



NUMBER 13-15-00449-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

CALVIN WAYNE McCLAIN,

Appellant,

v.

DIANA ALAMAR McCLAIN,

Appellee.

**On appeal from the 430th District Court
of Hidalgo County, Texas.**

MEMORANDUM OPINION

**Before Justices Contreras, Longoria, and Hinojosa
Memorandum Opinion by Justice Hinojosa**

Appellant Calvin Wayne McClain appeals the dismissal of claims for breach of contract, fraud, and constructive trust in favor of appellee Diana Alamar McClain.¹ In

¹ For ease of reference, we will refer to the parties by their first names.

eight issues, which we treat as four, Calvin complains that the trial court erred in dismissing claims for (1) breach of contract, (2) fraud, (3) constructive trust, and (4) a “gift.” We affirm.

I. BACKGROUND²

A. The Divorce Decree

On July 9, 2009, the trial court signed a final divorce decree in Cause No. F-1223-09-J. It provided the following:

7. Division of Marital Estate

....

Property to Wife

IT IS ORDERED AND DECREED that the wife, Diana Alamar McClain, is awarded the following as her sole and separate property, and the husband is divested of all right, title, interest, and claim in and to that property including any and all improvements and attachments:

W-1. Lot 122 Block 3, La Homa Ranch Citrus Groves Sub'[d]., Unit No. 2 Hidalgo County, Texas

Also known as 21037 N. Moorefield Rd.

....

8. Real Property

The real property described as the following:

Lot 122, Block 3, La Homa Ranch Citrus Groves Sub'[d]., Unit No.2 Hidalgo County, Texas

Also known as 21037 N. Moorefield Rd.

² Because this is a memorandum opinion and the parties are familiar with the facts, we will not recite them here except as necessary to advise the parties of the Court's decision and the basic reasons for it. See TEX. R. APP. P. 47.4.

As long as Calvin Wayne McClain lives on the real property described above, he shall be responsible for the property taxes and the maintenance on the property. It is Ordered that the real property described above is the sole and separate property of Diana Alamar McClain.

No appeal was taken from the final divorce decree.

B. The Post-Decree “Affidavit of Community Division”

On July 22, 2009, Diana signed a document, bearing a notary’s signature and seal, titled, “Affidavit of Community Division” (hereinafter “the affidavit”). It provides in relevant part:

I, DIANA ALAMAR McCLAIN agree that as part of the community division under the divorce proceeding styled “In the Matter of the Marriage of Diana Alamar McClain and Calvin Wayne McClain; F-1223-09-J”, I will here agree that after the sale of property described as Lot 122, Block 3, La Homa Ranch Citrus Groves Sub’D., Unit No.2 Hidalgo County, Texas, Also known as 21037 N. Moorefield Rd.; I will give 50 percent of the net sale proceeds to Calvin Wayne McClain.

C. The Claims

Nearly four years later, Calvin filed a “Petition for Declaratory Judgment” in the same trial court. The petition was assigned Cause No. C-4008-13-J. The petition requested “a declaratory judgment for Two Hundred Fifty Thousand dollars” and attorney’s fees. Diana answered, asserted a general denial, and pleaded several affirmative defenses, including lack of consideration and estoppel. The clerk’s record contains an “Order of Dismissal” providing:

BE IT REMEMBERED, that on this the 4th day of June, 2014, came on for consideration, the Respondent’s Motion to Dismiss. The Court after hearing the arguments of counsel is of the opinion that Respondent’s Motion to Dismiss should be GRANTED only as to the Bill of Equitable Review. The remaining Common Law causes of action(s) Fraud, Breach of Contract and Constructive Trust shall remain on the Court’s docket.

IT IS THEREFORE, ORDERED, ADJUDGED and DECREED that the above-styled and numbered cause this [sic] action is here Dismissed only as to the Bill of Equitable Review and the Court shall set the remaining causes of action(s) for Docket Control Conference^[3]

(Emphasis in original).

D. The Bench Trial

After the order of dismissal was signed, the trial court conducted a bench trial at which only Calvin and Diana testified regarding, among other things, the property's purchase, potential sale, and the affidavit.

1. Property's Purchase

On examination by Calvin's counsel, Diana testified that before the marriage, she used trust-fund money for the down payment on the land at issue. During the marriage, Diana used trust-fund money to make monthly payments until the mortgage was paid off. Calvin testified that he paid the \$8,000 down payment for the land and made most of the payments on the property. On examination by Diana's counsel, Calvin acknowledged that his Social Security wage and contribution summary showed that in the five years preceding the 1988 purchase of the property in question, Calvin earned approximately \$4,000 in total. Nevertheless, Calvin insisted that he was able to save \$8,000 for the down payment.

