In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-21-00211-CV

RENEGADE WELL SERVICES, LLC, APPELLANT

V.

AMERIVAX, INC. F/K/A AMERIFLUSH, INC., APPELLEE

On Appeal from the 70th District Court
Ector County, Texas
Trial Court No. A-20-05-0562-CV, Honorable Denn Whalen, Presiding

May 9, 2022

MEMORANDUM OPINION

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

By three issues, Renegade Well Services, LLC, challenges the trial court's verdict awarding damages and attorney's fees to Amerivax, Inc. f/k/a Ameriflush, Inc. Each involves, in one way or the other, the sufficiency of the evidence underlying the trial court's decision. We affirm in part and reverse in part.

Background

The parties had an ongoing business relationship concerning the provision of goods and services. Amerivax rented equipment to Renegade and periodically serviced

their portable toilets at various job sites. Eventually, several invoices Amerivax sent for payment went unpaid. This lawsuit resulted from the default.

One invoice concerned the rental of a cool-down trailer that Amerivax rented to Renegade. Someone stole it. Though later recovered, it needed repairs. Amerivax turned to Renegade for payment, per their rental agreement. Other invoices encompassed toilet cleaning services rendered.

Trial was to the court. Upon hearing the parties' evidence, it awarded damages of $9,636.14 to Amerivax. They covered both the trailer repairs and toilet services. So too did the court award Amerivax attorney's fees.

Three issues pend for our review. They concern (1) the sufficiency of the evidence supporting that portion of the damages relating to the trailer repairs; (2) the legal and factual sufficiency of the evidence showing that Renegade ordered, and Amerivax delivered, the toilet services in question; and (3) the sufficiency of the evidence underlying the award of attorney's fees.

Issue One—Trailer Repair

Renegade's first issue is multifarious in that it combines several points of error under one issue. *See In re C.W.J.,* No. 11-17-00085-CV, 2019 Tex. App. LEXIS 1768, at *9–10 (Tex. App.—Eastland Mar. 7, 2019, no pet.) (mem. op.) (so defining a multifarious issue). In addition to asserting the evidence was legally insufficient to support the verdict, it also complains about the admissibility of evidence that would otherwise provide the allegedly missing support. We overrule the issue.

Regarding the admissibility of evidence, that in question consisted of testimony from an Amerivax representative about the cost of repairing the trailer. Renegade

objected to the same when proffered below, deeming it "[i]mproper lay witness opinion." How it constitutes such goes unexplained, however. Instead, Renegade simply concludes that, "[g]iven Lawrence's admission that his damages were based on an internet search and not actual costs incurred or actual proposals, the Court erred in overruling." Neither substantive analysis nor citation to applicable authority supporting the contention accompanies the conclusion. Thus, the argument is inadequately briefed and, therefore, waived. *See Pham v. State Farm Lloyds*, No. 07-17-00366-CV, 2018 Tex. App. LEXIS 8605, at *5 (Tex. App.—Amarillo Oct. 22, 2018, no pet.) (mem. op.) (holding that because the appellant failed to provide substantive analysis or authority supporting his claim, his inadequate briefing relieved the court of addressing the claim).

Regarding the sufficiency of the evidence, Renegade again offers us a conclusory argument. Its sum and substance appears in the short statements that, "even if Lawrence's internet search was properly admissible, his testimony still constitutes nothing more than surmise or suspicion regarding the costs of repair" and "[s]uch surmise . . . does not pass the legal sufficiency threshold to allow an award of damages for the cool down trailer." Again, why it does not goes unexplained. This is particularly troublesome since evidence appears in the record illustrating the basis underlying the testimony about the $5,521.99 cost to repair the trailer. According to the Amerivax representative who testified (i.e., Lawrence), the sum consisted of replacing a generator, water tank, and "evaporative port-a-cool." "It's for a lot of – you got to – have to put all that together," according to the witness. "It's got to have all the fittings, and hoses, and wiring, and all of that." And, because "it would take probably a couple of days to put a unit back together again" there also was "labor involved for that." The costs were "reasonable, necessary[]

customer costs for those kind of parts and repairs," he also opined. To be adequate briefing compliant with the pertinent standard of review, Renegade's argument required illustration as to why consideration of the foregoing testimony by Lawrence did not supply meat to the alleged skeletal bones of "surmise" and "suspicion." Missing that effort from Renegade but finding evidence illustrating more than purported "surmise" and "suspicion," we overrule this aspect of issue one, as well.

Issue Two—Services Delivered

Renegade next contends that the evidence was both legally and factually insufficient to support another aspect of the trial court's award. It concerns recovery for toilet cleaning services and equipment rental. Multifariousness also permeates this issue. Renegade again blends within it a complaint about the admission of evidence. We overrule the issue.

