



**COURT OF APPEALS  
SECOND DISTRICT OF TEXAS  
FORT WORTH**

**NO. 02-16-00040-CV**

MIGUEL PONCE AND CHRYSTAL  
PONCE

APPELLANTS

V.

JAMES DIAZ JR. AND MARY DIAZ

APPELLEES

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FROM COUNTY COURT AT LAW NO. 2 OF TARRANT COUNTY  
TRIAL COURT NO. 2014-001825-2

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**MEMORANDUM OPINION ON REHEARING<sup>1</sup>**  
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**I. Introduction**

Appellants Miguel Ponce and Chrystal Ponce filed a motion for rehearing of our July 13, 2017 memorandum opinion and judgment. We deny the motion

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<sup>1</sup>See Tex. R. App. P. 47.4.

for rehearing but withdraw our July 13, 2017 opinion and substitute the following in its place.

In one legal sufficiency issue and five factual sufficiency issues, the Ponces appeal the trial court's judgment for Appellees James Diaz Jr. and Mary Diaz. We affirm.

## **II. Factual and Procedural Background**

### **A. Undisputed Facts**

At trial, the parties agreed to these facts:

Miguel is a roofer. James and Mary, his wife of over forty years, had a leaky roof over the porch of their residence on Wilson Road. When James and Mary spotted some leftover roofing material in the back of Miguel's truck, which was parked at his house, they stopped to ask him about purchasing the materials. Miguel was not home at the time, but his wife Chrystal took down James's name and phone number and handed Miguel's business card to James.

At some point, Miguel went to the Diazes' home and examined their roof. He reported that the roof needed a lot of work, and he offered to repair it. James told him that he could not afford to repair the whole roof because he owned another house (hereinafter, "the McCart house")<sup>2</sup> that he was trying to sell, but if he could sell the McCart house, then he would probably call Miguel for the roofing job on their Wilson Road home.

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<sup>2</sup>The trial court admitted into evidence a copy of James's July 15, 1965 deed to the McCart house.

Thereafter, James and Miguel went to the McCart house and looked at it, inside and outside. By everyone's account, the house was in bad condition at that point. After seeing the McCart house, Miguel offered to buy it, and on November 15, 2012, all four parties met at the Ponces' house to discuss the terms of the sale. During that meeting, Chrystal wrote out an agreement, which all of the parties signed.

In it, the parties agreed that Miguel would purchase the McCart house for \$30,000, which would be paid "in two years from the current date of November 15, 2012," and that Miguel would receive a \$10,500 credit against the purchase price for "doing the roof and siding" on the Wilson Road home. The agreement also provided that James would receive an unspecified amount "at the closing of the property" and that James would get "the remainder of his property" within two years:

I Miguel Ponce will be purchasing the property at 3913 McCart St Fort Worth, TX 76110, for the amount of 30,000 dollars. That will be paid in two years from the current date of Nov, 15, 2012.

↳ I Miguel Ponce will be doing the roof and siding at 5395 Wilson Rd Fort Worth, Texas 76140 for the amount of 10,500 dollars which will be deducted from the the price of 30,000 dollars. A

down payment will be given to Mr. James Diaz at the closing of the property. Mr. James Diaz will get the remainder of his property with in the two years. On Nov the 27<sup>th</sup> a amount of 2,000\$ was given towards the down payment.

X James Diaz  
Owner sign

X Mary E. Diaz



DM  
8/23/13

Miguel Ponce  
Buyer sign

Crystal Wolf

Because James did not read well, Mary read the agreement to him after they returned home that evening.

Additionally, James told Miguel that he would give him the key to the McCart house once he removed his personal property from inside of it. In December 2012, after James removed his personal property from inside the McCart house and after Miguel gave the Diazes \$3,000, James handed over the key to the McCart house to Miguel.

Subsequent notes written and typed on the face of the parties' written agreement, indicated the following payments were made by Miguel during the first year:

- On November 27, 2012, Miguel paid \$2,000, leaving an outstanding cash balance due of \$17,500.
- On December 13, 2012, Miguel paid \$3,000, leaving an outstanding cash balance due of \$14,500.
- On February 27, 2013, Miguel paid \$1,000, leaving an outstanding cash balance due of \$13,500.
- On June 27, 2013, Miguel paid \$1,000, leaving an outstanding cash balance due of \$12,500.
- On October 29, 2013, Miguel paid \$1,000, leaving an outstanding cash balance due of \$11,500.
- On November 15, 2013, Miguel paid \$1,000, leaving an outstanding cash balance due of \$10,500.

