claim or defense. A consistent denial of the existence of an agreement or the assertion that an agreement is not enforceable does not presume the assertion of the defense that one's breach of the same alleged agreement is excused by the other party's prior material breach. *See* Tex. R. Civ. P. 94 (listing fraud and

statute of frauds, for example, as separate affirmative defenses); *Blackstone Med., Inc. v. Phoenix Surgicals, L.L.C.*, 470 S.W.3d 636, 646 (Tex. App.—Dallas 2015, no pet.) ("The contention that a party to a contract is excused from performance because of a prior material breach by the other contracting party is an affirmative defense that must be affirmatively pleaded."). In fact, the trial court and opposing counsel had pointed out at a November 2014 summary judgment hearing two months before that RayMax did not have any pleadings on file raising a breach of the settlement agreement by New Cingular and discussed that in the absence of such pleadings, RayMax could not recover on such a claim.[7] RayMax's counsel stated at that hearing that he did not think a settlement agreement existed and that if he thought a settlement agreement existed, he would have filed a claim for breach of it. Thus, even though RayMax's supplemental pleading was timely filed, it caused surprise and raised new claims or defenses. *See* Tex. R. Civ. P. 63. As such, it was prejudicial on its face, and therefore, the trial court did not abuse its discretion by striking it.

In the alternative, RayMax argues that it tried the issue of breach of the settlement agreement by consent because both Maxine and Charles testified that they did not agree that the $20,000 could be paid at any time and that they would not have agreed to the settlement had they known that it would take almost a

[7]The trial court stated, "Then he may just lose everything, then. I mean, if he comes into Court and says that -- and I decide there's a settlement agreement, and he doesn't have a claim for breach of that settlement agreement, I don't think he gets anything."

year for New Cingular to pay the settlement amount. But this testimony was relevant to other issues, particularly RayMax's defense that the settlement agreement was not enforceable because it was missing the essential term of date of payment. Consent may be found only when evidence regarding a party's unpled issue is developed under circumstances indicating both parties understood the issue was in the case, and the other party failed to make an appropriate complaint. *In re A.B.H.*, 266 S.W.3d 596, 600 (Tex. App.—Fort Worth 2008, no pet.) (op. on reh'g). Therefore, we hold that the issue was not tried by consent.

Accordingly, we overrule RayMax's third issue.

IV. Take-Nothing Judgment

In its fourth issue, RayMax contends that the trial court erred by failing to render judgment for the $20,000 settlement amount rather than a take-nothing judgment. RayMax claims that if the settlement agreement is valid, the final judgment should incorporate the terms of the settlement agreement, citing *In re K.N.M.*, No. 2-08-308-CV, 2009 WL 2196125, at *8 (Tex. App.—Fort Worth July 23, 2009, no pet.) (mem. op.) (holding that judgment must conform to rule 11 agreement entered into during litigation). Because *K.N.M.* involved the trial court's enforcement of a rule 11 settlement within that same case, it is inapposite. *See id.*

A trial court's judgment must conform to the pleadings. *See* Tex. R. Civ. P. 301. A trial court may not enter judgment on a claim that was not sufficiently pled

or otherwise tried by consent. *See* Tex. R. Civ. P. 67, 301; *Stoner v. Thompson*, 578 S.W.2d 679, 682–83 (Tex. 1979); *Maswoswe v. Nelson*, 327 S.W.3d 889, 894 (Tex. App.—Beaumont 2010, no pet.). As we have pointed out, RayMax had no pleadings on file seeking the settlement amount; instead, it sought only the full amount of back rent that it claims would have been due under the lease in the absence of a settlement agreement. And the case RayMax presented at trial did not seek to recover on the settlement agreement. Accordingly, we hold that the trial court did not err by rendering a take-nothing judgment instead of a judgment for the settlement amount. *See, e.g.*, *In re N.W.*, No. 02-12-00057-CV, 2013 WL 5302716, at *11 (Tex. App.—Fort Worth Sept. 19, 2013, no pet.) (mem. op.) ("The permanent injunction cannot stand in the absence of pleadings requesting that relief, the granting of a trial amendment to add a request for permanent injunction, or trial of the issue by consent."). Thus, we overrule RayMax's fourth issue.

V. Conclusion

Because we have overruled all of RayMax's issues, we affirm the trial court's judgment.

/s/ Anne Gardner
ANNE GARDNER
JUSTICE

PANEL: LIVINGSTON, C.J.; DAUPHINOT and GARDNER, JJ.

DELIVERED: December 15, 2016