Affirmed and Opinion Filed June 8, 2018.

In The

Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01376-CV

DAVID HOPPENSTEIN FAMILY, LTD, Appellant

V.

ALAN H. ZARGARAN A/K/A ABDOL HOSSEIN ZARGARAN, Appellee

On Appeal from the County Court at Law No. 4
Collin County, Texas
Trial Court Cause No. 004-00741-2016

MEMORANDUM OPINION

Before Justices Lang, Brown, and Whitehill
Opinion by Justice Lang

David Hoppenstein Family, Ltd. ("Hoppenstein") appeals the trial court's judgment that awarded Hoppenstein $37,180.82 for the breach of a commercial lease by Alan H. Zargaran a/k/a Abdol Hossein Zargaran ("Zargaran"). Hoppenstein raises two issues on appeal arguing these points: (1) the evidence is legally and factually insufficient to support the trial court's findings of fact and the trial court erred when it made conclusions of law relating to the amount of damages awarded, and (2) the trial court erred when it awarded damages because it applied the wrong measure of damages. Zargaran did not file a brief on appeal. We conclude the evidence is legally and factually sufficient and the trial court did not err. The trial court's judgment is affirmed.

I. FACTUAL AND PROCEDURAL CONTEXT

In February 2008, Zargaran signed a five-year lease with Towne Square Shopping Center L.P. to rent space for his restaurant known as Pancho's Mexican Buffet. According to the terms of the lease, Zargaran agreed to pay $5,000 in rent per month. In 2011, Towne Square filed for bankruptcy and, according to Zargaran, it stopped "keeping up" the parking lot and common areas. As a result, tenants began leaving the shopping center when their leases expired. Zargaran also wanted to leave the shopping center, but Towne Square convinced him to renew his lease by offering reduced rent. In March 2013, Zargaran renewed his lease with Towne Square for an additional five years for the reduced rent of $3,750 per month. However, Zargaran testified the conditions of the shopping center continued to worsen.

On October 20, 2014, at an auction, Hoppenstein purchased the shopping center and all of the leases associated with the shopping center, including Zargaran's 2013 lease. According to Zargaran, after Hoppenstein purchased the shopping center, the conditions of the center improved "a little," but not as much as Zargaran believed they should have. In May, July, and September of 2015, Zargaran failed to make his rent payments. The last rent payment Zargaran made to Hoppenstein was in November 2015. As a result, Hoppenstein filed a lawsuit in justice court to evict Zargaran. On January 13, 2016, the justice court signed an eviction judgment in favor of Hoppenstein and awarded it $9,294.18 in damages for past due rent.

After the eviction hearing, Zargaran vacated the restaurant in the shopping center, leaving all of his restaurant equipment. He made no further payments to Hoppenstein. On May 3, 2016, Hoppenstein re-leased the property to Art of Music & Grill for a period of five years. Art of Music & Grill paid a security deposit of $5,075, agreed to pay rent in the amount of $3,750 per month,

and contracted to pay its proportionate share of Hoppenstein's insurance, common area maintenance costs, and property taxes. The record reflects that Art of Music & Grill paid $1,325 per month total for insurance, common area maintenance costs, and property taxes. This was less than what Hoppenstein had previously charged Zargaran for those items.

On April 4, 2016, Hoppenstein filed its original petition in the trial court against Zargaran for breach of contract, claiming that after offsetting the amount awarded in justice court, Zargaran owed it $56,593.78 in unpaid rent, taxes, insurance, late fees, filing fees, and common area maintenance fees. Zargaran filed an answer generally denying the allegations.

The case was tried to the court on August 25, 2016. During the trial, Linda Blumen, the administrative assistant for Hoppenstein, testified that Hoppenstein's damages had increased to $75,570.60 because the lease was "ongoing."

A tenant ledger was admitted in evidence. Blumen stated the ledger showed the sum of $75,570.60 was due in damages that included rent, common area maintenance fees, property insurance, property taxes, late fees, and a lockout fee. Specifically, Blumen testified the tenant ledger showed Zargaran owed several months of rent in the amount of $3,750 per month, common area maintenances fees in the amount of $926.95 per month, property insurance in the amount of $100 per month, property taxes in the amount of $777.23 per month, and late fees in the amount of $375 per month. Hoppenstein orally requested during trial leave to amend its original petition to include the greater amount of damages. The trial court did not rule on Hoppenstein's oral request to amend the petition.