And a notation near the entry reflecting Miguel's November 15, 2013 payment recited that the total amount of cash that the Diazes had received to date was \$9,000.

In August 2013, Miguel entered into an agreement to lease the McCart house to Benny Lara, and he began collecting rent of \$650 per month from Lara in September. A copy of this lease agreement was admitted into evidence.

Miguel paid all of the property taxes on the McCart house for 2013. For 2014, Miguel paid half of the property taxes and James paid half, although the record is unclear as to whether this was by agreement, design, or happenstance.

The parties agreed that a breach occurred in February 2014, but they disagreed as to which of them committed a breach and in what order. The parties do not dispute that Miguel never put the roof on the Diazes' house and that although Miguel installed some siding on the Diazes' house during the first year of the agreement, he failed to paint it, as he had agreed to do. Nor do the parties dispute that the Diazes did not receive the full \$30,000 by November 15, 2014, and that the Ponces still owed money on the house on that date. The precise meaning of the contract and many other events that transpired after its execution were contested at trial.

## **B. Disputed Testimony**

### **1. Miguel's Testimony**

Miguel testified that his understanding of the agreement was that he was buying the McCart house for \$30,000, that he was going to put \$10,500 of work

into the Wilson Road house, and that he was going to pay the balance “on the closing in two years.” While he admitted that he did not pay the outstanding balance by November 15, 2014, two years later, he explained that he did not do so because litigation had already commenced by then. And while Miguel did not characterize the interim payments he made to James as down payment installments, he did confirm that he made periodic payments to James totaling \$9,000 over a period of time subsequent to the signing of the agreement.

With regard to the siding work Miguel had agreed to install, Miguel’s testimony was inconsistent as to when he began that work, although he conceded he never finished it. First, he testified that he began in the summer of 2013, that he paid five workers to do the work, that they finished the work in five days, and that James supervised the work. Miguel said that the siding he used was new but because it was leftover material from other jobs, the siding was “all different colors,” and he had planned to paint it. Later, he testified that he did not recall when he began the work, other than he knew that it was not in the winter and that—except for painting—he had finished the work. In subsequent testimony, he said that the reason he did not paint the siding was because he had to wait until the summer to paint it, but by that time James had said the contract was no good and would not let him.

Miguel also admitted that one or two pieces of siding were damaged and needed replacement and that he needed to trim a piece or two that had shifted out of place. Again, he testified that he needed to wait until summer to make the

adjustments “because it was in February when that happened, and [he] couldn’t cut it because the vinyl would break because it was below 32.” At trial, Miguel valued the siding he installed at \$3,000 and estimated that the paint job would have cost him another \$800.

With regard to the roof repairs on the Diazes’ home, Miguel testified that they had originally agreed to install regular shingles for the roof. That agreement changed when Miguel told James that he could get tin roofing for almost the same price, even though a tin roof is typically much more expensive. James told Miguel that he would prefer a metal roof, so Miguel agreed to install a metal roof instead “because [he] thought [they] were doing good on the business deal.” The tin shingles Miguel planned to use were materials left from another, bigger job; they were scratched and in assorted colors but were otherwise new, and, as with the siding, “all [they had] to do [was] just paint them.” But Miguel admitted that he never put the roof on James’s house, again because James told him the contract was no good and would not allow Miguel to do the work. Miguel estimated that the labor for the roofing installation would have cost around \$800.

According to Miguel, he was in the process of leaving the roofing materials at James’s house in February 2014 when James told him that he wanted more money. Miguel replied that he could not give James any more money because they needed to reserve some money for the closing. Miguel testified that he then offered to James, “[L]et me finish the roof and paint the house, and then we’ll discuss that.” When James insisted that he needed the money, Miguel said that



he proposed going to closing right then. Miguel claimed that it would have taken \$10,000 to close and that he had \$10,000 ready.

When asked why he did not pay James at least a part of the \$10,000 he claimed to have had on hand, Miguel testified: "I didn't want to give him the money. I said, let's go close, because I've already given you too much money. I said, let's go to close. He says, no, I want you to finish the project here first. I said, okay."

When James pressed him about finishing the work, Miguel said that he told James,

I said, the siding needs to be painted in the summertime. That's when I want to do the roof, I said, first, and then we'll come back and paint the siding. And there were, like, one or two pieces that were out of place. Siding, during the wintertime and the summertime, it moves, so I just needed to cut it a little bit, like a length, in order - - it's, like, two pieces that I saw that were damaged that I needed to cut. So I said I couldn't cut it, because it was in February when that happened, and I couldn't cut it because the vinyl would break because it was below 32. I said, in the summertime, I'll come and fix that. Meanwhile, I said, I got all the material here for the roof. I just need to do the roof first, and then we'll do all the painting later, so that's when he said that the contract is no good.

