TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-14-00464-CV

Appellant, Continental Healthcare, Inc.// Cross-Appellant, Remedy Therapy Staffing, PLLC

v.

Appellee, Remedy Therapy Staffing, PLLC// Cross-Appellee, Continental Healthcare, Inc.

FROM THE COUNTY COURT AT LAW NO. 2 OF TRAVIS COUNTY
NO. C-1-CV-13-003042, HONORABLE J. DAVID PHILLIPS, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

"Texas has long followed the 'American Rule' prohibiting [attorney's] fee awards unless specifically provided by contract or statute."[1] The issues in this appeal center on whether the trial court had any statutory or contractual basis to award attorney's fees to the appellee or should have awarded fees to the appellant instead. On this record, we conclude that neither party was entitled by statute or contract to recover attorney's fees. Consequently, the American Rule bars both from recovering fees here.

[1] *MBM Fin. Corp. v. Woodlands Operating Co.*, 292 S.W.3d 660, 669 (Tex. 2009) (citing *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 310–11 (Tex. 2006)); *see also Texas State Bd. of Veterinary Med. Exam'rs v. Giggleman*, 408 S.W.3d 696, 702 (Tex. App.—Austin 2013, no pet.) (citing *MBM Fin. Corp.*, 292 S.W.3d at 669); *Wibbenmeyer v. TechTerra Commc'ns, Inc.*, No. 03-09-00122-CV, 2010 Tex. App. LEXIS 2203, at *10 (Tex. App.—Austin Mar. 26, 2010, pet. denied) (mem. op.) (citing *MBM Fin. Corp.*, 292 S.W.3d at 669).

BACKGROUND

The underlying facts are materially undisputed. At relevant times, appellant Continental Healthcare, Inc., a home-health agency, contracted with appellee Remedy Therapy Staffing, PLLC, to provide physical, occupational, and speech-therapy services to patients whom Continental served. The contracts governing the parties' relationship, first executed in 2010,[2] provided that Remedy would be compensated for its services according to flat per-patient-visit rates, for which Remedy would periodically invoice Continental (which it typically did on two-week intervals) and Continental was to pay within thirty days of receipt. According to Remedy, Continental was persistently late in meeting its payment obligations, and by late January 2013 Remedy had retained counsel to assist in collection efforts. On February 14, 2013, Remedy made written demand that Continental pay eight overdue invoices totaling $14,010 in amount, plus an additional $450 in attorney's fees, by March 16 or face possible legal action. After Continental did not make any payment by the deadline, Remedy filed suit on April 2, seeking recovery of the $14,010 owed on the eight invoices on theories of sworn account, breach of contract, and quantum meruit.[3] Remedy also prayed for an unspecified amount of "reasonable attorneys' fees incurred in the collection of the amounts due and owing Plaintiff," citing Chapter 38 of the Civil Practice and Remedies Code as the sole asserted authority for such an award.

---

[2] The parties executed a December 2010 "Staffing Agreement" and "Addendum," with the former addressing physical- and occupational-therapy services to be provided by Remedy, the latter speech-language pathology services. Subsequently, in March 2012, the parties signed a "Contractual Agreement," backdated to December 1, 2010, which elaborated on various aspects of patient care and documentation. There is no contention that the Contractual Agreement effected any modifications to their earlier contracts that are material to this appeal.

[3] The eight invoices were attached to Remedy's petition.

Continental was not served with process until July 2013, which Remedy effected through substituted service the trial court authorized on evidence alleging that Continental had been deliberately evading service. In the meantime, however, Continental made two payments to Remedy totaling $14,970—$9,850 on April 12, 2013, and another $5,120 on April 26, 2013—through which it purported to satisfy the $14,010 in outstanding invoices on which it had been sued, plus two additional invoices totaling $960 that Remedy had issued in February 2013. It is undisputed that Remedy accepted these payments and that their total amount exceeded the original principal indebtedness that Remedy had sued to recover. Yet Remedy did not consider the matter closed.

Remedy demanded that Continental pay it an additional $80 allegedly owed on another outstanding invoice. Continental refused, maintaining that Remedy had double-billed it for charges Continental had already paid. But a more critical complication in resolving the dispute was Remedy's further insistence that Continental compensate it for attorney's fees Remedy claimed it had accrued in collecting the debt, roughly $1,500 at that juncture. Unless and until Continental made full payment of these sums, Remedy insisted, it would continue to prosecute its lawsuit. After being served, Continental joined issue with a general denial and further defensive pleadings to the effect that it had fully paid any obligation it owed to Remedy, rendering Remedy's claims moot or without merit. Continental also asserted a counterclaim for attorney's fees, relying (as had Remedy) solely on Civil Practice and Remedies Code Chapter 38.

