In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-15-00358-CV

TERRY T. BLEVINS, APPELLANT

V.

VINCENT ALI, A/K/A JAMES VINCENT HOUSTON AND MARTHA HOUSTON, APPELLEES

On Appeal from the 12th District Court
Walker County, Texas
Trial Court No. 1427232, Honorable Donald Kraemer, Presiding

September 29, 2016

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and HANCOCK, JJ.

Terry T. Blevins appeals from a final judgment denying him recovery against Vincent Ali, a/k/a James Vincent Houston and Martha Houston (collectively referred to as Ali). Blevins sued Ali for claims arising from the latter's alleged failure to fulfill an agreement to sell two parcels of land. The claims involved breached contract, common law fraud, statutory fraud, and deceptive trade practice, among others. The aforementioned judgment was entered after the dispute was tried to the court. Various findings of fact and conclusions of law were included in both the judgment and a

separate document entitled "Findings of Fact and Conclusions of Law." Aspects of those findings are under attack by Blevins as being insufficiently supported by the evidence. It is unclear whether Blevins' challenges implicate only factual sufficiency challenges or challenges to the legal sufficiency of the evidence. We will treat them as factual sufficiency challenges since finding them to be factually sufficient would implicitly make them legally sufficient as well. And in so considering them, we affirm the trial court's judgment.[1]

Background

The record disclosed that Ali and Blevins entered into an oral real estate agreement. Ali opted to sell a parcel of land known as tract 5 that consisted of approximately 4.3 acres and priced it at $130,000. He also had an undivided 3/4th's interest in a parcel adjacent to tract 5 known as tract 4. It too consisted of approximately 4.3 acres. Blevins agreed to buy both parcels for $160,000, as is. Under the terms of the deal, Blevins was to make a down payment to Ali of $30,000 to be paid via installments of $1,250 per week for approximately six months. After that, the weekly payment would be $750. Blevins also agreed to pay Ali $5,000 for repairs to the property.

Once the agreement was struck, Ali moved off the land, and Blevins moved onto it with his family. The $1,250 weekly payments were also made, but the transaction had yet to close when the final $1,250 was paid. This concerned Blevins, who contacted Ali. In response, Ali caused to be drafted three general warranty deeds which were

[1]Because the appeal was transferred to this court from the Tenth Court of Appeals, we apply the latter's precedent where available should no controlling precedent from a higher court exist. TEX. R. APP. P. 41.3

delivered to Blevins. One allegedly encompassed tract 5, one encompassed tract 4, and another encompassed a trailer on the property. Though signed and filed of record, the deeds lacked a legal description of the various parcels involved. Instead, the property was referred to by tax I.D. numbers. So too did Ali cause the name of the properties' owner reflected on the appraisal district's records to be changed to Blevins. This was not the first warranty deeds provided by Ali. About three months earlier, he had delivered to Blevins a document entitled "General Warranty Deed w/ Vendor's Lien." Unlike the subsequent deeds, though, it contained a metes and bounds description of both tracts but was unsigned.

Because the transaction had yet to close some ten months after Blevins moved on the property, he began to investigate. This led him to the local title company which was to provide the requisite title insurance. There, he was told that the company could not insure title because of various clouds on it; the title company would eventually agree to issue title insurance on tract 5 only. Blevins also claims that around this time he discovered that Ali only owned a 3/4 interest in tract 4. Of import though is that three months earlier Ali and Blevins had walked the property. The purpose of this was to show the extent of the land being sold. This sojourn was captured on video, and in that video Ali can be heard informing Blevins that he owned three of the four acres in tract 4 while a third-party owned one acre. At trial, Blevins admitted that the video captured the terms of the transaction.

Because of the purported clouds on the title, Blevins stopped paying Ali. By that time the sums delivered had amounted to $42,250 plus the additional $5,000 for repairs. Though payments were no longer forthcoming, Blevins remained on the property and

initiated suit. Through it, he contended that Ali had agreed to sell him 8.6 acres of land, had agreed to perform the repairs reflected in the $5,000 payment, and warranted that he had good and marketable title to the property.