Miguel said that James reiterated his insistence that the contract was no good in a later phone conversation when Miguel requested that they go to closing. Miguel also claimed that he twice offered to pay James all of the money before the November 2014 deadline if James would give him the deed and that he even offered James more money to close because he had not completed the agreed-upon work.

With regard to the McCart house, Miguel said that his original plan had been to demolish the McCart house, but after receiving the key from James in December 2012 he saw that it could be remodeled, so he decided to convert it into a rent house instead. He testified that he had replaced the wiring and sheetrock and reinstalled the plumbing because the copper pipes had been stolen. According to Miguel, he hired four workers to clean up the McCart house, taking “at least four trailers of trash to the dump.” Miguel’s workers lived in the house for a month or two while painting and cleaning it. Miguel estimated that he put approximately \$10,000 worth of materials and labor into the McCart house.

Miguel testified that at one point, the wind had caused a tree to fall on the shed, that he had notified James and Mary, and after they came over and took everything they wanted, he then cut up the shed and cleaned up the debris. According to Miguel, at the time he demolished the shed, none of James’s personal property remained inside. Yet in March 2014, Miguel filed a small claims action and a sworn complaint for eviction seeking an order to compel James to remove his property from the garage of the McCart house.<sup>3</sup> According to James, “the judgment [from the small claims court] was that [he] kept the property until [they] went to a higher court.”

In August 2013, Miguel signed an agreement to lease the McCart house to Lara. The handwritten lease recited:

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<sup>3</sup>The face of Miguel’s small claims pleading indicates that he gave the initial notice to vacate on February 1, 2014.

I Miguel Ponce is [sic] renting the house on 3913 McCart St. Fort Worth Tx 76110, [f]or the amount of 600.00 deposit and 650.00 a month [s]tarting on September 1, 2013[] for one year [l]ease with the option of [b]uying as is for the amount of 65,000 with 5,000 down payment and 750.00 a month for ten years. When purchasing any improvement will be deleted from price of house if two payments are missed the house is returned to owner of house.

Miguel said that he did not intend the lease to begin until he paid James what he owed on the house, but he also admitted that he did not intend to receive the deed to the property until November 2014, when he paid the \$30,000 owed. He also explained that he would receive the deed when he paid the rest of the money for the house and that when James gave him the key to the McCart house, Miguel received only possession of the house. Yet while Miguel acknowledged that he understood the difference between owning a piece of property and merely possessing it, contrary to that testimony, Miguel also testified that he believed he owned the house when he received possession.<sup>4</sup> Whether in his mind he owned the McCart house or he merely possessed it, he agreed that Lara had been paying him rent on the McCart house since September 1, 2013.

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<sup>4</sup>At trial Miguel likened this arrangement to when someone buys a house from the bank, the bank gives the buyer the key but the buyer still owes money, but he also acknowledged that when one purchases a house from a bank, one must make payments every month or the house returns to the bank. Miguel said that pursuant to their agreement, if he did not pay James by the end of the two years in the agreement, the house would revert to James.

## **2. Chrystal's Testimony**

From Chrystal's perspective, "everybody was going to win" by entering into this agreement because James was tired of "messaging" with the McCart house and wanted to get siding and a new roof on his home, while she and Miguel wanted to "help [him] out" while "getting something in return." Chrystal testified that one of the problems that James related to the Ponces regarding the McCart house was that he had been having a hard time with squatters tearing it up.

Chrystal's testimony provided more detail regarding the terms of the agreement. As to the down payment provision, Chrystal elaborated on her understanding by explaining, "[James] wanted a certain amount, and we had this certain amount, so there was really not enough agreement so we could put it in [the written agreement], the amount, like, we're going to give you \$5,000 down or \$10,000 down. It was discussed, but no one agreed." According to Chrystal, she and Miguel told James, "[I]f you need money or whatever, [we'll] give you what [we] can whenever [we] can," and James indicated that he was fine with that arrangement. With regard to when they would receive the deed to the McCart property, her understanding mirrored that of her husband—they would receive it when they paid the rest of the money.

