In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00330-CV

TIMOTHY FITZGERALD AND WYNNE A. FITZGERALD, APPELLANTS

V.

WATER ROCK OUTDOORS, LLC D/B/A ARTISAN HOMES, GRANT WILSON, AND INGRAM CONCRETE, LLC, APPELLEES

On Appeal from the 237th District Court
Lubbock County, Texas
Trial Court No. 2015-514,158, Honorable Les Hatch, Presiding

December 1, 2017

OPINION

Before QUINN, C.J., and PIRTLE and PARKER, JJ.

Appellants, Timothy and Wynne Fitzgerald, appeal the trial court's grant of partial summary judgment and its final judgment in their suit against appellees, Water Rock Outdoors, LLC d/b/a Artisan Homes; Grant Wilson; and Ingram Concrete, LLC. We will affirm the trial court's judgments.

Factual and Procedural Background

In 2013, Artisan Homes began construction on a new home at 3805 101st Street in Lubbock, Texas. Prior to completion, the Fitzgeralds decided to buy the home and entered into a residential construction contract with Artisan. The Fitzgeralds asked to move into the home before its contractual completion date. After the Fitzgeralds moved into the home, they notified Artisan that there were a number of defects in the home that needed repair. Artisan repaired some of these items but the Fitzgeralds were not satisfied with the repairs. Artisan continued to offer to repair the defects but the Fitzgeralds denied Artisan further opportunities to do so.

In January of 2015, the Fitzgeralds filed suit against Artisan and its owner, Grant Wilson, asserting claims for breach of contract, breach of implied warranty, breach of express warranty, breach of implied warranty of good workmanship, fraud in the inducement, common law fraud, and unjust enrichment. Subsequently, the Fitzgeralds amended their petition to add claims of negligence against Ingram relating to its supply of concrete used in construction of the home. After filing answers, Artisan and Wilson filed a motion for partial summary judgment asserting traditional and no-evidence grounds. In December of 2015, the trial court granted the motion and dismissed the Fitzgeralds' claims for common law fraud, fraud in the inducement, and unjust enrichment with prejudice.[1]

In preparing their case, the Fitzgeralds retained Phillip King to testify as an expert regarding the defects in the home and the resultant damage. King prepared a written

[1] These were the only claims made against Wilson in his individual capacity.

report in which he concluded that a failure to install reinforcing steel in the home's foundation violated Lubbock construction ordinances and necessitated that the home be demolished and rebuilt. Artisan filed a motion to exclude King's opinion testimony. A hearing was held on the motion. At this hearing, Artisan offered the testimony of Steven O'Neal, Chief Building Inspector for the City of Lubbock. O'Neal testified that the Lubbock ordinance relied on by King did not require continuous steel reinforcement in residential construction. At the close of the hearing, the trial court concluded that King's opinion was not reliable and excluded it from being offered at trial.

Five days before trial was scheduled to commence, the Fitzgeralds moved for and were granted a continuance to supplement King's theory of damages. After reviewing King's supplemental opinion, Artisan and Ingram filed a joint motion to strike portions of King's supplemental expert testimony. By letter ruling, the trial court granted the motion to strike on the basis that King's supplemental opinion constituted a new theory of liability. However, the trial court expressly stated that King's supplemental opinion could be used as rebuttal evidence.

In July of 2016, the Fitzgeralds' remaining claims were presented to a jury. The jury returned its verdict finding that Artisan did not breach the contract or its express warranties. The jury did find that Artisan breached the implied warranty of performing services in a good and workmanlike manner and awarded the Fitzgeralds $32,250 as damages for this breach. The jury also found that Ingram was not negligent. The trial court entered its final judgment in conformity with the jury's verdict. The Fitzgeralds timely appealed.

The Fitzgeralds present three issues by their appeal. Their first issue contends that the trial court erred in determining that King's opinion that the home needed to be demolished and rebuilt was unreliable. Their second issue contends that the trial court erred in granting Artisan and Wilson's motion for partial summary judgment. Their third issue contends that the trial court erred by striking King's supplemental opinion. We will address the propriety of the trial court's grant of partial summary judgment first.