Regarding the admission of evidence, Renegade objected to Lawrence testifying about the sums due. Allegedly, the witness lacked personal knowledge about whether Renegade actually received the services and equipment described in the invoices. The trial court overruled the complaint, and the witness continued his testimony as before. Renegade did not renew its objection about the witness's purported absence of personal knowledge. Nor did it request a running objection. Given those circumstances, it waived its appellate complaint. *See Willie v. Donovan & Watkins, Inc*., No. 01-00-01039-CV, 2002 Tex. App. LEXIS 2655, at *10 (Tex. App.—Houston [1st Dist.] Apr. 11, 2002, no pet.) (mem. op.) (involving an objection to a witness's competency to testify and holding that the objection was waived because the complaining party did not ask for a running

objection to the testimony and lodged no subsequent objections to ensuing questions or answers).

As for the sufficiency of the evidence, we apply the standards mentioned in *McAllen Hosps., L.P. v. Lopez*, 576 S.W.3d 389, 392 (Tex. 2019), when assessing its legal sufficiency and *Windrum v. Kareh*, 581 S.W.3d 761, 781–82 (Tex. 2019), when assessing its factual sufficiency. With them in mind, we are asked if Amerivax proved Renegade received the services manifested in the invoices. Lawrence's testimony supports that it did. For instance, he (1) answered "yes" when asked, "[T]hose were provided at the request of Renegade; is that correct?"; (2) described how the toilet service was done "weekly"; (3) stated that Amerivax employees did the work; and (4) expressed that Renegade personnel themselves collected and returned the equipment (pressure washers) it rented. Construing this in a light most favorable to the trial court's decision, it is some evidence upon which reasonable minds could rationally conclude that Amerivax provided and Renegade received the services and equipment at issue.

When pressed on cross-examination, Lawrence, who happened to be the Amerivax president, admitted that he did not personally clean the toilets. Instead, he said company employees did, though he could not recall their names; whether they actually did was a matter he accepted on "good faith." And, Amerivax would not have known to clean them had Renegade not complained of their condition, he continued. He also added that, upon sending the invoices in question to Renegade, the latter failed to state that the work described in them was not done. This coupled with the remainder of the evidentiary record does not prove the trial court's decision awarding damages for the work and rentals

encompassed by the invoices to be against the great weight and preponderance of the evidence so as to be manifestly unjust.

In sum, the evidence underlying the trial court's award under attack in issue two is legally and factually sufficient. So, again, we overrule the issue.

Issue Three—Attorney's Fees.

Lastly, Renegade complains that attorney's fees should not have been awarded because no evidence illustrates the existence of an underlying agreement or contract permitting their recovery. We sustain the issue.

The award of attorney's fees in Texas is governed by the "American Rule." Under it, they are recoverable only if authorized by statute or contract. *Intercont'l Grp. P'ship v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 653 (Tex. 2009). Prior to September of 2021, statute authorized recovery of attorney's fees for services, labor, sworn account, and contracts against any "individual or corporation." TEX. CIV. PRAC. & REM. CODE ANN. § 38.001(b). A limited liability company, such as Renegade, was neither a corporation nor individual; thus, fees were not recoverable against it under § 38.001. *D. Webb Indus., LLC v. Permian Equip. Rentals, LLC*, No. 11-18-00221-CV, 2020 Tex. App. LEXIS 6690, at *10–11 (Tex. App.—Eastland Aug. 20, 2020, no pet.) (mem. op.). Amerivax acknowledged as much and viewed the only avenue available to recover fees lay in proving the existence of an agreement permitting them. The agreement in question purportedly arose not from expressed consent but rather implication and course of conduct. Renegade disputes the existence of evidence illustrating that such occurred. We sustain the contention.

Initially, we reject the contention that Renegade failed to preserve this no-evidence contention. Legal sufficiency complaints arising from a bench trial may be raised for the first time on appeal. TEX. R. APP. P. 33.1(d). Moreover, Renegade urged it during closing arguments at trial.

Again, Amerivax sought fees under an implied contract theory founded upon a course of conduct. That is, Renegade executed no express contract obligating itself to pay them. Rather, Amerivax's routine consisted of invoicing Renegade for services already rendered. Sometime after the two entities first began their business relationship, Amerivax added the following passage to the bottom of each invoice: "This invoice is issued subject to the terms and conditions of the rental agreement, which are incorporated herein by feference [sic]. A copy of the rental agreement is available upon request." The "rental agreement" mentioned the obligation to pay attorney's fees incurred in collecting payment. And, in paying those invoices over time, Renegade impliedly acquiesced to the obligation to pay fees.