## **3. James's Testimony**

James testified that the parties agreed that Miguel would make a \$10,000 down payment, plus \$1,000 per month, but that Chrystal failed to write that in as part of the agreement. According to James, after the parties signed the

agreement, James had instead allowed Miguel to pay the down payment in installments and the parties agreed that when the \$10,000 payment was complete, they would go to a title company and get the agreement “all written up, notarized.” James testified, “If the man would have done what he said he was going to do, everything was fine. All he had to do is just keep up like he told me, \$1,000 a month. There wouldn’t have been a word said. We made a deal, and I stand by my deals.”

In addition, James said that the parties had agreed that James could continue to store his personal property in the storage shed and the garage at the McCart house “before the two years are up,” but that instead Miguel took his personal property from the shed—including a .22 rifle and some antique tools that his father had left him—and then lied about it, telling James that a tree had fallen on the shed and destroyed it. According to James, “[t]here was no tree there to be able to fall on that storeroom.”

With regard to the installation of the siding, James testified that Miguel had used different colors and sizes of siding, and when he complained, Miguel assured him, “[O]nce I paint it, you’ll never know the difference.” And, for a while James was satisfied because he believed that Miguel would paint over the siding as promised. But once Miguel stopped coming to his house and working on it, he took photos of the siding. The photographs that James took were admitted into evidence. They show multiple colors and sizes of siding, uneven seams, and

disconnection, including a long piece hanging down from around the eaves on one side of the house.

In November 2013, James complained to Miguel that the siding was falling down. James said that Miguel did nothing to fix the problem other than tell him that he would fix it and that it needed to be adjusted for size. James also testified that he had to install a portion of the siding himself “because [Miguel] [had] left it wide open, and squirrels, rats, anything could go through there into [James’s] house.” James denied that Miguel told him that vinyl siding could not be cut in the winter because it would break or that Miguel told him that he would adjust the piece that was falling off when the weather warmed.

James said that he called Miguel before Valentine’s Day—the last time he had spoken with Miguel—to ask for a payment because he wanted to buy Mary a Valentine’s Day gift. James testified that Miguel had told him that he did not have the money at that moment but that he would bring it the following Monday. According to James, Miguel never paid them any more money, although James acknowledged that it was probably the next Monday when Miguel stopped by to deliver roofing materials.

James testified that the conversation that Miguel described that allegedly occurred the day that Miguel dropped off the roofing materials did not happen. Contrary to Miguel’s testimony, James denied having a phone conversation with Miguel about going to closing. James further denied that he had told Miguel that

the contract was null and void or that the contract was good or bad, and he denied that Miguel had offered him any money to close.

James said that if Miguel had paid him the full amount that he owed in cash and had performed the siding and roofing on his house as promised, he had intended to sign the deed to the McCart house but that Miguel had never offered to go to closing and pay in full. James testified that he figured that the contract was over since Miguel had stopped paying him, and because Miguel did not own the McCart house, James decided to collect rent payments from Lara, the tenant.

James acknowledged that during the course of their dealings, he received \$9,000 from Miguel, and an additional \$600 in rent from Lara, which he had not given to Miguel.

James said that after their last conversation in February, all further communications between him and Miguel came through Lara. In contrast to his other testimony that Miguel had not offered him any money to close, he did concede that Lara had passed along a message to him that Miguel would give James \$20,000 in return for title to the McCart house. He added, “[Miguel] wasn’t man enough to call me and talk to me to tell me that. Why? What did I do to him?”

As to the repairs that Miguel made to the McCart house, James agreed that Miguel had made some improvements, but he denied that the house needed rewiring and that Miguel had rewired the house. He testified that he did not know the value of the labor involved, how much it would cost to rewire the house, to

have the plumbing fixed, to install sheetrock, or to install the gas line, or how much the improvements had increased the property's value.

#### **4. Mary's Testimony**

Mary, however, agreed that the McCart house needed rewiring and plumbing work because thieves had broken into the house, stripped the wiring, and removed the copper. She did not characterize the thieves as "squatters," as Chrystal had.

Mary testified that she thought selling the McCart house to the Ponces for \$30,000 had been a good idea because James had otherwise contemplated selling it to the neighbors for \$25,000. According to Mary, although they had asked Miguel for a \$10,000 down payment, when Miguel only had \$3,000, she and James "didn't ask for nothing more" at that time because they trusted him. After that, Miguel made periodic payments to them, and when they needed additional money, they would go to his house and ask.