2. Potential Sale

Both Calvin and Diana acknowledged that the property had not sold. Calvin

³ The clerk's record presented to us in Cause No. C-4008-13-J contains neither a motion to dismiss nor any pleadings seeking an equitable bill of review nor any pleadings asserting the common law causes of action referenced by the trial court's dismissal order. Given the reporter's record before us, we assume that the claims for breach of contract, fraud, and constructive trust were tried with the consent of both parties.

contended that the property, at some unspecified point in time, was listed for sale for \$400,000. However, no offers to purchase the property were made.

3. The Affidavit

Diana testified that Calvin threatened to kill her if she “didn’t go back and do something to” change the way the property was divided in the final divorce decree. Diana claimed that, out of fear, she went to her divorce lawyer’s office and instructed a secretary to prepare the affidavit. Diana’s divorce lawyer did not review the affidavit before she signed it. According to Diana, Calvin gave her nothing in exchange for the affidavit. Calvin recalled living rent-free on the property for two years after the divorce. According to Calvin, he paid no rent, but he paid the property taxes.

E. The Judgment

Ultimately, the trial court signed a judgment dismissing with prejudice Calvin’s claims for fraud, breach of contract, and constructive trust. This appeal followed.

II. DISCUSSION

We construe Calvin’s arguments to mean that the trial court erred in dismissing his claims for (1) breach of contract, (2) fraud, (3) constructive trust, and (4) “gift” on the ground that he conclusively established each of the elements of said claims.⁴

A. Standard of Review and Applicable Law

In a trial to the court where no findings of fact or conclusions of law⁵ are filed, the

⁴ Calvin does not raise any argument that may be construed as challenging the factual sufficiency of the evidence supporting the trial court’s judgment. Accordingly, we limit our review to a legal sufficiency challenge.

⁵ While Calvin initially requested findings of fact and conclusions of law, he did not file a “Notice of Past Due Findings of Fact and Conclusions of Law.” See TEX. R. CIV. P. 297. Failure to file a notice of past due findings and conclusions waives the right to complain about the lack of findings and conclusions.

judgment of the trial court implies all necessary findings of fact in support of it. See *Pharo v. Chambers County, Tex.*, 922 S.W.2d 945, 948 (Tex. 1996). Where a complete reporter's record is filed, as in this case, these implied findings are not conclusive. See *Roberson v. Robinson*, 768 S.W.2d 280, 281 (Tex. 1989). An appellant may challenge them by raising both legal and factual sufficiency of the evidence points. *Id.* Where such points are raised, the standard of review to be applied is the same as that to be applied in the review of jury findings or a trial court's findings of fact. See *id.*

In reviewing the legal sufficiency of the evidence, we view the evidence in the light most favorable to the judgment. *AutoZone, Inc. v. Reyes*, 272 S.W.3d 588, 592 (Tex. 2008). When a party attacks the legal sufficiency of an adverse finding on an issue on which he has the burden of proof, he must demonstrate on appeal that the evidence establishes, as a matter of law, all vital facts in support of the issue. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001). In other words, the appellant must show that there is no evidence to support the finding and the evidence conclusively establishes the opposite of the finding. *Id.* We first examine the record for any evidence supporting the finding while ignoring all evidence to the contrary. *Id.* If no evidence supports the finding, then we review the entire record to determine whether the contrary proposition is established as a matter of law. *Id.*

When an appellant challenges the legal sufficiency of the evidence supporting an adverse finding of fact for which the opposing party had the burden of proof, the appellant

Id.; *Holmes v. GMAC, Inc.*, 458 S.W.3d 85, 97 (Tex. App.—El Paso 2014, no pet.); *Commercial Servs. of Perry, Inc. v. Wooldridge*, 968 S.W.2d 560, 563 (Tex. App.—Fort Worth 1998, no pet.).

must demonstrate that there is no evidence, or merely a scintilla of evidence, to support the adverse finding. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005).

B. Breach of Contract

Calvin pleaded a breach of contract claim regarding the affidavit. In response to Calvin's breach of contract claim, Diana pleaded the affirmative defense of lack of consideration. See TEX. R. CIV. P. 94. A contract that lacks consideration lacks mutuality of obligation and is unenforceable. *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 409 (Tex. 1997). Calvin argues that no consideration was required for the affidavit because it was a marital agreement that qualified for a statutory exemption from consideration. Alternatively, Calvin also argues that he provided adequate consideration. We reject both of Calvin's arguments.