Implied contracts may arise from a course of conduct between parties. *See, e.g.*, *L & S Meats, LLC v. USA Feedyard, LP*, No. 07-18-00030-CV, 2020 Tex. App. LEXIS 590, at *15–16 (Tex. App.—Amarillo Jan. 22, 2020, no pet.) (mem. op.) (noting that "contracts arise in various ways, one of which is through a course of conduct" and "[a]n implied contract arises when the parties' acts indicate, according to the ordinary course of dealing and common understanding, that there is a mutual intention to contract"); *Preston Farm & Ranch Supply v. Bio-Zyme Enters.,* 625 S.W.2d 295, 298 (Tex. 1981) (holding that continued payments and purchases after receipt of the interest-charging invoices constituted evidence of an agreement between the parties to pay interest as

merchants under the Uniform Commercial Code). Yet, the mere failure to object, within a reasonable time, to a term unilaterally incorporated into an invoice alone does not establish an agreement to perform the particular promise in dispute. *Triton Oil & Gas Corp. v. Marine Contractors & Supply, Inc*., 644 S.W.2d 443, 445–46 (Tex. 1982). Indeed, an implied agreement "is one in which 'the acts of the parties are such as to indicate according to the ordinary course of dealing and . . . common understanding of . . . a *mutual* intention to contract.'" *Tubelite v. Risica & Sons, Inc.*, 819 S.W.2d 801, 804–05 (Tex. 1991) (quoting *Preston Farm & Ranch Supply*, 625 S.W.2d at 298) (emphasis supplied by *Preston Farm*).

Per *Tubelite*, the affirmative action of the one to be charged must relate to the particular obligation at issue. For instance, repeated payment of invoices containing an interest charge unilaterally inserted by the creditor when the payment covers both principal and interest may create an implied agreement to pay interest, as illustrated in *Preston Farm* and explained in *Tubelite*. On the other hand, partially paying invoices containing a finance charge does not itself evince agreement to pay a unilaterally imposed charge. *Tubelite*, 819 S.W.2d at 805. This is so because the circumstances support two equally consistent inferences, they being an agreement to accept the obligation and one not to accept it. *Id.* In other words, one cannot reasonably infer from payment alone that one agreed to the terms and conditions included in an invoice sent after performance occurred. No less is true regarding the payment of an invoice containing a forum selection clause unilaterally inserted by the creditor; payment alone does not establish acceptance of the clause. *See Int'l Metal Sales, Inc. v. Global Steel Corp*., No. 03-07-00172-CV, 2010 Tex. App. LEXIS 2201, at *39 (Tex. App.—Austin Mar. 24, 2010, pet. denied) (mem. op.).

Nor does it alone prove acceptance of a duty to arbitrate. *See Stewart & Stevenson, LLC v. Galveston Party Boats, Inc.*, No. 01-09-00030-CV, 2009 Tex. App. LEXIS 8582, at *24–25 (Tex. App.—Houston [1st Dist.] Nov. 5, 2009, no pet.) (mem. op.).

Here, the trial court found the following:

> The history between [Amerivax] and [Renegade], involves repeated occasions of performance by [Renegade] with the knowledge of the nature of the performance and opportunity for objection to it by the other. The course of performance accepted and acquiesced in without objection included that: [Renegade] paid a number of invoices from [Amerivax] for weekly servicing of portable toilets rented from [Amerivax]; [Renegade] paid a number of invoices for renting pressure washer trailers; [Renegade] paid a number of invoices for renting cool down trailers; and [Renegade] paid a number of invoices without a purchase order on the invoice.

Yet, nothing of record indicates that Renegade ever (1) paid attorney's fees to Amerivax per those, or any other, terms and conditions, or (2) expressly agreed to abide by them when ordering services. Instead, the evidence only illustrates that Amerivax sent invoices to Renegade upon performing the services, and Renegade simply paid them. What we have here is scenario akin to those in *Triton Oil* and *Tubelite*. And, they mandate a similar outcome. Paying the invoice alone supports two equal but opposite inferences, one indicating an intent to accept the terms and one indicating an intent to reject them. It matters not that Renegade failed to complain within a reasonable time about the terms and conditions, in general, or the obligation to pay attorney's fees, in particular. *See Triton Oil & Gas Corp.,* 644 S.W.2d at 445. So, the aforementioned finding lacks legally sufficient evidentiary support, as does any implied agreement to pay attorney's fees.

Having overruled Renegade's first two issues but sustained its third, we modify the final judgment by reversing that portion of it awarding Amerivax, Inc., f/k/a Ameriflush,

Inc. attorney's fees against Renegade Well Services, LLC and affirm the judgment as modified.

Brian Quinn
Chief Justice