Mary testified that Miguel had started putting the siding on their home in November 2012. Then, according to Mary, sometime before Valentine's Day in 2014, James called Miguel to ask for a payment because he wanted to buy Mary a Valentine's Day gift. She testified that the conversation had been on speaker phone and that she heard Miguel tell James that he did not have the money at that moment but would bring it the following Monday. According to Mary, Miguel never showed up and that was the last time that they spoke to him.



Mary said that Miguel had never offered to finish the roof or complete the contract, either in person or by phone. Nor did he offer to pay the rest of the purchase price. Mary also denied that James had ever told Miguel that the contract was no good. She denied that subsequent telephone conversations occurred between Miguel and James and testified that after he dropped off the roofing material, she and her husband never heard from Miguel again.

Then on March 14, 2014, they received an eviction notice related to the McCart house. Mary said that after the small claims judge told them that he was not going to evict them, she and James went from the courthouse to the rent house and collected a rent payment from Lara.

#### **5. Lara's Testimony**

At the time of trial, Lara was still living in the McCart house and had been living there for a year and a half. He identified the August 2013 rental agreement as his agreement with Miguel to rent the house.

Lara stated that the McCart house was "still in real bad condition" and in need of considerable repair. He testified that although Miguel eventually explained to him that the reason he was not making repairs was because of Miguel's dispute with James over the home's ownership, Miguel had not informed him about the agreement between the Ponces and the Diazes at the outset. Because Miguel was not making repairs during the litigation, he agreed to reduce Lara's monthly rent from \$650 to \$550.

Lara testified that he had made some repairs himself and had paid for them out of his own pocket, but Miguel had reimbursed him for repairing the gas line to the house. Under his agreement with Miguel, the total amount Lara would have paid Miguel for the house, at \$750 a month for ten years, would have been \$90,000, including interest and the improvements Miguel had made to the house. Lara did not think the house was worth \$90,000, but he acknowledged that the \$90,000 price included interest and that the house's actual price would have been closer to \$65,000.

According to Lara, sometime in February or March, he paid his rent to James because James informed him that he was the owner of the McCart house, not Miguel. When Miguel demanded the rent for that month, Lara explained that he had paid the rent to James, and Miguel responded by filing an eviction suit against him.<sup>5</sup> Lara's receipt for the payment to James was admitted into evidence. It bore the date March 10, 2014, and included a hand-written notation, "option to buy." Lara explained that he and James had discussed the possibility of Lara's purchasing the McCart house, but no agreement was reached because "it depend[ed] on the improvements on the house."

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<sup>5</sup>The record is silent as to how the eviction suit was ultimately resolved, but the record shows that as of the date of trial Lara remained in the McCart house and that he made only one payment to James; all other payments were made to Miguel.

### **C. The Litigation**

In April 2014, Miguel sued James for breach of contract. In May 2014, James and Mary counterclaimed for declaratory judgment and conversion of \$5,000 of James's personal property that had been in storage at the McCart house, and they raised breach of contract as a defense to Miguel's claim. One of the bases for their breach-of-contract defense at that time was that Miguel had not satisfactorily performed the repairs on their house. In February 2015, James and Mary added a counterclaim for breach of contract based on Miguel's failure to pay and "fail[ure] to comply with terms of the written agreement" and added a counterclaim for trespass to try title. They also abandoned their declaratory judgment claim.

### **D. Motion for Directed Verdict**

At the close of evidence, the Ponces moved for a directed verdict on anticipatory repudiation and breach, which the trial court denied.

### **E. Jury Charge**

Twelve questions<sup>6</sup> were included in the charge, some of which were not answered by the jury because they were conditioned upon affirmative findings to other questions:

- Question No. 1: Did Miguel Ponce fail to comply with the agreement entered into on or about November 15, 2012? Answer: Yes.

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<sup>6</sup>The jury questions are numbered through Question No. 11, but Question No. 6 was divided into Question No. 6A and Question No. 6B.