Next, Zargaran testified. Zargaran believed the information contained in the tenant ledger was "very arguable." Zargaran requested a "credit" for the security deposit and the equipment he

left in the restaurant. Additionally Zargaran requested the court reduce charges charged for common area maintenance charges, property insurance, property taxes, and late fees. Zargaran also requested that Hoppenstein "remove all late charges [and] late fees."

At the conclusion of the trial, the trial court rendered judgment in favor of Hoppenstein on its breach of contract claim, orally stating an award of $37,180.72 in damages. On September 7, 2016, the trial court signed its final judgment providing for the same damage award to Hoppenstein. Hoppenstein requested findings of fact and conclusions of law and Zargaran requested additional findings of fact and conclusions of law. On November 1, 2016, the trial court signed its written findings of fact and conclusions of law.

II. TRIAL COURT'S AWARD OF DAMAGES TO HOPPENSTEIN

In issues one and two, Hoppenstein argues the evidence is legally and factually insufficient to support the trial court's findings of fact and the trial court erred when it made conclusions of law relating to the amount of damages it was awarded. It contends there is no evidence it breached the lease or that its damages are only $37,180.82. Hoppenstein claims it was due the full measure of damages sought and the damages awarded were "manifestly too low." Also, Hoppenstein contends Zargaran cannot rely on the affirmative defense of prior material breach because he did not plead the defense.

A. Standard of Review

1. Legal and Factual Sufficiency of the Trial Court's Findings of Fact

In an appeal from a bench trial, findings of fact have the same weight as a jury's verdict. *See Speer v. Presbyterian Children's Home & Serv. Agency,* 847 S.W.2d 227, 233 n.4 (Tex. 1993); *see also Anderson v. City of Seven Points*, 806 S.W.2d 791, 794 (Tex. 1991). The trial court's

findings of fact are reviewable for legal and factual sufficiency of the evidence by the same standards that are applied in reviewing the evidence supporting a jury's answer. *See BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002); *Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996) (per curiam); *Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994). When the appellate record contains a reporter's record, findings of fact are not conclusive and are binding only if supported by the evidence. *Sheetz v. Slaughter*, 503 S.W.3d 495, 502 (Tex. App.—Dallas 2016, no pet.). An appellate court defers to unchallenged findings of fact that are supported by some evidence. *See Tenaska Energy, Inc. v. Ponderosa Pine Energy L.L.C.*, 437 S.W.3d 518, 524 (Tex. 2014).

When a party attacks the legal sufficiency of an adverse finding on which it had the burden of proof, it must demonstrate on appeal that the evidence establishes, as a matter of law, all vital facts in support of the issue. *See Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001); *Khorshid, Inc. v. Christian*, 257 S.W.3d 748, 762 (Tex. App.—Dallas 2008, no pet.). When reviewing the record, an appellate court determines whether any evidence supports the challenged finding of fact. *See Sheetz*, 503 S.W.3d at 502. If more than a scintilla of evidence exists to support the finding of fact, the legal sufficiency challenge fails. *See Graham Central Station, Inc. v. Pena*, 442 S.W.3d 261, 263 (Tex. 2014).

When a party attacks the factual sufficiency of an adverse finding on an issue on which he has the burden of proof, the party must demonstrate that the adverse finding is against the great weight and preponderance of the evidence. *See Dow Chem. Co.*, 46 S.W.3d at 242. When an appellant challenges the factual sufficiency of the evidence on an issue, an appellate court considers all the evidence supporting and contradicting the finding of fact. *See Plas–Tex, Inc. v.*

U.S. Steel Corp., 772 S.W.2d 442, 445 (Tex. 1989). An appellate court sets aside findings of fact for factual insufficiency only if the finding is so contrary to the evidence as to be clearly wrong and manifestly unjust. *See Ortiz*, 917 S.W.2d at 772; *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986) (per curiam); *Sheetz*, 503 S.W.3d at 502. In a bench trial, the trial court, as factfinder, is the sole judge of the credibility of the witnesses. *See Sheetz*, 503 S.W.3d at 502; *Fulgham*, 349 S.W.3d at 157. As long as the evidence falls "within the zone of reasonable disagreement," an appellate court will not substitute its judgment for that of the factfinder. *See City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005); *Sheetz*, 503 S.W.3d at 502; *Fulgham*, 349 S.W.3d at 157.

