TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-19-00592-CV

Gatehouse Media Texas Holdings, Inc. as Successor in Interest to Cox Texas Newspapers, L.P. d/b/a Austin American-Statesman, Appellant

v.

George Poe d/b/a Cedar Park Jewelry, Appellee

FROM THE COUNTY COURT AT LAW NO. 2 OF TRAVIS COUNTY
NO. C-1-CV-16-010120, THE HONORABLE TODD T. WONG, JUDGE PRESIDING

MEMORANDUM OPINION

Gatehouse Media Texas Holdings, Inc. as Successor in Interest to Cox Texas Newspapers, L.P. d/b/a Austin American-Statesman (Gatehouse) appeals the trial court's judgment, entered after a bench trial, that Gatehouse take nothing on its claims against George Poe (George)[1] d/b/a Cedar Park Jewelry. In its appellate issues, Gatehouse contends that (1) it conclusively proved its contract cause of action against George and (2) the evidence was factually insufficient to support the trial court's rulings to the contrary. Because the evidence was legally and factually sufficient to support the trial court's findings against Gatehouse on the performance element of its contract cause of action, the court did not err by entering judgment that Gatehouse take nothing on that cause of action. We affirm.

[1] George's brother, Larry Poe, is important to the facts underlying Gatehouse's suit, so we will refer to the Poe brothers by their first names.

BACKGROUND

This suit centers on jewelry stores once owned and operated as a sole proprietorship by George, doing business as "Cedar Park Jewelry," and George's transfer of the business to an entity called "Cedar Park Jewelry LLC" (the LLC). George started the business in 2006 as sole proprietor. In early 2013, George's wife became paralyzed after an injury, so, according to George's testimony, he asked Larry to "run the business for [him] so [he] could tend to other personal matters." He said that he only asked Larry "just to come sit in as an eye, as somebody that's [his] family member"; that "there was not really any taking over of the business by Larry"; and that he did not "want to make [Larry] a partner" or "[a]nything like that."

Larry testified differently, stating that George told him that he was in disputes with family members over the jewelry stores and asked Larry to "come and help him work in the stores and help him through this crisis." Larry agreed and believed that George gave him "[f]ull unfettered access and authority," "pretty much running everything for George."

Later in 2013, George created the LLC. At that time, he neither transferred any assets to the LLC nor started operating it.

Ads for the jewelry business ran on TV over the years, and Andrea Vick, who works for Gatehouse[2] in advertising, saw many of them, according to her testimony. The ads spurred her to walk into one of the jewelry stores in late 2014 to ask for a meeting to discuss advertising the business through Gatehouse. Vick understood George to be the business's owner, based on the TV ads. Vick had several meetings with people from the jewelry business to discuss advertising

[2] During the period relevant to this suit, it was Gatehouse's predecessor-in-interest that employed Vick and did business with George d/b/a Cedar Park Jewelry. We call the predecessor-in-interest "Gatehouse" as well.

through Gatehouse. She met first with George and later with Larry and others. George told her that he owned the business. An early meeting included Jose Garcia, from the Cabeza Advertising agency, and Keith Newton, who handled digital and website work for the jewelry business. Both Garcia and Newton had been advertising consultants to George for some time. They then introduced Larry to the Gatehouse team and set up further meetings for Larry and others to attend. George described himself as having only limited involvement in the meetings.

Based on the meetings, Vick prepared an advertising proposal and letter of understanding. Once these were in hand, Larry said, "[w]e hired them." According to Vick, George told her during their negotiations over an advertising contract "that Larry was in charge of all marketing and advertising decisions and that [she] should work with him directly."

Vick described one of the important steps before signing an advertising contract in the media industry. She said that she and her colleagues are "trained pretty heavily on how to determine who the decisionmaker is," including by "ask[ing] a lot of questions." When Vick "met the owner, George Poe, [she] knew he was the decisionmaker for Cedar Park Jewelry." And "when he told [her] that his decisions for advertising and marketing were made by Larry Poe, that gave [her] the confidence to know that this is the person that should be signing the contracts."

The negotiations led to a January 2, 2015 Advertising Agreement (the 2015 Advertising Agreement) between Gatehouse and "Cedar Park Jewelry," the latter of which the agreement names as the contracting "Advertiser." Larry signed the 2015 Advertising Agreement for "Cedar Park Jewelry." The agreement explains the advertising services that Gatehouse would provide and that the services would be for both the Cedar Park Jewelry store in Cedar Park and a Houston store called "Diamonds by George." It also states that it "shall be in accordance with the following attached documents: . . . Credit Terms for Direct Advertiser."

