



NUMBER 13-19-00076-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

KESSLING SERVICES,

Appellant,

v.

STEPHEN MANNING,

Appellee.

**On appeal from the County Court at Law No. 4
of Nueces County, Texas.**

MEMORANDUM OPINION

**Before Justices Benavides, Perkes, and Tijerina
Memorandum Opinion by Justice Benavides**

Appellant Kessling Services appeals a property code retaliation judgment in favor of appellee, former tenant Stephen Manning. By three grounds, Kessling argues that the judgment cannot be sustained on the grounds that: (1) a property manager is not responsible as a landlord, (2) a tenant who is not current on rent may be evicted and it is not an act of retaliation to do so; and (3) Manning did not plead or prove attorney's fees

and may not recover them. See TEX. PROP. CODE ANN. § 92.332. We affirm in part and reverse and render in part.

I. BACKGROUND

Tammy Manning testified that she, her husband Stephen, their three children, dogs, and a U-Haul full of furniture moved from Austin to Corpus Christi on July 31, 2015. They rented a house at 318 Mediterranean and previously hand delivered a cashier's check for \$1200 to Kessler Services on or about July 24th for the deposit. They received a call from Alison at Kessler on July 30 advising them that they could pick up the keys and sign the lease the following morning and could have access to the garage on July 31 with move-in on August 1. The Mannings presented themselves at the Kessler office to sign the lease at 10:15 a.m. on July 31 as scheduled with a rent check for August. The first issue was the dogs. Their rental application noted they had dogs, but Kessler had not noticed and was not going to allow the Mannings to move in. They came to an agreement that the Mannings would pay the pet deposit of \$300 per dog by August 15th.

The Mannings went to the house and discovered the garage door did not work from the outside. When they went in the garage from an exterior door, it was full of "garbage and trash." They went into the house and noticed there were screws and nails in the carpet; door frames were damaged; door latches were missing; the kitchen was filthy; there were dead roaches everywhere; the air conditioning intake covers had mold on them; the air conditioning vents had mold on them; some vents were missing; there were holes in the walls; wires coming out of the walls; the dishwasher door would not stay closed; the stove did not work; the breaker box in the garage had been tampered with;

and the washer and dryer connections were damaged with the electrical connections coming out of the wall. In addition, an exterior door between the garage and the house fell off the hinges and onto Stephen's foot, and there was glass in the yard all around the house. She called Kessler and was told that workers would be there in the afternoon to work on the property. According to Tammy, the workers painted a couple of the bedrooms and re-hung a few bedroom door frames but did not clean or haul-off trash.

The Mannings moved in August 1 pursuant to their lease but cleaned the house themselves to make it livable. They contacted Kessler again by phone and by email. On August 3, 2018, Tammy sent Kessler a certified letter requesting repairs. By September 1, no repairs had been made. The Mannings paid their September rent, less \$716.54 for the repairs and clean up. They included an invoice for the repairs and clean up.

On September 6, Tammy found an eviction notice on the front door for non-payment of rent that stated they were required to vacate the premises on September 9. Instead of vacating the premises, the Mannings disputed the eviction. Kessler's suit for eviction was unsuccessful, and the Mannings were not required to vacate. At the end of their lease term, Kessler refused to renew their lease. This suit followed.

Stephen testified that he lost approximately 58 hours of wages at \$41 per hour for a total of \$2384.64 for his time to attend court on the eviction matter and to attend court on days that Kessler's attorneys requested postponements of previous trial settings on the day of trial. He further testified he had paid his attorney \$7100 through trial. He sought statutory damages for four acts of retaliation.

A family friend of the Mannings, Brandy Adair, testified that she came to Corpus

Christi to help them move and arrived on August 1. She testified that the house was generally filthy and she would not have allowed her children to sleep there until it was cleaned and that the photos that the Mannings took of the holes in the walls, roaches, filthy conditions in the kitchen, missing and moldy air conditioning vents, and electrical represented the conditions she saw on August 1. Adair cleaned the kitchen and stated that it took more than just wiping down the inside of the cabinets to get them clean. While working on the kitchen cabinets, Adair found a glass crack pipe hidden in them. The garage was full of trash and garbage when Adair arrived, and when she left on Sunday, no one from Kessler had been out to remedy any of the conditions.

Joe Kessler testified that he manages approximately 130 properties and routinely files eviction suits against tenants who have not paid rent. He testified that 95% of the eviction actions he files are for nonpayment of rent. He filed the eviction suit against the Mannings because they did not pay the full amount of rent due on September 1, 2015.

Defense counsel did not object to the jury charge which submitted multiple questions on statutory violations and attorney's fees. The jury found four violations of the property code, awarded statutory damages of \$500 and \$1800 (monthly rental) for violations of the property code, awarded actual damages in the amount of \$2384.64, trial attorney's fees in the amount of \$7100, and contingent appellate attorney's fees in the amount of \$25,000. Counsel for Kessler withdrew and was replaced by new counsel who filed a motion for judgment notwithstanding the verdict (JNOV) on the following grounds: Kessler was a property manager, not a landlord, and was not liable under the property code; a landlord does not retaliate when he seeks to evict a tenant who has not paid rent;

and Stephen had not pleaded nor proved attorney's fees. The trial court entered judgment on the verdict. Kessler filed a motion for new trial and reurged his motion for JNOV. The trial court denied both by written order. This appeal followed.

