

**NO. 12-08-00371-CV**

**IN THE COURT OF APPEALS**

**TWELFTH COURT OF APPEALS DISTRICT**

**TYLER, TEXAS**

*DONALD EMMETT WARD,* § *APPEAL FROM THE 1ST*  
*SHERREL SCARBOROUGH*  
*AND DENNIS SCARBOROUGH,*  
*APPELLANTS*

§ *JUDICIAL DISTRICT COURT*  
V.

*THOMAS LADNER,* § *SABINE COUNTY, TEXAS*  
*APPELLEE*

---

---

***OPINION***

Donald Emmett Ward, Sherrel Scarborough, and Dennis Scarborough (collectively “Appellants”) appeal the trial court’s judgment entered in favor of Thomas Ladner. Appellants raise four issues on appeal. We reverse and render.

**BACKGROUND**

Dillis Ward and his wife, Gertie, owned property on the shore of Toledo Bend Reservoir in Sabine County, Texas (hereinafter the “property”). The property, on which stood a small store with living quarters, was surrounded by land owned by the Sabine River Authority of Texas. In 1987, Dillis Ward died. Thereafter, Dillis Ward’s son, Donald Ward (“Ward”), had a conversation with Ladner concerning the property. According to Ward, the two entered into an oral agreement whereby Ladner would rent the property. However, according to Ladner, the two orally agreed that he would purchase the property.

Ladner lived on the property during the late 1980s and, since that time, has received rental income from the campsites located predominantly on the adjacent property owned by the Sabine River Authority. Ward visited the property occasionally over the years and contacted

Ladner prior to these visits. Ward's daughter, Sherrel Scarborough, likewise visited the property occasionally during the relevant period and also contacted Ladner prior to her arrival.

In 1996, Gertie died. In 2007, by deed of gift, Ward transferred the property to Sherrel Scarborough and her husband, Dennis Scarborough. In January 2007, the Scarboroughs moved to the property. In August 2007, the Scarboroughs gave notice to Ladner that they would not continue to rent the property to him.

Ladner filed the instant suit seeking a declaratory judgment that he and Ward entered into a binding contract for the purchase of the property. Ladner further sought specific performance of an oral real estate contract. Ladner also made allegations of, among other things, trespass to try title and promissory estoppel. Thereafter, Ladner sought a temporary restraining order. In his sworn petition and affidavit filed in support of his petition for temporary restraining order, Ladner averred that Ward agreed to sell the property for \$160,000 "paid at \$500 per month with no interest (320 months or 26.6 years to pay off)." Ladner further alleged that he "agreed to this arrangement and began paying the monthly payments to Donald Ward by check mailed to Donald Ward's address in Temple, Texas."

Following the presentation of evidence, the matter was submitted to the jury. Ultimately, the jury found that the parties had entered into an oral agreement for the sale of the property. The jury further found that Ladner (1) made monthly payments on the \$160,000 beginning in 1987 and continuing until October 2007, (2) took possession of the property in 1987 and retained such possession to the present time, and (3) made permanent and valuable improvements upon the property beginning in 1987. The trial court entered judgment in Ladner's favor and ordered specific performance of the oral contract. By its judgment, the trial court further ordered the transfer of title to the property to Ladner and that Ladner pay the remainder of the unpaid balance of \$160,000 at a rate of \$625 per month. This appeal followed.

#### **LEGAL SUFFICIENCY**

In their fourth issue, Appellants argue that the evidence was both legally and factually insufficient to sustain specific performance under the equitable exception to the statute of frauds.