The attached Credit Terms for Direct Advertiser clarify who the "Cedar Park Jewelry" named in the agreement as the "Advertiser" was. The Credit Terms refer to a Credit Application that Gatehouse required from its clients. The Credit Terms say that the Credit Application "is for businesses interested in utilizing the services of" Gatehouse and that "[b]y clicking 'Submit' below, I hereby represent that I am authorized to submit this application and bind the business identified in this Application (the 'Applicant'), and that the information provided is for the purpose of obtaining credit and is true, correct and complete." It continues:

> The Applicant submitting an Application through this website hereby agrees that this Application and Applicant's purchase of advertising or related services ("Ads") from [Gatehouse] (each such transaction, an "Advertising Agreement") shall be subject to the following terms and conditions (these "Terms" and, together with this Application, the "Agreement") and that the Terms of this Agreement shall be incorporated into each such Advertising Agreement:
>
> . . . .
>
> Applicant represents and warrants that all information submitted in this Application is true, correct, and complete.

Soon after the signing of the 2015 Advertising Agreement, Gatehouse received the completed Credit Application, which Larry had authorized the business's bookkeeper to fill out on his behalf and submit to Gatehouse. The completed Credit Application contained Larry's electronic signature and showed that his title was "VP." It also showed that the "Business Structure" for "Cedar Park Jewelry" was "Sole Ownership" and listed only George's name under the heading "Name of Propriet[o]r, Officers." Vick understood George to be the owner of "Cedar Park Jewelry" and "Diamonds by George." In all, the agreement's use of "Cedar Park Jewelry" as the contracting "Advertiser" referred to George, doing business as Cedar Park Jewelry.

Gatehouse then took over from Cabeza Advertising as the advertising agent of record for "Cedar Park Jewelry," and, according to Larry, he, Garcia, and Newton all continued to advise George about advertising. Larry said that George continued to offer input, and was sought out for his opinions, on advertising for the business because he was the face of the brand and often "had creative suggestions." As part of its work under the agreement, Gatehouse created elements of an advertising campaign with "the brand of the store," according to Vick, being "George Poe." To her, that "brand" never wavered or changed.

In February 2015, an incident took place between George and his wife, leading to George's conviction and incarceration for assault. As a result, George went to alcohol rehabilitation in Mississippi for four months, followed by a three-month stay in the county jail. During these seven months, George said, he was not "involved in the operation of the store." Larry said that while George was away, he kept George advised about the status of advertising and "all company matters" and that he continued to do so through 2016. But George disagreed, saying that Larry did not contact him about what was going on with the business during those seven months.

On the day he left for rehab, George signed a Statutory Durable Power of Attorney, which, according to him, "g[a]ve authority to Larry to run the business and keep the business going." The power of attorney authorized Larry to conduct "[r]eal property," "[t]angible personal property," "[s]tock and bond," "[b]anking and other financial institution," and "[b]usiness operating" transactions for George. George said that while he was in rehab, Larry came to assume that he had become the person in charge of the jewelry business.

Vick often visited the Cedar Park store during 2015. People there told her that George was in rehab and would be going to jail. She never saw or spoke to George again.

Just before George's September 2015 release from jail, Larry asked George to sign the LLC's Company Agreement. Though hesitant at first, George eventually signed. Under the Company Agreement, George made a capital contribution to the LLC in exchange for a Class B ownership interest in it. His capital contribution included "all right, title and interest in and to the assets of George R. Poe, Sole Proprietorship (d/b/a[] Cedar Park Jewelry)." The Company Agreement limited George's role in the business for two years, prohibiting him from unilaterally (1) contacting any current or former employees of the LLC, (2) entering any place of business of the LLC, or (3) holding himself out as in any way having authority to act on behalf of the LLC or to bind it in any way. George understood that he could not enter the store, have any input into the business, or talk to people at the business. As a result, he did not return to the store. In fact, if he or his wife had returned, he said, either Larry or store employees at Larry's direction would have locked the doors and called the police.

Larry had signatory authority for the LLC, and a separate entity that Larry controlled had sole control of the LLC. George said that he "never gave [Larry] permission after 9-15 to do anything" and that he could not bestow on Larry any titles in the LLC because George had no authority in the LLC to do so. Larry, however, believed that George had at least some right of involvement in the LLC. On his release from jail, George expected to resume "management of the company." But Larry avoided George and did not discuss the business with him, George said.

