COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00130-CV

STRIPE-A-ZONE, INC. — APPELLANT

V.

M.J. SCOTCH FAMILY LIMITED PARTNERSHIP — APPELLEE

FROM THE 352ND DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 352-271842-14

MEMORANDUM OPINION[1]

This appeal arises from a bench trial that concerned a claim for breach of an oral contract. Appellant Stripe-A-Zone, Inc. (Stripe-A-Zone) appeals the trial court's judgment awarding damages to appellee M.J. Scotch Family Limited Partnership (Scotch). In four issues, Stripe-A-Zone contends that the evidence is insufficient to prove the formation of a contract, that the evidence shows that any

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

such contract was subject to the statute of frauds, and that evidence precludes the application of any exceptions to the statute of frauds. We affirm.

Background Facts

According to Stripe-A-Zone's president David Sargent, in 2008, Robert Taccia, with whom Sargent had prior business dealings, arranged a transfer of money from Scotch to Sargent in his personal capacity (not in his capacity as Stripe-A-Zone's president). Scotch sent $212,000 through a wire transfer to Stripe-A-Zone's bank account (rather than to Sargent's personal account). Taccia gave Stripe-A-Zone's account number to Scotch so that Scotch could complete the transfer. Sargent testified that when he "received the loan it was to [him] and [he] put it into [his] company." He explained, "I didn't need personal money so I wired [the loan] to Stripe-A-Zone instead of my personal account." He testified, "It was not Stripe-A-Zone's money, but that's where it went." Later, he stated, "[T]he money was loaned to me and then I gave it to the company."

Sargent also testified that he did not know of Scotch at the time and did not meet the Scotch family until about six months after the transaction occurred. He explained that he believed that he had an agreement with Taccia and that Taccia had a separate agreement with Scotch. He did not view the transaction as a loan but instead viewed the money he had received as funds that "Taccia had owed [him] over a period of several years on . . . manufacturing that we had done together[,] and it was his way of repaying me for the money they paid him."

Stripe-A-Zone—not Sargent personally or Taccia—eventually began repaying the $212,000 to Scotch at a rate of $4,000 per month. The record contains copies of several checks from Stripe-A-Zone's operating account to Scotch for that amount. Stripe-A-Zone sent the last $4,000 payment to Scotch in September 2012. According to Sargent, he stopped making payments at that time because "Taccia told [him] that he had done some business with [Scotch]" and that Scotch owed Taccia money. In all, Stripe-A-Zone repaid Scotch at least $96,000 (twenty-four payments of $4,000 each) of the $212,000 that Scotch originally transferred to Stripe-A-Zone.[2]

The testimony of Michael Scotch, Scotch's president, establishes that he viewed the transaction differently than Sargent did. Michael testified that in 2008, Scotch sent Stripe-A-Zone money as a loan and expected to be repaid with interest. He expressed that he viewed the loan as an investment and that the money was given to "Sargent in care of Stripe-A-Zone." In October 2012, when Stripe-A-Zone stopped repaying Scotch, Michael sent a letter to Sargent that stated in part,

> In January 2008, [Scotch] loaned your company . . . monies in the amount of $212,000.00. Your company started making payments in the amount of $4,000.00 back to [Scotch] in October 2010. . . . You were also instructed by Alex Tandy, attorney,[3] to directly mail the payments to [Scotch] . . . .

[2]Sargent testified that Stripe-A-Zone paid Scotch an additional $52,000, but he conceded that he did not have any records supporting that claim.

[3]Tandy represented both parties and Taccia at that time.

. . . .

> . . . The October 2012 . . . payment is now in default. . . . If the October 2012 payment is not received within . . . 10 days, then you will force [Scotch] to take other actions against you and your company.

Michael conceded that he had no documents establishing an explicit loan agreement between Stripe-A-Zone and Scotch. He acknowledged that repayment of the $212,000 at $4,000 per month would take "more than a year" to complete.

Tamara Scotch, Scotch's vice president, testified that Scotch made a loan "to Stripe-A-Zone through [Sargent]."[4] She expressed her understanding that the loan carried a 9% interest rate and would be "paid back at any time that [Scotch] requested it" through either payments or a lump sum. She recognized that the parties never executed a written contract for the loan, but she stated that Taccia told her that Sargent "[was] good for" the money. Tamara stated that the parties discussed that Scotch could be repaid in less than a year and at any time Scotch asked for the money. Tamara testified that Sargent and Taccia knew each other well and had worked on many business deals together. Contrary to Sargent's testimony, Tamara testified that she met Sargent before agreeing to loan money to Stripe-A-Zone.