#### **Legal Sufficiency**

A party who challenges the legal sufficiency of the evidence to support an issue upon which he did not have the burden of proof at trial must demonstrate on appeal that there is no

evidence to support the adverse finding. *Bright v. Addison*, 171 S.W.3d 588, 595 (Tex. App.—Dallas 2005, pet. denied). When reviewing a “no evidence” issue, we determine “whether the evidence at trial would enable reasonable and fair minded people to reach the verdict under review.” *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). In making this determination, we must credit favorable evidence if a reasonable finder of fact could, and disregard contrary evidence unless a reasonable finder of fact could not. *Id.* The finder of fact is the sole judge of the credibility of the witnesses and the weight to be assigned to their testimony. See *Canal Ins. Co. v. Hopkins*, 238 S.W.3d 549, 557 (Tex. App.—Tyler 2007, pet. denied) (citing *City of Keller*, 168 S.W.3d at 819). The finder of fact is free to believe one witness and disbelieve another, and reviewing courts may not impose their own opinions to the contrary. *Id.* Accordingly, we must assume that the finder of fact decided all credibility questions in favor of the findings if a reasonable person could do so. *Id.* If a reasonable finder of fact could have done so, we must assume that the finder of fact chose what testimony to disregard in a way that favored the findings. See *Canal*, 238 S.W.3d at 557 (citing *City of Keller*, 168 S.W.3d at 820). A finder of fact “may disregard even uncontradicted and unimpeached testimony from disinterested witnesses” where reasonable. *Canal*, 238 S.W.3d at 557 (quoting *City of Keller*, 168 S.W.3d at 819–20).

Moreover, it is within the finder of fact’s province to resolve conflicts in the evidence. *Canal*, 238 S.W.3d at 557 (citing *City of Keller*, 168 S.W.3d at 820). Consequently, we must assume that, where reasonable, the finder of fact resolved all conflicts in the evidence in a manner consistent with the findings. *Id.* Where a reasonable finder of fact could resolve conflicting evidence either way, we must presume the finder of fact did so in favor of the findings. *Canal*, 238 S.W.3d at 557 (citing *City of Keller*, 168 S.W.3d at 821). Where conflicting inferences can be drawn from the evidence, it is within the province of the finder of fact to choose which inference to draw, so long as more than one inference can reasonably be drawn. *Id.* Therefore, we must assume the finder of fact made all inferences in favor of the findings if a reasonable person could do so. *Id.*

Additionally, any ultimate fact may be proved by circumstantial evidence. See *Wal-Mart Stores, Inc. v. Bertrand*, 37 S.W.3d 1, 12 (Tex. App.—Tyler 2000, pet. denied). However, the legal equivalent of no evidence exists when circumstantial evidence gives life to inferences equally consistent with two different propositions. *Id.* Furthermore, when circumstances are

equally consistent with either of two facts and nothing shows that one is more probable than the other, neither fact can be inferred and the no evidence challenge must be sustained. *Id.*

### **Equitable Exception to the Statute of Frauds**

The statute of frauds is an affirmative defense requiring that certain specified classes of contracts be in writing to be enforceable. *See* TEX. R. CIV. P. 94; *Gerstacker v. Blum Consulting Engineers, Inc.*, 884 S.W.2d 845, 850 (Tex. App.—Dallas 1994, writ denied). Whether a contract falls within the statute of frauds is a question of law. *Gerstacker*, 884 S.W.2d at 850. The instant case concerns allegations of a contract for the sale of real estate. Therefore, the parties' contract, if any, is governed by the statute of frauds. *See* TEX. BUS. & COM. CODE ANN. § 26.01(a), (b)(4) (Vernon 2009) (contract for sale of real estate not enforceable unless in writing and signed by person charged with agreement).

However, there exists an equitable exception to the statute of frauds. *See Hooks v. Bridgewater*, 111 Tex. 122, 229 S.W. 1114, 1116 (Tex. 1921). In *Hooks*, the Texas Supreme Court held that to relieve a parol sale of land from the operation of the statute of frauds, three things are necessary: (1) payment of the consideration, whether it be in money or services; (2) possession by the vendee; and (3) the making by the vendee of valuable and permanent improvements upon the land with the consent of the vendor.<sup>1</sup> *Id.* The court described these three elements as “indispensable.” *Id.*

In the case at hand, the burden was upon Ladner to secure jury findings to support this equitable exception. *See Choi v. McKenzie*, 975 S.W.2d 740, 743 (Tex. App.—Corpus Christi 1998, pet. denied). He sought to do so by the submission of Questions 2, 3, and 4.