After an unsuccessful attempt by Remedy to obtain summary judgment on its breach-of-contract claim, the parties proceeded to a bench trial. At the outset of trial, Remedy moved for, and was denied, leave to amend its original petition to allege additional principal indebtedness

beyond the $14,010 it had sued to recover, and it was later denied a trial amendment to the same effect.[4] Consequently, because there was no dispute that Remedy had accepted the $14,970 in payments from Continental and that this amount had exceeded the original principal indebtedness, trial centered on the extent to which Continental owed Remedy attorney's fees. Remedy's basic theme was that it must "be made whole" for the attorney's fees it had incurred in collecting the debt—which by time of trial had mushroomed to $10,740, it claimed—further blaming these expenses on what it characterized as Continental's recalcitrance in refusing to pay its obligations in full. In response, Continental complained that Remedy's lawsuit was wholly a contrivance to recover attorney's fees and that it had already satisfied any obligations it legitimately owed.

After hearing evidence, the trial court rendered judgment awarding Remedy the following relief of primary importance to this appeal:

1. $__0__ as the principal amount due;

2. $__0__ in pre-judgment interest on the principal amount due through the date of judgment;

3. $__5000__ for attorney's fees for services rendered through trial of this case[.]

The trial court further awarded Remedy a total of $9,000 in conditional appellate attorney's fees, plus court costs, and denied all other claims by the parties for relief. Subsequently, the trial court made findings of fact and conclusions of law elaborating on the bases for its judgment. Of principal significance, the court found that while Continental had "eventually made payments that satisfied

[4] Remedy has not preserved any complaint regarding these rulings on appeal.

the amount[s] originally due under the contract," it had "refused to pay the attorney[']s fees that were necessarily expended in pursuit of the contract damages."

Both Continental and Remedy perfected appeals from this judgment.

ANALYSIS

Continental brings what are styled as four issues on appeal, the chief thrust of which is that the trial court lacked any statutory or contractual basis to award Remedy attorney's fees in this case. Conversely, in its cross-appeal, Remedy brings a single issue urging that the trial court erred in awarding it only $5,000 in attorney's fees and not the full $10,740 Remedy had sought at trial. Because Continental's challenges to the recovery of fees altogether logically precedes Remedy's complaint about their amount, we turn to Continental's issues first. Construction and application of statutory or contractual provisions authorizing attorney's-fee awards present questions of law that we review de novo.[5]

CPRC Section 38.001

In its first two issues, Continental disputes that Chapter 38 of the Civil Practice Remedies Code—again, the sole ground Remedy pleaded—can serve as a basis for recovering attorney's fees in this case. In relevant part, Chapter 38 (more specifically, Section 38.001) authorizes recovery of "reasonable attorney's fees from an individual or corporation, in addition to

[5] *See Wibbenmeyer*, 2010 Tex. App. LEXIS 2203, at *10 (citing *Holland v. Wal-Mart Stores, Inc.*, 1 S.W.3d 91, 94 (Tex. 1999); *In re Lesikar*, 285 S.W.3d 577, 583 (Tex. App.—Houston [14th Dist.] 2009, no pet.)).

the amount of a valid claim and costs, if the claim is for . . . an oral or written contract."[6] It is well established, as Continental emphasizes, that Section 38.001 requires that a claimant both (1) prevail on a cause of action for which attorney's fees are awarded, *and* (2) recover damages.[7] And because Remedy did not recover any damages here, Continental urges, Remedy cannot recover attorney's fees under Section 38.001. We agree—and indeed Remedy makes no attempt on appeal to defend its fee award on that ground. We accordingly sustain Continental's first and second issues.

Contractual fee-shifting

Remedy now insists that the trial court's fee award was actually "not under Section 38.001," but pursuant to a provision in Remedy's contracts with Continental. The contract provision in question states:

> The parties further agree that the prevailing party in any lawsuit brought to enforce the terms of this Agreement or which is brought to collect any amount owed under the terms of this Agreement shall be entitled to recover its reasonable attorney's fees and costs.[8]

---

[6] Tex. Civ. Prac. & Rem. Code § 38.001(8).