- Question No. 2: Did James Diaz fail to comply with the agreement entered into on or about November 15, 2012? Answer: No.
- Question No. 3: Who failed to comply with the agreement first? Answer: Miguel Ponce.
- Question No. 4: Was Miguel Ponce's failure to comply excused? Answer: No.
- Question No. 5: Was James Diaz's failure to comply excused? Answer: (Not answered pursuant to conditioning instruction.)
- Question No. 6A: Do you find that Miguel Ponce was ready, willing, and able to timely perform his obligations under the agreement? Answer: (Not answered pursuant to conditioning instruction.)
- Question No. 6B: Do you find that Miguel Ponce actually tendered performance of his obligations under the contract? Answer: (Not answered pursuant to conditioning instruction.)
- Question No. 7: What is the value, if any, of the siding and roofing work performed by Miguel Ponce at 5395 Wilson Rd., Fort Worth, TX 76140? Answer: (Not answered pursuant to conditioning instruction.)
- Question No. 8: Does Miguel Ponce or James Diaz have the current lawful right of possession of 3913 McCart St., Fort Worth, TX 76110? Answer: James Diaz.
- Question No. 9: What sum of money, if any, if paid now in cash, would fairly and reasonably compensate James Diaz and Mary Diaz for their damages, if any, that resulted from Miguel Ponce's failure to release possession of the property to James Diaz? Consider the following elements of damages, if any, and none other. (1) Loss of Rental Income Answer: \$4,950.00.
- Question No. 10: Did Miguel Ponce unlawfully retain personal property of James Diaz that was located at 3913 McCart St., Fort Worth, TX 76110? Answer: No.
- Question No. 11: What sum of money, if any, if paid now in cash, would fairly and reasonably compensate James Diaz for his damages, if any, that

resulted from Miguel Ponce's unlawful retention of personal property?  
Answer: (Not answered pursuant to conditioning instruction.)

The Ponces objected only to Question 5, which was not answered by the jury pursuant to the conditioning instruction that preceded the question.<sup>7</sup> There were no other objections to the charge.

#### **F. Jury Verdict and Judgment**

The jury's verdict was unanimous. In January 2016, the trial court entered a judgment declaring that Mary and James had the current lawful right of possession to the McCart house and awarding the Diazes \$4,950 in actual damages, an additional \$10,970 for their attorney's fees, and postjudgment interest.

### **III. Sufficiency of the Evidence**

In their first issue, the Ponces argue that the trial court erred by denying their motion for directed verdict on the ground that James committed an anticipatory breach in March 2014. In their remaining five issues, the Ponces argue that the evidence is factually insufficient to support the jury's verdict that (1) James did not breach the contract; (2) Miguel breached the contract first; (3) Miguel was not excused from performing in November 2014; (4) James has the current right to possession of the house; and (5) \$4,950 would fairly compensate James for his lost rental income.

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<sup>7</sup>The Ponces did not object to the conditioning instruction.

## A. Standards of Review

A directed verdict is proper only under limited circumstances: (1) when the evidence is insufficient to raise a material fact issue, 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). That is, we apply the standards for assessing legal sufficiency of the evidence. See *City of Keller v. Wilson*, 168 S.W.3d 802, 823, 827 (Tex. 2005); see also *Exxon Corp. v. Emerald Oil & Gas Co.*, 348 S.W.3d 194, 215 (Tex. 2011). We may sustain such a legal sufficiency challenge only when (1) the record discloses a complete absence of evidence of a vital fact, (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a mere scintilla, or (4) the evidence establishes conclusively the opposite of a vital fact. *Ford Motor Co. v. Castillo*, 444 S.W.3d 616, 620 (Tex. 2014); *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 334 (Tex. 1998), *cert. denied*, 526 U.S. 1040 (1999). In determining whether there is legally sufficient evidence to support the finding under review, we must consider evidence favorable to the finding if a reasonable factfinder could and disregard evidence contrary to the finding unless a reasonable factfinder could not. *Cent. Ready Mix Concrete Co. v. Islas*, 228 S.W.3d 649, 651 (Tex. 2007); *City of Keller*, 168 S.W.3d at 807, 827.

When reviewing an assertion that the evidence is factually insufficient to support a finding, we set aside the finding only if, after considering and weighing all of the evidence in the record pertinent to that finding, we determine that the credible evidence supporting the finding is so weak, or so contrary to the overwhelming weight of all the evidence, that the answer should be set aside and a new trial ordered. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986) (op. on reh'g); *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965).

Absent an objection to the jury charge, the sufficiency of the evidence is reviewed in light of the charge submitted. *Romero v. KPH Consolidation, Inc.*, 166 S.W.3d 212, 221 (Tex. 2005) (citing *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 715 (Tex. 2001)). The trier of fact is the sole judge of the credibility of witnesses and the weight to be given to their testimony. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003).