As previously mentioned, the matter was tried to the court. Upon hearing the evidence presented, it denied recovery to Blevins and permitted Ali to retain the $42,250 as reasonable rent. In support of its decision, it entered findings of fact and conclusions of law to the effect that 1) there was no "meeting of the minds or mutual assent between the parties on the essential terms of the agreement," 2) there was no written agreement between the parties, 3) "[t]he parties did not come to an agreement on what property would be conveyed in the sale, the time when the conveyance would occur, the amount of property that would be conveyed, and the interest in the property that would be conveyed," 4) Ali did not transfer the property in question to Blevins, 5) Ali did not commit false, misleading or deceptive acts or omissions, 6) Ali did not breach any warranties or engage in an unconscionable course of conduct, and 7) Ali did not make false representations to Blevins or omit to disclose material facts to him, among other things. Blevins appealed.

Issue One—Mutuality of Assent / Meeting of the Minds

Under his first issue, Blevins argues that the trial court's finding about there being no meeting of the minds or mutuality of assent was against the great weight and preponderance of the evidence. This is purportedly so because the parties came to an agreement, Blevins paid Ali the sums agreed upon until the discovery of a defect in title, Blevins moved onto the property, the agreement was captured on video, and Ali executed three warranty deeds. We overrule the issue.

A party who had the burden of proof and complains of the factual insufficiency of an adverse finding "must demonstrate that the adverse finding is contrary to the great weight and preponderance of the evidence." *O'Connor v. Miller*, 127 S.W.3d 249, 254 (Tex. App.—Waco 2003, pet. denied). In assessing whether that obligation was satisfied, we weigh all the evidence and reverse the adverse finding only if it is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. *Id.* That does not permit us to simply substitute our judgment for that of the fact finder, however. *Id.* So too must we remember that the trier of fact has the authority to resolve inconsistencies in the testimony and make credibility choices. *Id.* We lack such power.

Next, a meeting of the minds on the essential terms of the agreement is necessary to the formation of a valid, binding contract. *Sacks v. Haden*, 266 S.W.3d 447, 450 (Tex. 2008). In determining whether that occurred, we review "in an objective fashion 'what the parties actually said and did' without consideration of subjective intent." *Choctaw Props., L.L.C. v. Aledo I.S.D*., 127 S.W.3d 235, 245 (Tex. App.—Waco 2003, no pet.), *quoting New Caney Indep. Sch. Dist. v. Burnham AutoCountry, Inc.*, 30 S.W.3d 534, 538 (Tex. App.—Texarkana 2000, pet. denied). So too do we peruse "' . . . the communications between the parties and to the acts and circumstances surrounding those communications.'" *Choctaw Props., L.L.C. v. Aledo I.S.D*., 127 S.W.3d at 246, *quoting Copeland v. Alsobrook,* 3 S.W.3d 598, 605 (Tex. App.—San Antonio 1999, pet. denied).

The record at bar discloses that the parties struck an oral deal pertaining to the sale of land and agreed to the financial terms related to that sale. Yet, Blevins believed

that he was to receive 8.6 acres and a good and marketable title to the same. Ali believed he was conveying 7.6 acres. The latter, in his mind, consisted of either 1) 4.3 acres in tract 5 and 3 acres in tract 4, or 2) 4.3 acres in tract 5 and an undivided 3/4ths interest in tract 4. The video confirmed Ali's representation that he did not own all of tract 4, and it is this video that reflected the terms of the agreement, according to Blevins. In effect, both the buyer and seller intended to consummate the transaction. But they did not agree on the quantum of land or the interest in the land to be sold. That struck at the very essence of the agreement. What Blevins was to receive and Ali convey was an essential term of the bargain, and neither had agreed to the same quantum or interest. The evidence evincing this failure to agree is not weak or tenuous. So, the finding of the trial court about the parties failing to have a meeting of the minds is not factually insufficient. Because the parties lacked the same, no enforceable agreement to sell tracts 4 and 5 came into existence. Given this, we need not consider the sub-issues proffered under issue one pertaining to 1) specific performance, 2) statute of frauds, 3) Ali's entitlement to possession of the property, and 4) Blevins' entitlement to damages for breached contract.

