

NO. 12-11-00160-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

RODNEY LEE DOCKERY,
APPELLANT

§

APPEAL FROM THE 321ST

V.

§

JUDICIAL DISTRICT COURT

KIMBERLY ANN DOCKERY,
APPELLEES

§

SMITH COUNTY, TEXAS

MEMORANDUM OPINION

Rodney Lee Dockery appeals the trial court's divorce decree awarding \$25,000 in contractual alimony to Kimberly Ann Dockery. In one issue, Rodney contends that Kimberly breached their premarital agreement and, as a result, he was not obligated to pay her contractual alimony. We affirm.

BACKGROUND

Rodney and Kimberly entered into a premarital agreement that set forth that their respective earnings during their marriage would be separate property and no community estate would be established. The premarital agreement also stated that if the couple remained married for five years, but later divorced, Rodney would pay Kimberly \$25,000 in contractual alimony. The agreement further stated that if either party tested the enforceability of the premarital agreement in divorce proceedings, that party's action would amount to a breach of the agreement.

After the couple had been married twelve years, Rodney filed for divorce. During the course of the proceedings, Kimberly asserted in pleadings and discovery responses that the couple had amassed community property that needed to be divided by the court.

At trial, Rodney called Kimberly as an adverse witness. During her testimony, Kimberly conceded that she had filed pleadings and discovery responses in which she alleged the couple had community property. Rodney also testified at trial. During his testimony, in three separate instances, he stated that he wanted to go forward with the premarital agreement. Specifically, Rodney testified as follows:

Q: In conjunction with the Premarital Agreement, you want it, right?

A: Yes.

....

Q: All right. Well, are you asking this Court to award to you any property that is in your name pursuant to that Premarital Agreement?

A: Yes.

....

Q: And it is your request also that these Premarital Agreements and the Post-Marital Agreement be confirmed, correct?

A: Yes.

Q: And that the property be awarded in accordance with those terms?

A: Yes.

In its divorce decree, the trial court awarded Rodney and Kimberly their respective separate property pursuant to the premarital agreement. It also awarded Kimberly \$25,000.00 in contractual alimony. Thereafter, Rodney requested findings of fact and conclusions of law. In both its findings of fact and its conclusions of law, the trial court stated that “[t]here was no breach of the premarital agreement by either party.” Rodney timely filed this appeal.

PREMARITAL AGREEMENT

In his sole issue, Rodney contends the trial court erred in awarding Kimberly contractual alimony of \$25,000.00 pursuant to the premarital agreement because she had breached the agreement by contesting it.

Standard of Review

In an appeal from a bench trial, we review a trial court's conclusions of law as legal questions, de novo, and will uphold them on appeal if the judgment can be sustained on any legal theory supported by the evidence. *BMC Software Belgium v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002); *Fischer-Stoker v. Stoker*, 174 S.W.3d 272, 277 (Tex. App.–Houston [1st Dist.] 2005, pet. denied). An appellant may not challenge a trial court's conclusions of law for factual sufficiency, but we may review the legal conclusions drawn from the facts to determine their correctness. *BMC Software*, 83 S.W.3d at 794; *Stoker*, 174 S.W.3d at 277. When the appellate record contains a reporter's record, as it does in this case, findings of fact are not conclusive on appeal if the contrary is established as a matter of law or if there is no evidence to support the findings. *Material P'ships, Inc. v. Ventura*, 102 S.W.3d 252, 257 (Tex. App.–Houston [14th Dist.] 2003, pet. denied). If we determine that a conclusion of law is erroneous, but that the trial court nevertheless rendered the proper judgment, the error does not require reversal. *BMC Software*, 83 S.W.3d at 794; *Stoker*, 174 S.W.3d at 277. Whether a particular agreement constitutes an enforceable contract is generally a question of law. *Sadeghi v. Gang*, 270 S.W.3d 773, 776 (Tex. App.–Dallas 2008, no pet.).