Throughout 2015 Gatehouse issued monthly invoices for its services. All were paid. Beginning in early December 2015, Gatehouse received checks bearing the name "Cedar Park Jewelry LLC" and Larry's signature. Vick testified that Gatehouse does not have a "response if checks come from various people who are not obligated on the contract." Instead, she "do[es]n't

care who the check comes from" because "[a]s long as it's coming to an account that's due, we're applying it to the account it says to apply it to" and not caring "where the money comes from."

In late 2015 and early 2016, because of "a successful first year of advertising and marketing with them," Vick discussed "2016's plan, came up with our new advertising plan, and then put together the document" that would become the February 2, 2016 Advertising Agreement (the 2016 Advertising Agreement), which is the basis for Gatehouse's contract cause of action against George here. The 2016 agreement is between Gatehouse and "Cedar Park Jewelry," which was again named in the agreement as the contracting "Advertiser." Before the agreement was executed, Vick did not go through the same process, as in 2015, of identifying the counterparty decisionmaker, saying, "Why would I?" Vick "had no dealings with [George] regarding" the 2016 Advertising Agreement, and Larry signed the agreement as "CEO." The agreement says that "[t]his Agreement, including the Rate Card, is the entire agreement of the parties." No new Credit Application accompanied the agreement. Instead, the agreement says that it "shall be in accordance with the . . . Signed Credit Terms for Direct Advertiser already on file."

Also that year, George and Larry became embroiled in a legal dispute. George believed that he had not told Larry that he could sign or approve any obligation imposing personal liability on George for "debts of this company" post-Company Agreement. And, George said, although Larry had told him "that he would give my store back to me in two years," he felt that Larry was not advising him about what was going on with the business. So George sued Larry in a Travis County probate court, seeking to have the Company Agreement set aside as voidable so that he could get back to running the business.

By this time, the LLC's bank had a lien on the LLC's assets and considered Larry to be in sole control of the LLC. The bank intervened in the probate-court suit, alleging that Larry

was mismanaging the LLC. George discovered documents suggesting that Larry had transferred money out of the business to a location where George could not "figure out what was going on."

The probate court appointed an interim receiver to take control of the LLC. It authorized the receiver to preserve the LLC's business as a going concern and to operate the LLC's business by paying all bills and amounts due as and when they became due.

Gatehouse issued monthly invoices for its 2016 services, as it had in 2015. These invoices were only partially paid. The payments that Gatehouse did receive were made by the "Cedar Park Jewelry LLC" checks discussed above. At the trial of the county-court-at-law suit underlying this appeal, George described the receiver's relationship to Gatehouse's fees:

> The Court: . . . The order for the receiver indicates that the receiver is to pay the debts of the entity. Was the [Gatehouse] contract part of the ongoing debts that the receiver was supposed to pay?
>
> [George]: The receiver was supposed to pay every debt.
>
> The Court: And that's on behalf of the LLC?
>
> [George]: At that point, it was the LLC.

A balance due of $185,111.49 remained under Gatehouse's 2016 invoices.

According to George, the probate-court suit was ultimately settled by "investors coming in, setting up a new entity, and buying all the assets." Gatehouse separately filed this suit in the county court at law, seeking the balance due on its 2016 invoices. Gatehouse sued both "George Poe dba Cedar Park Jewelry" and Larry, pleading breach of contract and alleging that "Larry Poe acted on behalf of George Poe with authority in entering into the transactions made the basis of this suit on behalf of Cedar Park Jewelry." At trial, Gatehouse nonsuited its claims against Larry. Until this suit, George was unaware that Larry had signed the 2016 Advertising Agreement.

After the bench trial, the trial court entered judgment that Gatehouse take nothing on its claims against George. It later entered these findings of fact and conclusions of law:

I. Findings of Fact

1. On February 2, 2016, the parties entered a written agreement entitled "Advertising Agreement," which was signed by Larry Poe as "CEO" of "Cedar Park Jewelry."

2. By the time the Advertising Agreement was executed, all assets and operations of the business known as Cedar Park Jewelry had been transferred to Cedar Park Jewelry LLC, a Texas limited liability company of which Larry Poe was the CEO.

3. By the time the Advertising Agreement was executed, all assets and operations of the business known as Cedar Park Jewelry were owned and operated by Cedar Park Jewelry LLC, and not by George Poe d/b/a Cedar Park Jewelry.