#### **Payment of Consideration**

Question 2 queries, “Did Thomas Ladner make monthly payments on the \$160,000.00 beginning in 1987 and continuing until October 2007?” Based on our review of the record, we note that there is evidence that either Ladner or someone acting on his behalf made multiple payments by check to Ward of varying amounts during the time period in question. However, payment of money by Ladner to Ward is equally consistent with the competing arguments proposed by the parties. In other words, there is no evidence tending to support that it is more probable that these payments were made as payment toward the purchase of the property than it

---

<sup>1</sup> The court noted that absent such improvements, it would consider the presence of such facts as would make the transaction a fraud upon the purchaser if it were not enforced. *Id.*

is that the payments were made as rent. As such, neither purpose for the payment of these monies can be inferred and Ward's no evidence challenge must be sustained with regard to Question 2. See *Bertrand*, 37 S.W.3d at 12.

Possession

Question 3 asks, "Did Thomas Ladner take possession of the property in question in 1987 and retain such possession to the present time?" From our review of the record, we note that there is evidence that Ladner was in possession of the property during the relevant time period. However, similar to the evidence underlying payment of consideration, Ladner's possession of the property is no more indicative of his status as a vendee than it is of his status as a person who is renting property. Therefore, we hold that neither status can be inferred from Ladner's possession of the property and, consequently, Ward's no evidence challenge must be sustained. See *id.*

Making of Improvements with Consent

Question 4 asks, "Did Thomas Ladner make permanent and valuable improvements upon the property in question beginning in 1987?" Based on our review of the record, we conclude that there is legally sufficient evidence to support that Ladner made permanent and valuable improvements on the property. Specifically, the evidence supports that Ladner made improvements such as replacing the roof on the building located on the property and converting the interior of the structure, which was previously a store, to a residence. We note that no inquiry was made of the jury concerning Ward's consent to these improvements. However, Ladner's testimony supports that such improvements were made with Ward's consent.<sup>2</sup>

Summation

As set forth above, we have concluded that there is legally sufficient evidence to support the jury's finding with regard to Question 4, but not with regard to Questions 2 and 3. We are mindful that the three elements comprising the equitable exception to the statute of frauds are each indispensable. See *Hooks*, 229 S.W. at 1116. As such, the absence of legally sufficient evidentiary support for any one of these elements is fatal to the application of the exception. See

---

<sup>2</sup> Question 4 is an incomplete submission to which no objection was made. See TEX. R. CIV. P. 279. Because the record contains some evidence that Ward consented to Ladner's making improvements to the property, which is consistent with the trial court's judgment, we deem the missing element of consent found. *Id.*; see *Chon Tri v. J.T.T.*, 162 S.W.3d 552, 557 (Tex. 2005); *State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 437 (Tex. 1995).

*id.* Thus, since the elements of payment of consideration and possession are not supported by legally sufficient evidence, we hold that the exception set forth in *Hooks v. Bridgewater* is inapplicable and, as a result, the parties' contract is not relieved from the operation of the statute of frauds. Appellants' fourth issue is sustained in part.

**DISPOSITION**

We have sustained Appellants' fourth issue in part. Having done so, we *reverse* the trial court's judgment and *render* judgment that Ladner take nothing by his suit. Appellants' first, second, and third issues as well as the remainder of their fourth issue are unnecessary to the disposition of this appeal. Therefore, we do not address them. *See* TEX. R. APP. P. 47.1.

**SAM GRIFFITH**

**Justice**

Opinion delivered January 6, 2010.  
*Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.*

(PUBLISH)