## **B. Breach of Contract and Anticipatory Repudiation**

The elements of a breach of contract claim are (1) the existence of a valid contract, (2) performance or tendered performance by the plaintiff, (3) breach of the contract by the defendant, and (4) resulting damages to the plaintiff. *Rice v. Metro. Life Ins. Co.*, 324 S.W.3d 660, 666 (Tex. App.—Fort Worth 2010, no pet.). Repudiation consists of words or actions by a contracting party that indicate he is not going to perform his contract in the future. *Jenkins v. Jenkins*, 991 S.W.2d 440, 447 (Tex. App.—Fort Worth 1999, pet. denied). It is conduct that shows a

fixed intention to abandon, renounce, and refuse to perform the contract. *Id.* But there is no repudiation if the refusal to perform is based upon a genuine mistake or misunderstanding as to matters of fact or law. *Id.*

Further, after the defaulting party breaches a contract, if the other party continues to insist on performance by the defaulting party, the nondefaulting party is not excused from performing its part of the contract as a result of the defaulting party's breach; the contract continues in force for the benefit of both parties. *Inimitable Grp., L.P. v. Westwood Grp. Dev. II, Ltd.*, 264 S.W.3d 892, 901 (Tex. App.—Fort Worth 2008, no pet.). Thus, when one party materially breaches a contract, the nondefaulting party is forced to elect between two courses of action, i.e., continuing performance or ceasing performance. *Id.* Treating the contract as continuing after a breach deprives the nondefaulting party of any excuse for terminating its own performance. *Id.*

### **C. Analysis**

In their first issue, the Ponces complain that the trial court erred by denying their motion for directed verdict, claiming that the evidence established that the Ponces sued James four days after James's breach, excusing their subsequent breach. By denying their motion, the trial court allowed the jury to make this decision. Thus, the question before us with regard to the first issue is whether there was legally sufficient evidence to support the jury's answer. As stated above, in making this determination, we apply the law as submitted in the charge. See *Romero*, 166 S.W.3d at 221.



In their third issue, the Ponces complain that the evidence is factually insufficient to support the jury's verdict that Miguel breached the contract first. Because they are related, we address issues one and three first.

In response to jury charge Question No. 1, the jury found that Miguel Ponce breached the agreement. In response to Question No. 3, "Who [breached] the agreement first?" the jury answered, "Miguel Ponce." Jury charge Question No. 4 then inquired as to whether Miguel's breach was excused. Question No. 4 included instructions on the defenses of: (1) plaintiff's prior material breach, and (2) anticipatory repudiation.<sup>8</sup> By its answer, the jury rejected both defenses.

The record here contains evidence supporting the theories advanced by both sides—the Ponces' contention that the Diazes breached first, and the

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<sup>8</sup>The instructions accompanying Question No. 4 mirrored Pattern Jury Charges 101.22 and 101.23 and stated:

Failure to comply by Miguel Ponce is excused by James Diaz's previous failure to comply with a material obligation of the same agreement, if any.

Failure to comply by Miguel Ponce is excused by James Diaz's prior repudiation of the same agreement, if any.

A party repudiates an agreement when he indicates, by his words or actions, that he is not going to perform his obligations under the agreement in the future, showing a fixed intention to abandon, renounce, and refuse to perform the agreement.

See Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Business* PJC 101.22–.23 (2014).

Diazes' contention that the Ponces breached first. Just because the Ponces' theory has support in the evidence does not mean that the jury's verdict should be set aside. The jury, as the sole judge of the weight and credibility of the evidence, considered all of the conflicting evidence and conflicting inferences from that evidence and, by its answer, determined which theory it considered most reasonable. *Benoit v. Wilson*, 239 S.W.2d 792, 797 (Tex. 1951).

For example, with regard to Miguel's performance under the agreement to provide the siding installation, the jury could have determined that Miguel breached the contract first. While there is no dispute that, pursuant to the contract, Miguel installed siding on the Diazes' house, the level of quality, care, and skill—or lack thereof, as demonstrated by the photographs admitted into evidence—could have allowed the jury to determine that Miguel had failed to comply with a material term of the parties' agreement by providing shoddy workmanship.<sup>9</sup> The jury could also have believed James's testimony that he had to install a portion of the siding himself to prevent rodents and other creatures

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<sup>9</sup>In Question 1, following the definition provided in the comment to Pattern Jury Charge 101.2, the jury was instructed that circumstances to consider in determining whether a failure to comply is material included the extent to which the injured party will be deprived of the benefit that he reasonably expected, the extent to which he can be adequately compensated for the part of the benefit of which he will be deprived, the extent to which the party failing to perform or to offer to perform will suffer forfeiture, the likelihood that the party failing to perform or to offer to perform will cure his failure, taking into account the circumstances, including any reasonable assurances, and the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing. See Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Business* PJC 101.2 Cmt. (2014).

from getting under the siding. In reaching its verdict, the jury could have believed that Miguel deprived James of the benefit he reasonably expected and that Miguel's failure to correct the mistakes in a timely manner—such that rodents or other wild animals would not have access into his home through the gaps left in the siding—breached the agreement.