4. The goods and services provided by [Gatehouse] under the Advertising Agreement were provided to and used by Cedar Park Jewelry LLC (or a company operating in Houston known as Diamonds by George), not George Poe d/b/a Cedar Park Jewelry.

5. In October 2016, [Gatehouse] filed suit asserting claims against Defendants, George Poe and Larry Poe, for breach of contract and on an open account, for goods and services allegedly provided to Cedar Park Jewelry. [Gatehouse] contended that George Poe, individually, was operating/doing business as a sole proprietorship known as Cedar Park Jewelry, and that the contract and account sued upon were with George Poe d/b/a Cedar Park Jewelry.

6. During trial, but before it rested, [Gatehouse] non-suited and dismissed its claims against Defendant, Larry Poe.

7. George Poe d/b/a Cedar Park Jewelry did not enter any agreements with [Gatehouse] to provide the goods and services that were the subject of Plaintiff's claims.

8. Larry Poe did not enter any agreements with [Gatehouse], including the Advertising Agreement, on behalf of George Poe d/b/a Cedar Park Jewelry, but rather did so as CEO of, and on behalf of, Cedar Park Jewelry LLC.

9. Larry Poe did not enter any agreements with [Gatehouse], including the Advertising Agreement, as attorney-in-fact for George Poe.

10. None of the goods and services made the subject of Plaintiff's claims were provided to George Poe d/b/a Cedar Park Jewelry.

11. Larry Poe did not have actual or apparent authority to bind George Poe to any agreement with [Gatehouse].

12. George Poe had no authority to act on behalf of, and did not act on behalf of or otherwise become involved in the business of, Cedar Park Jewelry LLC.

13. At the time the Advertising Agreement was signed by Larry Poe, Larry Poe was in charge of and operating Cedar Park Jewelry LLC.

14. [Gatehouse] was not aware of the existence of a power of attorney executed by George Poe in favor of Larry Poe and did not rely upon such power of attorney or any purported authority of Larry Poe thereunder in entering into the Advertising Agreement or providing the goods and services made the subject of its claims.

15. Not all of the goods and services allegedly provided by [Gatehouse] were provided to Cedar Park Jewelry business. Some were provided to a business located in Houston known as Diamonds by George. [Gatehouse] did not differentiate in its billings services provided to the respective businesses.

II. Conclusions of Law

1. The Court has subject matter and personal jurisdiction in this matter.

2. Larry Poe did not have authority to act on behalf of George Poe, individually, in entering into the Advertising Agreement or otherwise entering into any agreement or undertaking to secure any goods and services from [Gatehouse], and did not do so.

3. The Advertising Agreement was not executed by George Poe or by his authority.

4. George Poe is not liable in the capacity in which he is sued.

5. George Poe is not liable to [Gatehouse] on any of the claims asserted by [Gatehouse] against him, including, without limitation, for breach of contract or under a sworn account, and [Gatehouse] should take nothing by its claims against him.

This appeal by Gatehouse followed.

STANDARD OF REVIEW AND APPLICABLE LAW

When, as here, the parties try the suit to the bench, the trial court enters findings of fact, and there is a reporter's record of the trial, we review the findings for legal and factual sufficiency of the evidence by the same standards applied to reviewing the evidence supporting a jury answer. *See Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994); *GATX Terminals Corp. v. Rylander*, 78 S.W.3d 630, 633 (Tex. App.—Austin 2002, no pet.). In a bench trial, the trial court is the factfinder and the sole judge of witness credibility. *Illiff v. Illiff*, 339 S.W.3d 126, 135 (Tex. App.—Austin 2009), *aff'd*, 339 S.W.3d 74 (Tex. 2011). It may believe one witness, disbelieve others, and resolve inconsistencies in any witness's testimony. *Id.*

Evidence is legally insufficient when (1) the record bears no evidence of a vital fact, (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a mere scintilla, or (4) the evidence conclusively establishes the opposite of a vital fact. *Shields Ltd. P'ship v. Bradberry*, 526 S.W.3d 471, 480 (Tex. 2017). More than a scintilla of evidence exists if the evidence rises to a level that would enable reasonable and fair-minded people to differ in their conclusions. *Dildine v. Bonham*, No. 03-07-00631-CV, 2009 WL 638200, at *3 (Tex. App.—Austin Mar. 12, 2009, pet. denied) (mem. op.). When reviewing for legal sufficiency, we must consider evidence favorable to the challenged finding if the factfinder could reasonably do so and disregard evidence contrary to the finding unless a reasonable factfinder could not disregard it. *Shields*, 526 S.W.3d at 480.

