In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-15-00063-CV

SIWELL, INC., D/B/A CAPITAL MORTGAGE SERVICES, APPELLANT

V.

JEFF W. WATTS, APPELLEE

On Appeal from the County Court at Law No. 3
Lubbock County, Texas
Trial Court No. 2013-568,987, Honorable Judy Parker, Presiding

January 19, 2016

MEMORANDUM OPINION

Before QUINN, CJ., and CAMPBELL and HANCOCK, JJ.

Challenging the sufficiency of the evidence, appellant Siwell, Inc. d/b/a Capital Mortgage Services appeals a judgment that it take nothing on its claim against appellee Jeff Watts.[1] According to Capital, Jeff fraudulently induced it to make a home loan to Ted which fell into default and ultimately required Capital to repay Fannie Mae $31,345.37. We will affirm the court's judgment.

[1] For simplicity, Jeff Watts, and his now-deceased father, Ted Watts, will be referred to in this opinion by their first names.

Background

The case was tried to the bench. The only witnesses were Jeff and Capital's representative, Royce Lewis.

According to Lewis's testimony, a mutual friend referred Jeff to him for possible assistance with his home loan. At the time, Jeff's home was in foreclosure so Lewis examined the situation to see if he could provide any assistance. Lewis concluded, however, the loan was legitimately delinquent and he could not help.

Lewis next saw Jeff when he and Ted came to his office in 2007 to see if Ted could co-sign a loan for Jeff to purchase a home. Lewis had known Ted "for years." Because of Jeff's recent foreclosure, Lewis told Ted that Jeff was not qualified as a borrower "under any circumstances."

Ted proposed that he buy a home and lease it to Jeff. Lewis explained to Jeff and Ted this would require a 25% down payment because the purchase would be considered an investment property for Ted. On the other hand, Lewis explained, a loan for an owner-occupied home would not require so large a down payment. Ted was unwilling to make the large down payment necessary for purchase of an investment property and, according to Lewis, Ted and Jeff left his office.

Ted and Jeff later returned to Capital and met with Lewis. This time Ted asked Lewis if he could qualify to buy a home for himself. Ted explained he was thinking of buying a new home for his wife and leasing his existing home on 63rd Drive to Jeff. Lewis told Ted he was not interested in doing "smoke and mirrors" and at closing Ted would have to certify he would actually occupy the house.

Ted made plans to buy a house on Utica Avenue and submitted a loan application. Its review showed Ted's debt-to-income ratio was too high to qualify for the loan. The loan was approved and completed, however, after Ted and Jeff signed a written lease agreement by which Jeff agreed to lease his father's home on 63rd Drive for twelve months at a rent of $2185 per month. This amount was identical to the amount of Ted's monthly mortgage payment on the Utica Avenue house.

Lewis testified he was not personally processing Ted's loan application but recalled conversations about it. He said his "recollection is that [Ted] was not able to qualify based on the income that he had from his . . . business, and . . . it's my recollection that the lease agreement was discussed." He said he did not see the lease agreement at the time but could not deny that Capital had provided it.

Ted never moved to the Utica Avenue house. Nor did Jeff occupy the 63rd Drive house, or pay his father rent on that house. Jeff lived in the Utica Avenue house for "a couple of years" then "moved to a rental property that was cheaper." He testified he made the mortgage payment to Capital for a period of time. Asked if his father "kept making" the mortgage payment after he stopped doing so, Jeff said he did not know.

According to Jeff's testimony, he understood the purpose of the rental agreement was "so my dad would show more income so he could obtain the loan." Jeff said he never intended to occupy his father's house on 63rd Drive. Jeff further testified he knew at the time Ted would remain in his existing 63rd Drive home and Jeff would occupy the Utica Avenue house.

The loan was "delivered" to Fannie Mae. Lewis testified the loan was "relatively current for a number of years after the loan was made." But it went into default near the time of Ted's death. The property was foreclosed and after its sale Fannie Mae reported a deficiency of $62,690.73.

Fannie Mae conducted a review of the loan to determine the action it would take. A Fannie Mae document in the record describes the result of its review. Asked if the document contains an "explanation of why Fannie Mae required that this loan be repurchased," Lewis replied affirmatively and explained that in instances in which Fannie Mae requires a loan servicer like Capital to "make whole" a loss, "they always have to tell you what they have found fault with."