Partial Summary Judgment

By their second issue, the Fitzgeralds contend that the trial court erred in granting summary judgment in favor of Artisan and Wilson on the claims of common law fraud, fraud in the inducement, and unjust enrichment.

A no-evidence summary judgment is essentially a pretrial directed verdict, and we apply the same legal sufficiency standard of review. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 750-51 (Tex. 2003). The party moving for a no-evidence summary judgment must assert that there is no evidence of one or more of the essential elements of the claim on which the nonmovant would have the burden of proof at trial. TEX. R. CIV. P. 166a(i); *Hamilton v. Wilson*, 249 S.W.3d 425, 426 (Tex. 2008) (per curiam). The nonmovant must respond with evidence sufficient to raise a material fact issue as to the challenged elements of its cause of action. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006). If the nonmovant fails to produce summary judgment evidence raising a genuine issue of material fact on the challenged elements, the trial court must grant the motion. *Hamilton*, 249 S.W.3d at 426. The nonmovant need not prove the challenged elements; rather, its response must only raise a fact issue as to those elements. *Id*. In determining

whether the nonmovant has met its burden, we view the evidence in the light most favorable to the nonmovant. *King Ranch, Inc.*, 118 S.W.3d at 751. Because the trial court's judgment does not specify the grounds relied upon for its ruling, we must affirm the summary judgment if any of the theories advanced are meritorious. *Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex. 1989).

"A common-law fraud claim requires a material misrepresentation, which was false, and which was either known to be false when made or was asserted without knowledge of its truth, which was intended to be acted upon, which was relied upon, and which caused injury . . . . Fraudulent inducement is a distinct category of common-law fraud that shares the same elements but involves a promise of future performance made with no intention of performing at the time it was made." *Rick Lovelady Carpets, Inc. v. G.R. Chapman L.P.*, No. 07-15-00340-CV, 2017 Tex. App. LEXIS 9728, at *7 (Tex. App.—Amarillo Oct. 17, 2017, no pet. h.) (mem. op. on reh'g) (quoting *Zorrilla v. Aypco Constr. II, LLC*, 469 S.W.3d 143, 153 (Tex. 2015)). Fraudulent inducement requires the existence of a contract as part of its proof. *Id*. "[U]njust enrichment is an implied-in-law contractual basis to require restitution when it would work an injustice to allow benefits received to be retained." *Timbercreek Canyon Prop. Owners Ass'n v. Fowler*, No. 07-14-00043-CV, 2015 Tex. App. LEXIS 8460, at *16 (Tex. App.—Amarillo Aug. 12, 2015, no pet.) (mem. op.).

As discussed above, both fraud and fraud in the inducement require that material misstatements were made. For a misstatement to be material, it must be the type of statement that "a reasonable person would attach importance to and would be induced to act on the information in determining his choice of actions in the transaction in

question." *Smith v. KNC Optical, Inc*., 296 S.W.3d 807, 812 (Tex. App.—Dallas 2009, no pet.). The Fitzgeralds base their claims of common law fraud and fraud in the inducement on statements made by Artisan and Wilson such as that Artisan is a high quality custom homebuilder with years of experience, is hardworking and honest, and employs top-quality subcontractors. These statements were not material misstatements but were merely "puffing" or opinion and, as such, cannot constitute actionable fraud. *See Prudential Ins. Co. of Am. v. Jefferson Assocs.*, 896 S.W.2d 156, 163 (Tex. 1995) (statements that building was "superb," "super fine," and "one of the finest little properties in the City of Austin" are opinion and will not support a claim for fraud). The Fitzgeralds offered no evidence that would raise a genuine issue of fact regarding whether any misstatement (if, in fact, such statements were not true) made by Artisan or Wilson was material. Since materiality is an essential element of a fraud claim, we conclude that the trial court did not err in granting summary judgment on the Fitzgeralds' common law fraud and fraud in the inducement claims.[2]