b. Review of the Trial Court's Conclusions of Law

An appellate court reviews the trial court's conclusions of law de novo. *See BMC Software*, 83 S.W.3d at 794; *Sheetz*, 503 S.W.3d at 502. An appellant may not challenge the trial court's conclusions of law for factual insufficiency, but it may review the legal conclusions drawn from the facts to determine their correctness. *See BMC Software*, 83 S.W.3d at 794; *Reisler v. Reisler*, 439 S.W.3d 615, 619 (Tex. App.—Dallas 2014, no pet.). If an appellate court determines that a conclusion of law is erroneous, but the trial court nevertheless rendered the proper judgment, the error does not require reversal. *See BMC Software*, 83 S.W.3d at 794; *Sheetz*, 503 S.W.3d at 502; *Reisler*, 439 S.W.3d at 619–20; *Fulgham*, 349 S.W.3d at 157–58. We will reverse the trial court's judgment only if the conclusions of law are erroneous as a matter of law. *Sharifi v. Steen Auto., L.L.C.*, 370 S.W.3d 126, 149 (Tex. App.—Dallas 2012, no pet.).

B. Applicable Law

A successful breach-of-contract claim requires proof of the following elements: (1) a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by

the defendant; and (4) damages sustained by the plaintiff as a result of the breach. *See Transitional Entity L.P. v. Elder Care L.P.*, No. 05-14-01615-CV, 2016 WL 3197160, at *6 (Tex. App.—Dallas May 27, 2016, no pet.)(mem. op.); *Sharifi v. Steen Auto., L.L.C.*, 370 S.W.3d 126, 140 (Tex. App.—Dallas 2012, no pet.). "When one party to a contract commits a material breach of that contract, the other party is discharged or excused from any obligation to perform." *Davis v. Allstate Ins. Co.*, 945 S.W.2d 844, 845–46 (Tex. App.—Houston [1st Dist.] 1997, pet. withdrawn).

Under Texas law, the "right of offset is an affirmative defense." *Brown v. Am. Transfer & Storage Co.*, 601 S.W.2d 931, 936 (Tex. 1980). "The burden of pleading offset and of proving facts necessary to support it are on the party making the assertion." *Id.* However, "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." TEX. R. CIV. P. 67. "To determine whether the issue was tried by consent, the Court must examine the record not for evidence of the issue, but rather for evidence of trial of the issue." *RE/MAX of Tex., Inc. v. Katar Corp.*, 961 S.W.2d 324, 328 (Tex. App.—Houston [1st Dist.] 1997, pet. denied).

C. Application of the Law to the Facts

In his first issue, Hoppenstein expressly challenges the legal and factual sufficiency of findings of fact nos. 16 and 17. In the second part of issues one and two, Hoppenstein expressly challenges conclusions of law nos. 5 and 10. In issue three, Hoppenstein does not specify the finding of fact it challenges, however, based on its argument, we construe issue three to provide additional argument challenging the legal sufficiency of conclusion of law no. 5.

Findings of fact 16 and 17 state the following:

> 16. **[Zargaran] presented evidence** of [Hoppenstein's] breach of the lease for failure to keep up the appearance of the property including, landscaping, mowing,

> parking lot, lighting and general maintenance and repair in the manner it had previously been kept that was in keeping with similar shopping centers in Plano, Texas.
>
> 17. **[Zargaran] presented evidence** that had [Hoppenstein] fulfilled its obligations under the lease and properly maintained the property, [Zargaran's] business would not have suffered and [Zargaran] would have been able to make the rent payments as it had for the prior 25 years.

(Emphasis added.)

Hoppenstein argues the evidence is legally and factually insufficient to support findings of fact nos. 16 and 17 because there "was no evidence that Hoppenstein breached the 2013 lease." However, the findings of fact do not make an affirmative finding that Hoppenstein breached the lease. Instead, the findings simply state "[Zargaran] presented evidence" of Hoppenstein's breach of the lease and "presented evidence" that had Hoppenstein fulfilled his obligations, Zargaran would have been able to make his rent payments.