[4]Tamara testified, "In my mind [the loan] was to Stripe-A-Zone and [Sargent] is the president of the company. . . . [T]hey're almost synonymous."

In April 2014, Scotch sued Stripe-A-Zone. Scotch alleged that Stripe-A-Zone had borrowed money from Scotch for business purposes and that Stripe-A-Zone had repaid only some of the money. Scotch asserted that it had demanded Stripe-A-Zone to pay the rest of the amount but that Stripe-A-Zone had refused. Thus, Scotch brought several causes of action, including breach of contract. Scotch sought damages for the unpaid balance and also asked for an award of attorney's fees. Stripe-A-Zone answered the suit with a general denial and by pleading that the statute of frauds precluded Scotch's recovery.

After a bench trial, the trial court signed a judgment awarding Scotch $116,000 ($212,000 less the repaid $96,000) in compensatory damages and $15,000 in attorney's fees. The court entered the following findings of fact and conclusions of law:

Findings of Fact

1. The presence of sufficient circumstantial evidence necessary to find an implied agreement is a question of fact. The actions of the parties, to wit the payment of $212,000 by [Scotch] coupled with $96,000 in payments by Stripe-A-Zone, provides sufficient basis to find an implied-in-fact contract existed between the parties. Further there is sufficient evidence to find the funds were a loan from [Scotch] to [Stripe-A-Zone]. There was no written agreement signed by the parties.

2. The weight of the evidence shows that the full amount of $212,000 was delivered from [Scotch's] bank account to [Stripe-A-Zone's] account on January 29, 2008 via a wire transfer to a bank account number supplied by [Stripe-A-Zone's] agent Robert Taccia.

3. In the latter part of 2008 [Scotch] made demand on [Stripe-A-Zone's] agent Robert Taccia for full payment of the loan. This demand was not honored.

4. The weight of the evidence shows [Stripe-A-Zone] partially performed [its] repayment obligations. [Stripe-A-Zone] began re-payment in October, 2010. Payments consisted of checks in the amount of $4,000, drawn on [Stripe-A-Zone's] corporate operating account, addressed to [Scotch] as the payee, and delivered to the parties' mutual attorney Alex R. Tandy. [Stripe-A-Zone] paid its last check in September 2012. In total [Stripe-A-Zone] tendered 24 $4,000 checks for a total repayment of $96,000 leaving a loan deficit of $116,000.

Conclusions of Law

1. No writing was ever executed by the parties [but] a valid contact was created based upon their mutual beneficial actions in performing and forwarding the purposes of the agreement. Moreover[,] [Stripe-A-Zone] collected the funds in [its] bank account and thus received the benefit of the bargain.

2. [Scotch's] only obligation was to pay $212,000, which [it] did. Thus[,] [Scotch] fulfilled all obligations of [its] side of the agreement. Having previously found that [Stripe-A-Zone's] payment of $96,000 constituted partial performance, the Court finds that the Full Performance exception to the Statute of Frauds has been fulfilled. [Stripe-A-Zone] was therefore estopped from asserting a statute of frauds affirmative defense.

3. Having determined a debt of $116,000 remains outstanding, the Court additionally finds that the concept of Equity also applies as allowing the statute of frauds to apply in this case would perpetrate a fraud on [Scotch].

4. Having found the existence of a valid implied contract and having found the Statute of Frauds inapplicable to this case, [Scotch] should therefore recover the remainder of [its] debt in the amount of $116,000 with an additional $15,000 in attorney's fees.

Stripe-A-Zone brought this appeal.

Legal and Factual Sufficiency

In four issues, Stripe-A-Zone contends that the evidence is legally and factually insufficient to establish the existence of a contract between the parties

and to support the trial court's rejection of its statute of frauds affirmative defense.[5]

Standards of review

We may sustain 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.

[5]Stripe-A-Zone's first three issues concern whether the evidence is sufficient to prove the existence of a contract, to support a finding against the statute of frauds affirmative defense, and to support exceptions to the statute of frauds. Stripe-A-Zone's fourth issue challenges the trial court's denial of its motion for a directed verdict on the same grounds listed in the first three issues. A challenge to the denial of a motion for directed verdict is really a challenge to the legal sufficiency of evidence. *See City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex. 2005); *U.S. Invention Corp. v. Betts*, 495 S.W.3d 20, 23 (Tex. App.—Waco 2016, pet. denied).

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).