To recover under the theory of unjust enrichment, the claimant must establish that the other party has obtained a benefit from another by fraud, duress, or the taking of an undue advantage. *Heldenfels Bros., Inc. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992). Unjust enrichment is not a proper remedy merely because it might appear expedient or fair that some remedy be provided for an unfortunate loss. *Id*. at 42. Rather,

[2] The Fitzgeralds contend that the trial court erred by granting summary judgment on their fraud-related claims because such claims turn on fact issues of intent and knowledge, which are not generally appropriate for summary judgment. While materiality is usually reserved for the trier of fact, when the alleged misrepresentations are so obviously immaterial that reasonable minds cannot differ, it is appropriate for the court to rule that the claims are inactionable as a matter of law. *Highland Capital Mgmt., L.P. v. Ryder Scott Co.*, 402 S.W.3d 719, 744 (Tex. App.—Houston [1st Dist.] 2012, no pet.). The statements presented by the Fitzgeralds to establish that Artisan and Wilson made material misstatements are obviously immaterial statements of opinion.

recovery for unjust enrichment is appropriate when the person charged has wrongfully secured a benefit or has passively received one which would be unconscionable to retain. *Villarreal v. Grant Geophysical, Inc.*, 136 S.W.3d 265, 270 (Tex. App.—San Antonio 2004, pet. denied). The Fitzgeralds claim that it would be unconscionable for Artisan and Wilson to retain the $398,924.37 that the Fitzgeralds paid for the home because the Fitzgeralds have been "burdened with a home that exhibits substantial defects that require demolition of the home to remedy." However, the Fitzgeralds did not address how Artisan and Wilson obtained a benefit by fraud, duress, or the taking of an undue advantage. Furthermore, the Fitzgeralds wholly fail to establish how they can recover under the quasi-contractual theory of unjust enrichment rather than seeking remedies under the contract with Artisan. *See Fortune Prod. Co. v. Conoco, Inc.*, 52 S.W.3d 671, 684 (Tex. 2000) ("Generally speaking, when a valid, express contract covers the subject matter of the parties' dispute, there can be no recovery under a quasi-contract theory."). The Fitzgeralds discuss cases where exceptions were found to the general rule that recovery under the theory of unjust enrichment cannot be obtained when a contract covers the subject matter of the dispute. However, the Fitzgeralds fail to explain how any of those exceptions apply in this case. Clearly, if the Fitzgeralds were able to prove that the defects in the home were so substantial as to require demolition of the home, they would be able to recover the $398,924.37 purchase price under the contract.[3] For both of these reasons, we conclude that there was no evidence to support the Fitzgeralds' unjust

[3] The Fitzgeralds make a conclusory claim that, since there was no contract between themselves and Wilson, they should be able to recover unjust enrichment damages against him. Assuming this to be true, the Fitzgeralds have not identified how Wilson obtained a benefit by fraud, duress, or taking an undue advantage. As such, the Fitzgeralds have failed to establish their entitlement to unjust enrichment recovery from Wilson.

enrichment claim. Consequently, the trial court did not err in granting Artisan and Wilson's summary judgment on the Fitzgeralds' unjust enrichment claim.

Concluding that the trial court did not err in granting Artisan and Wilson's summary judgment as to the Fitzgeralds' common law fraud, fraud in the inducement, and unjust enrichment claims, we overrule the Fitzgeralds' second issue.

Exclusion of Expert Testimony

By their first issue, the Fitzgeralds contend that the trial court abused its discretion by excluding the initial opinion of their expert, Philip King, as unreliable. By their third issue, the Fitzgeralds contend that the trial court abused its discretion by excluding King's supplemental expert opinion. Both issues challenge the trial court's decision to admit or exclude evidence.

The trial court determines preliminary questions about the admission or exclusion of evidence. TEX. R. EVID. 104(a). Its decision to admit or exclude evidence is reviewed under an abuse of discretion standard. *Brinker v. Evans*, 370 S.W.3d 416, 421 (Tex. App.—Amarillo 2012, pet. denied). As such, if the ruling comports with guiding rules and principles and is not arbitrary and capricious, we cannot disturb it. *Id*. (citing *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985), for its discussion of the abuse of discretion standard).