The record shows that Zargaran testified the shopping center "start[ed] to fail[]" around 2011 and the "property condition continued to worsen" in 2013. After Hoppenstein bought the shopping center in 2014, Zargaran testified the conditions of the shopping center "did a little improve [sic]," but the conditions did not improve "as much as they should" have. According to the lease, Hoppenstein was "responsible for the operation, management, and maintenance of the Common Area" of the shopping center. Zargaran testified he believed "if [Hoppenstein] would have do[ne] his obligation" of maintaining the shopping center, Zargaran would have been able to continue paying his rent and operating his restaurant. Accordingly, we conclude the evidence is legally and factually sufficient to support findings of fact nos. 16 and 17 because, as those findings of fact state, Zargaran did "present evidence" of Hoppenstein's breach of the lease and that if

Hoppenstein had fulfilled his obligations, Zargaran would have been able to make his rent payments.

Further, Hoppenstein expressly challenges the following conclusions of law:

> 5. As damages Plaintiff is entitled to recover $37,180.82 (Thirty Seven Thousand One Hundred Eighty and 82/100 Dollars).
>
> 10. Plaintiff breached the lease contract by failing to provide adequate maintenance for the shopping center, and Defendant was damaged as a result.

The crux of Hoppenstein's argument is that these conclusions of law show the trial court concluded in favor of Zargaran on his unpleaded affirmative defense of prior material breach. We disagree with Hoppenstein's characterization of these conclusions of law as being based on the affirmative defense of prior material breach. If proved, an affirmative defense of prior material breach would have excused Zargaran from further performance under the lease. *See Davis*, 945 S.W.2d 844. However, the trial court's judgment finds in favor of Hoppenstein on its claim for breach of contract. The record shows that during the trial, without objection, Zargaran offered evidence of offsets. Hoppenstein did not object at trial to this evidence based upon the failure of Zargaran to plead an affirmative defense. Accordingly, we conclude Zargaran's claimed offsets were tried by consent. *See RE/MAX of Tex.*, 961 S.W.2d 324, 328.

As to conclusion of law no. 5, Hoppenstein argues there is "no evidence" to support the award of $37,180.82 because the "only evidence of damages came from the [t]enant [l]edger" that "establishe[d] a debt" of $75,570.60. However, Zargaran testified the ledger was "very arguable." Specifically, he testified a $6,945 deposit contained in the ledger was "exaggerated" and "three times what it [was] supposed to be," that "$7,000 should be deducted [from the ledger]" because Hoppenstein "didn't give [Zargaran] credit" for the security deposit, and that Hoppenstein should

have given Zargaran "credit" for the equipment he left in the restaurant when he moved out. Further, Zargaran testified the $1,794.18 he paid per month in common area maintenance charges, insurance, and property taxes was "overstated" and believed Hoppenstein should have lowered the common area maintenance charges, insurance, and property taxes to $1,325 per month, which was the amount Hoppenstein was charging Art of Music & Grill for the same services. Therefore, on this record, we conclude there is evidence to support the trial court's conclusion that Hoppenstein is entitled to recover less than the sum of $75,570.60 it claims in damages.

As to conclusion of law no. 10, Hoppenstein argues "there is no legal basis" or evidence that Hoppenstein breached the 2013 lease. As discussed above, the trial court did not award a recovery based upon a prior material breach by Hoppenstein because the trial court rendered a judgment awarding damages in favor of Hoppenstein. Conclusion of law no. 10 does not address a controlling issue, and it cannot be a basis for reversal of the trial court's judgment. *See Cooke County Tax Appraisal Dist. v. Teel*, 129 S.W.3d 724, 731 (Tex. App.—Fort Worth 2004, no pet.). Therefore, conclusion of law no. 10 is immaterial in this case. *See Andrews v. Key*, 13 S.W. 640, 641 (Tex. 1890).

Issues one is decided against Hoppenstein.

III. MEASURE OF DAMAGES

In is third issue, Hoppenstein contends "the trial court employed the wrong measure of damages when it awarded Hoppenstein $37,180.82 plus attorney's fees and costs." Hoppenstein argues the trial court's damages "did not convey on Hoppenstein the benefit of the bargain" because there "is no evidence that establishes that the proper measure of damages was $37,180.82…[and] this number has no relation to the facts of this case." Accordingly, Hoppenstein

argues, "the evidence conclusively establishes that the trial court should have awarded Hoppenstein $75,570.60 plus reasonable and necessary attorney's fees and costs."