Factual sufficiency points or issues depend on who has the burden of proof at trial. *See Gooch v. Am. Sling Co.*, 902 S.W.2d 181, 184 (Tex. App.—Fort Worth 1995, no writ). Accordingly, when the party without the burden of proof on a fact issue complains of an adverse fact finding, that party must show that there is "insufficient evidence" supporting the finding; that is, that the credible evidence supporting the finding is too weak or that the finding is against the great weight and preponderance of the credible evidence contrary to the finding. *See Garza*, 395 S.W.2d at 823. When the party with the burden of proof appeals from a failure to find, the party must show that the failure to find is against the great weight and preponderance of the credible evidence. *Dow Chem. Co.*, 46 S.W.3d at 242; *Cropper v. Caterpillar Tractor Co.*, 754 S.W.2d 646, 651 (Tex. 1988); *see Gonzalez v. McAllen Med. Ctr., Inc.*, 195 S.W.3d 680, 681–82 (Tex. 2006).

Any ultimate fact may be proved by circumstantial evidence. *Russell v. Russell*, 865 S.W.2d 929, 933 (Tex. 1993). A fact is established by

circumstantial evidence when the fact may be fairly and reasonably inferred from other facts proved in the case. *Id.*

Contract formation—meeting of the minds

In its first issue, Stripe-A-Zone contends that the evidence is legally and factually insufficient to support the trial court's finding that the parties entered into an implied-in-fact contract. Stripe-A-Zone contends that "the essential terms were never assented to by" Stripe-A-Zone. Stripe-A-Zone further argues that "[a]ll the material terms implied in fact were agreed upon by . . . Taccia, and [Scotch] is now attempting to bind [Stripe-A-Zone] to terms agreed to by [Taccia]."

A valid contract is an essential element of a breach-of-contract claim. *See Rice v. Metro. Life Ins. Co.*, 324 S.W.3d 660, 666 (Tex. App.—Fort Worth 2010, no pet.). Parties form a binding contract when the following elements are present: (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 terms, and (5) execution and delivery of the contract with the intent that it be mutual and binding. *McCoy v. Alden Indus., Inc.*, 469 S.W.3d 716, 728 (Tex. App.—Fort Worth 2015, no pet.). The determination of a meeting of the minds, and thus offer and acceptance, is based on the objective standard of what the parties said and did and not on their subjective state of mind. *Id.*

An implied-in-fact contract must include mutual assent through a meeting of the minds, but these requirements may be inferred from the parties' conduct

and course of dealing. *Tex. Ass'n of Ctys. Cty. Gov't Risk Mgmt. Pool v. Matagorda Cty.*, 52 S.W.3d 128, 133 (Tex. 2000); *Haws & Garrett Gen. Contractors, Inc. v. Gorbett Bros. Welding Co.*, 480 S.W.2d 607, 609 (Tex. 1972); *see Outdoors v. Noah*, No. 02-09-00247-CV, 2010 WL 1946872, at *3 (Tex. App.—Fort Worth May 13, 2010, no pet.) (mem. op.) ("An implied contract exists when the facts and circumstances show a mutual intention to contract . . . . The determination of whether there is a meeting of the minds must be based upon objective standards of what the parties said and did, not on their alleged subjective states of mind." (citation omitted)). In other words, an "implied-in-fact contract arises when the intentions of the parties are not expressed in writing, but an obligation is implied from the parties' acts or conduct." *Crull v. Rhodes*, No. 02-04-00235-CV, 2005 WL 737473, at *3 (Tex. App.—Fort Worth Mar. 31, 2005, no pet.) (mem. op.).

We conclude that under the standards explained above, legally and factually sufficient evidence supports the trial court's finding that the parties entered into a contract. Stripe-A-Zone emphasizes that it and Scotch never directly discussed contractual terms and contends that Scotch's transfer of $212,000 to Stripe-A-Zone's bank account occurred when Scotch had communicated only with Taccia, not with Stripe-A-Zone. Stripe-A-Zone argues, "[Scotch] only communicated with Robert Taccia, only negotiated terms with Robert Taccia, and only demanded money from Robert Taccia." Furthermore, Stripe-A-Zone asserts that Taccia "directed where the money went [and] how it

was transferred." Finally, Stripe-A-Zone argues that "terms for the repayment and amount were negotiated between [a]ppellant and [Taccia]," not between Stripe-A-Zone and Scotch. In other words, the principal focus of Stripe-A-Zone's argument is that a contract could not have been formed because Stripe-A-Zone and Scotch each communicated with Taccia, not with each other.[6]

The trial court, however, expressly found that Taccia was acting as Stripe-A-Zone's agent. An agency relationship may create authority for an agent to bind a principal to a contract. *See Paragon Indus. Applications, Inc. v. Stan Excavating, LLC*, 432 S.W.3d 542, 549 (Tex. App.—Texarkana 2014, no pet.); *Expro Ams., LLC v. Sanguine Gas Expl., LLC*, 351 S.W.3d 915, 924 (Tex. App.—Houston [14th Dist.] 2011, pet. denied).