Issue One

In October of 2015, Artisan and Ingram filed a motion to exclude the opinion testimony of King that was contained in his expert report dated August 13, 2015. During

the subsequent hearing on the motion, King testified that he was of the opinion that the City of Lubbock requires reinforcing steel in residential slab construction and, therefore, the home needed to be torn down and rebuilt. However, he also testified that, if reinforcing steel was not required in residential slab construction, then he would not be of the opinion that the home needed to be torn down. After King concluded his testimony, Artisan called Steven O'Neal, the City of Lubbock's Chief Building Official, to the stand. The Fitzgeralds objected on two bases: (1) that the City of Lubbock's code requirements do not require interpretation of an expert, and (2) O'Neal was not proven qualified to testify as to his opinion of what is required by the City of Lubbock's code requirements. O'Neal testified as to his qualifications and then opined that the City of Lubbock does not require reinforcing steel in residential slab construction. Following this hearing and by letter ruling dated November 24, 2015, the trial court determined that King's opinion that the house needed to be torn down was not reliable and granted the motion to exclude.

The Fitzgeralds assume that the trial court's ruling that King's testimony was unreliable was based on O'Neal's testimony. While the trial court's letter ruling does not expressly support this assumption, we conclude that the Fitzgeralds failed to preserve any complaint regarding the admission of O'Neal's opinion testimony. The record reflects that, after their initial objections regarding the propriety of O'Neal's testimony and his qualifications, the Fitzgeralds did not raise any further objection to O'Neal's testimony. Likewise, at no point did the Fitzgeralds obtain a ruling on their objections to the propriety of O'Neal's testimony or his qualifications,[4] so those objections are not preserved for our

[4] We note that O'Neal testified that he is the Chief Building Official for the City of Lubbock and that he directs the building inspection department for the City. He has drafted the residential codes for residential construction for the last thirteen years. He testified that there is no one "higher up" than him

review. *See* TEX. R. APP. P. 33.1(a)(2) (preservation of error generally requires trial court ruling); *Duncan-Hubert v. Mitchell*, 310 S.W.3d 92, 105 (Tex. App.—Dallas 2010, pet. denied) (failure to obtain trial court ruling on objection to expert's qualifications does not preserve that objection for appellate review). Similarly, the Fitzgeralds complain on appeal that the trial court did not *sua sponte* rule on the reliability of O'Neal's testimony. However, to preserve a complaint regarding the reliability of an expert's testimony, it must be made before trial or at the time that the evidence is offered. *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 409 (Tex. 1998). Since the Fitzgeralds failed to preserve error in regard to the reliability of O'Neal's testimony, that issue is not before this Court for review.

The Fitzgeralds do not advance any other argument on appeal regarding the reliability of King's testimony. This is likely due to King's testimony that, if the City of Lubbock code did not require reinforcing steel in residential slab construction, then his opinion would not be that the home would need to be torn down.

The only other argument advanced by the Fitzgeralds in support of this issue is that King was qualified to provide his expert opinion in this case, as the trial court found. Since the Fitzgeralds are in agreement with the trial court's ruling in this regard, this argument presents nothing for our review. We note that the trial court excluded King's testimony that the home needed to be torn down on the basis of King's opinion being

when it comes to the "ABCs of the ordinances." Thus, even if the Fitzgeralds had properly preserved their objection to O'Neal's qualifications, Artisan and Ingram probably sufficiently established O'Neal as an expert.

unreliable and not because King was not qualified. As we determined above, the Fitzgeralds did not preserve error relating to the reliability of King's testimony.

Because the Fitzgeralds did not properly preserve their complaints regarding the trial court's exclusion of King's opinion that the home needed to be torn down, we overrule the Fitzgeralds' first issue.