[7] *See, e.g.*, *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 390 (Tex. 1997) ("To recover attorney's fees under Section 38.001, a party must (1) prevail on a cause of action for which attorney's fees are recoverable, and (2) recover damages." (citing *State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 437 (Tex. 1995))); *see also Intercontinental Grp. P'ship v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 653 (Tex. 2009) (citing *Green*, 951 S.W.2d at 390); *Wibbenmeyer*, 2010 Tex. App. LEXIS 2203, at *11 (quoting *MBM Fin. Corp.*, 292 S.W.3d at 666).

[8] The provision was contained in both the December 2010 "Staffing Agreement" and the "Addendum."

According to Remedy, it "prevailed" as the provision required because its lawsuit prompted Continental to make payment and it obtained a judgment holding Continental liable for attorney's fees. Perhaps anticipating this argument, Continental challenges this contractual basis for fee recovery in its third issue.

We need go no farther than to observe again that Remedy never pleaded this contractual authorization as a basis for its attorney's-fee recovery. Accordingly, Remedy waived any right to recover fees by virtue of contract.[9] And the contractual fee provision is unavailing in any event.

Remedy's contracts with Continental do not define "prevailing party," and thus, as Continental urges, this case is controlled by the Texas Supreme Court decision in *Intercontinental Group Partnership v. KB Home Lone Star L.P.*[10] *Intercontinental* involved a "prevailing-party" contractual attorney's-fee provision similar to the one at issue here that did not define "prevailing party."[11] The plaintiff sued for breach of contract and at trial sought only lost profits as damages.[12] The claim was submitted to a jury, which found the defendant had breached the contract but awarded

---

[9] *See Intercontinental*, 295 S.W.3d at 659 ("Intercontinental has certainly waived . . . its right to recover fees under the contract. Intercontinental did not plead for attorney's fees under the contract, and never sought to amend its pleadings to do so."); Tex. R. App. P. 33.1 (preservation-of-error requirements).

[10] *See* 295 S.W.3d at 655–56.

[11] The contract in *Intercontinental* provided that "the prevailing party" in an "action to enforce the terms of [the] Contract or to declare rights [t]hereunder . . . shall be entitled to his reasonable attorney's fees to be paid by losing party as fixed by the court." *Id.* at 652.

[12] *Id.*

the plaintiff no damages.[13] The trial court rendered judgment awarding the plaintiff attorney's fees on the contract claim but no other relief.[14] On appeal, the supreme court held it was "untenable to say that [the plaintiff] prevailed and should recover attorney's fees."[15]

In construing "prevailing party" as used in the contract, the supreme court looked in the absence of a specific definition to the term's "ordinary meaning" as established in attorney's-fee jurisprudence.[16] Relying principally on cases from the United States Supreme Court, the court observed that a plaintiff does not "prevail" under these authorities so as to obtain attorney's fees unless it obtains (1) judicially sanctioned "relief on the merits" of its claim that (2) "materially alters the legal relationship between the parties."[17] This requires, the court explained, "an enforceable judgment against the defendant from whom fees are sought, or comparable relief through a consent decree or settlement."[18] Therefore, the supreme court continued, "the *judgment*," not preliminary

---

[13] *See id.*; *see also Wibbenmeyer*, 2010 Tex. App. LEXIS 2203, at *20 (citing *Intercontinental*, 295 S.W.3d at 652, 653).

[14] *See Intercontinental*, 295 S.W.3d at 652–53; *see also Wibbenmeyer*, 2010 Tex. App. LEXIS 2203, at *20–21 (citing *Intercontinental*, 295 S.W.3d at 652, 653).

[15] *Intercontinental*, 295 S.W.3d at 655.

[16] *See id.* at 653; *see also Wibbenmeyer*, 2010 Tex. App. LEXIS 2203, at *21 (citing *Intercontinental*, 295 S.W.3d at 653).

[17] *Intercontinental*, 295 S.W.3d at 653–54 (quoting *Farrar v. Hobby*, 506 U.S. 103, 111–12 (1992)); *see also Giggleman*, 408 S.W.3d at 703 (quoting *Intercontinental*, 295 S.W.3d at 653–54); *Wibbenmeyer*, 2010 Tex. App. LEXIS 2203, at *21 (same).