Thus, the record reflects sufficient evidence upon which the jury could have determined that Miguel breached the agreement and did so either before James allegedly said the contract was no good or collected the rent from Lara. Accordingly, we hold that the evidence was sufficient to support the jury's finding that Miguel breached the agreement first and that the trial court did not err by denying Miguel's motion for directed verdict. We overrule the Ponces' first and third issues. *See Ford Motor Co.*, 444 S.W.3d at 620 (legal sufficiency standard); *Pool*, 715 S.W.2d at 635 (factual sufficiency standard).

In their second issue, the Ponces complain that the evidence is factually insufficient to support the jury's verdict that James did not breach the contract when James testified that he surrendered possession of the property to Miguel in December 2012, did not interfere with Miguel's possession from December 2012 to March 2014, and then showed up at the property in March 2014, declared himself the owner, and demanded and received rent from the tenant.

As set out above in our analysis of issues one and three, the jury could have determined that by the time James collected the rent payment from Lara on March 10, 2014, Miguel had already materially breached the agreement by failing

to correct the defective workmanship on the siding project in a timely manner, thus excusing any subsequent breach by James. We overrule the Ponces' second issue.

In their fourth and fifth issues, the Ponces complain that the evidence is factually insufficient to support the jury's verdict that Miguel was not excused from performing in November 2014 or that James had the current right to possession of the McCart house, contending that James sued Miguel only for a breach that occurred in November 2014. The Ponces argue that the evidence established that James had breached the contract by March 2014, that Miguel sued him for breach of the contract shortly thereafter, and that the Diazes therefore could not prevail on breach of contract against Miguel for failing to pay the full purchase price eight months later, in November 2014.

First, we disagree that the Diazes' breach of contract action against the Ponces should be construed in such a limited manner. In their first amended original answer and counterclaim filed on February 12, 2015, the Diazes asserted that Miguel had "failed to pay [the total sum of \$30,000] by November 15, 2014." They also alleged, generally, that Miguel "breached the contract for the sale of property" and that he "failed to comply with the terms of the written agreement." Liberally construed, this pleading would not only encompass the breach of nonpayment that occurred in November 2014 but also would include the failure to make the repairs that were part of the written agreement. See *Wise Elec. Coop., Inc. v. Am. Hat Co.*, 476 S.W.3d 671, 717 (Tex. App.—Fort Worth 2015, no pet.)

(observing that appellate court is “to liberally construe pleadings to do substantial justice”); see also *Alsheikh v. Altawil*, No. 02-12-00178-CV, 2015 WL 392220, at \*4 (Tex. App.—Fort Worth Jan. 29, 2015, no pet.) (mem. op.) (stating that Texas follows a fair notice pleading standard such that pleadings are to be liberally construed in favor of the pleader when the complaining party has not filed special exceptions to them).

Second, as stated above, the jury could have believed testimony relating to Miguel’s acts and omissions that occurred prior to November 2014—particularly the failure to perform the siding and roofing work in a timely or workmanlike manner—and could have reasonably found that this conduct constituted breach of the contract by Miguel before James collected rent from Lara. Based on the record before us, and under the applicable standard of review, we hold that there is factually sufficient evidence to support the jury’s verdict on these issues, and we overrule the Ponces’ fourth and fifth issues.

In their final issue, the Ponces complain that the evidence is factually insufficient to support the jury’s verdict that \$4,950 would fairly compensate James for lost rental income. In their first amended original answer and counterclaim, among other things, the Diazes requested \$650 per month as the fair market rental value of the property from November 15, 2012 until the date of judgment. The evidence at trial reflected that Miguel had reduced Lara’s monthly rent from \$650 to \$550 during the time that he was not making repairs on the McCart house, i.e., during the litigation. In closing arguments, the Diazes asked

the jury for only nine months' worth of back rent, from the day the final payment of the \$30,000 under the contract was due (November 15, 2014) until the last day of trial, i.e., the period of time during which litigation was pending. \$550 each month for nine months equals \$4,950. We overrule the Ponces' final issue.

#### **IV. Conclusion**

Having overruled all of the Ponces' issues, we affirm the trial court's judgment.

/s/ Bonnie Sudderth  
BONNIE SUDDERTH  
JUSTICE

PANEL: WALKER, MEIER, and SUDDERTH, JJ.

DELIVERED: August 24, 2017