A. Standard of Review

This court reviews de novo whether the trial court applied the proper measure of damages. *Transitional Entity LP v. Elder Care LP*, No. 05-14-01615-CV, 2016 WL 3197160, at *8 (Tex. App.—Dallas May 27, 2016, no pet.) (mem. op.).

B. Applicable Law

Damages must be measured by a legal standard, and that standard must be used to guide the fact finder in determining what sum would compensate the injured party. *See Transitional Entity*, 2016 WL 3197160, at *6; *Sharifi*, 370 S.W.3d at 148. Damages for breach of contract protect three interests: a restitution interest, a reliance interest, and an expectation interest. *See Sharifi*, 370 S.W.3d at 148; *Chung v. Lee*, 193 S.W.3d 729, 733 (Tex. App.—Dallas 2006, pet. denied).

The ultimate goal in measuring damages for a breach-of-contract claim is to provide just compensation for any loss or damage actually sustained as a result of the breach. *See Sharifi*, 370 S.W.3d at 148. By the operation of that rule, a party generally should be awarded neither less nor more than his actual damages. *See id.* (citing *Stewart v. Basey*, 245 S.W.2d 484, 486 (Tex. 1952)). The facts of the case determine the proper measure of damages as well as any allowance offsets. *See Vance v. My Apartment Steak House of San Antonio, Inc.*, 677 S.W.2d 480, 481 n. 1 (Tex.1984); *Sharifi*, 370 S.W.3d at 148; *Weitzul Constr., Inc. v. Outdoor Environs*, 849 S.W.2d 359, 363 (Tex. App.—Dallas 1993, writ denied). Generally, the measure of damages in a breach-of-contract action is the loss of the benefit of the bargain, which would put the complaining party

in as good a position as if the contract had been performed. *See Transitional Entity*, 2016 WL 3197160, at *6; *see also Goldman*, 414 S.W.3d at 360–61.

The fact-finder has discretion to award damages within the range of evidence presented at trial. *See Mays v. Pierce*, 203 S.W.3d 564, 578 n. 20 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (court of appeals described how trial court could have arrived at damage award, but stated appellate court need not recreate the fact-finder's calculations in order to determine whether amount of actual damages awarded was within range of evidence presented at trial); *see also Howell Crude Oil Co. v. Donna Refinery Partners, Ltd.*, 928 S.W.2d 100, 108 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (concluding damage award was not outside range of evidence presented at trial, even where it was not clear how trier of fact arrived at figure).

C. Application of the Law to the Facts

Here, Hoppenstein presented evidence that Zargaran owed him a balance of $75,570.60. However, as described above, Zargaran presented testimony of offsets as to the security deposit, common area maintenance charges, insurance, property taxes, and the equipment he left in the restaurant. Additionally, Hoppenstein claimed in his brief that $30,000 of the balance was from "[t]he rent not paid in 2016 between January and August." However, the record shows Hoppenstein re-leased the space previously leased by Zargaran to Art of Music & Grill with a lease term commencing on May 1, 2016. Finally, Hoppenstein's original petition sought only $56,593.78 in damages and the trial court did not rule on Hoppenstein's oral request during trial to amend the petition as to damages. Accordingly, we conclude the damages awarded by the trial court of $37,180.82 for Zargaran's breach of contract is within the range of evidence presented at trial.

We decide against Hoppenstein on his third issue.

IV. CONCLUSION

The evidence is legally and factually sufficient to support the trial court's findings of fact and the trial court did not err when it made its conclusions of law. Also, the trial court did not err when it determined the amount of damages.

The trial court's judgment is affirmed.

/Douglas S. Lang/

DOUGLAS S. LANG
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DAVID HOPPENSTEIN FAMILY, LTD, Appellant

No. 05-16-01376-CV V.

ALAN H. ZARGARAN A/K/A ABDOL HOSSEIN ZARGARAN, Appellee

On Appeal from the County Court at Law No. 4, Collin County, Texas
Trial Court Cause No. 004-00741-2016.

Opinion delivered by Justice Lang. Justices Brown and Whitehill participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 8th day of June, 2018.