Issue Three

At a pretrial hearing held five days before the trial was to be held, the trial court granted the Fitzgeralds' motion for continuance to allow them an opportunity to supplement King's theory of damages in light of the trial court's exclusion discussed above. The Fitzgeralds submitted King's supplemental expert report in March of 2016. Artisan and Ingram filed a joint motion to strike portions of the supplemental report, contending that the supplemental report included new theories of liability. By letter ruling dated March 31, 2016, the trial court found that King's supplemental theory, that the wrong type of fiber mesh concrete was used in the home, constituted an unpermitted new theory of liability. However, the trial court expressly provided that the Fitzgeralds could use King's supplemental theory as rebuttal evidence.

At trial, the Fitzgeralds offered King's testimony. However, he did not testify about the appropriate type of fiber mesh that should have been used in the home. In addition, King was not recalled to rebut any evidence presented by Artisan and Ingram.

In their initial brief, the Fitzgeralds stated that, "This [supplemental] testimony from Mr. King was vital not as an independent theory of liability, but as a rebuttal to the assertions made by Appellees through their own designated experts." At least four times

in their brief, the Fitzgeralds contend that they should have been allowed to use King's supplemental testimony to rebut the defenses raised by Artisan and Ingram through their expert witnesses. The express language of the trial court's letter ruling allowed the Fitzgeralds to use King's supplemental testimony in rebuttal if Artisan and Ingram contend that a particular fiber mesh was used in the home. That the Fitzgeralds chose not to avail themselves of the opportunity to present King's supplemental testimony in rebuttal does not render the trial court's ruling erroneous.

"An appellate court does not reach the question of whether evidence was erroneously excluded unless the complaint has first been preserved for review." *In the Estate of Miller*, 243 S.W.3d 831, 837 (Tex. App.—Dallas 2008, no pet.). To preserve an objection to the exclusion of evidence, the complaining party must present the excluded evidence to the trial court by offer of proof or bill of exception. *Id*. (citing TEX. R. EVID. 103(a)(2); TEX. R. APP. P. 33.2; and *Langley v. Comm'n for Lawyer Discipline*, 191 S.W.3d 913, 915 (Tex. App.—Dallas 2006, no pet.)). The Fitzgeralds did not offer King's supplemental opinion through his direct testimony or by way of offer of proof or bill of exception. Therefore, whether the trial court excluded King's supplemental testimony from evidence in the Fitzgeralds' case-in-chief is not before us because this issue was not properly preserved. *See id*. Without an offer of proof or bill of exception showing the substance of the excluded evidence, a reviewing court can never determine whether exclusion of the evidence was harmful. *Sink v. Sink*, 364 S.W.3d 340, 347 (Tex. App.—Dallas 2012, no pet.).

In their reply brief, the Fitzgeralds contend that it is disingenuous for Artisan and Ingram to argue that the Fitzgeralds did not preserve error in relation to King's

supplemental opinion testimony since the trial court granted appellees' motion in limine. The Fitzgeralds contend that the trial court's ruling on the motion in limine prohibited them "from even mentioning the issue." A court's ruling that grants a motion in limine is not a ruling on the admissibility of evidence. *Sw. Country Enters., Inc. v. Lucky Lady Oil Co.*, 991 S.W.2d 490, 493 (Tex. App.—Fort Worth 1999, pet. denied). Rather, the motion in limine simply prohibited reference to King's supplemental opinion without first obtaining a ruling on the admissibility of that testimony outside of the presence of the jury. *See id*. If a motion in limine has been granted, to preserve error, the party wanting to introduce the evidence must: (1) approach the bench and ask for a ruling, (2) formally offer the evidence, and (3) obtain a ruling on the offer. *Id*. The Fitzgeralds did none of these. In addition and as discussed above, the trial court's letter ruling expressly allowed the Fitzgeralds to offer King's supplemental opinion in rebuttal. Therefore, it is not true that the trial court's rulings on King's supplemental opinion or the motion in limine prohibited the Fitzgeralds "from even mentioning the issue."

Determining that the Fitzgeralds did not properly preserve error in relation to King's supplemental opinion testimony, we overrule the Fitzgeralds' third issue.

Conclusion

Having overruled each of the Fitzgeralds' issues, we affirm the judgment of the trial court. *See* TEX. R. APP. P. 43.2(a).

Judy C. Parker
Justice