First, Calvin argues that the affidavit needed no consideration on the ground that it was a marital agreement. See TEX. FAM. CODE ANN. § 4.104 (West, Westlaw through 2015 R.S.).⁶ Diana counters that the affidavit does not constitute a "post-nuptial agreement" under section 4.104 of the Texas Family Code. We agree with Diana based on a plain reading of the statutes in question. Section 4.104 of the Texas Family Code refers to sections 4.102 and 4.103, which apply only to agreements by "spouses." See *id.* §§ 4.102, 4.103 (West, Westlaw through 2015 R.S.). In contrast, the legislature has used the phrase "former spouse" elsewhere in the Texas Family Code. See *id.* §

⁶ "A partition or exchange agreement under Section 4.102 or an agreement under Section 4.103 must be in writing and signed by both parties. Either agreement is enforceable without consideration." TEX. FAM. CODE ANN. § 4.104 (West, Westlaw through 2015 R.S.).

9.201(a) (West, Westlaw through 2015 R.S.).⁷ The final divorce decree was signed on July 9, 2009; the affidavit was signed on July 22, 2009. At the time Diana signed the affidavit, she and Calvin were former spouses because the divorce decree had already been signed. Accordingly, the affidavit did not qualify for the consideration exemption afforded by section 4.104. See *id.* § 4.404.

Second, Calvin argues that, if consideration is required, his consideration for the affidavit was not continuing to litigate the divorce decree.⁸ Assuming, without deciding, that such a “promise” constitutes adequate consideration, we find no evidence supporting Calvin’s contention. Calvin testified that Diana promised to give him half of the property in question because “she knew that I was entitled to half of it.” Calvin’s counsel asked Diana if he told her “If you don’t sign the document, I’m going to have to hire a lawyer and reopen this divorce?” Diana answered, “No.” On direct examination by her counsel, Diana was asked and answered:

Q. What did Mr. McClain give you in exchange for your supposed promise to give him 50 percent of the net proceeds?

A. Nothing.

Q. Okay. He didn’t give you any money?

A. No money.

Q. Did he make any promises in exchange for – for your promise to give him 50 percent of something that belong[ed] to you?

A. No.

⁷ “Either *former spouse* may file a suit as provided by this subchapter to divide property not divided or awarded to a spouse in a final decree of divorce or annulment.” TEX. FAM. CODE ANN. § 9.201(a) (West, Westlaw through 2015 R.S.) (emphasis added).

⁸ In the summary of the argument section of Calvin’s brief, he argues that he “performed under the terms of the contract by not reopening the Divorce Proceeding.”

Reviewing the evidence in the light most favorable to the judgment, we conclude that there is some evidence supporting a finding that Calvin failed to provide any consideration for the affidavit. See *Francis*, 46 S.W.3d at 241. At the bench trial, Calvin made no mention of him forgoing legal remedies in the divorce proceeding. Further, Diana testified that Calvin made no promises regarding the affidavit.

Calvin's first issue is overruled.

C. Fraud

In his second issue, Calvin argues,

[Diana] committed fraud against [Calvin] when she testified before the [t]rial [c]ourt that she was the sole owner of the property made the basis of this [a]ppeal. [. . .] The real property and improvements in question were purchased primarily with community funds and therefore was a community asset. The majority of the payments were made during the marriage with or out of community funds. [. . .]

[Diana] further committed fraud against [Calvin] when she advised [Calvin] that he did not need to attend the Final Divorce Hearing and that she would request that the real property and improvements made the subject of this suit be divided equally between them.

The only case referenced by Calvin in support of his second issue is *Chapman v. Chapman*, 591 S.W.2d 574, 577 (Tex. Civ. App.—Forth Worth 1979, no writ). *Chapman* discusses the differences between intrinsic and extrinsic fraud as they relate to a bill of review. See *id.* We note that although there is an order dismissing an equitable bill of review, Calvin provides no citation to a bill of review in the record, see TEX. R. APP. P. 38.1(i), and our record review has found no such pleading. We further note that it does not appear Calvin was represented by counsel in the divorce proceeding.

As best we can tell from the record before us, the trial court conducted a bench

trial on “Common Law causes of action(s)” for, among other things, fraud. The record and Calvin’s briefing leads us to construe, out of an abundance of caution, Calvin’s second issue as a contention that he conclusively established the elements of a claim for fraud relating to statements made by Diana before the divorce decree was signed.⁹ 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. See *Zorrillo v. Aypco Constr. II, LLC*, 469 S.W.3d 143, 153 (Tex. 2015).

Diana asserts that Calvin produced no evidence as to Diana’s intent at the time of her alleged statement. We note that Calvin has failed to refer us to any part of the record regarding Diana’s intent in making the alleged pre-divorce statements as to the division of the property, see TEX. R. APP. P. 38.1(i), and our review of the record has found none. While a factfinder may infer intent from a party’s subsequent acts, *Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 434 (Tex. 1986),¹⁰ Calvin has failed to meet his burden on appeal of establishing Diana’s intent as a matter of law. *Francis*, 46 S.W.3d at 241. Even categorizing Calvin’s testimony that Diana promised to give him half of the property in question because “she knew that I was entitled to half of it” as some evidence of Diana’s intent, such evidence fails to conclusively establish Diana’s intent. *Id.* Accordingly, Calvin has not demonstrated that he established all of the elements of a common law

⁹ In addition to the argument quoted above, Calvin also argues that Diana “induced [Calvin] to refrain from attending the Divorce hearing”

¹⁰ “While a party’s intent is determined at the time the party made the representation, it may be inferred from the party’s subsequent acts after the representation is made.” *Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 434 (Tex. 1986).

fraud claim as a matter of law. See *id.*; see also *Francis*, 46 S.W.3d at 241.