Evidence supports the trial court's agency finding, which Stripe-A-Zone does not expressly challenge on appeal.[7] Michael testified that Taccia approached him, took him to Stripe-A-Zone's business, and used the pronoun "we" when explaining the business and the money that Sargent and Taccia had made from the business. Michael explained that Taccia would "go over [to Stripe-A-Zone] and talk to [Sargent] all the time. I mean, it wasn't uncommon to

[6]Stripe-A-Zone concludes its argument by stating, "Based on the conduct of the parties . . . the evidence shows there was an agreement, but it was between [Taccia] and [Scotch], not [Stripe-A-Zone]."

[7]"We defer to unchallenged findings of fact that are supported by some evidence." *Super Ventures, Inc. v. Chaudhry*, 501 S.W.3d 121, 126 (Tex. App.—Fort Worth 2016, no pet.).

see [Sargent] come into [Taccia's] office or [Taccia] to go over to [Sargent's] office." Michael testified that at one point, he met Sargent and Taccia together at Taccia's office. With respect to this loan transaction, Michael testified,

> [Taccia] came to us and said, ["]Hey, if you'll give me, you know, money I can invest it in Stripe-A-Zone, [Sargent] will pay you, you know, like 9% interest on this money that was drawing like 1% at the time in the banks.["] And it was just like a short-term thing.
>
> And I asked him, I said, ["]Can I get my money back at any time?["] He said, ["]Oh, yeah, trust me.["] He said, ["]I can get your money back tomorrow if you need it.["]

Tamara testified that she met Sargent in Taccia's office and that at that time, Sargent and Taccia each showed her "a binder . . . of contracts" that Stripe-A-Zone had entered into "over the years." She also testified that Taccia had told her "several times that he had [a] contract [for the loan] in his office signed by [Sargent]." She testified that Taccia gave her Stripe-A-Zone's account number to complete the wire transfer and that Taccia told her that Stripe-A-Zone would repay the loan through monthly checks signed by Sargent. Finally, Tamara explained that her impression was that Taccia "was wanting to help [Sargent] with this loan."

Considering this evidence supporting an agency relationship between Stripe-A-Zone and Taccia, the trial court could have rationally found that the parties' communications with Taccia, coupled with the parties' conduct toward each other, established the existence of an oral contract for the loan of money from Scotch to Stripe-A-Zone and the repayment of that money from Stripe-A-

Zone to Scotch. The evidence of what the parties said and did to establish a contract—*see Outdoors*, 2010 WL 1946872, at *3—includes Scotch's wire transfer to Stripe-A-Zone of $212,000 and Stripe-A-Zone's partial repayment ($96,000) of that amount at the rate of $4,000 per month from the corporate account. Based on the ongoing repayments from Stripe-A-Zone to Scotch, the trial court could have rationally rejected Sargent's testimony that the $212,000 constituted money that Taccia owed to him based on "manufacturing that [they] had done together."[8] Sargent's testimony establishes that within a month of Stripe-A-Zone's receiving the $212,000 from Scotch, he knew that repayment was expected.

Stripe-A-Zone contends that the interest rate and repayment amount were essential terms of the contract and that no evidence exists that the parties agreed to those terms. *See T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex. 1992) ("In a contract to loan money, the material terms will generally be . . . the amount to be loaned, maturity date of the loan, the interest rate, and the repayment terms."). But Michael's testimony, which we quoted above, shows that the parties (through Taccia) agreed on an interest rate

[8]The trial court could have also rejected other parts of Sargent's testimony that conflicted with Michael's and Tamara's testimony. *See Liberty Mut. Ins. Co. v. Burk*, 295 S.W.3d 771, 777 (Tex. App.—Fort Worth 2009, no pet.) (explaining that in a bench trial, the trial court assigns weight to witnesses' testimony, accepts or rejects the testimony, and resolves conflicts).

(9%),[9] on the repayment amount (the complete amount of the money loaned), and on Scotch's right to full repayment at any time. Although Stripe-A-Zone asserts on appeal that it was "impossible . . . to understand what [its] obligations [were]," the evidence establishes Stripe-A-Zone's understanding of the obligation to repay $212,000 because Stripe-A-Zone delivered several monthly payments aimed at doing just that.