Lewis went on to read from the Fannie Mae loan review document a paragraph under the heading "significant findings." The finding refers to Ted's "insufficient income/omitted liabilities," and states his "monthly debts" were reported as $810 at the time of loan origination but that a credit report indicated Ted had additional debt that Capital chose to exclude from its calculation of his debt ratios. The additional debt arose from Ted's co-signing a note for Jeff. The Fannie Mae document explains that Capital provided a letter supporting its decision to exclude the co-signed note from its calculations. The letter, signed by an officer of the bank holding the co-signed note, stated that Jeff "had made all of the payments on time for the prior 12 months." The Fannie Mae document, however, stated that Capital should have verified the payments at the time with Jeff's cancelled checks. The "significant finding" concludes with the statement that including the additional debt from the co-signed note would have given Ted a "new debt ratio" that was "excessive" and rendered the "subject mortgage

ineligible for delivery to Fannie Mae."[2] Nonetheless, the document indicates, Fannie Mae determined to offer Capital a "negotiated settlement" requiring Capital to pay Fannie Mae $31,345.37.

Capital's suit against Jeff alleged he fraudulently induced Capital into the loan transaction by misrepresenting his intention to lease the 63rd Drive house and pay his dad $2185 a month, and sought as damages the $31,345.37. After a bench trial, the court rendered a take-nothing judgment in favor of Jeff. According to the judgment, the court found Capital "failed to prove each element of its case against [Jeff]." The court made extensive written findings of fact and conclusions of law.

Analysis

Through a single issue, Capital challenges the legal and factual sufficiency of the evidence supporting the trial court's express and implicit negative findings on each element of its fraud claim. This means for Capital to prevail on appeal, the record must demonstrate the trial court's findings on each of the elements of Capital's fraud claim lack sufficient evidentiary support. If sufficient evidence supports a negative finding on even one element, the judgment must be affirmed.

Capital sought to recover from Jeff the $31,345.37 it paid Fannie Mae. The trial court found that Capital's liability to Fannie Mae resulted from its underwriting practices at the origination of the loan. We look then to causation of Capital's asserted injury and whether sufficient evidence authorized the trial court as factfinder to believe that

[2] The finding also includes a statement noting that the risk of the loan was increased because Ted was a first-time landlord without a history of managing rental property.

Capital's asserted damage resulted from its own conduct rather than a misrepresentation by Jeff.

A party attacking the legal sufficiency of the evidence supporting an adverse finding on an issue on which the party bore the burden of proof must demonstrate all vital facts in support of the issue were established as a matter of law. *Dow Chemical Co. v. Francis,* 46 S.W.3d 237, 241 (Tex. 2001) (per curiam); *Petroleum Synergy Group, Inc. v. Occidental Permian, Ltd.,* 331 S.W.3d 14, 21 (Tex. App.—Amarillo 2010, pet. denied). The analysis requires that we first examine the record in the light most favorable to the verdict for some evidence supporting the adverse finding, crediting evidence favoring the finding if a reasonable fact finder could and disregarding contrary evidence unless a reasonable fact finder could not. *City of Keller v. Wilson,* 168 S.W.3d 802, 807, 822 (Tex. 2005). Some evidence, meaning more than a scintilla, exists when the evidence "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Merrell Dow Pharms., Inc. v. Havner,* 953 S.W.2d 706, 711 (Tex. 1997). If, however, no evidence appears to support the finding, we then examine the entire record to determine whether the contrary proposition is established as a matter of law. *Francis,* 46 S.W.3d at 241; *Raw Hide Oil & Gas, Inc. v. Maxus Exploration Co.,* 766 S.W.2d 264, 276 (Tex. App.—Amarillo 1988, writ denied). A proposition is established as a matter of law when a reasonable fact finder could draw only one conclusion from the evidence presented. *City of Keller,* 168 S.W.3d at 814-16; *Brent v. Field,* 275 S.W.3d 611, 619 (Tex. App.—Amarillo 2008, no pet.).

A party challenging on appeal the factual sufficiency of evidence supporting a finding on an issue on which that party had the burden of proof at trial must demonstrate

that the adverse finding is against the great weight and preponderance of the evidence. *Francis,* 46 S.W.3d at 242; *Maxus Exploration,* 766 S.W.2d at 276. On review under this standard, the court must consider and weigh all the evidence and may set aside the finding only if the evidence is so weak or the finding is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust. *Francis,* 46 S.W.3d at 242; *see Maritime Overseas Corp. v. Ellis,* 971 S.W.2d 402, 407 (Tex. 1998) (court of appeals may set aside verdict only if it is so contrary to the overwhelming weight of the evidence that the verdict is clearly wrong and unjust). The appellate court may not pass on the witnesses' credibility or substitute its judgment for that of the trier of fact, even if the evidence would clearly support a different result. *Maritime,* 971 S.W.2d at 407.