Calvin's second issue is overruled.

D. Constructive Trust

In Calvin's third issue, he argues that Diana "created a constructive trust when she signed" the affidavit. A party seeking to impose a constructive trust must establish (1) breach of a special trust or fiduciary relationship or actual or constructive fraud,¹¹ (2) unjust enrichment of the wrongdoer, and (3) an identifiable res that can be traced back to the original property. *KCM Fin. LLC v. Bradshaw*, 457 S.W.3d 70, 87 (Tex. 2015). Calvin has failed to establish all of the elements of a constructive trust claim as a matter of law. *Id.*; see also *Francis*, 46 S.W.3d at 241. Specifically, Calvin has failed to establish that at the time Diana signed the affidavit, she and Calvin, as former spouses, had a "special trust or fiduciary relationship."

Calvin's third issue is overruled.

E. Gift

In Calvin's fourth issue, he argues that "[b]y the very language of the [affidavit] [Diana] made a gift of the proceeds of the sale of real property." Unlike Calvin's first three issues, we need not engage in a legal sufficiency review of the "gift claim" because it was never pled.

"The live pleadings define the issues in a case." *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 219 (Tex. 2001). "The judgment of the court shall conform to the pleadings" TEX. R. CIV. P. 301; see *Morton v. Nguyen*, 412 S.W.3d 506, 513 (Tex. 2013)

¹¹ Constructive fraud is the breach of a legal or equitable duty that the law declares fraudulent because it violates a fiduciary relationship. *Archer v. Griffith*, 390 S.W.2d 735, 740 (Tex. 1964).

(reversing an award of mental anguish damages because they were not supported by any pleaded claim). “A plaintiff may not be granted a favorable judgment on an unpleaded cause of action, absent trial by consent.” *Maswoswe v. Nelson*, 327 S.W.3d 889, 894 (Tex. App.—Beaumont 2010, no pet.) (quoting *Marrs & Smith P’ship v. DK Boyd Oil & Gas Co.*, 223 S.W.3d 1, 18 (Tex. App.—El Paso 2005, pet. denied)); see *Formosa Plastics Corp., USA v. Kajima Int’l Inc.*, 216 S.W.3d 436, 456 (Tex. App.—Corpus Christi 2006, pet. denied).

The rule of trial by consent is limited to those exceptional cases where the parties clearly tried an unpleaded issue by consent. *UMLIC VP LLC v. T & M Sales & Env’tl. Sys., Inc.*, 176 S.W.3d 595, 605 (Tex. App.—Corpus Christi 2005, pet. denied). The rule should be cautiously applied and should not be applied in doubtful situations. *Id.* “An objection to the submission of a jury question on an unpleaded issue prevents the trial of that issue by implied consent.” *Id.*

At the bench trial, the trial court confirmed that only three claims were being tried.

At one point, the following exchange took place:

Diana’s Counsel: Your Honor, if I may. I’d like to object in general to the line of questioning. What he’s getting at, so far, is apparently a claim for some kind of reimbursement for –

Court: That’s what I was going to ask. What is the pleading? What is the pleading –

Diana’s Counsel: – and that is not – that is not at issue here, Your Honor. We already –

Calvin’s Counsel: We haven’t – we haven’t.

Diana’s Counsel: That’s already been adjudicated, Your Honor, and it

should not be before the Court at the moment. So it's really inappropriate to solicit that kind of testimony. They haven't gotten to the essence of their claims, because they don't really exist. So I would just ask the Court to be cognizant of that fact.

Court: Well, I'm cognizant that I granted your motion to dismiss as to the bill of review. I'm cognizant that they had common law cause of action, and I thought that's why we were here on *fraud, breach of contract* and *constructive trust*, right?

Calvin's Counsel: *That's correct.*

(Emphasis added). Thus, Calvin conceded that only his claims for fraud, breach of contract, and constructive trust were before the trial court. We find no error in the trial court disregarding Calvin's "gift" claim in the final judgment. Accordingly, we need not conduct a legal sufficiency analysis regarding that claim. See TEX. R. APP. P. 47.1.

Calvin's fourth issue is overruled.

III. CONCLUSION

The judgment of the trial court is affirmed.

LETICIA HINOJOSA
Justice

Delivered and filed the
20th day of April, 2017.