[18] *Intercontinental*, 295 S.W.3d at 654 (quoting *Farrar*, 506 U.S. at 111–12); *see also Giggleman*, 408 S.W.3d at 703–04 (quoting *Intercontinental*, 295 S.W.3d at 654).

rulings or findings, "is critical to the prevailing-party determination."[19] In other words, "[w]hether a party prevails [for purposes of qualifying for attorney's fees] turns on whether the party prevails upon the court to award it something, either monetary or equitable."[20]

Under these principles, Remedy is not a "prevailing party." The judgment awarded Remedy only attorney's fees on its contract claim and no other relief, whether monetary, equitable or declaratory.[21] According to the Texas Supreme Court in *Intercontinental*, "[a] zero on damages necessarily zeroes out 'prevailing party' status."[22] While Remedy insists that it "prevailed upon Continental to pay the balance outstanding" through "several demands upon Continental" and through the "fil[ing of] the lawsuit to enforce Continental's payment obligations under the [Staffing] Agreement," these arguments merely evoke the "catalyst" theory rejected by *Intercontinental* and its antecedents.[23] And while Remedy cites some court-of-appeals cases holding to the contrary,

---

[19] *Intercontinental*, 295 S.W.3d at 656 (citing *Buckhannon Bd. & Care Home, Inc. v. West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603–04 (2001)); *see also Giggleman*, 408 S.W.3d at 704 (quoting *Intercontinental*, 295 S.W.3d at 656); *Wibbenmeyer*, 2010 Tex. App. LEXIS 2203, at *21 (same).

[20] *Intercontinental*, 295 S.W.3d at 655; *see also Wibbenmeyer*, 2010 Tex. App. LEXIS 2203, at *22 (quoting *Intercontinental*, 295 S.W.3d at 654–55).

[21] *See Intercontinental*, 295 S.W.3d at 655 (plaintiff did not prevail where it "received nothing of value of any kind, certainly none of the relief sought in its petition").

[22] *Id*. at 655–56.

[23] *See Buckhannon*, 532 U.S. at 605 (While "[a] defendant's voluntary change in conduct" may "accomplish[] what the plaintiff sought to achieve by the lawsuit," this nonetheless "lacks the necessary judicial *imprimatur* on the change."); *see also Epps v. Fowler*, 351 S.W.3d 862, 864, 866–71 (Tex. 2011) (holding a plaintiff's nonsuit without prejudice does not confer prevailing party status on the defendant "unless the court determines . . . that the plaintiff took the non-suit in order to avoid an unfavorable judgment," and also noting that "[a] voluntary change in the defendant's conduct . . . lack[s] the requisite 'judicial imprimatur' to confer prevailing party status on the

including an unpublished decision from this Court,[24] these predate *Intercontinental* and can no longer be considered binding or persuasive authority.

Beyond this, Remedy decries (as it did below) the perceived inequity of having to incur attorney's fees in making demand of and ultimately suing Continental, not to mention overcoming Continental's alleged avoidance of service, all to collect bills that Continental had been bound contractually to pay all along. But this is a risk inherent in the American Rule itself, which requires litigants to absorb their own legal costs absent statute or contract providing otherwise.[25] We are not at liberty to deviate from that established doctrine.[26] And considering that parties are free to shift or mitigate this risk by contract,[27] any perceived unfairness is to some degree of Remedy's own making. Although Remedy conceivably could have negotiated more robust protections for itself,

---

plaintiff") (quoting *Buckhannon*, 532 U.S. at 605); *Giggleman*, 408 S.W.3d at 704 ("[Plaintiff's] mandamus claim was rendered moot before final judgment when the Board had eventually produced the disputed exhibits to him, obviating any justiciable controversy regarding his entitlement to the writ." (citing, *inter alia*, *Buckhannon*, 532 U.S. at 605–06)); *Wibbenmeyer*, 2010 Tex. App. LEXIS 2203, at *32–37 (holding plaintiff's nonsuit was not "judicially sanctioned," and therefore defendants were not "successful" or "prevailing" parties in enforcing shareholders' agreement) (citing *Buckhannon*, 532 U.S. at 600–05; *RFR Indus., Inc. v. Century Steps, Inc.*, 477 F.3d 1348, 1353 (Fed. Cir. 2007)).

[24] *See Polk v. St. Angelo*, No. 03-01-00356-CV, 2002 Tex. App. LEXIS 3934 (Tex. App.—Austin May 31, 2002, pet. denied) (not designated for publication).

[25] *See, e.g.*, *MBM Fin. Corp.*, 292 S.W.3d at 669.

[26] *See, e.g.*, *Petco Animal Supplies, Inc. v. Schuster*, 144 S.W.3d 554, 565 (Tex. App.—Austin 2004, no pet.) ("As an intermediate appellate court, we are not free to mold Texas law as we see fit but must instead follow the precedents of the Texas Supreme Court unless and until the high court overrules them or the Texas Legislature supersedes them by statute.").