We conclude that based on all of the evidence in the record, and particularly on Michael's and Tamara's testimony, the trial court could have rationally found that by their words and conduct, the parties entered into a contract for Scotch to loan Stripe-A-Zone money and for Stripe-A-Zone to repay the money. We hold that the evidence is legally and factually sufficient to support the trial court's finding that the parties entered into an oral, implied-in-fact contract. *See Matagorda Cty.*, 52 S.W.3d at 133; *Outdoors*, 2010 WL 1946872, at *3. We overrule Stripe-A-Zone's first issue.

Statute of frauds

In Stripe-A-Zone's second and third issues, it contends that the evidence is legally and factually insufficient to support the trial court's rejection of its statute of frauds affirmative defense. Stripe-A-Zone argues that the statute of frauds precluded recovery on any contract that it entered into with Scotch because the

[9]The trial court's judgment requires Stripe-A-Zone to pay only the remaining principal on the loan.

contract was oral and because "the parties did not contemplate [performance] within one year."

A party pleading the statute of frauds has the initial burden to establish its applicability. *See* Tex. R. Civ. P. 94 (stating that the statute of frauds is an affirmative defense); *Hawkins v. Myers*, No. 02-14-00123-CV, 2015 WL 1646812, at *4 (Tex. App.—Fort Worth Apr. 9, 2015, no pet.) (mem. op. on reh'g). Once a party establishes that the statute of frauds applies, the burden shifts to the other party to establish an exception. *Thomas v. Miller*, 500 S.W.3d 601, 609 (Tex. App.—Texarkana 2016, no pet.).

Generally, when a "promise or agreement, either by its terms or by the nature of the required acts, cannot be completed within one year, it falls within the statute of frauds and is unenforceable unless it is in writing and signed by the person to be charged." *Hawkins*, 2015 WL 1646812, at *4 (citing Tex. Bus. & Com. Code Ann. § 26.01(a), (b)(6) (West 2015)). But when "one party fully performs a contract, the statute of frauds is unavailable to the other who knowingly accepts the benefits and partly performs." *Davis v. Insurtek, Inc.*, No. 05-09-01029-CV, 2010 WL 5395668, at *3 (Tex. App.—Dallas Dec. 30, 2010, no pet.) (mem. op.); *see Hawkins*, 2015 WL 1646812, at *5 (recognizing the full-performance exception to the statute of frauds and citing *Davis*); *see also McElwee v. Estate of Joham*, 15 S.W.3d 557, 559 (Tex. App.—Waco 2000, no pet.) ("One exception to the application [of the statute of frauds] is when one party has fully performed under the contract . . . . This exception has specifically

been applied to an agreement to loan money requiring payments to be made over a period greater than one year." (citation omitted)); *626 Joint Venture v. Spinks*, 873 S.W.2d 73, 76 (Tex. App.—Austin 1993, no writ) ("[W]here one party to a contract has fully performed his obligations under it, the statute of frauds is unavailable to the other who knowingly accepts benefits and partly performs."); Restatement (Second) of Contracts § 130 cmt. d. (1981) (stating that the statute of frauds "does not apply to a contract which is performed on one side at the time it is made, such as a loan of money").

The trial court expressly found that the full-performance exception to the statute of frauds applied.[10] We conclude that the evidence is legally and factually sufficient to support the application of this exception because it shows that Scotch fully performed its obligation by loaning $212,000 to Stripe-A-Zone and that Stripe-A-Zone partially performed its obligation by repaying $96,000. *See Davis* 2010 WL 5395668, at *3; *McElwee*, 15 S.W.3d at 559. We hold that the trial court did not err by rejecting Stripe-A-Zone's statute of frauds affirmative defense, and we overrule Stripe-A-Zone's second and third issues.

[10]The parties' briefs focus on the partial-performance exception to the statute of frauds, which is distinct from the full-performance exception that the trial court relied on. *See Hawkins*, 2015 WL 1646812, at *5 n.7; *Davis*, 2010 WL 5395668, at *4 n.3; *see also Hairston v. S. Methodist Univ.*, 441 S.W.3d 327, 336 (Tex. App.—Dallas 2013, pet. denied) (explaining the requirements of the partial-performance exception).

Directed verdict

In Stripe-A-Zone's fourth issue, it contends that the trial court erred by denying its motion for a directed verdict. Stripe-A-Zone's fourth issue depends on a positive resolution of one of its first three issues; indeed, Stripe-A-Zone presents the same arguments we have already rejected. Thus, because we have overruled Stripe-A-Zone's first three issues, we overrule its fourth issue.

Conclusion

Having overruled all of Stripe-A-Zone's four issues, we affirm the trial court's judgment.

/s/ Terrie Livingston

TERRIE LIVINGSTON
CHIEF JUSTICE

PANEL: LIVINGSTON, C.J.; WALKER and MEIER, JJ.

DELIVERED: April 13, 2017