When the party challenging the legal sufficiency of the evidence supporting a finding bore the burden of proof on that finding, the party must show that "the record conclusively establishes all vital facts in support of the issue." *Id.* When we review this kind of sufficiency issue, we first review the record for evidence that supports the challenged finding and ignore all evidence contrary to the finding. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001) (per curiam). Only if no evidence supports the finding do we then examine the entire record to determine whether the contrary proposition is established as a matter of law. *Id.* We may sustain the issue only when the contrary proposition is conclusively established. *Id.* A matter is conclusively established if ordinary minds could not differ about the conclusion to draw from the evidence. *International Bus. Machs. Corp. v. Lufkin Indus., LLC*, 573 S.W.3d 224, 235 (Tex. 2019).

When reviewing for factual sufficiency, we examine the entire record and consider and weigh all the evidence, both in support of and contrary to the challenged finding. *Fox v. O'Leary*, No. 03-11-00270-CV, 2012 WL 2979053, at *3 (Tex. App.—Austin July 10, 2012, pet. denied) (mem. op.). When the party challenging the factual sufficiency of the evidence supporting a finding bore the burden on that issue at trial, the party must show that the finding "is against the great weight and preponderance of the evidence." *Id.* In a factual-sufficiency review, "[w]e may not substitute our own judgment for that of the factfinder, even if the evidence would support a different result." *Saltworks Ventures, Inc. v. Residences at The Spoke, LLC*, No. 03-16-00711-CV, 2018 WL 2248274, at *6 (Tex. App.—Austin May 17, 2018, no pet.) (mem. op.).

We review conclusions of law de novo. *Fox*, 2012 WL 2979053, at *3. "An erroneous conclusion of law does not require reversal if the trial court rendered the proper judgment." *Bos v. Smith*, 556 S.W.3d 293, 299 (Tex. 2018). We will uphold the conclusions if we can sustain the judgment on any legal theory supported by the evidence. *DPRS 15th St., Inc. v.*

Texas Skyline, Ltd., No. 03-11-00101-CV, 2014 WL 4058796, at *4 (Tex. App.—Austin Aug. 13, 2014, no pet.) (mem. op.).

The elements of a contract cause of action are (1) the existence of a valid contract; (2) the plaintiff's performance, or tender of performance, as the contract required; (3) the defendant's breach by failure to perform, or to tender performance, as the contract required; and (4) damages to the plaintiff resulting from the breach. *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 501 n.21 (Tex. 2018); *Roundville Partners, L.L.C. v. Jones*, 118 S.W.3d 73, 82 (Tex. App.—Austin 2003, pet. denied).

PERFORMANCE ELEMENT OF CONTRACT CAUSE OF ACTION

In its first issue, Gatehouse contends that "the evidence conclusively establishes all of the elements of [its] breach of contract cause of action against George in his individual capacity." In its second, it attacks the factual sufficiency of the evidence supporting the trial court's findings, contending that "the trial court's findings regarding [the] breach of contract cause of action . . . are so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." And in its third, it contends that "the evidence conclusively establishes that . . . Larry . . . was authorized to sign the 2016 Advertising Agreement on behalf of George."

To prevail against George under the 2016 Advertising Agreement, Gatehouse needed to prove all elements of its contract cause of action, including the performance element. *See Zorrilla v. Aypco Constr. II, LLC*, 469 S.W.3d 143, 154 n.9 (Tex. 2015) ("Performance of a contract is distinct from formation of a contract."); *Roundville Partners*, 118 S.W.3d at 82 (holding that contract cause of action failed because plaintiff did not perform). The trial court made findings against Gatehouse on the performance element: "[t]he goods and services provided by [Gatehouse]

under the [2016] Advertising Agreement were provided to and used by Cedar Park Jewelry LLC (or a company operating in Houston known as Diamonds by George), not George Poe d/b/a Cedar Park Jewelry," and "[n]one of the goods and services made the subject of [Gatehouse]'s claims were provided to George Poe d/b/a Cedar Park Jewelry."[3]