[27] *Cf. Intercontinental*, 295 S.W.3d at 653 ("Parties are free to contract for a fee-recovery standard either looser or stricter than Chapter 38's . . . .").

such as a requirement that Continental pay any costs of collection, it agreed instead to fee-shifting conditioned on prevailing-party status, thereby incorporating the more demanding standards addressed in *Intercontinental*. It is not our proper judicial role to rewrite the contract the parties have made.[28]

In sum, even if Remedy had preserved a claim for attorney's fees under its contracts with Continental, it would not be entitled to recover on that basis as a matter of law. We accordingly sustain Continental's third issue. And in the absence of any statutory or contractual basis to support Remedy's fee award, the "American Rule" compels us to reverse and render judgment that Remedy take nothing.[29] This holding is also fatal to Remedy's cross-appeal complaining of the amount of fees awarded, and we accordingly overrule it.

Although not styled as a discrete issue on appeal, Continental presents a "request for relief" in which it urges us to render judgment awarding it attorney's fees in lieu of Remedy. As the basis for that award, Continental relies on the parties' contractual fee-shifting provision and reasons that it is the "prevailing party" because Remedy failed to obtain any judgment award against it. Although it seems clear that a defendant does not have to obtain affirmative relief in order to be a "prevailing party" post-*Intercontinental*,[30] a footnote in that opinion has suggested

---

[28] *See, e.g.*, *American Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 162 (Tex. 2003) ("[W]e may neither rewrite the parties' contract nor add to its language." (citing *Royal Indem. Co. v. Marshall*, 388 S.W.2d 176, 181 (Tex. 1965)).

[29] *See MBM Fin. Corp.*, 292 S.W.3d at 669; *Wibbenmeyer*, 2010 Tex. App. LEXIS 2203, at *10.

[30] *See Old HH, Ltd. v. Henderson*, No. 03-10-00129-CV, 2011 Tex. App. LEXIS 9669, at *9–10 (Tex. App.—Austin Dec. 9, 2011, no pet.) (mem. op.) (concluding that defendants prevailed when trial court rendered a take-nothing judgment in their favor and therefore were entitled

some uncertainty as to whether a defendant has "prevailed" where, as here, the fact-finder finds it liable but no damages are awarded.[31] But while this question is perhaps "interesting legally," as in *Intercontinental* it is "not before us procedurally" because Continental pleaded only Chapter 38 as its basis for recovering attorney's fees.[32] We accordingly overrule Continental's "request for relief."

Costs

In its fourth and final issue, apparently urged in the event it did not prevail on any of the preceding ones, Continental challenges the trial court's award of costs to Remedy in its original judgment. Similar to its arguments contesting Remedy's prevailing-party status, Continental urges that Remedy should not be considered the "successful party" entitled to costs under Rule of Civil Procedure 131 in light of Remedy's failure to recover damages on its claims. We need not reach this contention in light of our reversal of the trial court's fee award and taxation of costs in light of that ruling.

---

to attorneys' fees under "prevailing party" contract clause); *see also Fitzgerald v. Schroeder Ventures II, LLC*, 345 S.W.3d 624, 627–30 (Tex. App.—San Antonio 2011, no pet.) (concluding that *Intercontinental* "does not answer the question of what a defendant must do to be a prevailing party" and that defendants who obtained a take-nothing judgment in their favor were "prevailing parties" entitled to recover attorneys' fees under parties' agreement).

[31] *See Intercontinental*, 295 S.W.3d at 659 n.42 ("Some might argue that not every lawsuit produces a winner (even cases that go to verdict); the parties could battle to what amounts to a draw, pay their own fees and expenses, and go home. Here, a jury finds there was breach but not injurious breach; the wronged plaintiff gets nothing and the wrongdoing defendant gives nothing. If 'receiving no damages' means the plaintiff did not prevail, does 'remitting no damages' necessarily mean the breaching defendant prevailed? When defining litigation success, some might argue that while relief is required for plaintiffs to prevail, a finding of 'no breach' is required for defendants—that is, a desired finding on breach is insufficient for plaintiffs but indispensable for defendants.").

[32] *See id*. at 659.

CONCLUSION

We reverse the judgment award of attorney's fees to Remedy and render judgment that Remedy take nothing on that claim. We affirm the judgment to the extent it denies Continental recovery on its counterclaim for attorney's fees.

_____

Bob Pemberton, Justice

Before Justices Puryear, Pemberton, and Field

Affirmed in part; Reversed and Rendered in part

Filed: October 14, 2016