Applicable Law

Generally, in Texas, courts interpret premarital agreements like other written contracts. *Williams v. Williams*, 246 S.W.3d 207, 210 (Tex. App.–Houston [14th Dist.] 2007, no pet.) (citing *Beck v. Beck*, 814 S.W.2d 745, 748–49 (Tex. 1991)). “Breach of agreement,” or contract, means the failure, without legal excuse, to perform any promise that forms the whole or part of an agreement. *Bernal v. Garrison*, 818 S.W.2d 79, 83 (Tex. App.–Corpus Christi 1991, pet. denied). It is a fundamental principle of contract law that when one party to a contract commits a material breach, the other party's performance is excused. *Prodigy Commc'ns v. Agric. Excess*, 288 S.W.3d 374, 378 (Tex. 2009).

However, if the nonbreaching party treats the contract as continuing after the breach, he is deprived of any excuse for terminating his own performance. See *Long Trusts v. Griffin*, 222 S.W.3d 412, 415 (Tex. 2007); see also *Inimitable Group, L.P. v. Westwood Group Dev. II, Ltd.*, 264 S.W.3d 892, 901 (Tex. App.–Fort Worth 2008, no pet.) (“If, after a party breaches a contract, the other party continues to insist on performance by the defaulting party, the nondefaulting party

is not excused from performing its part of the contract as a result of the defaulting party's breach; the contract continues in force for the benefit of both parties.”). Thus, when one party materially breaches a contract, the nondefaulting party is forced to elect between two courses of action, i.e., continuing performance or ceasing performance. See *Long Trusts*, 222 S.W.3d at 415. Treating the contract as continuing after a breach deprives the nondefaulting party of any excuse for terminating its own performance. *Kennedy Ship & Repair, L.P. v. Pham*, 210 S.W.3d 11, 25 (Tex. App.–Houston [14th Dist.] 2006, no pet.).

Analysis

In the instant case, Rodney correctly asserts that Kimberly breached the noncontestability clause of the premarital agreement by her pleadings and discovery responses. Thus, there is no evidence to support the trial court's findings of fact and conclusion of law that Kimberly did not breach the premarital agreement. However, during his own testimony, Rodney insisted in three instances that he wished to go forward with the premarital agreement. The law in Texas does not permit Rodney to receive benefits under the premarital agreement, but, at the same time, deny Kimberly her benefits under it. See *Gupta v. E. Idaho Tumor Inst.*, 140 S.W.3d 747, 756 (Tex. App.–Houston [14th Dist.] 2004, pet. denied). When Kimberly breached the premarital agreement, Rodney had the opportunity to elect between continuing or ceasing his performance under it. See *id.* Because Rodney sought the benefits of the premarital agreement, Kimberly was entitled to receive her benefits under the agreement as well. See *id.* Although the trial court erred in finding that Kimberly had not breached the premarital agreement, we hold that its divorce decree was correct as a matter of law as a result of Rodney's election to continue under the terms of the agreement. See *BMC Software*, 83 S.W.3d at 794; *Stoker*, 174 S.W.3d at 277. Rodney's sole issue is overruled.

DISPOSITION

Having overruled Rodney's sole issue, we *affirm* the trial court's judgment.

JAMES T. WORTHEN

Chief Justice

Opinion delivered July 31, 2012.

Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

(PUBLISH)



COURT OF APPEALS
TWELFTH COURT OF APPEALS DISTRICT OF TEXAS
JUDGMENT

JULY 31, 2012

NO. 12-11-00160-CV

RODNEY LEE DOCKERY,
Appellant
v.
KIMBERLY ANN DOCKERY,
Appellee

Appeal from the 321st Judicial District Court
of Smith County, Texas. (Tr.Ct.No. 10-1592-D)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that all costs of this appeal are hereby adjudged against the appellant, **RODNEY LEE DOCKERY**, for which execution may issue, and that this decision be certified to the court below for observance.

James T. Worthen, Chief Justice.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.