Performance is generally a question of fact. *See Grayco Town Lake Inv. 2007 LP v. Coinmach Corp.*, No. 03-15-00088-CV, 2016 WL 7335862, at *5 & n.24 (Tex. App.—Austin Dec. 16, 2016, no pet.) (mem. op.) ("[T]o the extent there is a dispute, whether the parties' conduct constituted breach or performance, is a question for the fact finder."); *M7 Cap. LLC v. Miller*, 312 S.W.3d 214, 222–23 (Tex. App.—Houston [14th Dist.] 2010, pet. denied) (analyzing performance as question of fact). To prove that it performed or tendered performance under the 2016 Advertising Agreement, Gatehouse needed to prove either that it complied with the contract's provisions, that it offered to perform and was able to do so, or that there was some valid excuse for its failure to perform. *See M7 Cap.*, 312 S.W.3d at 222 (citing *Preston State Bank v. Jordan*, 692 S.W.2d 740, 744 (Tex. App.—Fort Worth 1985, no writ)); *Carr v. Norstok Bldg. Sys., Inc.*, 767 S.W.2d 936, 939 (Tex. App.—Beaumont 1989, no writ) (citing *Acme Pest Control Co. v. Youngman*, 216 S.W.2d 259, 263 (Tex. App.—Waco 1948, no writ)).

We first review the record for any evidence supporting the trial court's findings that Gatehouse did not perform for, or tender performance to, George, ignoring all evidence to the contrary. *See Dow Chem.*, 46 S.W.3d at 241. Evidence supported the findings. Under the 2016 Advertising Agreement, Gatehouse agreed to provide advertising services to the same

[3] These findings undermine Gatehouse's assertion in its appellate brief that "[a]ll agree . . . that Gatehouse performed under the 2016 agreement."

"Advertiser" as in 2015—George, doing business as "Cedar Park Jewelry."[4] But the evidence establishes that by the time of the 2016 Advertising Agreement, George no longer owned the business—the LLC did—and he had ceased participating in it. He also had no contact with Gatehouse or Vick from his trips to rehab and jail forward. Because reasonable and fair-minded people therefore could have differed over whether Gatehouse performed the advertising services for, or tendered performance to, George, Gatehouse did not conclusively prove that it performed for, or tendered performance to, George under the agreement. *See id.*; *M7 Cap.*, 312 S.W.3d at 222. We overrule this portion of Gatehouse's first issue.

We also conclude that factually sufficient evidence supported the findings about Gatehouse not providing goods or services to George under the agreement. *See Fox*, 2012 WL 2979053, at *3. Although Gatehouse performed under the 2016 agreement as it had under the 2015 one, George had by that time transferred the business to the LLC and no longer owned or operated it. And although George testified that he expected and wanted to resume ownership and control of the business, that did not happen. Even if some of the evidence would support a different result, we may not substitute our judgment for the factfinder's because the evidence supporting the trial court's performance findings was not against the great weight and preponderance of the evidence. *See Saltworks Ventures*, 2018 WL 2248274, at *6; *Fox*, 2012 WL 2979053, at *3. The evidence was factually sufficient to establish that Gatehouse's advertising services were not provided to George. *See M7 Cap.*, 312 S.W.3d at 222; *see also Baucum v. Great Am. Ins. Co. of N.Y.*, 370 S.W.2d 863, 866 (Tex. 1963) (holding that insurance

[4] If the 2016 Advertising Agreement's contracting "Advertiser" is instead the LLC, then that alternative would itself defeat Gatehouse's contract cause of action against George because, under this alternative view, George is not even a party to the agreement.

company failed to tender policy benefits in compliance with policy's terms, which required tender of benefits to insured in person, because company tendered benefits by delivering check to court clerk instead). Gatehouse puts forward no other evidence or argument to contest the trial court's performance findings. *See, e.g., Crawford v. Haywood*, 392 S.W.2d 387, 389 (Tex. App.—Corpus Christi 1965, no writ) ("A party who asserts that performance of the contract on his part has been excused has the burden of establishing the facts relied on for such excuse." (quoting *Smith v. Irwin*, 289 S.W. 113, 113 (Tex. App.—El Paso 1926, no writ))). We overrule this portion of Gatehouse's second issue.

Because we uphold the trial court's findings against Gatehouse on the performance element, we hold that the trial court did not err by entering a take-nothing judgment against Gatehouse on its contract cause of action. *See Roundville Partners*, 118 S.W.3d at 82. We need not reach the remainder of Gatehouse's issues. *See* Tex. R. App. P. 47.1.

CONCLUSION

We affirm the trial court's judgment.

Chari L. Kelly, Justice

Before Chief Justice Rose, Justices Baker and Kelly

Affirmed

Filed: November 5, 2020