> The elements of fraud are:
> (1) that a material representation was made; (2) the representation was false; (3) when the representation was made, the speaker knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) the speaker made the representation with the intent that the other party should act upon it; (5) the party acted in reliance on the representation; and (6) the party thereby suffered injury.

Italian Cowboy Partners v. Prudential Ins., 341 S.W.3d 323, 337 (Tex. 2011) (citing *Aquaplex, Inc. v. Rancho La Valencia, Inc.,* 297 S.W.3d 768, 774 (Tex. 2009)).

The plaintiff in a fraud action seeking recovery of direct damages[3] must prove an injury resulted from its reliance on a material misrepresentation. *Lesikar v. Rappeport,*

[3] Capital characterized its damages as an out-of-pocket loss. Such a loss is a measure of direct damages. *See Arthur Andersen & Co. v. Perry Equip. Corp.,* 945 S.W.2d 812, 817 (Tex. 1997) (under Texas common law direct damages for misrepresentation are measured by out-of-pocket and benefit-of-the-bargain standards). "Direct damages are the necessary and usual result of the defendant's wrongful act; they flow naturally and necessarily from the wrong. . . . Direct damages compensate the plaintiff for the loss that is conclusively presumed to have been foreseen by the

33 S.W.3d 282, 305 (Tex. App.—Texarkana 2000, pet. denied); COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES: BUSINESS, CONSUMER, INSURANCE & EMPLOYMENT PJC 115.19 & cmt. (2014); *see Scott v. Sebree,* 986 S.W.2d 364, 371 (Tex. App.—Austin 1999, pet. denied) (statutory fraud); *El Paso Dev. Co. v. Ravel,* 339 S.W.2d 360, 363 (Tex. Civ. App.—El Paso 1960, writ ref'd n.r.e.) (statutory fraud).

Examining the record in the light most favorable to the verdict for some evidence supporting the adverse finding on causation, we first note Lewis's testimony, supported by the Fannie Mae loan review document, explicating the analysis that led Fannie Mae to require Capital to bear part of the loss on the loan. Fannie Mae's criticism of Capital's loan origination decisions dealt not with Ted's income but with his debt. Fannie Mae's "significant finding" questioned Capital's decision to exclude the co-signed note from Ted's debt ratio calculation, leading to its conclusion Ted's mortgage loan was not eligible for delivery to Fannie Mae. And, importantly, Lewis testified that Fannie Mae's analysis assumed that Ted's income included the $2185 rent. This evidence supports the trial court's findings that "Fannie Mae's evaluation of the loan to determine whether or not the servicer has liability is based on the transaction when the [mortgage] originated and then delivered to Fannie Mae"; "Fannie Mae found additional debt that was not identified on Ted Watts[']s application form . . . to support the loan"; "the basis of [Capital's] liability to Fannie Mae was the debt/income ratio of Ted Watts"; that "Fannie Mae sought recourse from [Capital] because Fannie Mae determined that the loan

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defendant from his wrongful act." *Perry Equip. Corp.,* 945 S.W.2d at 816 (citations omitted); COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES: BUSINESS, CONSUMER, INSURANCE & EMPLOYMENT PJC 115.4 cmt. on direct damages (2014).

made to Ted Watts did not meet . . . underwriting standards when the loan was made"; and that Capital's liability to Fannie Mae "was a result of risky underwriting practices of [Capital] at the origination of the loan to Ted Watts."

As the trial court pointed out during trial, the term of the lease on the 63rd Drive residence was twelve months. Ted's mortgage loan performed for "a number of years." The trial court found the mortgage lien was foreclosed almost six years after Capital made the loan. Although the record does not establish the date of Ted's death, Lewis testified the loan default occurred near that time. These undisputed facts constitute evidence that the loan default leading to the foreclosure and Fannie Mae's loss on the loan was caused by factors other than Jeff's failure to perform the lease on the 63rd Drive residence.

Conclusion

The trial court's findings that Capital's injury resulted from Fannie Mae's evaluation of its underwriting decisions, and not from a false representation by Jeff, are supported by legally sufficient evidence. And, considering and weighing all the evidence, we conclude its adverse causation finding is not so against the great weight and preponderance of the evidence that it is clearly wrong and unjust. *Francis,* 46 S.W.3d at 242.

Because we have concluded the court's adverse finding on causation is supported by legally and factually sufficient evidence, it is not necessary for us to consider the evidence supporting other elements of Capital's cause of action. The trial

court did not err in rendering judgment that Capital take nothing. The judgment is affirmed.

James T. Campbell
Justice