Issue Two - Rentals

Next we address whether Ali was entitled to rent for the period Blevins lived on the property. Ali had filed a counterclaim against Blevins asking for a myriad of relief. One of the requests included a claim of unjust enrichment due to Blevins' decision to remain on the land without paying rent. He also requested damages relating to the "loss of use" of the property. The trial court deigned to permit Ali to keep the $42,500 Blevins' had paid as the "reasonable rental value for the property for the time that

[Blevins] occupied the property." Blevins argues that this was error because the transaction was not a rental agreement, equitable title had passed to Blevins, and Ali had not pled for rent. In so arguing, he does not question the reasonability of the sum awarded, only the awarding of the sum. We overrule the issue.

As indicated above, Ali urged a claim founded on unjust enrichment and under it complained about Blevins remaining on the property without either fulfilling the terms of the agreement or paying rent. So too did he seek the recovery of damages related to his loss of use of the land. In essence, what we have here is Blevins enjoying the use of the property for the period during which he occupied it. Arguably, he received a benefit because the land belonged to another.

The Waco Court of Appeals has held that one occupying and using the land of another becomes "'liable to pay a reasonable sum as rental therefor.'" *Scott v. Scott*, 347 S.W.2d 288, 290 (Tex. Civ. App.—Waco 1961, writ ref'd) *quoting*, *Nilsen v. Bonugli*, 220 S.W.2d 178, 180 (Tex. Civ. App.—San Antonio 1949, no writ). Indeed, the facts in *Nilsen* are akin to those here. In *Nilsen*, the appellees took possession of realty under the belief that they were acquiring it as their own. *Nilsen v. Bonugli*, 220 S.W.2d at 180. Yet, the contract was legally unenforceable. Eventually, the trial court awarded the true land owners rent. On appeal, the reviewing court recognized that the situation involved one where the trial court was called upon to adjust the equities. *Id.* In so recognizing, it also uttered the statement quoted above; that is, "[b]y reason of having occupied and used the property they [the appellees] became liable to pay a reasonable sum as rental therefor." *Id.* The same is no less true here. It did not matter that there was no agreement to pay rent. The obligation to do so arose from equity because Blevins had

occupied the property of another. And, again, Blevins does not complain about the amount of rentals ordered.

Issue Three—Negligent Misrepresentation, Fraud, Deceptive Trade Practice, and Statutory Fraud

The final issue addressed relates to the trial court's findings that Ali committed neither negligent misrepresentation, fraud, deceptive trade practices, nor statutory fraud. The findings were purportedly against the great weight and preponderance of the evidence because Ali represented that he had clear title to all of tract 4 when he did not, and Blevins purportedly relied on that representation in agreeing to make the payments he did. We overrule the issue.

As previously discussed, Blevins admitted that the terms of the agreement were reflected in the video. Before the video was made, the parties had executed no written documents memorializing the sale, its terms, or the extent of title to be conveyed. Yet, captured in the video is Ali discussing not only the extent of his interest in tract 4 but also the third-person who owned part of it. After that, Blevins remained on the property and continued paying $750 per week for about three months. And while three warranty deeds were signed by Ali several months after the video, he had already disclosed his limited interest in tract 4. Given this, we cannot say that the great weight and preponderance of the evidence compelled the trial court to find that Ali misrepresented his interest in that tract of land in order to induce Blevins to make the payments.

Having overruled each of issue, we affirm the judgment of the trial court.

Brian Quinn
Chief Justice