II. KESSLER'S LIABILITY

By his first issue, Kessler argues that he is a property manager, not a landlord, and is therefore not liable under § 92.332. See TEX. PROP. CODE ANN. §§ 92.056, 92.332. Section 92.001 of the property code defines a landlord as: "the owner, lessor, or sublessor of a dwelling, but does not include a manager or agent of the landlord unless the manager or agent purports to be the owner, lessor, or sublessor in an oral or written lease." See *id.* § 92.001(2). The written lease identifies Kessler as the property manager and he testified that he worked for the owner. The evidence established that Kessler filed the unsuccessful eviction less than a month after the Mannings paid partial rent and submitted an invoice for repair and clean-up for the balance.

The jury charge, which was submitted without defense objection, did not ask whether the landlord committed the statutory violations, but whether Kessler committed the violations. Kessler never filed a verified denial pursuant to Rule 93 asserting that he was not liable in the capacity in which he was sued or that he was not the proper party; he filed only a general denial to the lawsuit. TEX. R. CIV. P. 93(2), (4). A party who does not follow rule 93's mandate waives any right to complain about the matter on appeal. *Nootsie, Ltd. v. Williamson County Appraisal Dist.*, 925 S.W.2d 659, 662 (Tex. 1996) (citing *Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 494 (Tex. 1991)); *Nine Greenway Ltd. v. Heard, Goggan, Blair & Williams*, 875 S.W.2d 784, 787 (Tex. App.—

Houston [1st Dist.] 1994, writ denied) (“A party who fails to raise the issue of capacity through a verified plea waives that issue at trial and on appeal.”). Whether there is a defect of parties or whether a defendant is sued in a capacity he should not be, he must file a verified denial to preserve his complaint. See *Nootsie, Ltd.*, 925 S.W.2d at 662. Kesslering did not do so and the jury charge submitted Kesslering by name. He has waived the issue. See TEX. R. APP. P. 33,1(a).

We overrule Kesslering’s first issue.

III. RETALIATION

By his second issue, Kesslering argues that he did not retaliate against Manning, but instead filed the eviction for nonpayment of rent. Essentially, he complains that the evidence of retaliation is insufficient. As part of this complaint, he argues for the first time that Stephen was not entitled to repair and deduct because he did not comply with the statute by hiring a contractor, but instead he and his family made the repairs themselves. In addition, Kesslering argues that Stephen failed to establish that the conditions were harmful to the health and safety of the average tenant.

There are four ways to preserve legal sufficiency challenges. A party may include the complaint in (1) a motion for instructed verdict, (2) an objection to the submission of a jury question, (3) a motion for judgment notwithstanding the verdict, or (4) a motion for new trial. *Cecil v. Smith*, 804 S.W.2d 509, 510–11 (Tex. 1991); *Gerdes v. Kennamer*, 155 S.W.3d 523, 532 (Tex. App.—Corpus Christi—Edinburg 2004, pet. denied). In addition, an issue raised on appeal must correspond to a motion made to the trial court. *Gerdes v.*, 155 S.W.3d at 532.

Kessling filed a ~~motion~~ JNOV and motion for new trial. But neither raised the sufficiency of Stephen's evidence of compliance with the property code. As a result, Kessling's current complaint was not preserved and is waived. See TEX. R. APP. P. 33.1(a); see *Gerdes*, 155 S.W.3d at 533.

We overrule Kessling's second issue.

IV. ATTORNEY'S FEES

The property code provides for attorney's fees in cases of retaliation. See TEX. PROP. CODE ANN. § 92.333. By his third issue, Kessling challenges the legal sufficiency of the evidence supporting attorney's fees and further complains that the judgment does not conform to the pleadings because Stephen did not plead for attorney's fees.

A. Standard of Review

We review the award of attorney's fees for legal sufficiency. See *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 498 (Tex. 2019). Sufficient evidence of attorneys' fees must include "evidence of (1) particular services performed, (2) who performed those services, (3) approximately when the services were performed, (4) the reasonable amount of time required to perform the services, and (5) the reasonable hourly rate for each person performing such services." *Id.*; *Charette v. Fitzgerald*, 213 S.W.3d 505, 512 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (construing a landlord-tenant statute that provided for "reasonable attorney's fees"); see also *Serrano v. Ramos*, No. 13-13-00476-CV, 2015 WL 3826794, at *8 (Tex. App.—Corpus Christi—Edinburg June 18, 2015, no pet.) (mem. op.).

B. Discussion

Kessler preserved this issue by filing his motion for JNOV specifically challenging the sufficiency of the evidence to support attorney's fees. The only evidence of attorney's fees in the record is Stephen's testimony that he paid his attorney \$7100 through trial. *In re D.Z.*, 583 S.W.3d 284, 296 (Tex. App.—Houston [14th Dist.] 2019, no pet.) (holding that client's testimony about the total amount of attorney's fees she paid with a general description of her previous attorney's services was legally insufficient to sustain award of attorney's fees). There is nothing in the record to support an award of appellate attorney's fees. Therefore, the evidence in the record is legally insufficient to sustain the award of attorney's fees.

We sustain Kessler's third issue.

V. CONCLUSION

We affirm the judgment of the trial court in part and reverse and render the judgment on attorney's fees.

GINA M. BENAVIDES,
Justice

Delivered and filed the
7th day of May, 2020.